The return of racial quotas in South African Sport

Both Cricket South Africa and the South African Rugby Union have recently reintroduced racial quotas, requiring that a certain number of ‘players of colour’ are included in teams. Andre M. Louw, Senior Lecturer at the School of Law, University of KwaZulu-Natal, examines the history of racial quotas in South African sport. He highlights examples of instances where teams have not been allowed to compete, or athletes have been denied medals due to their failure to meet racial quotas. He examines whether such quotas fit with the Olympic Charter and South Africa’s Constitution, as well as assessing the practicality of such measures and whether they contribute to fair inclusion or breed resentment in sport.

South African sport is once again blighted by a phenomenon that is relatively unique in the world (of sport). Both Cricket South Africa (CSA) and the South African Rugby Union (SARU) announced in late 2013 that they will reintroduce racial quotas in their respective sporting codes. The quotas require that a certain number of ‘players of colour’ (with an emphasis on black Africans) be included in teams selected for various competitions, such as the second-tier professional rugby competition, the Vodacom Cup. These quotas are reminiscent of similar measures implemented during the early years of South Africa’s post-1994 democracy, and represent the highest profile measure employed in the name of ‘transformation’ of sport in a country that was characterised by the notorious apartheid policies of racial division and systemic disadvantage experienced prior to 1994. The quotas announced by SARU and the CSA include financial incentives to be paid to professional franchises and other teams for the consistent fielding of black players (reminiscent of measures implemented by the England and Wales Cricket Board to counter the ‘scourge’ of Kolpak players in English county cricket in recent years), but such administrative niceties are mere bells and whistles. They do not detract from the inherently race-based nature of artificial player quotas, which pursue the questionable social engineering of ‘representative’ sports teams on the basis of the skin colour of their members.

These measures, while ostensibly implemented by private sports federations, are the direct consequence of the policies of the African National Congress (ANC) government. This liberation movement of the late great (and recently departed) Nelson Mandela has, since it assumed power, frequently been criticised for its pre-occupation with race and continuation – reminiscent of apartheid - of divisive race-based policies in a number of spheres. While government spokespersons

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1. A European Court of Justice ruling stating that citizens of certain countries that had signed agreements with the European Union, have the same rights to freedom of movement and employment within the EU. The Kolpak ruling is available at http://bit.ly/1dncY2c
2. Such as the (controversial) Broad-based Black Economic Empowerment (or BBBEE) policies which provide for preference for black Africans in e.g. government procurement, on the basis of race. These policies have been widely criticised for having contributed to the establishment of a new African middle class and wealthy elite (of largely politically-connected ‘tenderpreneurs’ who do business with government) while failing to promote true
have in the past (sometimes quite disingenuously) denied involvement in transformation measures as implemented by sports federations, government has for years been actively pushing transformation in the previously ‘white sporting codes’ through the signing of ‘transformation charters’ with sports federations and other means, and such government agenda has also found its way, very prominently and quite controversially, into the country’s sports legislation3. While, of course, morally laudable in light of the country’s past and the fact that South Africa is still one of the most unequal societies in the world, the moral justification for redress of past disadvantage should however not obscure the fact that these ‘transformation’ measures are unconstitutional, illegal and, frankly, nonsensical.

Earlier attempts at ensuring ‘representative’ sports teams included some very controversial examples. In the run-up to the 2000 Sydney Olympic Games, the (then) National Olympic Committee of South Africa (or ‘NOCSA’) disqualified the men’s national team from participating in the Games. Even though this team was at the time the continental champions in Africa, NOCSA’s selection criteria for Sydney included a provision that ‘[t]eams would be considered for participation in the Games] if the qualifying team, individuals or combination of athletes are made up of an acceptable portion of athletes from the historically disadvantaged sector of South African society.’ The manager of team preparation for international competition of the more recently established iteration of the country’s national Olympic Committee, the South African Sports Confederation and Olympic Committee (SASCOC), told the parliamentary sports committee in June 2007 that South African sports codes that do not have at least a 50-50 ‘Black-White ratio’ of participants would not be allowed to send teams to the Beijing Olympics in 2008. One wonders whether this stance of SASCOC reflects the proper function of a national Olympic Committee under the Olympic Charter. These events followed an earlier incident when the controversial ANC Chair of the parliamentary sports oversight committee, Butana Komphela, threatened that government would request the Department of Home Affairs to withdraw the passports of white rugby players in the national team who were scheduled to tour to France for the IRB rugby World Cup 2007, if the team was not demographically representative enough and did not contain ‘at least six black and/or coloured players’. A personal favourite, which displays the incoherence and, frankly, blatant idiocy of such measures is the use of race quotas in women’s netball. Netball South Africa announced in 2007 that it had been decided that ‘instead of docking points from teams that do not meet the quota, any team that had the required five-two ratio [of black African v. white players] on court at all times would receive an additional six goals. If they fielded a six-one ratio, they would receive three additional goals ... In the past, some teams were docked so many points that they went into negative

