Liability of Officials at Sports Events[*] [**]

by Steve Cornelius[***]

1. INTRODUCTION

In the world of rugby union, the year 1995 will probably always be remembered as the year of South Africa's dramatic victory in the Rugby World Cup. However, in the aftermath of the World Cup, the local Currie Cup competition was decided in an almost anti-climactic way. The overwhelming joy of the World Cup victory ensured that a Currie Cup season filled with controversy, would forever be overshadowed. The team of Natal eventually won the Currie Cup final in convincing fashion, but the preceding tournament was fraught with controversial decisions which almost certainly assisted the Natal team to reach the final in the first place.[1]

In one of the early season matches, Northern Transvaal[2] met neighbours Transvaal[3] at the Loftus Versveld Stadium in Pretoria. As regulation time drew to a close in

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* This article is based on a paper presented at the session on Sport in the International Context which was held during the XVIth Congress of the International Academy of Comparative Law on 14 July 2002 in Brisbane, Australia. An earlier version of this paper was published under the title "How Final is the Final Whistle? Review of and Liability for Decisions taken by Officials at Sport Events" in 2002 *Tydskrif vir die Suid-AFrikaanse Reg* 628.

** I wish to express my appreciation to a number of people who have in some way or another assisted with my research for this paper or with my understanding of the issues involved. Their contributions were vital, but the views expressed in this paper are entirely my own. They are Mr Andre Both of the Blue Bulls Rugby Union, Ms Sharon Hendricks of *The Star* newspaper and my colleagues, Proff George Barrie, Dawie de Villiers and Giel Prinsloo (ret) of the Rand Afrikaans University.

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1 Van Rooyen (ed) *Bankfin SA Rugby Writers' Annual* (1996) 112.

2 Now the Blue Bulls.

3 Now the Golden Lions.

Pretoria, Northern Transvaal held a slender lead of 19-15 over Transvaal. In the dying seconds of injury and stoppage time in Pretoria, Transvaal launched a move which resulted in hooker, James Dalton, being tackled just short of the Northern Transvaal try line. While he was still held in the tackle, Dalton seemed to make a second movement which enabled him to reach the try line and place the ball across it. This second movement should have resulted in a penalty being awarded to Northern Transvaal. However, the referee awarded a try to Transvaal. The conversion was successful and the final whistle blew. Transvaal had snatched victory by 22-19![4]

At virtually the same moment in Bloemfontein, Free State was playing Natal. Free State had lead for most of the game and held a 34-29 lead over Natal. Also, during the dying seconds of injury and stoppage time, Natal launched an all out attack which saw James Small cross the Free State try line. As he crossed the line, Small was tackled from behind and dropped the ball. As a result, the referee should have indicated a knock-on and blown the final whistle. However, the referee awarded a try to Natal. After the conversion, the final whistle blew. Just as Transvaal had done, Natal had snatched victory in the final seconds of the game, beating Free State by 36-34.[5]

In the second half of the Currie Cup Season, Northern Transvaal met Natal in Pretoria. With about 15 minutes remaining in the match, Northern Transvaal lock Johan Ackermann crossed the Natal try line and grounded the ball for what should have been a try that would have placed the match out of reach of Natal. However, the referee judged that the ball had been held up in the tackle and declined the try. This allowed Natal to claw their way back into the match in brilliant fashion and eventually force a 36-36 draw.[6]

As a consequence of the results achieved in the matches, Natal finished on top of the league table with 15 points, while Western Province finished in second place with 14 points. Northern Transvaal finished third, just one league point shy of Western Province and was eliminated from the competition. But suppose the incorrect decisions by the referees in the matches could have been reversed. What would the

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4 Van Rooyen (n 1) 114, 149.

5 Van Rooyen (n 1) 112.

6 Van Rooyen (n 1) 112, 114, 147.

effect have been on the league and the eventual resting place of the Currie Cup for the 1995 season?

If the referees in the matches concerned had made the correct decisions, Northern Transvaal would have won two more games and Natal would have lost two games which they had won or drawn. The league table would then have looked very different. Northern Transvaal would have ended on the top of the log with 16 points, followed by Western Province on 14 points and Natal on 12 points. The result would have been that Western Province would have met Northern Transvaal in Pretoria, rather than Natal in Durban, in the final for the Currie Cup.

These events have always led me to wonder whether Northern Transvaal or somebody else, for that matter, could have had some remedy at their disposal to undo the wrong decisions which had caused their premature exit from the competition that year. Could an interested party have taken recourse to court or some other forum? Would such a court or forum have overturned the results of the two matches? If not, what would the reasons for their refusal have been? If they had intervened, would this have been desirable. Do we really want to settle matches months later in court or some other forum, or should they be settled on the playing field? Will the public accept results that are obtained in the court room or other forum rather than the playing field? Would it be possible for a judicial officer or other adjudicator to accurately determine the outcome of an event if a certain decision is overturned? In the Northern Transvaal/Transvaal and Free State/Natal examples given above, that would have been simple, since the controversial decisions had occurred right at the end of the games and could easily have been disregarded to determine what the supposed outcome would have been. But suppose the controversial decisions had been taken earlier in the games concerned, as in the Northern Transvaal/Natal example. Taking away the controversial decision in such cases would substantially affect the rest of the game, so that any attempt to determine what the outcome of such an event would have been, would amount to nothing more than speculation.

The problem is not restricted to rugby. More recently, allegations concerning preferential treatment given to certain drivers have been made in respect of Formula 1 motor racing. According to these largely unsubstantiated allegations, Michael Schumacher regularly exceeds the pit lane speed-limit, but is never penalised with the usual 10 second stop-and-go penalty which is customarily applied for such infringements and which has occasionally been awarded against some of

Schumacher's main rivals.[7] Much is made of the fact that, in some of the races concerned, Schumacher had finished ahead of the next competitor by a margin which is less than the 25 seconds that are generally lost as a result of a 10 second stop-and-go penalty.

But let us suppose for the sake of argument that, at least in respect of one Grand Prix, these allegations are accurate. Again, one has to question whether interested parties could have some remedy at their disposal to undo the wrongs caused as a result of decisions that are incorrectly taken or not taken at all. One also has to question whether it would be possible for a judicial officer or other adjudicator to accurately determine the outcome of a race if such a decision, or lack of decision, is overturned. These questions become even more acute if one considers the fact that the Formula 1 World Championship has, on many occasions, only been decided in the final race of the season, with the result that one incorrect decision could determine the outcome of the Championship in a given year. As with the example of the rugby matches, it may not be possible for a judicial officer or other adjudicator to accurately determine the outcome of a race if a certain decision is overturned. The solution is not as simple as adding to his final race time the 25 odd seconds which a driver may have lost for a penalty and then determining the winner on that basis. It is one thing for one racer to catch up with the driver in front, but it is not that simple to get past. Any speculation on whether or not a particular driver would have been able to pass, can only be that - speculation.

