

'Transforming' South African professional sport: Some observations on recent developments*

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'The moral position is absolutely clear. Human beings should not be willing partners in perpetuating a system of racial discrimination. Sportsmen have a special duty in this regard in that they should be first to insist that merit, and merit alone, be the criterion for selecting athletes for representative sport.'

Abdul S Minty, ANC

(From a paper prepared for the United Nations Unit on Apartheid, 1971)¹

1 INTRODUCTION

The issue of transformation of South African sport, with all the controversy it entails, again received public attention recently in three presentations to Parliament's Sport and Recreation Portfolio Committee. On 19 October 2004 the Department of Sport and Recreation briefed the Committee on a number of matters related to the gathering of information for a proposed sports 'Transformation Charter'. On 22 October, the Committee received briefings from two of the major sports federations, Athletics South Africa and the United Cricket Board of South Africa, on progress in respect of transformation, challenges faced, and key strategic objectives.

A 'Transformation Charter' is not a new concept. During the term of former Minister of Sport and Recreation, Mr Ngconde Balfour, there was much talk of the need for such a document to impose the will of government on recalcitrant sports federations in respect of transformation at all levels of their operations, ranging from administrators to players and officials.² This proposed Charter, which has been described as a guide for

* It is suggested that this article should be read with the author's previous series of articles on the application of affirmative action in South African professional sport, referred to in note 4 below.

1 Minty AS 'International boycott of apartheid sport' *UN Unit on Apartheid Notes and Documents* No 16/71 (April 1971) – full document available online at <http://www.anc.org.za/ancdocs/history/aam/abdul-2.html>

2 Eg, see the address by Minister Balfour of 10 February 2000 at the GCIS Media Briefing Week, available online at <http://www.pmg.org.za/briefings/000210sport.htm>; and the minister's media briefing of 22 September 2000, available online at <http://www.pmg.org.za/briefings/briefings.php?id=141>.

transforming sport in South Africa, was frequently discussed in the same breath as calls for something akin to a 'Sports Equity Act' or a Black Economic Empowerment Act in the sports context; that is, legislation aimed at forcing those federations and individual functionaries in South African sport who are reluctant to embrace transformation, to play a more active role in promoting the representation of all groups in sport.³

But it was at the recent Portfolio Committee hearings on 19 October 2004 that we first saw a more concrete indication of what such a Charter, and possibly such legislation, might entail. It is the purpose of this article to briefly examine the content of suggestions in this regard with a view to evaluating the role and legitimacy of such steps to transform South African sport. As in a previous paper,⁴ the focus of this piece will be on the impact of these steps in the context of professional sport. In line with observations made previously about the employment-related aspects of sports transformation for professional players, the object will be to place such measures, proposals and developments in their proper context, and to evaluate their legitimacy from the perspective of the labour lawyer.

As this article again deals with controversial issues and views, I feel obliged to include a brief disclaimer. In writing these comments I have no political agenda, aspirations or interest.⁵ Specifically, I have no intention or wish to promote a 'polysyllabic pomposity or selfish protection of privileges'.⁶ Suffice it to say that in more than two years of research on the topic, and after a number of discussions with role-players in government, sports federations and Parliament, I have not yet been convinced that there is a legitimate place for the application of affirmative action in the selection of professional sports teams. What I do remain convinced of is that, at the very least, the ways in which this agenda has been applied in practice during the last decade do not comply with the South African Constitution or its laws. Readers should draw their own conclusions from this piece, which is meant simply as (yet another) opening salvo in what I

3 See the minutes of the Parliamentary Portfolio Committee meeting of 19 October 2004, available online at <http://www.pmg.org.za/view/minute.php?id=4706>; see also the report by Masondo S 'Tougher legislation for sports transformation' *The Herald Online* 15 August 2005 - available at http://www.theherald.co.za/herald/2005/08/15/news/n04_15082005.htm.

4 See Louw AM 'Should the playing fields be levelled? Revisiting affirmative action in professional sport' 2004 *Stellenbosch Law Review* Vol 15 No 1 119, Vol 15 No 2 225, Vol 15 No 3 409.

5 Having denied any political agenda in undertaking this analysis, I will acknowledge that some of the observations contained herein relate specifically to the statements and platforms of certain political parties. This is simply a product of the nature of our political dispensation: As a result of the ANC's dominance in the legislative and executive branches of government, the agenda of transformation in sport (and elsewhere in our society) is largely an ANC agenda. Naturally also, the most vocal critic of this agenda is usually the Democratic Alliance, the main opposition party. References to statements by members of these parties are not intended to display any political preference on my part but simply to put a human voice to both sides of the debate.

6 Minister MA Stofile, speaking about government's transformation mandate in his budget speech to the National Assembly, 12 April 2005, available online at <http://www.pmg.org.za/briefings/briefings.php?id=201>.

hope will be a meaningful, rational and public debate on these issues in the near future.

A note on the style of this piece: the reader will note that the discussion refers extensively to government policy and practice while appearing to largely neglect the law relating to the application of transformation measures and policies in this context. The reason for this is simply that I have previously attempted to canvass the 'hard law' (ie constitutional and legislative provisions) relevant to the process of transformation, by means of a critical analysis of the legality and constitutionality of such policies and measures in light of the legal framework for the application of affirmative action.⁷ The purpose of this piece is to round out the analysis by focusing on government rhetoric relating to this issue, with a view to reducing government's transformation agenda in sport to its nuts and bolts. As a result, the reader will find more references to statements by politicians and sports administrators than to pronouncements by judges or the authors of legal textbooks.

Finally, it should be noted that this piece deals exclusively with the concept of transformation as it relates to the issue of 'race'.⁸ Nothing is said regarding the transformation of sport on the basis of gender, or of the existing inequalities in respect of female athletes in our society. The reason for this is simple: the main thread of government's transformation agenda as it relates to (professional) sport is concerned with racial representation; this has also engendered the most public debate in recent times. The issue of transformation has received most attention in respect of the composition of the high profile and elite sports in our society, which, rightly or wrongly, are the male representative teams in our three major sporting codes – rugby, cricket and soccer.

2 A 'TRANSFORMATION CHARTER' FOR SPORT: DEFINING THE TERMINOLOGY

The briefing of the Department of Sport and Recreation of 19 October 2004⁹ set out to describe the process behind the development of a sports Transformation Charter, and referred to a number of provincial indabas and workshops held recently. These events involved various stakeholders, including the government, the Parliamentary Portfolio Committee on Sport and Recreation, sports federations, and even the Human Rights Commission. The purpose was to enable sports federations to report on progress made in respect of transformation during the first ten years of democracy and to set out their future ambitions and expectations. The ultimate goal was to facilitate the drafting of a Transformation Charter to

7 In the three articles referred to in n 4 above.

8 While recognising the historical and contemporary difficulties surrounding the potential reification of 'race' as a social or political construct, its use is required in the context of a discussion of the transformation of South African sport.

9 This briefing is available online as a PowerPoint presentation, at <http://www.pmg.org.za/docs/2004/appendices/041019transformation.ppt>.

lay the basis for the development of a comprehensive national policy on transformation in sport and recreation.

The 1998 White Paper on Sports and Recreation contained a number of references to transformation, most notably that in Priority 6:

'Currently club, provincial and national teams do not reflect the racial demographics of South Africa. Clearly the concept of 'sport for all' is based on values of equity and access, which can only be realised through a concerted effort to develop previously disadvantaged sports people. South African sport will not be able to realise its true potential, unless it reaches all its people – it is an imperative that will ensure ongoing and sustained success.'