advancement of the poorest sections of the African population (which are undoubtedly most in need of government intervention). Compare also the employment legislation such as the Employment Equity Act, Act 55 of 1998, which provides for the advancement of ‘designated groups’ through the means of affirmative action programmes – see discussion in the text that follows.

3. Compare the primary piece of sports legislation, the National Sport and Recreation Act, Act 110 of 1998 (as amended in 2007). Section 4(2) of the Act states specifically that the national policy on sport as determined by the Minister of Sport may relate inter alia to ‘help in cementing the sports unification process; and instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process’. Section 13A of the Act (as amended) provides that ‘[t]he Minister [of Sport] must issue guidelines or policies to promote equity, representivity and redress in sport and recreation’. Sections 13B and 13C require every sport or recreation body to submit, annually, statistics on its membership and also to report progress on the issues referred to in s 13A. Section 13(5)(a)(ii) empowers the Minister to intervene ‘in any non compliance with guidelines or policies issued in terms of section 13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution’, by e.g. issuing a ‘directive’ which is binding on the parties to a dispute (or, specifically, a sport body in such cases).
Most troubling from a moral perspective, however, is the fact that such race quotas have also been applied at the level of youth sport, and it is unknown how many young athletes have been impacted negatively by such measures in the past two decades. The South African Games, held in Port Elizabeth in March 2004, were tainted by an incident where a young white tennis player, Adele van Niekerk, was stripped of her medal by tournament director David Kampele, apparently because her team did not meet the required ‘50% black’ quota as prescribed. A month earlier, white athlete Erna Wedemeyer’s team was disqualified from the South African Life Saving Championships because they did not comply with the prescribed racial quotas.

Space does not allow for more detailed recounting of the practical application of such race quotas, but their legitimacy under law needs to be interrogated briefly. South Africa’s Constitution contains a Bill of Rights, which is generally recognised as one of the most progressive of such instruments to be found anywhere in the world. Section 9 of the Bill of Rights contains the equality clause, which provides that everyone is equal before the law and is entitled to equal protection under law. This section also provides for the passing of legislation to promote equality. The Constitutional Court has endorsed a notion of substantive equality, i.e. the promotion of equality of outcomes as opposed to a formal notion of equality which merely requires equal treatment of persons. The pursuit of substantive equality under the Bill of Rights has spawned a number of legislative interventions. In employment, the Employment Equity Act of 1998 (or EEA) prescribes the application of race-based affirmative action by designated employers in order to attain the equitable representation of ‘designated groups’. In other contexts, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (or PEPUDA) prohibits unfair discrimination on a number of grounds (including race), and promotes the achievement of equality on the basis of race and other grounds. A detailed evaluation of the relevant legislative instruments is beyond the scope of this piece, but I will focus briefly on a few pertinent aspects.

A major problem with race quotas in professional sport can be found in the employment legislation itself. Courts (and the statutory alternative dispute resolution body for labour disputes, the Commission for Conciliation, Mediation and Arbitration, or CCMA) have unequivocally held that players in professional team sports such as rugby, cricket and football, are employees for purposes of the labour laws, and the relevant statutes apply to the employment of such players. It is

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6. Section 9(2) provides for the application of affirmative action, as follows:
   ‘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.’
7. Minister of Finance & Others v. van Heerden 2004 (6) SA 121 (CC).
8. ‘Designated groups’ in terms of section 1 of the Act means ‘black people (i.e. Africans, Coloureds and Indians), women and people with disabilities.’
therefore strange to consider the use of such race quotas by the SARU and CSA in light of the fact that the EEA expressly forbids the use of quotas as part of an affirmative action programme. Neither government nor any of the relevant sporting federations have, to date, explained this discrepancy when it comes to the application of race quotas in professional rugby and cricket teams.

One of the most troubling aspects of the pursuit of sports transformation is that government has chosen to pursue an agenda whereby equality is measured by means of ‘representivity.’ The achievement of equality is measured against race demographics. Only if a sports team (or workplace) is demographically representative of all groups in the population and in the proportion of such representation within the population (e.g. 80% black African) is such representation deemed to be equitable. In this way a statistical yardstick, which has no link to the achievement of equality (and is nowhere mentioned in the constitutional equality right), has managed to usurp other, more germane factors (such as sporting merit, or the available pool of suitably qualified or talented players) in the determination of equitable treatment of all. Such measures do not, in the meaning of the words of the Constitutional Court, pursue the achievement of redress for the previously disadvantaged, but rather the tokenistic achievement of ‘representative sports teams’.

Demographics have become an illegitimate proxy for equality, and this highlights just one aspect of the irrationality of the use of such race-based quotas. It also brings into question the legitimacy of the use of the ‘softer’ measure of numerical targets, which have also been employed in sports teams and elsewhere in the application of affirmative action in employment under the EEA. These more aspirational goals for the representation of players of colour come to function just as rigidly as racial quotas if the determination of ‘equitable representation’ of such players in a team is subject to racial demographics in the greater population - until such time as the level of representation in the population has been reached, such a target will simply not be met. The danger is well illustrated by the words of former national cricket selector, Omar Henry, when asked to explain the use of race-based targets in the national team during its tour to New Zealand in 2003 (explaining why such targets were to be preferred to quotas, which the United Cricket Board at the time had publicly condemned):

‘Let me make it clear once and for all. Transformation is an integral part of the selection process, whether people like it or not. There are however no numbers that must be complied with. We do pursue targets. If there are two coloured players in the team, we strive for three; and if three make the team we try to use four.’

The constant striving to increase the representation of coloured players, in terms of a ‘target’ that entails that their representation will apparently never be viewed as being satisfactory, points to a preconceived notion of the ‘equitable representation’ of such players that smacks of tokenism, or

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12. The US Supreme Court, in Local 28, Sheet Metal Workers’ International Association v EEOC 478 US 421 (at 495), distinguished as follows between quotas and numerical goals in affirmative action programmes in employment:
   ‘A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications. By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job.’
the equation of ‘diversity’ or representivity with equity. This approach appears to reify transformation for transformation’s sake. The Supreme Court of Appeal, in a recent landmark judgment which dealt with an affirmative action programme of the South African Police Service, appeared to recognise the danger and condemned such rigid use of racial demographics.\(^\text{14}\)

The legal issues aside, race quotas are also highly questionable on logical grounds, if one considers the special role and importance of sporting merit and the very nature of the (professional) sports industry. Professional sport is an entertainment industry - the economic value of the sporting event lies in its interest to spectators, who are interested in the uncertain outcome of the event. This uncertainty revolves around the competitive nature of sport, and the spectator is interested in seeing not only how the game is played, but also who will win. The competitive strengths of the participants are determined by their respective skills, abilities and form. Sporting merit is therefore central to the competitive value of the match and the resultant financial success or failure of the business involved. Ultimately, because of the role of individual players as entertainers, merit not only determines the outcome of matches, but also the entertainment value of the game. Any policy or measure which prescribes the preferment of one participant over another on the basis of attributes unrelated to the sporting merits of such player (e.g. the colour of their skin), constitutes an unacceptable denial of the importance of merit which runs counter to the very core values and characteristics of sport, and of the success of professional sport as an industry. One can only wonder how sports administrators - and sponsors and other commercial stakeholders - felt about the views of former President, Thabo Mbeki, after he famously declared as follows regarding the inclusion of quotas of ‘players of colour’ in sports teams in a speech at the South African Sports Awards in March 2002: ‘For two to three years let’s not mind losing international competitions because we are bringing our people into these teams.’ Not to mention the unintended consequence of such policies, of talented players of colour being perceived (or actually labelled) as ‘quota players’ who do not belong in the team. It is quite disturbing to note that two of the best international cricketers that South Africa has produced to date, MakhayaNtini and Herschelle Gibbs, were both quoted in media reports a few years ago as having experienced this stigma. On the other side of the coin, the South African-born star England batsman Kevin Pietersen claimed to have left South Africa to pursue his career elsewhere because of race quotas in cricket.

It is unfortunately true that inequality is still rife in South African society and also in its sport. Widespread poverty and a lack of proper sporting facilities in previously disadvantaged communities remain significant hurdles in the way of the achievement of real transformation. Many commentators have suggested (and I agree) that it is here – in the provision of sporting facilities and upliftment of these communities – that the real silver bullet to address sports transformation (and the proper role for government in this process) is to be found. But, seeing that the government has chosen a top-level, window-dressing approach to the transformation agenda in South African sport, would it be unfair to measure the success of transformation at this level? Let’s consider for a minute the representation of ‘players of colour’ in two of the country’s major professional sporting codes. In rugby union, Springboks such as Bryan Habana, J.P. Pietersen and Zimbabwean-born Tendai ‘The Beast’Mtawarira are currently (and have been for some time) some of the best players in the team and in their respective positions in world rugby. At the time that I write this, South African ‘players of

\(^{14}\) In ‘Solidarity obo Barnard v. SAPS’ (165/2013; judgment of 28 November 2013) – unreported at the time of writing.
colour’ hold the no. 2 position on both the international Test batting (Hashim Amla) and bowling (Vernon Philander) rankings published by the International Cricket Council (coincidentally, the no. 1 position on both these rankings are currently held by white South African players). Is this a positive indication of the very real strides made in transformation in SA cricket? Or are these two star cricketers simply not ‘black enough’ for the powers that be?

In social discourse in South Africa, it is viewed as politically incorrect to question aspects of transformation, and politicians and others frequently play the race card when detractors (if they happen to be white) express their concerns about the practical experience of transformation. Perhaps the most surprising thing about these racial quotas in South African sport is that nobody - specifically, no athlete - has ever challenged their legality before a court of law. Submissions on the illegitimacy of such measures by a civil rights group made to the international governing body in one of the country’s most prominent major sporting codes in 2007 were met with the response that the proper forum to vent these issues is the country’s domestic courts. Plans at the time to take the matter to the Court of Arbitration for Sport (CAS) in order to obtain an opinion in terms of CAS Rule 60 came to nought (presumably because of the costs involved). When one considers how frequently international governing bodies decry political interference in ‘the game’ by domestic governments (FIFA is a prime example), it is surprising that no such body has to date taken the South African government to task for its political interference in pursuing a race-based social engineering agenda in sport. Having mentioned FIFA, however, it should be noted that the South African government has never questioned the level of racial representation of the national football team, which has frequently fielded a team made up exclusively of black African players. Is there a double standard at play here? Or does such an all black (with apologies to New Zealand readers) football team not draw attention because it represents the ideal of what the ANC government is ultimately striving to achieve?

It is suggested that foreign sports lawyers and international governing bodies should take heed of these developments in South Africa. It raises serious questions regarding the proper place for sport within the context of domestic political agendas. It also raises questions regarding the role of those who govern sport in ensuring fairness towards all participants, and even whether international governing bodies may owe a duty towards athletes in domestic jurisdictions to actively ensure that sport is not used as a tool for scoring political points at the significant cost of the hopes and dreams of a certain section of the sporting youth. The international sporting community agrees that doping and match-fixing in sport is bad. And preparations for the Sochi winter Olympics in 2014 recently made headlines over the poor fit of discriminatory laws with Olympic ideals. So what about artificially imposed, race-based quotas? Does a specific country’s pariah history of abominable racial discrimination in sport mean that two wrongs can in fact make a right?15 Or does a misguided sense

15. It is interesting to note that the African National Congress always maintained a quite unequivocal stance in respect of the importance of merit selection in sport when it protested apartheid sport before the international community. Compare the following views expressed by ANC spokesperson, Abdul Minty, in a document addressed to the United Nations Unit on Apartheid in April 1971, which called for continuation of the international boycott of South African sport:

‘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 teams for representative sport. Indeed non-discrimination is such an essential part of true sportsmanship that many clubs and international bodies have expressed provisions to this effect. For example, the first fundamental principle of the Olympic Charter states: no discrimination is allowed against country or person on the grounds of race, religion or political affiliation...All
of political correctness allow the international sporting community to wash its hands of something that is anathema to everything that sport is (or should be) about? This author sincerely hopes that the international sporting fraternity will sit up and take note of what is occurring in South African sport, and its implications for the integrity of ‘the game’ and fairness towards all participants. After all, the Olympic Charter proclaims that the practice of sport is a human right:

‘Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.’

Andre M. Louw


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*links with racialist bodies should be abolished until sport inside South Africa is conducted on the basis of merit alone and not of colour.*

16 Principle 4 of the Fundamental Principles of Olympism, as contained in the Olympic Charter