

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
(BRAAMFONTEIN)

Case No: 1012 / 2022

In the matter between:

**UMBUKUDI, MAPULA**

Applicant

And

**SOUTH AFRICAN FEDERATION OF SWIMMING**

Respondent

And

**INSTITUTE FOR ACCOUNTABILITY IN**

*Amicus Curiae*

**SOUTH AFRICAN SPORT**

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**HEADS OF ARGUMENT**

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**1. Opening statement**

1.1 As *amicus curiae* to the case, we are bringing to the court that sports persons are entitled to their right to open justice as contemplated under section 34 of the Constitution, and that provisions such as Rule 10 inhibit this right and force them into clandestine arbitration processes within a sporting world that closes in on itself and does not favour any person advocating for social justice or for their basic rights. We are

arguing that as a matter of general principle sporting matters should be dealt with in the ordinary judicial process, in the same manner that other public bodies are accountable to the judiciary.

## **2. The parties**

2.1 The applicant is Ms Mapula Umbukudi, an Olympic swimmer that won five gold medals in the 2020 Tokyo Olympics. She is the current holder of the world record in the 50-metre freestyle and the 100-metre butterfly.

2.2 The respondent is the South African Federation of Swimming (“SAFS”). SAFS is the national federation in the discipline of swimming under the National Sport and Recreation Act 110 of 1998, and is the only body recognised by the International Swimming Federation (the “ISF”).

2.3 The *amicus curiae* is the Institute for Accountability in South African Sport (“IASAS”). IASAS is intervening in the matter and is arguing that that the SAFS, and all other national sport federations, either are public bodies as contemplated under the Constitution (read with the National Sport and Recreation Act), or exercise public and statutory functions and therefore are public administrative bodies in their nature. Their decisions, and in particular their rules and their

disciplinary processes, are therefore a matter of public interest and should be subject to judicial scrutiny.

### **3. The nature of action**

3.1 Administrative Action. Administrative Action deals with actions that result from persons who are deprived of their rights/ or have their rights abused by other persons, parties and/or entities.

### **4. Jurisdiction**

4.1 The above honourable court has jurisdiction to hear this matter, as the cause of action arose wholly within its area of Jurisdiction.

### **5. Locus standi**

5.1 We submit that the Applicant has *locus standi in judicio* in this matter as the conduct complained of directly affects the Applicant.

### **6. The background**

6.1 The SAFS announced in June 2022 the implementation of testosterone regulations in women's swim meets, which would apply to athletes with certain XY sexual development anomalies. These regulations effectively barred certain intersex athletes from competing in races unless they suppressed their testosterone levels medically.

6.2 Although she is not intersex, Umbukudi was outraged by the regulations and voiced her displeasure on social media. In

an interview with the SABWiL Law and Life Matters #LLM Podcast and the SABWiL Times, she also criticized the testosterone regulations. The testosterone regulations, in her opinion, were discriminatory, an invasion of privacy, and an insult to all swimmers. She also stated that the regulations were unnecessary because they were not part of the ISF rules, even though the ISF had issued a memorandum stating that national federations were free to make their own regulations regarding swimmers with sexual development anomalies.

6.3 The SAFS initiated disciplinary proceedings against Umbukudi shortly after these articles were published. Umbukudi was charged with violating Rule 8 of Chapter 4 of the SAFS domestic rules and regulations ("Rule 8"), which states: "8.1 Persons subject to these rules shall not act in a manner likely to affect adversely the reputation of the SAFS, or the sport of swimming generally, nor shall they act in a manner likely to bring the sport into disrepute. 8.2 Persons subject to these rules shall not publicly criticise or in any form or manner denigrate or make any negative statement or give rise to any negative inference in respect of the SAFS or the sport of swimming generally."

6.4 The SAFS stated that the social media posts, newspaper article, and Ubuntu News interview all violated the preceding rule. Umbukudi was summoned to answer the charges and was offered legal representation at the disciplinary hearing if she so desired.

## **7. The issues**

### **7.1 Factual issues**

- The Factual issues to this case are whether the decisions made to the case offer equal rights to intersex individuals. Examples of rights are, Rights to protection from discrimination, right to protection of physical integrity and bodily autonomy.

### **7.2 Legal issues**

7.2.1 Does Rule 10 constitute an internal remedy for the purposes of section 7(2) of PAJA?

- Section 7(2) of PAJA states that internal remedies should be exhausted before a person can ask a court to review an Administrative action and that there is an important rule with, and that is the rule of exhausting internal remedies. Judicial review and/appeal can be used as a last resort. Therefore, Yes rule 10 does constitute an internal remedy which is to take the matter for arbitration before it can be taken to a court of law which has jurisdiction to hear the matter.

7.2.2 Do the interests of justice require this matter to be heard by way of arbitration or by way of court proceedings?

- The interest of Justice promotes that matters where a persons rights have been infringed should be heard at a constitutional law. However, Section 7(2) of PAJA states that before a matter could be taken for Judicial review internal remedies must be Exhausted and a review/Appeal can be made within 180 after the exhaustion of the internal remedies.

7.2.3 Is it appropriate in the context of this matter for an arbitrator to preside over the dispute between the parties?

- Yes. An Arbitrator can preside over the case. The case can be heard as way of Arbitration as way of an internal remedy that needs to be followed, and then can be taken to court after such remedies have been Exhausted. This is according to Section 7(2) of PAJA. The Arbitrator should be a person who qualifies and has the powers according to the constitutional law to hear such matters.

7.2.4 Does the mere fact that constitutional issues have been raised mean that the matter can only be decided in court or is there any scope for an arbitrator to decide this matter?

7.2.5 Do the rules of the SAFS infringe on the constitutional rights of swimmers, and if so, which rights are infringed?

-Yes.

1. Right to equality.
2. Right to protection of bodily integrity and bodily autonomy.
3. Right to Freedom of choice.
4. Right against discrimination.

7.2.6 Does the right of access to court enshrined in section 34 of the Constitution require this matter to be heard in court or **can the matter be determined by way of arbitration?**

**- 34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.**

7.2.7 What is the appropriate remedy?

The Appropriate remedy for this action would have to be setting aside or remittal of the decision.

## **8. The law**

8.1 Section 34 of the **Constitution of South Africa, 1996**, states that:

“Everyone has the right to have any dispute that can be resolved. by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”<sup>1</sup> Therefore, sports persons are entitled to their right to open justice as contemplated under this section of the constitution and **Rule 10 of the SAFS domestic rules and regulations** inhibits this right and forces them into clandestine arbitration processes within a sporting world that closes in on itself and does not favour any person advocating for social justice or for their basic rights. Sporting matters should be dealt with in the ordinary judicial process, in the same manner that other public bodies are accountable to the judiciary.

**8.2 Rule 8 of Chapter 4 of the SAFS domestic rules and regulations (“Rule 8”), which provides as follows:**

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“8.1 Persons subject to these rules shall not act in a manner likely to affect adversely the reputation of the SAFS, or the sport of swimming generally, nor shall they act in a manner

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<sup>1</sup> The Constitution of South Africa, 1996.



likely to bring the sport into disrepute.<sup>2</sup> 8.2 Persons subject to these rules shall not publicly criticise or in any form or manner denigrate or make any negative statement or give rise to any negative inference in respect of the SAFS or the sport of swimming generally.”<sup>3</sup>

**Rule 8 of Chapter 4 of the SAFS domestic rules and regulations** is unconstitutional and invalid in that it infringes swimmers’ rights of freedom of expression under **section 16 of the Constitution** which states that:

Everyone has the right to freedom of expression, which includes- (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.<sup>4</sup> (2) The right in subsection (1) does not extend to- (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred

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that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.<sup>3</sup>

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<sup>2</sup> South African Federation Swimmers Domestic Rules and Regulations.

<sup>3</sup> South African Federation Swimmers Domestic Rules and Regulations. <sup>4</sup> The Constitution of South Africa, 1996.

<sup>3</sup> The Constitution of South Africa, 1996.

8.3 **Rule 10** does constitute an internal remedy for the purposes of **section 7(2) of PAJA**. However, section 7(2)(c) states that, “a court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”<sup>4</sup> Because this case involves various constitutional and public law issues, including questions about sportsmen and women's constitutional rights to free expression, it should not and cannot be referred to arbitration. Constitutional and public issues cannot be resolved through private arbitration, and only the Court has the authority to do so.

8.4 The interests of justice require this matter to be heard by way of court proceedings. SAFS, like all other national sport federations, is either a public body as defined by the Constitution (read with the National Sport and Recreation Act), or it performs public and statutory functions, making it a public administrative body. Their decisions, particularly

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<sup>4</sup> Promotion of Administrative Justice Act 3 of 2000.

their rules and disciplinary procedures, are thus of public interest and should be subject to judicial scrutiny.

8.5 Yes.

1. Right to equality.
2. Right to protection of bodily integrity and bodily autonomy.
3. Right to Freedom of choice.
4. Right against discrimination.

**8.6. S 34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.**

8.7 The rules of the SAFS did indeed infringe on the constitutional rights of swimmers. The right to privacy was infringed against the swimmers. Section 14 of the Constitution states that “everyone has the right to privacy, which includes the right not to have- (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.”<sup>5</sup> Rule 8 of Chapter 4 of the SAFS domestic rules and regulations is unconstitutional and

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<sup>5</sup> The Constitution of South Africa, 1996.

invalid in that it infringes swimmers' rights of freedom of expression under section 16 of the Constitution. The swimmers have a right to express freely, with who they want, about how they feel regarding decisions that are made by SAFS. Sportspeople have the right to open justice under Section 34 of the Constitution, and provisions like Rule 10 limit this right and force them into clandestine arbitration

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processes within a sporting world that closes in on itself and does not favour anyone advocating for social justice or basic human rights.

8.8 The right of access to court enshrined in section 34 of the Constitution requires this matter to be heard in court. Because this matter is of public interest, any of the swimmers have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>6</sup>

8.9 The appropriate remedy for this case would be for the matter to be heard in court. Court would be a better remedy because in court, you do not pay the judge; in arbitration, there is no appeal; in arbitration there are less rules; courts do not charge you if you settle and once your arbitration is complete you still must go to court.

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<sup>6</sup> The Constitution of South Africa, 1996.

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## Bibliography

### Legislation

Promotion of Administrative Justice Act 3 of 2000.

South African Federation Swimmers Domestic Rules and Regulations.

The Constitution of South Africa, 1996.