The White Paper proposed four main actions to remedy this situation. These were the setting of affirmative action goals, the integration of development into the 'main agenda', the introduction of adequate competitions for developing athletes, and making representivity a criterion for resources like funding.¹⁰

The briefing of 19 October 2004 explained that because the White Paper was not binding on sports federations, 'there should be a law to compel [federations] to do certain things'. It further explained that the existing four Acts of Parliament¹¹ that deal with sport do not adequately address the issue of transformation¹² and that, in addition, these Acts do not confer monitoring powers on the government to enable it to ensure that transformation takes place.¹³ But the briefing recognised the problems inherent in legislating such issues, namely the voluntary nature of federations and the fact that legislation should be used only as a last resort. It was therefore suggested that federations and government should enter into a partnership on transformation, also taking on board other stakeholders such as sponsors.¹⁴ However, even in recognising the potential problems inherent in legislating transformation, it was suggested that government should consider a (truly drastic) measure in enforcing compliance, namely the power to withdraw permission for teams to compete nationally or internationally.¹⁵

10 In respect of funding, see n 55 below

11 The National Sports and Recreation Act (110 of 1998), the South African Sports Commission Act (109 of 1998), the SA Institute for Drug-Free Sport Act (14 of 1997) and the South African Boxing Act (11 of 2001).

12 A point the author raised previously in criticism of the apparent lack of legislative authority for extensive government intervention in the transformation of professional sport: see Louw A 'Should the playing fields be levelled?' 2004 15 No1 *Stell LR* at 131-2.

13 In discussion with the Head of the Department of Sport and Recreation, Prof Denver Hendricks (interview conducted in Cape Town, 24 February 2005), this issue of a lack of legislative authority for government transformation initiatives in sport was specifically mentioned. Prof Hendricks lamented the fact that the lack of legislative clout was hamstringing the enforcement of transformation policies, especially given the voluntary nature of sports federations.

14 More will be said in s 4 below on the role and interests of sponsors.

15 It appears that members of the Parliamentary Portfolio Committee on Sport and Recreation are dissatisfied with the commitment to transformation displayed by national sports federations to date. Punitive measures to enforce compliance with the government transformation agenda have a central place in proposed measures to bolster performance in this regard; eg. the withdrawal of financial support to recalcitrant federations, the refusal of visas to teams heading overseas and withdrawing the right to use the South African flag and colours: see 'Sports quota law a last resort' *Mail & Guardian*

[continued on next page]

As a point of departure, the briefing included the following definition of 'transformation' in this context:

Sport transformation is a guided process with benchmarks, aimed at achieving and maintaining equitable access to facilities, competition opportunities and high performance training through the dual application of the principles of universality and merit with deliberate bias towards previously disadvantaged groups such as blacks, women and the disabled so as to put South African sport on a sustainable growth path.¹⁶

In order to further explain this rather complex definition, the briefing described the meaning of its constituent elements as follows:¹⁷

Benchmarks means that, at some point in the process we should be able to take stock of what it is that has been achieved by checking against agreed performance goals such as the quotas in the event of representation in sport.

Equitable access means the removal of all barriers based on unfair discrimination, racism, gender disparities and disabilities, so that every person can realise his/her full potential in sport.

Universality means a principle whose application emphasizes demographic representation. In this instance race, and not racism, plays a role, as blacks constitute the majority proportion of the total population of the country. Equitable access should therefore be applied in view of this fact. Within the International Olympic Committee (IOC) context, this principle applies to ensure fair participation of all countries in the Olympic Games.

Merit means a principle whose application emphasizes equality, irrespective of race, as expressed in terms of performance standards such as times, distances, height, ratings or other yardsticks, as may be determined from time to time by the relevant sport code or federation, whether nationally, continentally or internationally.

Dual application means ensuring that the principle of universality is not sacrificed in favour of the merit principle only as most antagonist (*sic*) of transformation tend to do, especially in team selection and preparation. It therefore means applying both principles at the same time.

Deliberate bias means taking a conscious decision in favour of previously disadvantaged groups.

Previously disadvantaged groups means those groups that were, in the past, barred from participating in sport simply because they were black (African, Coloured or Indian), disabled or female.

Sustainable growth path means an irrecoverable or irreversible high profile status of sport in the country in which there is continuous mass participation and a considerable number of high quality athletes of all races who can compete equally, if not better than, their counterparts in the world.

The above definition of sports transformation is expected to form the basis for a Transformation Charter and, in all probability, for any legislation dealing with this issue that may be contemplated in future.¹⁸ Accordingly,

23 January 2005, available online at http://www.mg.co.za/articlePage.aspx?articleid=195951&area=/breaking_news/breaking_news_sport/.

16 Definition provided on slide 6 of the PowerPoint presentation (n 9 above).

17 Contained in slides 16–19 of the PowerPoint presentation (n 9 above).

18 Despite recent conflicting press statements in this regard, a senior representative of the Department of Sport and Recreation informed the author that the minister has already commissioned the department's legal advisors to draft legislation on sports transformation during 2005. The current state of initiatives in this regard is unclear.

it would be prudent at this stage to undertake a brief analysis of this definition and its constituent elements, with a view to providing some preliminary views on its workability and relevance to the process of transforming our sports teams, and specifically our professional sports industry.

3 'SPORTS TRANSFORMATION' UNPACKED: A CRITICAL LOOK AT THE ELEMENTS OF THE DEFINITION

The above definition contains a number of interesting and controversial concepts. It states a preference for 'deliberate bias' (undoubtedly a reference to what we have come to know in our post-1994 democratic society as 'affirmative action') and refers to 'quotas' (a controversial feature of sports transformation efforts to date), the 'dual application' of what appears at first glance to be two mutually exclusive concepts,¹⁹ and finally, 'sustainable growth', meaning an 'irreversible high profile status of sport' which is comparable to and able to compete equally with sport in other countries.²⁰

It would not be unfair to say that this definition is confusing and, as will be argued, inherently incoherent. It will be argued that the definition, because of its intrinsic shortcomings and apparent contradictions is unsuitable as the foundation stone for a 'partnership' aimed at transforming our sport, and even more so for prescriptive legislation with the same purpose. In light of the arguments regarding the dubious legitimacy of the application of affirmative action in professional sport,²¹ this definition simply perpetuates the conceptual shortcomings associated with government's sports transformation agenda to date and does not promise any future effort to bring this agenda in line with our Constitution, our labour legislation, or just plain common sense.

The following sections will contain a few brief comments on the individual elements of the above definition with a view to picking at the threads of this dubious construct as a specific embodiment of government's transformation agenda. In the conclusion, some more general remarks regarding the place of this agenda in sport will be made.

3.1 'Universality' vs 'merit'

As a point of departure, it should be noted that the definition of transformation does not distinguish between amateur and professional sport as far as the application or meaning of 'transformation' is concerned. In this regard, it is unclear how one can employ the International Olympic Committee's efforts to ensure universality in the Olympic Games as

19 I.e. 'universality' and 'merit': see the discussion below.

20 I will not include any comments on the definition's reference to transformation as a 'guided process' – the discussion that follows will argue that the definition itself is incoherent and confusing, and not indicative of a rational and justifiable basis for a process of transformation.

21 See, generally, the discussion in the articles referred to in n 4 above.

justification for transformation in sport. The IOC's concept of universality is explained as a principle that applies 'to ensure fair participation of all countries in the Olympic Games'.²² As I have argued elsewhere,²³ a central issue in the evaluation of the legitimacy of transformation measures in sport is the distinction between amateur and professional sport. I argue that measures and policies that seem to function unproblematically and uncontroversially in the context of amateur sport cannot necessarily be applied legitimately in the professional arena, which functions as an entertainment-based industry. The objections here relate not only to the economic effects on the industry of measures that ignore the importance of merit, but also the impact of such measures on the (employment) rights of other participants in the industry.

Here it is important not to lose sight of the history and nature of the development of the Olympic Games. A key characteristic (and supposed virtue) of the modern Games has been its devotion to the principle of amateurism. Allowing athletes to receive payment for athletic prowess and success was viewed as inconsistent with the values of the Games in promoting sporting excellence and as an elite forum for competition between nations.²⁴ Even though the IOC changed its stance on professionalism in the closing decades of the last century, one must remember that this earlier devotion to amateurism is a fundamental basis for the principle of universality.

The interest in promoting the fair participation of all countries in the Games is part and parcel of amateur sport. For competitions to be fair, all potential participants should be able to compete for a place on the playing field. It is unclear how this principle is to be applied in professional sport, however, where the nature of the industry (specifically its revenue-generating entertainment role) and the interests of parties outside the team or league system (notably sponsors) require that merit, as determinative of the competitive value of participants, should be the basis for participation.

22 See slide 17 of the PowerPoint presentation (n 9 above).

23 See the discussion in the articles referred to in n 4 above.

24 The founder of the modern Olympic Games, Frenchman Baron Pierre de Coubertin, believed strongly that admitting professional athletes in the Games would be unfair towards part-time amateur participants. The concept of amateurism developed in the late 19th century as a result of British upper-class bias towards the working classes, in effect acting to prevent the working classes to compete with the aristocracy in 'amateur' sporting events. Jim Thorpe, an American athlete, 'felt the sting' of the definition of an amateur: in the Olympic Games of 1912 in Stockholm, Thorpe won the pentathlon and the decathlon, finished fourth in the high jump and seventh in the long jump, and was described by the King of Sweden as the greatest athlete in the world. When it became known the following year that he had been paid \$25 a week to play baseball in a North Carolina minor league during 1909 and 1910, the IOC stripped Thorpe of his medals. In reflection of the changing world of sport, the IOC in 1982 entered Thorpe's achievements in the record books and returned his medals to his children. See Sara Cohen 'Amateurs, Professionals, and Eligibility for Americans in the Olympics', in *Quirk ed Sports and the Law: Major Legal Cases* Garland Publishing Inc, 1996 at 41–2. For discussion of international influences in respect of the move from amateurism to professionalism in different sports, see Kelly *GM Sport and the law: An Australian perspective* The Law Book Company Ltd, Sydney (1987) at 425–430.

Because of the role of money in determining not only participation of individuals but also the sustainability of the professional league or competition, it is fallacious to insist that the notion of 'universality' – meaning the fair representation of 'all comers' – can find application here.

Accordingly, the use of this principle in the above definition reinforces the view that government has neglected to consider the differences between amateur and professional sport in the transformation debate.²⁵ This is illustrated also by the drastic nature of measures suggested in enforcing compliance with a transformation agenda.²⁶ This suggestion is reminiscent of an earlier statement by the President, who proposed that our teams should resign themselves to losing international competitions for the next few years in the interests of bringing persons from disadvantaged groups into these teams and building 'a 100 per cent South African team rather than a 30 per cent one'.²⁷ These statements either deny or ignore the nature of professional sport and its value for the country. In my view, they also amount to a recipe for potential suicide in the international sporting context.

It appears from recent press statements that the Department of Sport and Recreation (by way of Minister Makhenkhesi Stofile) has undergone a possible change of heart in respect of the measures to be used in sports transformation. It has been stated that there should, ostensibly,²⁸ be a move away from the use of race-based quotas towards grass-roots development programmes aimed at ensuring equitable access to participation in sport for previously disadvantaged persons. However, as will be shown, the proposals tabled before the portfolio committee and published for public consumption still fail to distinguish between sport at the different levels of amateur and professional participation. Accordingly, even such grass-roots development programmes, if tailored along the lines contained in the briefing under discussion, will amount to no more than a new application of the same old measures we have encountered to date. Also, as

25 Compare, eg, the SRSA *Strategic Plan 2004-2007* (available on the internet at www.srsa.gov.za): One of the core activities listed to achieve the objectives of SRSA is stated as '[ensuring] that all sport and recreation bodies achieve their affirmative action objectives'. Under 'Allocation of functions, identification of programmes, medium term goals and monitoring systems in sport and recreation in South Africa', the Plan states the following in respect of this core activity: 'Ensure that representativity targets are set and met w.r.t. women, people with a disability, race and rural communities in *all spheres of participation* (participants, officials, employees, etc).' [My emphasis.] This clearly does not envisage any distinction in the application of affirmative action between amateur and professional sporting codes.

26 The briefing, under the heading of 'internal stakeholders' to the transformation process, also contains the following suggestion: 'The principle of 60/40 composition in relation to representation on administrative structures should be strongly monitored. Punitive measures for non-compliance should be imposed in the form of reducing rights to international competition.'

27 President Thabo Mbeki, speaking at the Presidential Sports Awards, 8 March 2002 (as quoted by Peters M & Hooper-Box C in the *Cape Argus* of 9 March 2002 – available at www.iol.co.za).

28 See the discussion below, which will show that race-based quotas remain the golden thread running through government's sports transformation agenda.

the 'grass-roots' level constitutes the gatehouse to participation at all higher levels, race-based entry policies here will ultimately also have a ripple effect on participation at the level of professional sport.

To return to the briefing under discussion: the definition of 'merit' contained therein is also problematic. Reference to merit as a principle 'whose application emphasizes equality, irrespective of race, in terms of performance standards' is confusing in light of its proposed application. This definition does not address the concern that preferential selection or other measures, which are inherently race-based when used to prefer previously disadvantaged (eg black) athletes, run counter to the concept of equality in the application of neutral performance standards. When one measures the performance of a number of athletes (ostensibly) on the basis of neutral performance standards, but then selects one on the grounds of a 'definite bias' based on group identity or status, there can be no question of the true application of such performance standards. The concept of merit as an embodiment of a neutral assessment of performance based on neutral performance standards precludes the application of other considerations (such as race) in the selection decision. While this view may be subject to the same criticism referred to in the definition of 'dual application' of the two principles, it does not do away with the fact that government has to date failed to explain the interaction (if any) of preferential treatment and equality in this context.

It should also be remarked that there is a measure of ambivalence regarding the exact meaning of the term 'merit' in the transformation debate. It is suggested that the minister should decide what meaning he attaches to this concept: Referring to the practice of requiring participants in representative school sports teams to have to pay out of their own pockets for such participation, Minister Stofile remarked as follows:²⁹

I have never been comfortable with the system that requires payment for participation in any case for it meant that we could never have had representative teams based on merit, but rather on the ability to afford such participation.

It is interesting to note that the minister is downplaying the role of merit in determining participation at the higher levels of sport, where the racial characteristics of participants appear to hold sway, while professing a belief in its value at the lower levels.

I have tried to show that the principles of universality and merit, in the meanings ascribed to them, are mutually exclusive. This brings us to the conceptual problems inherent in their 'dual application'. How can one meaningfully apply these two principles 'at the same time'? The one requires selection or evaluation on the basis of neutral application of neutral performance standards. The other requires emphasis on demographic representation. In the absence of a correlation between demographic characteristics of candidates and performance, there is no basis upon which these two principles can possibly function together – unless one applies a

29 In his budget speech of 12 April 2005: available online at <http://www.pmg.org.za/briefings/briefings.php?id=201>.

'deliberate bias' in their application, which in this context equates to a political decision removed from the internationally accepted basis for selection and participation in sport.

One must, of course, not lose sight of the fact that the 'neutral' application of performance standards is not always present in the context of team selection in professional competition and that the selection decision often (always?) involves a measure of subjective opinion on the part of selectors, coaches, etcetera. I have referred elsewhere to the unique value of the individual player in professional sport and the fact that there are often a number of intangible factors or characteristics that inform the selection process.³⁰ But these factors, that may relate to issues such as individual flair, form, temperament and even sporting celebrity, are relevant to the competitive strength of the team and the entertainment value of the match. The race of participants has no such relevance.

3.2 The role of 'equitable access'

The reference to 'equitable access' raises the point of the interrelation of the different concepts contained in the definition. The achievement of equitable access is stated to be the object of sports transformation. But it is then said that this object is to be pursued 'through' the dual application of the two principles discussed above. Is this justifiable? The term 'equitable access' reminds one of the term 'equitable representation', which forms the very basis of the affirmative action provisions contained in chapter III of the Employment Equity Act.³¹ I have argued elsewhere that there is no rational correlation between the 'equitableness' of representation (or access for that matter) and demographic representativity.³² And yet the definition under discussion promotes the achievement of the one by means of the other. It is difficult to see how equitable access to competition opportunities can be achieved by means of a dual application of:

- (1) A neutral, merit-based evaluation of neutral performance standards; and
- (2) a principle of universality which emphasises demographic representation on the basis of majority racial representation with a 'deliberate bias' in favour of those previously disadvantaged.

The concept of equity has been defined as relating to the just and impartial treatment of all persons.³³ It is unclear how these considerations feature in a policy specifically involving preferential treatment, as nowhere in this definition or other pronouncements on transformation has government enumerated any such links.

30 Louw A 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 2 225 at 231 (and n 96).

31 55 of 1998.

32 See Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 3 409 at 416, 421 *et seq.*

33 'Equitable' is defined (by the *American Heritage Dictionary of the English Language* 4 ed 2000) as 'marked by or having equity, just and impartial'. 'Equity', in turn, is defined as 'the state, quality or ideal of being just, impartial and fair'.

With these concepts we have squarely entered the realm of the affirmative action debate. While government wishes to avoid allegations of equating preferential treatment in terms of a substantive notion of equality with 'reverse discrimination' or 'reverse racism', it is not clear what it means with the term 'sports transformation'. It is hard to grasp how changing a system of preferential treatment of a privileged few (under apartheid) to one of preferential treatment based on demographics can amount to any real 'transformation', unless 'transformation' simply means changing the racial profile of participants.³⁴ Note that the definition does not contain any reference to redressing injustices of the past as an explicit aim, as is the case with section 9(2) of the Bill of Rights,³⁵ but simply prescribes preferential treatment, apparently, as an end in itself.³⁶

3.3 'Dual application'

I have already referred to the fact that the definition under discussion predicates a dual application of two mutually exclusive concepts. It is stated that 'dual application' involves applying both principles at the same time in order to ensure that the principle of universality is not sacrificed 'in favour of the merit principle only as most antagonist[s] of transformation tend to do, especially in team selection and preparation'.

In order to evaluate this part of the definition, let us attempt to apply both these principles ('universality' and 'merit') at the same time in a practical example:

X is a white rugby fullback, Y an African fullback. Both compete for a place in the Springbok rugby team. In trials it emerges that X is faster than Y, and also that X has had 6 years experience of provincial rugby while Y has recently emerged from a development programme at schools level. X is 28 years old and Y is 19.

Application of the merit principle would require that X be selected for the position because he has succeeded in outperforming Y in terms of neutral performance standards relevant to the position to be filled (namely speed on the field of play, experience at high level rugby and

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

While our Constitution also does not prescribe a balance for the representation of different groups in the workforce, it appears that the EEA's preoccupation with demographic indicators does. The Act goes beyond the requirements for achievement of equality included in section 9(2) of the Bill of Rights by incorporating a controversial standard for the determination of equity in employment which, it is submitted, is not sufficiently justified by the Act.

35 See n 41 below.

36 See s 3.4 below.

maturity). The principle of universality, however, requires that Y be selected because of the object (of transformation) and the fact that Y is a member of the group that constitutes the majority of the population of the country. The deadlock is broken by the admonishment that this application must proceed with a 'deliberate bias' towards Y, a member of a previously disadvantaged group.

Not surprisingly, Y is capped as the Springbok fullback in the next test match against Australia.

What application of government's definition of sports transformation has managed to do is to ignore the merits of the two athletes, while explicitly stating that both principles are applied in order to ensure that the first principle (universality) is not sacrificed in favour of the merit principle only. In fact, it appears that the merit principle has now been sacrificed. When the definition of merit refers to 'equality, *irrespective of race*', the recipe for access to participation in sport in the new dispensation (through the 'dual application' scenario) seems to read as follows:

- Measure all candidates against neutral performance standards, disregarding race;
- *Then*, irrespective of who has come out tops in the performance stakes, consider the race of the candidates;
- In doing this, give preference to members of the majority black population.

Who are we fooling when we claim to have based our decision, even partly, on merit?³⁷

On a practical level, the recipe for access described above poses problems similar to that experienced by employers in applying the affirmative action provisions of the Employment Equity Act (EEA). Section 42 of the EEA is aimed at providing a yardstick in the determination of whether designated groups are equitably represented in the specific workplace. The failure of the Act to identify the weighting of the factors *vis-à-vis* one another creates a measure of uncertainty regarding their application.³⁸

37 Here one must not lose sight of s 20(3) of the Employment Equity Act (EEA), which defines an employee who is 'suitably qualified' in terms of the Act (for the purposes of affirmative action) as someone who may be so qualified as a result of any one of, or any combination of, that person's formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job. It should be obvious that being 'suitably qualified' to play in a professional sports team in no way means that such candidate should be allowed to participate.

38 The EEA's failure to explain the interaction between the factors listed in s 42 is surprising as they are not similar in nature: the first (in s 42(a)(i) (the demographic representation of different groups) is entirely divorced from the circumstances of the workplace, while all the other factors relate to either the pool of candidates qualified for employment in the workplace or the circumstances surrounding such workplace. This highlights the conflict between the terms 'underrepresentation' and 'equitable representation' employed in chapter III. Underrepresentation of a designated group as a result of one or more of the job- or workplace-related factors (eg limited pool, low labour turnover) can surely not be inequitable. And should underrepresentation in terms of national or regional demographics necessarily be viewed as inequitable? It is debatable

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Similarly, the definition under discussion does not provide any meaningful and concrete indication to team selectors regarding the role of merit in access to employment – something that, it is submitted, is fundamental to the nature of professional sport.³⁹

Of course, the outcome in our above example would be legitimate if one could justify the overriding importance of providing previously disadvantaged athletes the opportunity to participate in competition in order to redress past disadvantage. The achievement of this object must then outweigh the participant's suitability in actual performance for the task of playing for the Springboks. But is this the case in light of the rest of the definition, which emphasises the imperative of transformation to ensure an 'irreversible high profile status of sport in the country in which there is . . . a considerable number of high quality athletes of all races who can compete equally, if not better than, their counterparts in the world'? I do not think so.⁴⁰

While it is by no means my contention that athletes from previously disadvantaged groups are less qualified on merit than previously advantaged athletes, it is still my submission that any system of preferential treatment as contained in the definition under discussion, which explicitly

whether one can expect all occupations and workplaces to mirror the demographic make-up of our population.

- 39 There is generally consensus amongst writers in different jurisdictions that professional team sports constitute an industry that displays a number of peculiarities in respect of economics, legal regulation and governance. One of the fundamental peculiarities in this regard is the central role of the maintenance of competitive balance within sports leagues, which functions to determine the entertainment value of sporting competition. In the context of professional sport, the competitive nature and quality of the sporting event as an entertainment spectacle is the primary determinant of the financial success of the undertaking. Competition therefore features both on the field of play ('sporting' competition) and off it ('economic' competition). See, generally, Wise & Meyer *International Sports Law and Business* (2 vols), Kluwer Law International 1998, Vol 1 11; Szymansky S 'Income inequality, competitive balance and the attractiveness of team sports: Some evidence and a natural experiment from english soccer' March 2000 (available online at <http://mscmga.ms.ic.ac.uk/stefan/EJCB.pdf>); Gratton & Taylor *Economics of Sport and Recreation* E&N Spon 2000 193–194; Daly A & Kawaguchi A 'Competitive balance in Australian and Japanese sport' *The Otemon Journal of Australian Studies* Vol 30 (2004) 23–36. It is submitted that the sporting merit of participants in professional competition is the single most fundamental element of the competitive strength of teams and, by extension, the success of the team as an economic actor.
- 40 There have been a number of confusing statements about the interrelation between racial quotas and merit. Compare the statements by Mr Brian van Rooyen, president of SA Rugby, who has been quoted as follows: '[Q]uotas shouldn't be about colour but about the development of all players on merit . . . The sooner we get away from the idea to consider black players as quota players, the sooner we will get away from problems in South African rugby.' Coetzee G 'Brian red cards rugby quotas', available online at http://www.news24.com/News24/Sport/Rugby/0%2C%2C2-9-838_1588587%2C00.html. It is unclear how a quota system can ever function as an application of the development of players on merit. As I have argued elsewhere (Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 2 (2004) 225 at 240 *et seq*), the concept of a race-based quota is the antithesis of merit selection. Accordingly, the definition of sports transformation under discussion is incoherent in so far as it prescribes preferential treatment in access to participation on the basis of race but also proclaims one of the objectives of this process to be excellence on merit.

devalues the role of merit, is unacceptable, illegitimate and self-defeating in light of the stated objectives.

Unlike affirmative action provisions contained in our Constitution,⁴¹ the definition under discussion does not contain reference to a purpose of redressing past disadvantage.⁴² Similar to the affirmative action provisions contained in the Employment Equity Act, it appears that this definition elevates demographic considerations ('representativity') to the level of the objective of transformation. There is no authority for this proposition in our Constitution, nor any rational correlation between representativity and equality.

3.4 'Previously disadvantaged groups' and the right to 'participate'

The definition under discussion refers to groups classified as previously disadvantaged in terms of having been barred from participating in sport simply because they were black, disabled or female. A couple of points need to be raised here. Firstly, as I have observed in the preceding discussion, this part of the definition (which contains the only reference to past unfair discrimination found in the definition) does not link the objective(s) of transformation to such past conduct. Unlike the provisions of our Constitution dealing with the application of affirmative action,⁴³ we do not see an explicit contextualisation of transformation policies as a means to redress past disadvantage. Our courts have held that affirmative action programmes should be 'adequate', in the meaning of having the goal of promoting the achievement of equality as envisaged by the Constitution.⁴⁴ In the absence of clear evidence of previous unfair disadvantage, it would be hard to rationalise measures and policies by means of the unequal treatment of individuals or groups. It is submitted that such link is a *sine qua non* for the legitimacy of affirmative action in this context.

Another (related) troublesome aspect is the reference to the participation of such groups, which is not further defined. One is confronted with the question of what 'participation' entails in the context of high-level sport. It is contended that, due to the circumstances of competition at the higher levels, the importance of merit breeds the need for differentiation

41 See s 9(2), which reads: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

42 Although this might be implied from the part of the definition dealing with the application of a deliberate bias in favour of those previously disadvantaged, this issue of redress is not stated as the object or purpose of such preferential treatment and is, in fact, irreconcilable with the stated purposes of transformation. While the Constitutional Court recently reaffirmed that s 9 of the Constitution embraces a substantive (rather than a formal) notion of equality, an inherent element of such notion of equality is the redress of past disadvantage: see *Minister of Finance & Another v van Heerden* 2004 (6) SA 121 (CC) at par 32.

43 See the wording of s 9(2) (n 41 above).

44 See, eg, *Public Servants Association v Minister of Justice* 1997 5 BCLR 577 (1)

between candidates. The tougher and more high-profile the competition, the more the need for differentiating between candidates on the basis of those characteristics that are relevant to the competitive strength of the individual athlete and the team – namely competitive merit. It is imperative to distinguish between the 'right to participate' in respect of *access* to this level of competition versus actual participation through *selection*. Due to the nature of professional sporting competition, it can be argued that the 'right' to 'participate' in this last meaning of the term diminishes the more elite the competition becomes.⁴⁵

3.5 'Benchmarks'

The definition of 'benchmarks' in the process of transformation displays another example of confused thinking. It refers to the measurement of progress by 'checking against agreed performance goals such as the quotas in the event of representation in sport'. It should be noted that there is a clear difference between goals and quotas.⁴⁶ Goals represent a preconceived target or objective of what is rationally capable of achievement in the light of the expected impact of external factors. Quotas, on the other hand, function as an end in themselves by providing a 'target' that is non-negotiable, fixed and removed from the reality of factors that determine the achievability of a true goal. Accordingly (in the context of transformation), while 'goals' represent objectives, a quota functions as a measure in itself.

Therefore it is not correct to speak of benchmarking the process of transformation by checking against 'performance goals in the form of quotas': If I run a marathon and determine to continually test my progress against pre-set goals for times at certain points along the route, the times at these points would indeed provide true indicators of my progress. If, however, I have managed to arrange that certain times would be officially recorded as my progress at these same points, even though I have not actually reached them, these times do not reflect my true progress. Such times could never function as 'benchmarks' of performance, and would be just as artificial as quotas.

Maybe more relevant to this review is the fact that the definition appears to confirm the role of race-based quotas in the process. As has been argued previously, such quotas amount to no more than tokenism and efforts at 'racial balancing' which are illegitimate and also in conflict with the EEA⁴⁷ as it applies to the employment of players in professional sport.

45 See, in general, the discussion in Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 2 225 at 229-233.

46 Eg as these concepts are employed in the EEA, which allows 'numerical goals' or targets as legitimate affirmative action measures but excludes the use of quotas (see s 15(3) of the EEA and the discussion in Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 2 225 at 239 n 129).

47 Specifically its exclusion of quotas in affirmative action, contained in s 15(3) (see n 46 above).

4 THE ROLE OF SPONSORS

The above discussion has focused on the contents of the definition of sports transformation. An important element to consider in the evaluation of proposed measures to achieve transformation is that of the role-players concerned, the demarcation of their importance to the process, and their involvement therein.

Previously I tried to focus criticism of sports transformation measures employed to date, on the position of 'previously advantaged' athletes and players, those participants whose rights and interests are most directly influenced by such measures. In the process I tried to highlight our courts' interpretation of the constitutional equality provisions to necessitate a balancing of interests, and a need to consider the rights of non-beneficiaries of affirmative action policies and programmes in evaluating the legitimacy of such measures.⁴⁸

The parliamentary briefing under discussion contains a number of references to the position of sponsors in sport:

Federations should not only have agreements with sponsors, but government should also be a party to these in order to ensure that sponsorship income is utilized in an equitable way.⁴⁹

Sponsors are sometimes specific about communities to be involved – we need to set criteria to sponsors regarding transformation goals.⁵⁰

Government, especially National Treasury, should become more involved in sport sponsorship through tax concessions and incentives to companies providing sponsorships to attract more sponsors to sport.⁵¹

Resources: Incentivise sponsors whose programmes are biased towards disadvantaged communities.⁵²

It appears that these remarks all point to a view of the role of sponsors as entities that are to be employed as (a) the financiers of transformation, and (b) instruments to be employed in the achievement of a government-sponsored agenda, apparently removed from such sponsors' own agendas.

Again, these remarks tend to display a denial of the actual role of sponsors in professional sport. Sponsors are one of the main sources of income of federations, clubs and players in this industry. They provide the revenue to finance the teams, competitions and events that generate income from spectators and broadcasters (the industry's other main sources of revenue). But sponsors are generally not charitable organisations that are willing to plough money into sporting events purely 'for the greater good'. Sponsors do so for business reasons, in order to obtain a return on this investment through advertising and other means.

48 See Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 3 409 at 419-420.

49 Slide 10 of PowerPoint presentation (n 9 above).

50 Slide 13 of the presentation.

51 *Ibid.*

52 Slide 15 of the presentation.

The view conveyed by the above quoted remarks, however, seems to ignore the fact that sponsors constitute the very lifeblood of professional sport. Surely there should be less emphasis on bringing sponsors in line with government's agenda, but rather on ensuring that transformation does not threaten the interests of such sponsors. A system that denies the importance of merit in determining participation in competition constitutes just such a threat: in an entertainment industry such as professional sport, the specific composition of a team does not promise the generation of income for sponsors. Results are what count. The sponsor of a constantly losing team is not likely to renew the sponsorship agreement. When players are selected not on the strength of their performance, but rather the colour of their skin, one can expect the system to break down. And this is a view that is shared by members of the industry: in negotiation of the SANZAR agreement for the Super 12 rugby competition, it was specifically required by the other parties to the agreement that South African teams should not be selected on the basis of race-based quota prescriptions, for the simple reason that such a system was viewed as having the potential to weaken the competitive strength of teams.⁵³

These remarks provide one more troubling example of the interventionist stance of government in respect of sports transformation.⁵⁴ But they also paint a worrisome picture of the potential impact of this government intervention at a practical level if one considers the implementation of transformation policy from the perspective of sports federations. Sport and Recreation SA has incorporated its transformation agenda in its funding criteria for sports bodies,⁵⁵ linking commitment and performance in respect of transformation to funding. Accordingly, it seems that sports federations and governing bodies are faced with a situation where not only will government funding be dependent on toeing the line on transformation,

53 From discussion with a senior executive of SA Rugby (Pty) Ltd, interview conducted in Cape Town, 26 August 2003. It appears, however, that this has not stopped government from subsequently intervening in exactly this way - see n 54 below.

54 Eg. the call for punitive measures to enforce compliance with transformation targets by federations - see n 15 above. It appears that, even in light of recent remarks by Minister Makenkhesi Stofile that government's aim is to move away from racial quotas, the interventionist stance of government still extends to team selection on racial lines. Mr Brian van Rooyen (President of SA Rugby) was quoted recently as stating that government had insisted on the inclusion of eight players of colour in Super 12 rugby teams in 2004 as a condition for government support for the bid to host the 2011 Rugby World Cup - see Coetzee: G 'Rugby needs "black Pienaar"' (available online at <http://www.superrugby.co.za/Default.asp?id=136033&des=article&scat=superrugby/sarugby>).

55 See part 1 of the *SRSA Funding Policy and Processes 2002* (available on the internet at www.srsa.gov.za), which contains the following under 'funding criteria': 'Clients should promote free access/membership and participation in all events and organisational structures . . . Clients should provide SRSA and/or [the South African Sports Commission] with statistics on membership and development initiatives impacting on government priorities and other areas of participation/operation as may be required . . . Clients should contribute to general government priorities such as advancement of women, disabled persons, the youth, rural development, disadvantaged persons, campaign against HIV/AIDS, anti-crime, anti-racism, drug-free sport, transformation initiatives, etc.'

but government will also intervene in the process of obtaining private sector sponsorships.

A final point, in passing, relates to Sport and Recreation SA's jurisdiction over private enterprises as sponsors of sport. While it is undoubtedly within government's power to prescribe to corporations and individuals how to conduct themselves, specifically in respect of the upliftment of previously disadvantaged groups and individuals in line with our Constitution and equity legislation,⁵⁶ it is less certain that government can effectively flex this muscle at a practical level in order to promote transformation. While government can enforce its transformation agenda against potential sponsors of sport, it cannot force anyone to participate in this commercial enterprise. Therefore, individuals or corporations that disagree with government policies on transformation will be left with no alternative but to refrain from providing sponsorship. Reminiscent of the financial effects of the demise of tobacco sponsorship in sport, the prospects are that South African professional sport will ultimately lose. It is nothing strange in the international sporting world for those involved in the commercial exploitation of the game to be extremely savvy when it comes to avoiding government regulation.⁵⁷

At best, government might be advised to consider educating sponsors to raise awareness of social realities and the need for transformation. Calls for legislating or otherwise policing compliance with a transformation agenda are, however, of dubious legitimacy.

5 CONCLUSION

This article contains some cursory observations on the contents of the recent Sport and Recreation parliamentary briefing on sports transformation. The objective has been to raise a number of questions in respect of government's transformation agenda in the context of sport, and especially the form in which such agenda has been articulated. As such, it runs the risk of being premature, being largely based on information that is likely to be reviewed in future before the finalisation of a Transformation Charter or relevant legislation. However, in light of the apparently consistent stance displayed by government press releases on this issue over the past few years, it is unlikely that much thinking will go into rationalising the basis for such an agenda and the measures proposed to achieve the stated objectives. Accordingly, this piece aims to raise some questions that may remain relevant for as long as we are faced with calls for sports transformation along current lines.

56 Notably the EEA and Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) or PEPUDA.

57 Eg compare the International Cricket Council's recent moves to base its commercial arm in Dubai in order to avoid taxation in the UK, and the establishment of Florida as 'the golfing state' in the USA, where a large number of professional golfers and those active in the development of golf courses and tournaments made a similar move to avoid taxation in other states: see Sounes H *The Wicked Game* Sidgewick & Jackson London (2004) at 96.

As has been argued elsewhere,⁵⁸ it is my contention that there are serious flaws in government's transformation agenda in sport in South Africa, especially as it relates to the professional sports industry. While I realise and acknowledge the urgent necessity for real and substantive transformation, it is contended that, at the conceptual level, the process should not be aimed at ensuring 'representative' sports teams in the meaning apparently attributed to this concept. I have attempted to highlight the problems inherent in this notion and its true meaning and effect in this context, specifically as it impacts on the role and place of merit selection. In the light of the importance of merit in sport, it is crucial that government should bridge the conceptual gap between the interaction of merit and the constitutional imperative of redressing past discrimination and injustice. How can 'representativity' in the sense of '80% black' South African sports teams ever function as indication of a just system? Should all our African citizens have been entitled to participation at the highest level in our sports teams during apartheid, irrespective of merit?⁵⁹

It has been contended that the focus should rather be on assuring transformation to a system of fair access to opportunities at all levels. Our efforts at transforming sport should concentrate on eradicating the pervasive inequalities inherited from an unjust system in the past in respect of infrastructure, social and economic inequality and lack of opportunities for previously disadvantaged athletes, in the hope that these efforts will serve to attain more equitable representation of all groups in the near future. Although it may take time, it is an outcome worth waiting for.⁶⁰ We should avoid unworkable attempts at justifying a process of transformation aimed purely at ensuring a token representation based on demographics, which smacks of a 'quick fix' solution in a highly-charged political climate.

It is a sad reality that unfair discrimination still exists and even thrives in many sports, in South Africa as well as abroad.⁶¹ We see, for instance,

58 See, in general, the articles referred to in n 4 above.

59 On the use of the term 'African', the reader is referred to the report of the Ministerial Committee of Enquiry into Transformation in Cricket, 16 October 2002 (at 29), which appears to advocate the pursuit of representation of the different racial groups along the lines of the national demographic profile: see Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 3 409 at 416.

60 This is a view that was shared by the late former Minister of Sport, Mr. Steve Tswete, who stated the following in 1994: 'We cannot allow tokenism. Colour decoration (of teams) is dangerous. It will destroy young talent if you promote players simply because they are black. These players must grow through the ranks. Overnight we cannot have 11 black cricketers or 15 black rugby players. We must change gradually through an evolutionary process and not through colour decoration.'

(As quoted in correspondence on the issue of sports transformation between Mr Donald Lee (Democratic Alliance MP) and Minister Trevor Manuel, dated 18 February 2005, on file with the author).

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

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that eminent organisations such as the Augusta National golf club in the USA⁶² (and even the Royal and Ancient Golf Club of St Andrews, the world controlling and rule-making body of golf) still choose to exclude women from their membership.⁶³ Even though the Professional Golfers' Association of America was forced to discard its 'Caucasian clause' in 1961,⁶⁴ it appears that discrimination on the bases of race and sex is still rife in golf and in other sports. Our progressive legislation, including our Constitution's equality provisions and specific equality legislation,⁶⁵ now provide a powerful shield against such abhorrent conduct. Augusta National would be hard-pressed to defend its stance on the inclusion of women on the basis of the voluntary nature of its club and its freedom of association or dissociation in the face of such legislative prohibitions against unfair discrimination. But, it is submitted, our government's notion of moving beyond the prohibition of discrimination by enforcing the positive advancement of certain groups (on the basis of race demographics) in professional sport, in defiance of the role of merit, would not find favour among right-thinking persons anywhere in the world.

I have argued previously that the constitutional standing of the fundamental right to equality, even in its accepted substantive interpretation and which encompasses the notion of affirmative action, requires that the limitation of any person's right to equality should be clearly and sufficiently justified. I have referred to South Africa's apartheid history and the fact that our poor human rights record necessitates a special emphasis on the justification of any government or other action that threatens this right. The current application of affirmative action in the transformation of South African sport constitutes just such a threat to the equality of all the country's citizens, and a very visible one. The policies employed to date go to the very heart of the moral well-being of our society, and often spark fiery debate on issues of socio-economic reform that reflect wider and more pervasive issues of ideology, politics and public interest in the South African context.

South Africa David Philip Cape Town 1997; Bruce Murray and Christopher Merrett *Caught Behind: Race and Politics in Springbok Cricket* Wits University Press 2004; Jarvie G *Class, Race and Sport in South Africa's Political Economy* Routledge London 1985; Lapchick RE *The Politics of Race and International Sport: The Case of South Africa* Greenwood Westport 1975; Osborne P *Basil D'Oliveira - Cricket and Conspiracy: The Untold Story* Little Brown London 2004; Rodney Hartman *Ali: The life of Ali Bacher* Viking 2004.

62 The host association of the US Masters tournament, arguably the leading professional golf tournament in the world.

63 See the discussion in Howard Sounes *The Wicked Game* Sidgwick & Jackson London (2004) at 227 *et seq.*

64 Sounes at 79–80. The 'Caucasian clause', which was contained in the rules of the PGA of America (the organisation which represented golf professionals, including club and touring professionals at the time) since 1934, read as follows: 'Members: . . . Professional golfers of the Caucasian race, over the age of eighteen (18) years residing in North or South America, who can qualify under the terms and conditions hereunder specified, shall be eligible . . .' (As quoted in Sounes at 21).

65 Such as the FEA and PEPUDA.

Government has expressed its dedication to the priority of celebrating democracy and non-racialism as central to its strategic goals,⁶⁶ while our Constitution confirms that the Republic is a sovereign, democratic state founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms', and the values of 'non-racialism and non-sexism.'⁶⁷ It is therefore self-evident that the phenomenon of transformation of sport on the grounds of the race of participants is a very clear and fundamental symptom of the whole South African condition, which constitutes (at least in part) a legacy of our segregated past. Efforts by government to transform the way we live and play are central to our way of life, especially in our ongoing striving to complete this important process of 'nation-building' and reconciliation.

I am convinced that, even in the light of the considerable and continuous public debate on this issue during the past decade, sports transformation is not accorded its proper importance in the media and social dialogue. While we are all rightly concerned with the imperatives of eradicating poverty and addressing the threat of HIV/AIDS and other potential national catastrophes, it is submitted that government's treatment of the issue of transformation in sport highlights an underlying social agenda that is a dark current threatening to erode the very bedrock of our young democracy. These efforts, as embodied in (what I have argued to be) unjust, incoherent, irrational and illegitimate policies and measures, fly in the face of the very core values expounded in our Constitution. And, equally disturbing, their formulation and application appear to proceed in disregard of the transparency we rightfully demand of our government, as well as our fundamental right to demand that government display a proper respect for the Bill of Rights contained in the supreme law of our land.

I previously lamented the malaise of justification contained in the legislative framework for the application of sports transformation during the last decade. While highlighting the vague and confusing content and wording of sports legislation in respect of transformation along racial lines, I also attempted to illustrate the illegitimacy of this process in professional sport in the light of our labour legislation, notably the FEA.⁶⁸ Accordingly, at first glance, the prospect of a 'sports equity Act' appears to be a positive development that promises a measure of clarity regarding both government's agenda in transforming sport and the legislative framework for determining the rights and interests of the parties involved. However, despite statements condemning the use of controversial measures such as racial quotas and promising a change of tack by Sport and

66 See 'Priorities of the National Government as Articulated by the President', Annexure A to Sport and Recreation South Africa's *Strategic Plan 2004-2007* (available on the internet at www.srsa.gov.za).

67 Chapter 1 of the Constitution: Founding Provisions.

68 Act 55 of 1998 see the discussion in Louw AM 'Should the playing fields be levelled?' 2004 *Stellenbosch Law Review* Vol 15 No 2 (2004) 225 at 238 *et seq.*

Recreation SA,⁶⁹ it appears that government's position on sports transformation still displays a clear preference for what can only be termed race-based social engineering through active and drastic intervention in the autonomy of sports federations and processes such as team selection that have traditionally been regarded as matters 'of sporting interest only'.⁷⁰ It is ironic, if one considers the remarks quoted at the beginning of this article, to see that the ANC appears to have come full circle in their views regarding the role of 'race' – not only on the sports field but also elsewhere.⁷¹

In this context, it is interesting to note the wording of the definition of sports transformation under discussion and to read between the lines to determine the spirit in which it was drafted. As has been mentioned, the definition contains the statement that 'dual application' involves applying both principles [of 'universality' and merit] at the same time, in order to ensure that the principle of universality is not sacrificed 'in favour of the merit principle only as most antagonist (*sic*) of transformation tend to do, especially in team selection and preparation'. This approach appears to evince an attitude that the drafters of this definition are the sole proprietors of reason in the ongoing debate over this issue, advocating a view that simply must prevail. As one observer has remarked:

After 1994 people who attempted to sustain the former level of debate [within the black consciousness movement] or challenge the thinking of the president or the ANC were labelled as being 'anti-transformation'. This silencing of criticism is not an African tradition – that idea is a distortion of our society's traditional respect for its elders . . . To stave off criticism and silence its critics, the ANC has deliberately confused criticism with undermining 'national interest'. We need to strengthen democratic institutions, entrench democracy and a non-racial society.⁷²

69 In light of the content of the definition of sports transformation as discussed above, it is unclear what is meant by the following remarks on the proposed 'sports equity Act' (Mr Nxolisi Spondo, spokesperson for the Minister of Sport, Mr Makenkhesi Stofile): 'This is an umbrella act that will serve as guideline for sport equity and not a government measure to enforce sport quotas' (as quoted by Gert Coetzee 'Act not another quota plan', available online at http://www.news24.com/News24/Sport/More_Sport/0..2-9-32_1539918,00.html).

70 Regarding the extent of potential government intervention, see ns 15 and 55 above. Beloff, Kerr & Demetriou *Sports Law* Hart Publishing 1999 (at 37) state that, in the European context, European Community law 'insists on recognizing a region of autonomy for the organizers of sport, within which the law will not interfere'. This autonomy is afforded to rules that are characterized as being 'of sporting interest only'. This 'category' of rules is illustrated in the context of the distinction between the treatment of eligibility rules based on nationality in respect of national and other teams. As the authors remark, the dimensions of this exception are uncertain, and the European Court of Justice has not yet charted the frontier dividing purely sporting rules from others affecting sport as an economic activity.

71 Compare recent calls by government for the inclusion of racial classification in title deeds of immovable property, which has unleashed a fierce debate in the media and Parliament.

72 Professor Siphon Seepe, physicist and newspaper columnist, from an interview in the Helen Suzman Foundation's Focus 23, September 2001 (available online at <http://www.hsf.org.za/focus23/focus23interview.html> – last accessed 24 May 2005).

The proposed legislation augurs the beginning of a new dispensation where government will assume ultimate control of South African sport at all levels. In fact, it is submitted that the proposed legislation may prove to be the most drastic example of government intervention in this area of social and economic activity anywhere in the world, which promises to bring more problems than solutions. In passing, what expectations does this dispensation hold in respect of the regulatory function of international sports governing bodies? How will these organisations respond to such a social engineering agenda that holds the potential of again isolating South African sport from the rest of the world on the basis of 'race policies'? Will the denial of the role of merit in sport find favour internationally?⁷³ Or will South African sport become a joke?

Maybe the following montage of press statements by two of the major role-players in sports transformation (in the context of South African rugby) best expresses the 'climate of change' at present:

The media say we are interfering, but I am saying on record that neither the minister nor the portfolio committee is interfering, but must act if things are falling apart.

It is not a privilege for blacks to play rugby, but their right. They must be given an equal chance.

Mr Butana Komphela, ANC, Chair, Parliamentary Portfolio Committee on Sport and Recreation.

[Transformation in SA rugby] is a continuing process and by the time we come to [the Rugby World Cup in] 2011 there should be no doubt that the Springbok team could be 15 black players.

Mr Brian van Rooyen, President of SA Rugby.⁷⁴

Is it proposed that intervention is necessary to ensure that players of colour fulfill their 'right to participation', where an 'equal chance' of access translates to the objective of a 15-man team of 'non-white' players at the level of international competition? It is submitted that statements such as these indicate that things may already have fallen apart.⁷⁵ As was remarked recently, it appears that the ANC's current intervention in sport

73 Eg it appears that the international governing body for cricket, the ICC, does not currently view racial quotas in SA cricket (as applied sporadically during the last decade) as an issue warranting the organisation's attention. However, the ICC will probably intervene in SA cricket if it transpires that the absence of merit selection in international competition affects the quality of such competition, thereby 'bringing the game into disrepute' – from an interview with members of the senior executive of the ICC, London, 12 October 2004).

74 From a report on the SA Rugby presentation to the parliamentary portfolio committee on the World Cup 2011 bid, available online at http://www.rugbyrugby.com/news/story_41054.shtml [last accessed on 9 February 2005].

75 Have we reached a point in our society where 'policy' has eclipsed reality? Apparently so, according to the chairperson of the Parliamentary Portfolio Committee on Sport, Mr Butana Komphela, who, when questioned recently about sports transformation and his own views on the issue, responded as follows: 'I don't know anything about [sport], but I know the policy position of the ANC around sport . . . When you are a member of Parliament you are not elected because you have a masters degree in science. We are elected to look at policy directions.' (From 'So Many Questions' *Sunday Times*, 27 February 2005).

has occasioned a shift from 'no normal sport in an abnormal society' to one of 'abnormal sport in a normalising society'.⁷⁶ And one can only ask what is next: 'Will the government start telling South African chess players to move the black pieces first?'⁷⁷

It is sincerely hoped that government will view the observations contained in this article as a genuine invitation to explain its proposals, clearly and sufficiently, in the light of the realisation that we *all* share an interest in South African (professional) sport, as a national pastime, as an important contributor to our GDP, and as a symbol of our excellence as a nation.

BIBLIOGRAPHY

- Basson & Loubser *Sport and the Law in South Africa* Butterworths (loose-leaf) 2000
- Beloff, Kerr & Demetriou *Sports Law* Hart Publishing 1999
- Coetzee G 'Act not another quota plan' (available online at http://www.news24.com/News24/Sport/More_Sport/0,,2-9-32_1539918,00.html)
- Coetzee G 'Brian red cards rugby quotas' (available online at http://www.news24.com/News24/Sport/Rugby/0%2C%2C2-9-838_1588587%2C00.html)
- Coetzee G 'Rugby needs "black Pienaar"' (available online at <http://www.super-rugby.co.za/Default.asp?id=136033&des=article&scat=superrugby/sarugby>)
- Coetzee G 'Sporttransformasie gaan nie vir ewig aanhou, sê Stofile' *Die Burger* 3 March 2005
- Cohen S 'Amateurs, Professionals, and Eligibility for Americans in the Olympics' in *Quirk ed Sports and the Law: Major Legal Cases* Garland Publishing Inc. 1996
- Daly A & Kawaguchi A 'Competitive Balance in Australian and Japanese Sport' *The Otemon Journal of Australian Studies* Vol 30 (2004) 23
- Department of Sport and Recreation South Africa *Funding Policy and Processes 2002* (available online at www.srsa.gov.za)

76 Mr Tony Leon, official opposition leader, as quoted in 'No abnormal sport in normalising society' *Sunday Times*, 28 January 2005 - available online at <http://www.sundaytimes.co.za/zones/sundaytimesNEW/newss1/newsst1106904747.aspx> [last accessed 16 February 2005].

77 *Ibid.* 'This comical hyperbole is less absurd than it might sound if read with some of the government statements regarding sports transformation. Minister Stofile was quoted recently (by Coetzee G 'Sporttransformasie gaan nie vir ewig aanhou, sê Stofile'. *Die Burger* 3 March 2005) as lamenting the 'scandalous' fact that the French national rugby team, despite the demographic make-up of the French population, is a 'more cosmopolitan' team than that of South Africa. One must question this adherence to diversity in respect of the racial composition of a team, which appears to function irrespective of the demographic realities. Surely this serves to place the true role of demographic representativity in the transformation process, as interpreted by government, in a different and rather dubious light.'

- Department of Sport and Recreation South Africa *Strategic Plan 2004-2007* (available online at www.srsa.gov.za)
- Gouws J *Sport Management: Theory and Practice* Knowledge Resources 1997
- 'Government backs 2011 bid, but ...' available online at http://www.rugbyrugby.com/news/story_41054.shtml
- Gratton & Taylor *Economics of Sport and Recreation* E&N Spon 2000
- Hartman R Ali: *The life of Ali Bacher* Viking 2004
- Jarvie G ed *Sport, Racism and Ethnicity* Falmer Press 1991
- Jarvie G *Class, Race and Sport in South Africa's Political Economy* Routledge, London 1985
- Kelly GM *Sport and the Law: An Australian Perspective* The Law Book Company Ltd, Sydney 1987
- Lapchick RE *The Politics of Race and International Sport: The Case of South Africa* Greenwood, Westport 1975
- Louw AM 'Should the playing fields be levelled? Revisiting affirmative action in professional sport' 2004 *Stellenbosch Law Review* Vol 15 No 1 119-136 ('Part 1 - The Background and the Context')
- Louw AM 'Should the playing fields be levelled? Revisiting affirmative action in professional sport' 2004 *Stellenbosch Law Review* Vol 15 No 2 225-246 ('Part 2 - The Professional Sporting Context')
- Louw AM 'Should the playing fields be levelled? Revisiting affirmative action in professional sport' 2004 *Stellenbosch Law Review* Vol 15 No 3 409-428 ('Part 3 - Testing the Legitimacy of Affirmative Action in Professional Sport')
- Masondo S 'Tougher Legislation for Sports Transformation' *The Herald Online*, 15 August 2005 - available online at http://www.theherald.co.za/herald/2005/08/15/news/n04_15082005.htm
- Minty Abdul S 'International Boycott of Apartheid Sport' UN Unit on Apartheid, Notes and Documents No 16/71 (April 1971) - available online at <http://www.anc.org.za/ancdocs/history/aam/abdul-2.html>
- Murray B and Merrett C *Caught Behind: Race and Politics in Springbok Cricket* Wits University Press 2004
- Nauright J *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997
- 'No abnormal sport in normalising society' *Sunday Times*, 28 January 2005: available online at <http://www.sundaytimes.co.za/zones/sundaytimesNEW/newsst/newsst1106904747.aspx>
- Osborne P *Basil D'Oliveira - Cricket and Conspiracy: The Untold Story* Little Brown, London 2004
- Parliamentary Monitoring Group - various minutes and briefings, available online at <http://www.pmg.org.za>
- Seepe Prof S *Focus 23*, Helen Suzman Foundation, September 2001 (available online at <http://www.hsf.org.za/focus23/focus23interview.html>)
- 'So Many Questions' *Sunday Times*, 27 February 2005

Sounes H *The Wicked Game* Sidgewick & Jackson, London (2004)

Sports Transformation Charter Report to the Parliamentary Portfolio Committee on Sport and Recreation, 19 October 2004 (PowerPoint presentation, available online at <http://www.pmg.org.za/docs/2004/appendices/041019transformation.ppt>)

Szymansky S 'Income Inequality, Competitive Balance and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer' March 2000 (available online as <http://mscmga.ms.ic.ac.uk/stefan/EJCB.pdf>)

Transformation in Cricket, Report of the Ministerial Committee of Enquiry, submitted to the Honourable Minister of Sport and Recreation, Mr N Balfour, 16 October 2002

Wise A & Meyer B *International Sports Law and Business* (2 volumes), Kluwer Law International 1998 Vol 1