According to Beloff, Kerr and Demetriou,[8] it is so obvious that a court cannot intervene in a decision made by an official, that no authority is required to support that proposition. As an afterthought to cement their stance, they refer to the unreported case of *Machin v FA*[9] and *Mendy's case* before the Court of Arbitration in Sport.[10] However, this view seems simplistic. An attorney briefed to defend an

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7 Sippel "Oor, Uit en Duister..." *Wiel* August 2001 84.

8 *Sports Law* (1999) 107.

9 1993 AC.

10 In fact, there are a number of other cases to which the authors could have referred, such as *Sinclair v Cleary* [1946] St R Qd 74 and *Bain v Gillespie* 357 NW 2d 47. These cases, as well as the ones discussed by Beloff, Kerr and Demetriou (n 8), are considered further below.

action in which a decision by an official is challenged in court, would find it difficult to persuade a court that his or her client's case is obvious without reference to the applicable legal principles. The circumstances of each case may be unique, so that reference to one or two decided cases would not cover the entire field and yield an answer that would deal with the matter once and for all. As with all other matters, judicial remedies may be suitable and available in certain cases, yet unsuitable and unavailable in others. And, as Botein J held in *Tilelli v Christenberry*[11]

> a boxer's earning capacity is related to his reputation and his reputation is dependant on his success. In the sports world the interested public follows the detailed records and teams with avidity. It flocks to watch the athletes with winning records; and the earnings of those athletes are related directly to the number of paying spectators they can attract. Spiritually, a professional boxer may emerge greater in defeat than in victory. Materially, however, his prestige and the purses he can command are lowered. Any action which may affect his record so prejudicially of necessity impairs economic rights and interests sufficiently to give the petitioner legal standing to sue.

If a participant has legal standing to sue, there is obviously the possibility that he or she may be successful in an action. For this reason, the applicable legal principles should be considered carefully to determine whether or not a court would be willing to intervene in decisions made by officials at an event. Furthermore, the rules and regulations that govern participation in a particular sport or event, can impact on the availability and nature of remedies.[12]

The purpose of this paper, therefore, is to explore the possibilities of judicial and other intervention in decisions taken by event officials, to determine the remedies that may be available to a participant or team that feels wronged as a result of decisions taken by an official and to reflect on the desirability of those remedies. By no means do I purport to provide any conclusive answers on the matter. The purpose of this paper is rather to draw attention to a particular issue that could pose (and have in the past posed) severe problems for sport associations, event officials, lawyers and courts. In this way, I wish to stimulate debate on the relevant principles that may apply. For obvious reasons, I have taken the law of South Africa as the basis for my discussion and, where appropriate, compare the position in various other jurisdictions. The choice of legal systems in this regard, depended on the

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[11] 120 NYS 2d 697 699.

[12] Weistart and Lowell *The Law of Sports* (1979) 154 - 156.

availability of material that could sensibly contribute to a discussion of the topic at hand. Furthermore, I refer to various sports in the process to illustrate the practical implications of what is discussed. The sports to which I refer, were chosen at random from the more popular international sports.

2. APPLICABLE FIELD OF SUBSTANTIVE LAW

To determine whether or not it would be possible for an interested party to seek relief against an incorrect decision by an event official, it would firstly be necessary to determine which branch of substantive law regulates the relationship between the official and those who are directly affected by the official's decisions. Each particular branch of substantive law will provide its own rules that will determine whether and to what extent relief will be available to interested parties. It will also determine which interested parties will be entitled to claim such relief, as well as the appropriate forum in which relief can be claimed.

As I see it, there are at least five branches of substantive law that could conceivably affect the relationship between officials, participants and other interested parties. These are the law of contract, labour law, administrative law, the law of delict or torts and even criminal law. I will discuss each of these branches separately to determine whether, to what extent and under which circumstances the law would provide a remedy to a party who feels wronged as a result of a decision by an official at an event.

3. INTERVENTION BASED ON CONTRACT

3.1 General

The law of contract forms the basis of sports law. The vast majority of all the legal relationships that occur within the context of sport, are derived from some form of contract or the other.[13] Contracts are the most powerful tool available for the private regulation of matters and can be regarded as sources of *ad hoc* law that are created by the parties to deal authoritatively with certain matters *inter partes*.[14] Of particular importance for the discussion set out in this paper, contracts provide

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[13] *Natal Rugby Union v Gould* 1998 4 All SA 258 A. See also Beloff, Kerr and Demetriou (n 8) 9, 22 *et seq*. See also Weistart and Lowell *The Law of Sports* (n 12) 196.

[14] Voet *Commentarius as Pandectas* (1829) 18.1.27. See also Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2ed (1982) 339.

> the ultimate source of the regulatory jurisdiction of referees and governing bodies in sport, enabling the latter to determine the laws according to which sport is played ... and the former to implement those laws on the field of play.[15]

As a result, the various participants in a sporting event and, for that matter, the officials responsible for the enforcement of the rules or laws of the game, stand in a contractual relationship to one another.[16] In this regard, one should not be blinded by the simple bilateral contract which is generally used to teach law students the basic principles of contracts. Christie explains[17] that

> [n]ot all contracts fall into the simple pattern of one party on each side. Not only may there be more than one on either or both sides, but in a complex multipartite contract it may not be possible to divide the parties into 'sides' at all because two parties may be on the same side for the purposes of one term of the contract but on opposite sides for the purposes of another.

Basically any legal system today recognises that contracts may also create multilateral relationships with no limit as to the total number of people who may be parties to such a contract. Furthermore, it is not necessary that parties should regulate a specific matter by means of a single contract. The terms of their contractual relationship may be contained in various instruments that will have to be considered as a whole to determine the extent of the parties' rights and duties. Contractual relationships in sport are probably some of the most complex that people regularly get involved in. Not only is it virtually impossible to divide the parties into sides, but these contractual relationships are usually regulated by a hierarchy of instruments, some of which contain international elements, so that the rules of the conflict of laws become relevant.

3.2 Intervention in terms of a Contract

In most legal systems today, the principle of freedom of contract applies.[18] As a

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15 Beloff, Kerr and Demetriou (n 8) 22.

16 *Clarke v Dunraven* AC 59.

17 *The Law of Contract in South Africa* (2001) 288.

18 Van der Walt "Die Hantering van Onbillike Kontraksbedinge in die Verenigde State van Amerika" 1988 *De Jure* 96 107; Schoordijk *Het Algemeen Gedeelte van het Verbintenisrecht naar het Nieuw Burgerlijk Wetboek* (1979) 221; Snijders (editor) *Toegang tot Buitenlands Vermogensrecht* (1996) 462; Hartkamp and Tillema *Contract Law in the Netherlands* (1995) 37 (§19). Herbots *Contract Law in Belgium* (1995) 72 - 73 (§110); Nielsen *Contract*

result, the parties to a contract are generally free to regulate their contractual relationship in the manner they deem fit. This also means that the parties may establish their own procedures to deal with disputes that may arise from the contractual relationship.[19] However, it is also commonly accepted that the parties cannot completely oust the jurisdiction of the ordinary courts of law. Any contractual clause which purports to do so, will be contrary to public policy and, consequently, void.[20] This means that the parties may only postpone recourse to the courts. Obviously, if the matter is dealt with to the satisfaction of the parties under the contractual procedure, the matter will rest there. However, if either party should feel wronged by the result of the contractual dispute resolution procedure, that party would still have some recourse to court.[21]

As I have already indicated above, the contractual relationships in sport are regulated by a hierarchy of instruments that set out the terms to which the parties are bound. In most instances, one or more of these instruments provide mechanisms to resolve disputes that may arise in respect of the particular sport. Often, the various instruments provide a succession of mechanisms that can be utilised in an attempt to resolve the dispute concerned.

Track and Field Athletics has some of the most comprehensive measures to deal with disputes that may arise from decisions taken by officials at meetings. In terms of rule 146 in the *IAAF Handbook*, protests concerning the result or conduct of an event may be made within 30 minutes of the official announcement of the result achieved in that event. Any protest is made in the first instance to the Referee by an athlete or by someone acting on behalf of an athlete. To arrive at a fair decision, the Referee must consider any available evidence, which may include a film or picture produced by an official video tape recorder. If an athlete in a field event makes an immediate oral protest against having an attempt judged as a foul, the Chief Judge of the event may order that the attempt be measured and the result recorded, subject to the outcome of a protest which may be lodged with the Referee. The

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Law in Denmark (1997) 72 (§232); Guest (general editor) *Chitty on Contracts* 27ed (1994) §1-010.

19 Christie (n 18) 406.

20 Christie (n 18) 405 *et seq*.

21 *Davies v South British Insurance Co* 3 SC 416 421.

Referee may decide on the protest or may refer the matter to the Jury of Appeal established in terms of rule 118. If the Referee makes a decision and an athlete feels aggrieved as a result of his or her decision, a written appeal which is signed by or on behalf of an athlete, may be directed to the Jury of Appeal within 30 minutes of the official announcement of the decision made by the Referee. Significantly, rule 188 expressly states that any decision taken by the Jury of Appeal shall be final, which means that the rules of the IAAF does not provide for any further avenue of recourse if an athlete should feel aggrieved as a result of a ruling by the Jury of Appeal.

Similarly, the FIA rules that govern motor sport contain measures to deal with protests by participants in motor races. In terms of Articles 171 and 173 of the International Sporting Code of the FIA, a competitor may lodge a protest with the clerk of the course or the race stewards. However, Article 176 provides that protests against decisions made by the finish line judges and judges of fact will not be admitted.

In contrast, other sports provide no means for the review of decisions taken by event officials. In Cricket, law 21.10 provides that once the umpires have agreed with the scorers the correctness of the scores at the conclusion of the match, the result cannot afterwards be changed. Similarly, law 5 (a) in Rugby provides that the referee is the sole judge of fact and of law during a match. However, that law significantly also places a duty on the referee to apply the laws of the game fairly in every match. The significance of this obligation will become more evident in the discussion that follows.

The contractual remedies created by sports bodies have received statutory recognition in South Africa. In terms of section 13 of the National Sport and Recreation Act,[22] every sport body must resolve any dispute arising between its members or with its governing body in accordance with its internal procedures and remedies. If the dispute cannot be resolved internally, any member of the sport body concerned who feels aggrieved, or the sport body itself, may submit the dispute to the National Sports Commission, which must decide the matter in a way that best serves the sport concerned. However, the section does not compel any party to refer the matter to the Sports Commission and, since it is presumed that the legislator does not wish to oust the jurisdiction of the courts,[23] a party will not be

[22] 110 of 1998.

precluded from approaching the courts directly to resolve a dispute.

3.3 Intervention due to Breach of Contract

Sport officials are in the business of applying the rules for the carrying out of sport contests.[24] This means that an official is bound, in terms of his or her contract with the relevant sport association (and the participants in that sport), to enforce the rules of play and ensure that they are enforced fairly and consistently. However, this does not mean that it is expected of officials to be perfect and flawless. Officials are bound to make mistakes and, as Lord Bingham LCJ indicated in *Smoldon v Whitworth*,[25] an official

> could not properly be held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast moving and vigorous contest.

It seems that it is generally accepted as part of any sport that officials will from time to time make mistakes. As long as these mistakes are made honestly and within reasonable bounds, sports people who are adversely affected by such decisions, should abide by them. But if athletes and officials stand in a contractual relationship to each other and to the sport association, what would the legal basis for this acceptance of the occasional erroneous judgment be?

In what has come to be known in English law as the *Moorcock* doctrine, the law draws certain terms from the presumed intention of the parties, in order to give efficacy to a contract.[26] A term can be implied if it is necessary in the business sense to give efficacy to the contract and the officious bystander test is satisfied.[27] In

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23 Kellaway *Principles of Interpretation Interpretation of Statutes, Contracts and Wills* (1995) 191.

24 *Bain v Gillespie* 357 NW 2d 47 49.

25 [1997] ELR 249 CA 256E.

26 Per Bowen LJ in *The Moorcock* 37 WR 439. See also *Lyttleton Times Co Ltd v Warners Ltd* 23 TLR 751; *Midland Ry Co v London & North West Ry Co* 15 WR 34.

27 *Reigate v Union Manufacturing Co (Ramsbottom)* 37 WR 439. See also *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105; *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25; *Avis v Verseput* 1943 AD 331; *West End Diamonds v Johannesburg Stock*

Reigate v Union Manufacturing Co (Ramsbottom),[28] Scrutton LJ indicated[29] that a term can be implied

> if it such a term that can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course so and so will happen; we did not trouble to say that; it is too clear'.

It is not necessary that the parties should actually have considered the proposed term for it to be implied in their contract.[30] It is sufficient for the implication of a term if the parties would have agreed to the term concerned had their attention been drawn thereto at the time when they concluded the contract.[31] When the parties' answer to the question by the officious bystander is considered, they will be taken to answer as reasonable persons who will not withhold their agreement to the proposed term in an irrational or vengeful fashion.

In the context of mistakes made by officials during sport events, a strong argument can be made for the inclusion of an implied term on the basis of which mistakes will be tolerated within certain limitations. If someone were to ask a participant in a particular event whether he or she expected the officials at that event to be infallible, the participant will most certainly answer: "Of course not. Officials regularly make questionable judgments. It is part of the game and we have to accept it". In *Shapiro*

Exchange 1946 AD 910; *Graham v McGee* 1949 4 SA 770 D; *Lanificio Varam SA v Masurel Fils (Pty) Ltd* 1952 4 SA 655 A; *Cape Town Municipality v F Robb & Co Ltd* 1966 4 SA 329 A; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 A; *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 D; *Broome v Pardess Co-operative Orange Growers (Est 1900) Ltd* [1940] 1 All ER 603; *Sethia (KC) (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51.

28 1 KB 592.

29 605.

30 Vorster *Implied Terms in the Law of England and South Africa* (1987) PhD thesis, St John's College, Cambridge 161.

31 Vorster (n 31) 50.

v Queens County Jocky Club,[32] Pette J stated[33] that

> [w]here there is no charge of bad faith against the stewards, judges, referees or other officials of the sport, it cannot ordinarily be the duty of the court at some remote time to substitute its decision for that of those persons who were actually there at the time and who were specifically charged with the duty of determining the winners.

This would mean that an official who makes an honest mistake in the course of a sport event, will not be liable for breach of contract as a result of such mistake. To hold otherwise would be to expose officials to boundless liability.

It seems that implied terms, in the sense discussed here, are generally unknown to countries with a Civil law tradition.[34] Greece is a notable exception, where terms which the parties would have stipulated in accordance with good faith and common usages if they had dealt with the matter, may be inferred by supplementary interpretation.[35] In Denmark also, terms which are so obvious that they go without saying, can be implied in a contract.[36] A Belgian court cannot insert new terms into a contract to provide for matters which the parties did not foresee.[37] However, according to Herbots[38] the Belgian courts do occasionally imply a term in a contract when it is required by good faith and Article 1134 of the Belgian Civil Code can be invoked. In terms of Article 6: 258 of the New Dutch Civil Code, a court may modify the effects of a contract in the case of unforeseen circumstances that are of such a nature that the one party cannot, according to the requirements of reasonableness and good faith, expect to keep the other party bound to the contract as it stands.[39]

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32 53 NYS 2d 135.

33 139.

34 See *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 75.

35 Stathopoulos *Contract Law in Hellas* (1995) 128 (§174).

36 Nielsen (n 19) 113 (§426).

37 Herbots (n 19) 184 (§355).

38 (n 19) 185 (§356).

39 See also Hartkamp and Tillema (n 19) 63 (§51) See further Stathopoulos (n 36) 117 *et seq* (§154 *et seq*) on the position in Greece.

This means that even in these jurisdictions, the contracts which regulate sport events can be construed to contain unexpressed terms to the effect that mistakes made by event officials will be tolerated to the extent that such mistakes can reasonably be expected and do not constitute a breach of good faith.

However, it is important to note that mistakes by officials will not be acceptable in all circumstances. It has repeatedly been stated that officials will only evade liability *in the absence of fraud or bad faith*.[40] This implies that an official who acts *mala fide* in making an incorrect decision, could and should indeed be liable for breach of contract. *Mala fides* in this context can be manifested in a number of ways, ranging from bribery to unashamed prejudice.

In the Belgian case of *Ancion v ASBL Union Royale Belge des Sociétés de Football Association*,[41] a professional referee had, in two football matches, awarded 5 penalties and handed out a total of 19 yellow and 6 red cards for dubious incidents. The Central Refereeing Committee of the Belgian football authorities found that the referee had failed to comply with his obligations in the performance of his services and terminated the employment of the referee.

3.4 Remedies for Breach

If it is accepted that event officials may be held liable for breach of contract if they act in bad faith or grossly unreasonable, the next question would be to determine the nature of the remedy that would be available to the injured party. In South Africa, the remedies that can be applied in cases of breach are a claim for specific performance, an interdict, a declaration of rights, cancellation of the contract and a claim for damages. However, it should immediately seem evident that a particular remedy may not in all circumstances be appropriate.

Specific performance could relate to an order to perform a specified act or pay a certain amount of money in pursuance of a contractual obligation. However, a party will only be entitled to claim specific performance where the other party is in a

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40 *Finlay v Eastern Racing Association* 30 NE 2d 859 861; *Bain v Gillespie* 357 NW 2d 47 49; *Shapiro v Queens County Jockey Club* 53 NYS 135 139.

41 Brussels Labour Court (Interim Relief Division) 20 April 2000.

position to perform.[42] If specific performance would be impossible, a court will not grant an order in that regard. It is not absolute impossibility which is required. Done deals that are in breach of a contractual obligation, are generally not undone for the sake of specific performance.[43] Courts will almost certainly view decisions taken by event officials as done deals that cannot be undone by means of an order for specific performance, with the result that this remedy would not be appropriate to provide redress for incorrect decisions taken by event officials.

On the other hand, if the claim is not aimed at directly challenging the incorrect decision of the official, but rather at the failure or refusal by the appropriate association to comply with or initiate its own internal review procedures, the question of impossibility does not arise and an order for specific performance may well be appropriate. In this case, however, the action is not based on breach of contract on the part of the event official, but rather on the breach of contract on the part of the association concerned.

An interdict is usually the appropriate remedy to stave off impending breach. It is a preventative measure which a party may employ to avoid conduct that would jeopardise performance in terms of a contractual obligation.[44] In those instances where a decision of an event official is challenged, the action has already taken place and a preventative measure, such as an interdict, can serve no purpose. But suppose that there are reasonable grounds to believe that an official will, during a future event, make decisions that are not in accordance with the rules and spirit of the game (such as evidence of bribery or statements that indicate clear prejudice against a participant or team). Would an interdict be an appropriate remedy in such a case? In such a case, an interdict will, in effect, amount to an order not to contravene or ignore the rules of the game. Stated positively, such an interdict would amount to an order to comply with and enforce the rules of the game, which would in effect be an order for specific performance.[45] Consequently, the difficulties

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[42] *Thompson v Pullinger* 1 OR 301; *Farmer's Co-op Society (Reg) v Berry* 1912 AD 343.

[43] *Shakinovski v Lawson and Smulowitz* 1904 TS 326; *Rissik v Pretoria Municipal Council* 1907 TS 1024; *Wheeldon v Moldenhauer* 1910 EDL 97.

[44] Christie (n 18) 617.

[45] Christie (n 18) 608.

associated with the granting of an order for specific performance will also apply in the case of such an interdict. Courts are generally reluctant to grant an order for specific performance if the content of the obligation is imprecise and could lead to lengthy disputes concerning whether or not it has been obeyed.[46] The same will apply to an interdict in terms of which an official is ordered not to contravene or ignore the rules of the game. In most instances of this nature, it could well be nigh impossible to determine whether the official concerned has complied with the terms of the interdict and whether any mistakes that may have been made during the event concerned, were honest mistakes or malicious acts of defiance. The potential for lengthy disputes to result from such occurrences is so great, that courts will in all likelihood refuse to grant an interdict in these circumstances.

A declaration of rights is generally the appropriate remedy to resolve a real and pertinent dispute concerning the rights and duties of parties to a contract.[47] Apart from providing an authoritative statement of the parties position *vis-a-vis* each other, this remedy provides little relief in the case of breach of contract. In particular, in the event where an official may have committed breach of contract, this remedy will provide little assistance to an interested party that may have suffered prejudice as a result of such breach.

If the breach of contract is of a sufficiently serious nature, it may be possible for the injured party to cancel the contract due to such breach. This will usually be the case if the breach goes to the root of the contract, if a party repudiates the contract or if a party renders performance impossible.[48] If the breach of contract affects one in a series of contracts, cancellation of one contract does not necessarily affect the other contracts in the series. Similarly, the various parts of a divisible contract may be treated separately, so that only the effected part is terminated and the other parts remain operative.[49] If one considers the nature of sport contracts, cancellation seems to be an unusual remedy that may not be appropriate in most cases. One would not expect a team or individual to sever all ties with the various governing bodies in a particular sport. But it is not inconceivable that a team may withdraw

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[46] Christie (n 18) 615.

[47] Christie (n 18) 624.

[48] Christie (n 18) 625 *et seq*.

[49] Christie (n 18) 628 - 629.

from a league in protest of a decision by an official which amounts to breach of contract. Similarly, it may occur that a participant in an individual sport may withdraw from an event in the case of such a breach. Provided that the incorrect decision is clearly a case of breach, the team or individual concerned may be fully justified in terminating the contract relating to participation in the league or event concerned, while keeping the other contracts, such as membership of the relevant club, regional, national and international associations, intact.

However, this remedy is fraught with difficulty. The team or individual concerned should be absolutely certain that an actual breach of contract had occurred and that the breach would entitle them to invoke the remedy of cancellation. This may be very difficult to determine, since, as I have already indicated above, mistakes that are made honestly and in the absence of fraud or bad faith, would not constitute breach of contract on the part of the official. If a team or individual should withdraw from a tournament or event as a result of such a mistake, the team or individual concerned may be guilty of breach in the form of repudiation.[50] This would be the case, even if the team or individual concerned honestly believed that a breach had occurred that entitled them to cancellation.[51]

It should also be kept in mind that an official who maliciously makes a wrong decision, stands not only in a contractual relationship with the participants, but also with the relevant club or association. Breach of contract, therefore, does not only concern the participant who is directly affected by the decision, but also the club or association. As a result, the club or association may be justified in terminating its contractual relationship with the official concerned, thereby terminating the official's authority to adjudicate competitions in that particular sport. In professional sport, where officials are also paid for their services, it may not be as simple as merely cancelling the contract in terms of which a person is entitled to act as official in a particular sport. In such a case, the rules of labour law will invariably apply, so that the relevant procedures for dismissal on the grounds of misconduct, should be complied with.

In South Africa, dismissal on the grounds of misconduct calls for substantive fairness, as well as procedural fairness. In the case of substantive fairness, the main

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[50] Christie (n 18) 600 *et seq*.

[51] Christie (n 18) 602.

question is whether or not dismissal is an appropriate penalty for the misconduct concerned. The Code of Good Conduct in Schedule 8 to the Labour Relations Act[52] advocates a system of progressive discipline. Item 2(5) of the Code provides that when an employer has to decide whether or not to impose dismissal as penalty, the employer should, in addition to the gravity of the misconduct, consider factors such as the employee's circumstances, the nature of the job and the circumstances of the infringement itself. Item 7 (b) (iv) of the Code also states that an employer should consider whether or not dismissal is an appropriate sanction for the contravention of the rule or standard concerned. Another issue that should be taken into consideration, is the so-called parity principle. The courts require the equal treatment of similarly situated employees. However, it is recognised that an employer may justify a differentiation due to the personal circumstances of the employees (e.g. their length of service and disciplinary records)[53] and the merits (e.g. the role played in the commission of the misconduct).[54] In *SACCAWU v Irvin & Johnson*[55] the Labour Appeal Court held that discipline should not be capricious and that consistency is, therefore, simply an element of disciplinary fairness, but not a rule in itself.[56]

In the Belgian case of *Ancion v ASBL Union Royale Belge des Sociétés de Football Association*,[57] a football referee had been dismissed by the Central Refereeing Committee of the Belgian football authorities, challenged the decision before the Interim Relief Division of the Brussels Labour Court. The judge decided that there was some doubt as to the actual legality of the disciplinary sanction. However, since the disciplinary measure implied the termination of a contractual relationship, the interim relief judge was powerless to order reinstatement on the list of referees. The

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[52] 66 of 1995.

[53] *Early Bird Farms (Pty) Ltd v Mlambo* 1997 5 *BLLR* 541 (LAC).

[54] *NUM v Council for Mineral Technology* 1999 3 *BLLR* 209 (LAC) and *Mabinan & others v Baldwins Steel* 1999 5 *BLLR* 453 (LAC).

[55] 1999 20 *ILJ* 2302 (LAC).

[56] See also Smith "Labour Law and Sport" paper presented at a conference on Sport and the Law hosted by the Centre for Sport Law and the Faculty of Law at the Rand Afrikaans University on 7 and 8 September 2000.

[57] Brussels Labour Court (Interim Relief Division) 20 April 2000.

termination of the contract, even if it was unlawful, could be resolved only as a matter of damages. The application was therefore rejected. The parties eventually resolved the matter amicably and the referee was reinstated.

Another contractual remedy that is generally available to a party who may have suffered prejudice as a result of a malicious decision by an official, is a claim for damages. Bad decisions by officials could have varied effects on participants, ranging from cases where no patrimonial loss may occur, to extreme cases where the entire career of an individual participant may be ruined, with resulting losses running into millions of dollars. Bad decisions by officials can also have various effects on the patrimonial position of clubs and associations, ranging from loss of income due to reduced spectator attendance and diminished sale of branded merchandise, to losses due to the forfeiture of an event, such as a cup final, that may have been staged by the team had it not been for the bad decision.

In the Belgian case of *Lyra v Marchand and others*[58] a referee was ordered to pay damages in the amount of 100,000 Belgian Francs to Lyra Football Club resulting from an incorrect decision during a match between Lyra and Rita Berlaar Football Club, which led to the eventual elimination of Lyra from the Belgian Cup. The two third division clubs played against each other and, after the regulation 90 minutes of play, the score was drawn at one all. In such a case, the rules provided for two 15-minute periods of extra time to be played. If the score was still tied after extra time, a penalty shootout would decide the result. The referee made a mistake and decided to move straight to a penalty shootout, which was won by Lyra. Rita Berlaar filed a complaint and the competent Sports Committee decided, pursuant to article 21.1 of the Belgian Cup Regulations, to draw lots. Rita Berlaar won the draw, and was thus able to go into the next round of the Belgian Cup. The court found that the referee was guilty of negligence in the meaning of article 1382 of the Belgian Civil Code. As a professional, he should have known that extra time should have been played first and then, if necessary, a penalty shootout should have been held to determine the winner.

Where damages are claimed on the grounds that a bad decision amounted to breach of contract on the part of an official, the main issue to determine would be wether the injured party would be entitled to claim the particular kind of damages. In general, any patrimonial loss which is suffered as a result of breach, can be claimed from the

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[58] Malines Court of First Instance, 8 February 2001.

guilty party, provided that the damages are of a nature that would usually be expected as a result of a particular kind of breach or the nature of the damages would have been foreseeable at the time when the contract was concluded. Damages for breach is normally awarded based on the positive interest of the injured party. This means that the loss suffered is calculated, based on the hypothetical position the party would have been in, had the contract been properly complied with, in so far as this can be done by the payment of an amount of money, without causing undue prejudice to the party in breach.[59] A party may claim damages for loss which he or she may already have suffered, as well as damages which may be expected in future. On this basis, one could conclude that losses, such as prise money that may have been forfeited and loss of future earnings can be recovered in the case of breach. Similarly, loss of income due to reduced spectator attendance can also be claimed. On the other hand, in *Bain v Gillespie*[60] the court indicated[61] that

> [r]eferees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others.

This proposition, which seems sound, could be interpreted to mean that losses which result from diminished sale of branded merchandise, may be too remote to claim. On the other hand, modern professional sport has become a complex business so that one could indeed argue that diminished sale of branded merchandise would have been a foreseeable consequence of breach on the part of an official. This is even more so if one takes into consideration that an official will only be liable for breach of contract in the case of wrong decisions that are made in a malicious way. Although this could potentially open the door to limitless liability for damages resulting from breach of contract, the nature and extent of damages that will be awarded by court, will be restricted by two factors. Firstly, the principle of privity of contract applies, so that only those persons who stand in a contractual relationship with the errant official will be entitled to institute a claim for damages due to breach of contract.[62] Secondly, the party who claims damages bears the burden, not only to prove the nature and extent of the loss, but also the causal connection between the breach of contract and the loss suffered or anticipated. An injured party who claims

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59 *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22.

60 357 NW 2d 47.

61 49.

62 *Bain v Gillespie* 357 NW 2d 47; *Sinclair v Cleary* 1946 StR Qd 74.

damages may find it very difficult to prove the extent to which the bad decision may have contributed to his or her loss. This will particularly be the case where the damages claimed relate to loss of sales or loss of future earnings.

In South Africa, the contractual remedy of damages is limited further, in that it does not cover the awarding of compensation for non-patrimonial loss, such as physical injury, injured feelings or injury to reputation. A participant who suffers physical injury or impairment of personality as a result of breach, may have a claim in delict or tort if all the requirements in that regard are met, but the law of contract generally does not provide for compensation in such cases.

3.5 Conclusion

Apart from claiming damages as a result of breach of contract, it is clear that the remedies for breach of contract are mostly inappropriate to redress the situation where an official commits breach of contract by maliciously making wrong decisions during a sport event. Even in the case of damages, the impugned decision is not overturned, which means that it, and the result achieved as a consequence of that decision, stands.

4. INTERVENTION BASED ON ADMINISTRATIVE LAW

4.1 General

Although participation in sport and membership of sport clubs and associations are generally voluntary private relationships, courts in various countries have for some time recognised that members of private organisations, such as sport clubs and associations, often have little choice over the terms of their agreement with the clubs or associations and even less control over the management of the club or association. As a result, the courts in those countries have been prepared to apply the rules of administrative law to such clubs or associations.

In South Africa, the courts have in a number of cases been willing to apply principles of administrative law to the private relationships which exist in the sport environment.[63] According to Barrie,[64] the relationships within private bodies, such as

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63 *Marlin v Durban Turf Club* 1942 AD 112; *Jockey Club of South Africa v Transvaal Racing Club* 1959 1 SA 441 A; *Balomenos v Jockey Club of South Africa* 1959 4 SA 381 W; *Elsworth v Jockey Club of South Africa* 1961 4 SA 142 W; *Bekker v Western Province Sports Club* 1972 3 SA 803 C; *Turner v Jockey Club of South Africa* 1974 3 SA 633 A; *Carr v Jockey Club of South Africa* 1976 2 SA 717 W; *Middelburg Rugby Klub v Suid-Oos Transvaalse*

sport clubs and associations, may be founded on contract, but since these bodies are in a position to act just as coercively as public authorities, the common law principles of administrative law apply to these private bodies just as they do to organs of state. In principle, therefore, if the common law requirements for judicial intervention are met, South African courts may be willing to intervene in matters that relate to the playing of a game.

Not surprisingly, most of the cases in which South African courts have been willing to intervene, have involved the sport of horse-racing, which has until the last decade or so been one of the few professional sports in South Africa and the only one in which gambling has been lawfully permitted. All these cases related to decisions taken by disciplinary tribunals. There are no reported cases in which matters that relate to the playing of a game, have been brought before the courts.

German courts have also applied various articles of the German Civil Code to justify judicial intervention in the affairs of sport associations. According to Wise and Meyer,[65] German courts will even review matters that relate to the playing of a game, such as manipulation of a result.

In the United States as well, courts have been willing to accept that

> the principle of judicial noninterference set forth in the law of voluntary associations was not strictly applicable, noting that NASCAR was a for-profit company that completely dominated the field of stock car racing and that its members have no rights whatsoever with respect to the internal governance of the organisation.[66]

English law is a notable exception in this regard, as the courts have repeatedly refused to apply principles of administrative law to the private relationships which

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Rugby Unie 1978 1 SA 847 T; *Barnard v Jockey Club of South Africa* 1984 2 SA 35 W; *Natal Rugby Union v Gould* 1998 4 All SA 258 A.

64 "Disciplinary Tribunals and Administrative Law" paper presented at a conference on Sport and the Law hosted by the Centre for Sport Law and the Faculty of Law at RAU on 7 and 8 September 2000.

65 *International Sports Law and Business Volume 2* (1997) 1186.

66 *Crouch v National Association for Stock Car Auto Racing* 845 F 2d 397 400.

exist in the sport environment.[67] In *Law v National Greyhound Racing Club Ltd*,[68] the court held that judicial review procedures were not applicable to private sport bodies.[69] Lord Denning MR explained in *Enderby Town Football Club v The Football Association*[70] that

> [j]ustice can often be done in domestic tribunals better by a good layman than by a bad lawyer. This is essentially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game.

This statement, coming from one of the most highly regarded and respected of the English law lords, is surprisingly unconvincing and, in fact, inaccurate. In the first instance Lord Denning MR errs since, in English law, proper interpretation of a document is regarded as a question of law.[71] Whenever a sport body has to apply its own rules, it does not do so in a legal vacuum. It inevitably has to interpret its own rules and apply it to the facts of the matter concerned. Consequently, decisions of sport bodies will always include points of law and fact that will have to be decided. Secondly, even a bad lawyer will make better decisions than a bad layman. By simply focussing on the comparison between a bad lawyer and a good layman, he seems to be clouding the issue. What his lordship is probably trying to convey, is the idea that a lay person with extensive experience in the administration of a particular sport, is usually in a better position to decide an issue emanating from that sport, than a lawyer who is ignorant of the intricacies involved in that sport. With this proposition, there can be little fault, but it should be kept in mind that lay people are

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67 Grayson and Hill *Sport and the Law* (2000) 386 *et seq*.

68 [1983] 3 All ER 300 CA.

69 See also *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853 AC.

70 [1971] 1 All ER 215 CA.

71 *Halsbury's Laws of England Volume 9* 4ed (1974) 357 (§516 note 1); Lewison *The Interpretation of Contracts* (1989) 52 (§3.01); Cross and Tapper *Cross on Evidence* 7ed (1990) 161. See also *Neilson v Harford* 151 ER 1266; *Berwick v Horsfall* (1885) 4 CBNS 450; *Hill v Evans* [1862] De GF&J 288; *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1892] 1 QB 79; *Brutus v Cozens* [1973] AC 854; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1958] 2 All ER 368.

sometimes prone to making grave mistakes in law. If this happens, the injured party should be entitled to some form of redress. English courts seem to have held the view that disputes concerning decisions taken by sport bodies, are contractual in nature and the ordinary remedies for breach of contract should be applied where appropriate.[72] However, as I have indicated above, the contractual remedies may not provide satisfactory results in these circumstances.

An important requirement that must generally be met before a court will intervene on the basis of administrative law, is that internal remedies should first be exhausted before recourse is taken to the courts. This means that a party who feels aggrieved as a result of a bad decision made by an official or a tribunal, should first make use of those dispute resolution procedures that are set out in the rules of the sport concerned. Courts will, as a general rule, not entertain a matter in the first instance if the injured party could have resolved the matter by other means, unless it is patently clear that the internal remedies would be ineffective or would cause undue delay in resolving the matter.

4.2 Intervention in Decisions of Officials

There are no cases reported in South Africa in which a decision by an official had been challenged. However, an interesting analogy was drawn in *Beit v Frank Thorold (Pty) Ltd*,[73] a case in which the court had to adjudicate a dispute which had arisen at an auction. Blieden J concurred[74] with the view expressed by counsel, which described the function of the auctioneer

> as being similar to that of an umpire in a cricket match.

He described an auction as a form of competitive bargaining, aimed at creating, in accordance with certain rules, a contract of sale. The rules are the conditions of sale that are framed by the seller and represent the terms upon which he or she is prepared to submit the property to competition. His Lordship referred to these rules as the rules of the game that bind all the players.[75] The players are the auctioneer and all those who bid at the auction.[76] Blieden J explained,[77] much as Lord Bingham

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[72] Grayson and Hill (n 66) 387.

[73] 1994 4 SA 457 W.

[74] 468A.

[75] *Estate Francis v Land Sales (Pty) Ltd and others* 1940 NPD 441 457.

[76] 462F - G.

LCJ had done in *Smoldon v Whitworth*,[78] that

> the auctioneer ... had to come to an instant decision. He had to decide whether there was an overlooked bid or there was not. He thereafter had to decide what he would do with the bid if he accepted that he had overlooked a bid. There was no time to lodge a full investigation of what had occurred. A decision had to be made instantaneously.

According to the conditions of sale that applied in respect of the auction concerned, the auctioneer had an absolute discretion to resolve disputes. However, it was contended that an absolute discretion should not be absolute in the sense that there can be no appeal from it.[79] Blieden J drew[80] a distinction between 'absolute discretion' and merely 'discretion' as such. The former entails the exclusion from interference of anything but the exercise of such discretion in bad faith, while the latter implies the exercise of a reasonable discretion.

The issue has also received attention in the United States. Although the matter was brought before the courts after an internal enquiry had been conducted, the Second Circuit of the United States Court of Appeals, in *Crouch v National Association for Stock Car Auto Racing*[81] faulted the court *a quo* for delving into the rulebook and deciding *de novo* whether a disqualification had been appropriate in the circumstances. The court indicated[82] that sport associations possess considerable expertise in the conduct of their particular sport on which they may rely in the interpretation and application of their rules. Courts are generally unfamiliar with the standards that are applied in any particular sport and should decline attempts to have them act as officials for sport. The court saw the solution to improper officiating in pressure brought on officials by participants, rather than individual challenges in court which seek to undo bad decisions.[83] However, the court made it clear that

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77 470G.

78 [1997] ELR 249 CA 256E.

79 470D.

80 470F.

81 845 F 2d 397 402 - 403.

82 402.

83 403. See also *Koszela v National Association for Stock Car Auto Racing* 646

these principles would only apply in the absence of bad faith.[84]

Both the *Beit* and *Crouch* cases[85] left the possibility that a court may be willing to intervene in the case of bad decisions that are made maliciously and in bad faith. In fact, in *Wellington v Monroe Trotting Park Co*,[86] the court was willing to intervene where a horse had won a race, but one of the judges had separately told each of the other two judges that he and the third judge had concluded that another horse had won. As each of the other judges believed that the majority of them had concluded that the other horse had won, they agreed that the other horse would be declared the winner. The court held that a decision which had been induced by fraud, should not be allowed to stand.[87]

Even if courts may be willing to intervene in cases of bad decisions that are made maliciously and in bad faith, it should be a rare occurrence for such disputes to end up in court. In most instances, I expect that such disputes will be dealt with and resolved internally by the sport association concerned.

4.3 Intervention in Contractual Dispute Resolution Procedures

As I have indicated earlier, sport clubs and associations are generally at liberty to provide their own procedures in terms of which decisions by officials can be challenged. These procedures range from protests directed to individual adjudicators, to appeals before appeal tribunals. While judicial intervention based on administrative law, in decisions of officials at a sport event is still uncertain and controversial, courts in various jurisdictions have been willing to entertain actions brought in response to decisions made in the course of dispute resolution procedures for which the rules of a particular sport provide. In most countries, it has been accepted that private tribunals, even if constituted only of one adjudicator,[88] such as those often find in the context of sport, are to some extent subject to the

F 2d 749 756.

84 403.

85 *Supra*.

86 90 Me 495.

87 Weistart and Lowell (n 12) 155 - 156.

88 *Carr v Jockey Club of South Africa* 1976 2 SA 717 W 723F.

rules of administrative law. In *Jockey Club of South Africa v Feldman*,[89] the court held[90] that

> no statutory provisions come into play; it is a case of agreement to be bound by certain rules, namely the rules of the Jockey Club. Though these rules do not state expressly that the decision of race-meeting stewards in regard to the conduct of a jockey in riding a horse shall be final, in my view they imply that, subject to the right of appeal to the local executive stewards and the Head Executive Stewards, such decision shall be final as regards the merits of questions enquired into, and that as regards such merits the jurisdiction of Courts of law to interfere with action taken in accordance with such decision shall be excluded. The exclusion of the Courts of law on the merits is not contrary to public policy and our Courts have recognised that the decisions of such tribunals on the merits are final; but if the tribunal has disregarded its own rules or the fundamental principles of fairness, the Courts can interfere.

Similarly, in *Carr v Jockey Club of South Africa*,[91] the court held[92] that

> [t]he Court will not interfere on review merely because the decision was unwise or one which the Court itself would not have come to. Interference is in essence only justified if there was a failure to properly exercise the conferred ... discretion.

Consequently, the courts generally do not see themselves as appellate bodies that would adjudicate on the substantive fairness of decisions taken by domestic tribunals. They have rather seen their role as that of review, in which the court will determine whether principles of procedural fairness have been complied with. However, the distinction between process and substance is not watertight and an awareness of procedural unfairness is often triggered by an awareness of substantive unfairness.[93]

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89 1942 AD 340. Cited with approval in *Turner v Jockey Club of South Africa* 1974 3 SA 633 A.

90 350 - 351.

91 1976 2 SA 717 W.

92 720G.

93 Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 59.

In the first instance, courts will generally look towards the terms of the contractual relationship to determine whether a discretion has been properly exercised. The terms of such a contract is generally constituted by the rules of the club or association concerned. As long as the rules of the club or association had been complied with, courts have generally refused to intervene in decisions taken by tribunals established in terms of such rules.[94]

In the past, courts have tended to dismiss applications where the rules have been complied with, even if the courts had found the rules to be unjust or unfair.[95] Principles of fairness and justice with which public tribunals would normally have had to comply, were found not to apply to private tribunals if their rules contained provisions that were contrary to these principles of justice. In this regard, courts have refused to intervene where prior notice and further particulars concerning charges of misconduct had not been given,[96] all the relevant evidence had not been considered,[97] members of a tribunal had personally observed the incident at issue before the tribunals[98] and one person acted as member of a tribunal while also testifying before the same tribunal.[99] In all these cases, the seemingly irregular conduct was tolerated as the rules in terms of which the tribunal functioned, allowed for such eventualities.

4.4 Conclusion

In most jurisdictions, the principles of administrative law have been made applicable to sport. As more and more money is spent in and on sport, the pressure on courts to hold sport administrators bound to the rules of administrative law, will increase.

5. LIABILITY IN TORT OR DELICT

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94 *Carr v Jockey Club of South Africa* 1976 2 SA 717 W 720G.

95 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C; *Carr v Jockey Club of South Africa* 1976 2 SA 717 W; *Barnard v Jockey Club of South Africa* 1984 2 SA 35 W.

96 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C.

97 *Bekker v Western Province Sports Club (Inc)* 1972 3 SA 803 C.

98 *Marlin v Durban Turf Club and others* 1942 AD 112.

99 *Marlin v Durban Turf Club and others* 1942 AD 112.

5.1 General

Another question which arises, is whether and to what extent a referee who makes an incorrect decision in a sport event, can be held liable for loss, damage or injury which result from such a decision.

5.2 Liability for Injury to Participants

In most legal systems today, it is accepted that the officials at a sport event has a certain duty of care towards the participants in that sport. This means that an official may be liable for injuries sustained by participants if the official is found to have neglected this duty of care.

In the English case of *Smoldon v Whitworth*,[100] a rugby referee was held liable for inadequate control of an under 19 rugby match. The referee constantly allowed the scrums during the match to collapse and, in so doing, failed to apply the laws of rugby in so far as they applied safety in scrums for under 19 players. In particular, he failed to apply the crouch-touch-pause-engage procedure which had been recommended by the Staffordshire Rugby Union Society of Referees, which had also warned that referees would face liability for injuries if those procedures were not followed. The referee also ignored warnings from one of the touch judges and some of the spectators, as well as complaints by players that the situation was getting dangerous and out of hand. One of the front row forwards were eventually injured and paralysed as a result of a collapsed scrummage. He instituted a claim based on personal injury against the referee and succeeded. According to Griffith-Jones,[101] the court correctly held that a referee owed a duty of care to the players, but the facts of this case were extreme, so that referees will not be liable for every injury sustained on the playing field.

The courts were again faced with a similar question in the case of *Vowles v Evans and another*.[102] The claimant was injured while playing as hooker for Llanharan Rugby Football Club in a rugby match refereed by the first defendant. There had been a lot of rain before the match and the field was boggy. