

SABWIL HUMAN RIGHTS COURT

(Held on 10 December 2022, 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
SOUTH AFRICAN SPORT**

Amicus Curiae

Filing Sheet on behalf of the Applicant

Presented for argument

1. Heads of Argument on behalf of the Applicant.

DATED IN JOHANNESBURG ON THIS DAY 04TH DAY OF DECEMBER 2022

TO: THE REGISTRAR OF THE ABOVE MENTIONED HONOURABLE COURT

AND TO: COUNSEL FOR THE RESPONDENT

AND TO: COUNSEL FOR THE AMICUS CURIAE

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Parties

1. The Applicant is Ms **Mapula Umbukudi**, an adult female swimmer, who currently holds the world record in the 50-metre freestyle and the 100-metre butterfly.
2. The Respondent is the **South African Federation of Swimming**, the national federation in the discipline of swimming constituted as per the National Sport and Recreation Act 110 of 1998.
3. Amicus Curiae is **the Institute for Accountability in South African Sport**, an organisation that devoted in ensuring that sporting bodies comply with set rules and regulations.

Jurisdiction

4. The applicant approaches this court on section 167(3)(b)(i) and (ii), which states that this court is the Highest Court and may decide any constitutional matter.
5. The Applicant further approaches this court on section 34 of the Constitution which states the access court to have any dispute that can be resolved by the application of the law, to be done so in a fair and public hearing.

Background

6. In June 2022, the Respondent announced the implementation of testosterone regulations, which would affect certain female swimmers and prevent those swimmers from participating in the sport of swimming unless their testosterone levels were medically suppressed.

7. The Applicant was outraged by exclusion of other swimmers, and expressed her displeasure through her social media accounts, as well as other local media.
8. The Applicant's expression of frustration was met with impunity from the Respondent. As a result disciplinary proceedings were initiated against the Applicant. The Applicant allegedly transgressed Rule 8 of Chapter of 4 the SAFS domestic rules and regulations which reads as follows:

"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."*¹

9. The disciplinary proceedings initiated by the Respondent served the purposes of violating the constitutional rights of the Applicant, and the following rights were violated.
 - i. The right to dignity, section 10 – The Applicant is being subjected to unfair and punitive disciplinary process because the Applicant expressed a negative view in relation to the conduct of the Respondent.
 - ii. The right to freedom of expression, section 16 – The Applicant is being purged by the Respondent for views which she held and expressed about the new regulations.

¹ SAFS Rules and Regulations

- iii. The right to just administrative action, section 33 – The decision to discipline the Applicant constitutes administrative action .
- iv. The right to access courts, section 34 - The Respondent seeks to arbitrate the constitutional infringement between itself and the Applicant, thus denying the Applicant the ability to have this matter adjudicated upon by an independent tribunal being the Human Rights Court.

Issues

The following are the issues that will be decided by this court:

- 10. Whether or not the issues raised by the Applicant are of a constitutional nature and in the interest of justice enough to warrant adjudication by the Justices of the Human Rights Court.
- 11. Whether the Respondent's rules violated the constitutional rights of the swimmers.
- 12. Whether or not Rule 10 qualifies as an internal remedy for the purposes of PAJA.

Constitutional right to access the Human Rights Court

- 13. Section 34 of the Constitution² states that:

² Constitution of the Republic of South Africa Act 108 of 1998

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.

14. In *Telcordia*³ the Supreme Court of Appeal held inter alia that “Private arbitration as a stating point, falls within the ambit of section 34 of the constitution”. It also noted that it was in accordance with the approach in the European Court of Human Rights as per the decision in *Suovaniemi v Finland*.

15. First and foremost, this Court does have jurisdiction because the matter raises constitutional issues and Section 21(1)(f)⁴ clearly stipulates that the Court has the same power to make orders in respect of interim interdict or similar relief.

16. In *Boesak*, this Court held that

“Under section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues

³ *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112, 2007(3) SA 266 (SCA) BLCR 503 at para 47

⁴ Arbitration Act 49 of 1996

connected with decisions on constitutional matters is clearly an extensive jurisdiction.”⁵

17. Secondly, the Constitution⁶ clearly states that the constitution is the supreme law of the Republic; any law or conduct that contradicts it is invalid, and the obligations imposed by it must be fulfilled.

18. According to the facts⁷, rule 8.2 violates several sections of the constitution. Constitutional and public issues cannot be determined through private arbitration and only the court has the authority to make such a decision.

Jurisdiction of the Human Rights Court

19. Section 16 of the Constitution states that:

“(1) 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.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”⁸

⁵ S v Boesak [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 at para 14.

⁶ Section 2 of the Constitution of the Republic of South Africa Act 108 of 1998

⁷ Para 5

⁸ Constitution of the Republic of South Africa Act 108 of 1998

20. Any rule or conduct that serves to obscure or limit the Applicant's section 16 rights means that the Applicant's Constitutional rights are limited, and a limitation of Constitutional rights raises a constitutional question in relation to that right.
21. While the right to freedom of expression is a fundamental right, the courts have held that it is not a paramount value, unless interpreted in the context of other values within the Constitution.⁹
22. As a result, the Applicant contends that the Defendant's conduct and rules have also violated the Applicant's values and rights to human dignity and freedom.
23. The value of dignity in our Constitutional framework cannot be doubted. The Constitution asserts dignity to contradict our past in which human dignity was disregarded on impulse. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.¹⁰
24. Further to this, and according to section 8(3) of the South African Bill of Rights are applicable, which provide that: -

[a] 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;

[b] when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a

⁹ Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002)

¹⁰ Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35

*Court, in order to give effect to a right in the Bill, must apply the common law to the extent that legislation does not give effect to that right.*¹¹

25. Accordingly, This court only has jurisdiction to hear a matter if it is a constitutional matter or if it raises an issue connected with a decision on a constitutional matter.¹²

26. The Arbitration Act holds that:

EFFECT OF ARBITRATION AGREEMENTS. 3.

(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown;

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

*(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.*¹³

27. Article 36(1)(b) of the UNCITRAL Model states that:

Article 36. Grounds for refusing recognition or enforcement

¹¹ Constitution of the Republic of South Africa Act 108 of 1998

¹² Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) (20 March 2009)

¹³ Arbitration Act 42 of 1965

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.¹⁴

28. In the case of *Airports Company South Africa v ISO Leisure*, the court determined that parties should not be allowed to privatise constitutional disputes, as this bears the risk of allowing a parallel constitutional jurisprudence to develop in the country. Such a development goes against the grain of our constitutional system, which is based on recognising this court as the highest and in some respects, the only court that can make pronouncements on constitutional matters.¹⁵

29. As a result, the infringements asserted are purely constitutional and this fact alone places the matter squarely within the jurisdiction of this court.¹⁶ Because constitutional issues give jurisdiction to the Human Rights Court, it would be necessary for the Court to hear the matter.

¹⁴ Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I

¹⁵ *Airport Company South Africa Ltd v ISO Leisure or Tambo (Pty) Ltd and Another* 2011 (4) SA 642 (GJS) ; para 68

¹⁶ *Koyabe v Minister of Home Affairs* [2009] ZACC 23

Nature of Arbitration Awards

30. It is common cause that Arbitration awards are final and binding on all involved parties as per section 28 of the Arbitration Act.¹⁷
31. In light of the foregoing, the interests of justice demand that the Human Rights court provide legal certainty and clarity on the issue before the court. And the matter should be properly resolved by the court's Justices.
32. Referring the matter to arbitration would unjustifiably weaken the protection afforded by the Constitution. As a result, this court should rule against it.

Interests of Justice

33. The Constitutional Court has the authority to make provisions in its rules for direct access to the Court when it is in the interest of justice to do so in any matter over which it has jurisdiction. Rule 17 makes such a provision, allowing direct access only in exceptional circumstances, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.¹⁸
34. Further to this, section 167(6) of the Constitution provides that :

¹⁷ Arbitration Act 42 of 1965

¹⁸ Brink v Kitshoff NO (CCT15/95) [1996] ZACC 9 ; 1996 (4) SA 197 ; 1996 (6) BCLR 752 (15 May 1996)

National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –

*(a) to bring a matter directly to the Constitutional Court;
or*

(b) to appeal directly to the Constitutional Court from any other court.¹⁹

Internal Remedy

35. Internal remedies, as opposed to any form of potential extra-curial redress. A remedy, in this context, is defined as a 'means of counteracting or removing something undesirable, redress, relief, legal redress'. Inherent in this concept, as it is used in its legal context is the idea that a remedy, in order to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief. When the term is used in administrative law, it is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision maker - or, less common, an internal review.²⁰

36. When the term internal remedy is used in administrative law, it is used to connote an administrative appeal, which is usually on the merits, to an official or tribunal within the same administrative hierarchy.²¹

37. The Applicant has already alluded above that since an arbitration is final and binding on all parties, and not appealable, on the merits. The logical conclusion is that rule

¹⁹ Constitution of the Republic of South Africa Act 108 of 1998

²⁰ *Grapentin v Sue McGuinness Communication CC* (2018/15776) [2021] ZAGPJHC 569 ; [2022] All SA 228

²¹ *Century Loop Rite Trade (Pty) Ltd v North West Gambling Board* (M108/2017) [2019] ZANWHC 24 (20 May 2019)

10 does not constitute an internal remedy for the purposes of PAJA.

38. “The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted. There must be a clear legislative or contractual intention to that effect. In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether.”²²

Relief Sought

39. The Applicant accordingly seeks a Declaratory order declaring Rule 8 of Chapter 4 of the SAFS domestic rules and regulations unconstitutional and invalid in that it infringes swimmers’ rights of freedom of expression under section 16 of the Constitution.

40. In terms of section 21(1)(c) of the Superior Courts Act 2013²³ this Court has jurisdiction to grant declaratory orders.

41. The Supreme Court of Appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*²⁴ held that the existence of a dispute between the parties is not a prerequisite for the exercise of the power of the court in terms of section 19(1)(iii)²⁵. What is required is the existence of interested parties on whom the declaratory order would be binding.

²² Hoexter C : Administrative Law in South Africa, 2nd Ed. Juta 2011.

²³ Act No. 10 of 2013.

²⁴ 2005 (6) SA 205 (SCA).

²⁵ The predecessor to the current section.

42. In *Cordiant*, Jafta JA confirmed the two-stage approach adopted by Watermeyer JA in *Durban City Council v Association of Building Societies*²⁶ to say that the court must satisfy itself, that the applicant is a person interested in an “existing, future or contingent right” and then if satisfied, go on to determine whether the case is a proper one for the exercise of the discretion conferred. In other words, whether the applicant has an “existing, future or contingent right or obligation” is a condition precedent for the court to exercise its discretion whether to grant the declaratory order sought or not²⁷.

43. Given that the existence of an “existing, future or contingent right” is a condition precedent for the court’s exercise of its discretion, it follows that once it is found that the applicant does not have an “existing, future or contingent right or obligation”, the court should refuse the declaratory order without going to the second leg of the inquiry. Thus, in any application premised on section 21(1)(c), the court must first determine the interest of the applicant.

44. We submit that the applicants have established existing and future rights. They have also established the respondents’ existing and future obligations. These are derived from the applicants’ rights and respondents’ obligations implicated in section 16 of the Constitution

²⁶ 1942 AD 27, para 32.

²⁷ *Cordiant* (supra) at para 18. Also see *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments and Others v Director of the Financial Intelligence Centre* [2017] ZAGPPHC 576 ; [2017] 4 All SA 150 (GP) ; 2018 (3) SA 515 (GP), para 56 to 63.

Conclusion

45. Therefore, The Applicant concludes that the Constitutional rights of the Applicant has been infringed by the rules and conduct of the Respondent.

46. Rule 10 does not constitute an internal remedy in so far as the Promotion of Administrative Justice Act is involved.

47. The Human Rights is only appropriate court which may adjudicate on the current dispute between the Applicant and Respondent.

Costs

48. The Applicant requires for costs of this litigation to be declared as per the Biowatch Principle²⁸.

49. The Respondent will have to tender the costs of the litigation on behalf of the Applicant.

Prayer

50. Wherefore, the Applicant prays for the Court to rule that the current dispute between the Applicant and the Respondent should be adjudicated upon within the Human Rights Court.

²⁸ Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14 ; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

51. The Applicant further prays for the Court to rule that the dispute should be adjudicated upon by Justices of the Human Rights Court.
52. The Applicant further prays that the Court finds that the conduct of the Respondent infringed the constitutional right of the Applicant.
53. The Applicant further prays for the Court to find that Rule 10 of Chapter 2 does not constitute an internal remedy in as far as PAJA is concerned.
54. The Applicant further prays for a cost order against the Respondent.
55. The Applicant lastly prays for any further and alternative remedy that the Court may deem fit.

List of Authorities

Legislation

Arbitration Act 49 of 1996

Constitution of the Republic of South Africa Act 108 of 1998

Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I

Superior Courts Act 10 of 2013

SAFS Rules and Regulations

Textbooks

Hoexter C : Administrative Law in South Africa, 2nd Ed. Juta 2011.

Case law

Airport Company South Africa Ltd v ISO Leisure or Tambo (Pty) Ltd and Another 2011 (4) SA 642 (GJS)

Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14 ; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

Brink v Kitshoff NO (CCT15/95) [1996] ZACC 9 ; 1996 (4) SA 197 ; 1996 (6) BCLR 752 (15 May 1996)

Century Loop Rite Trade (Pty) Ltd v North West Gambling Board (M108/2017) [2019] ZANWHC 24 (20 May 2019)

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA)

Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)

Durban City Council v Association of Building Societies 1942 AD 27

Grapentin v Sue McGuinness Communication CC (2018/15776) [2021] ZAGPJHC 569 ; [2022] All SA 228

Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002)

Koyabe v Minister of Home Affairs [2009] ZACC 23

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Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112, 2007(3) SA 266 (SCA) BLCR 503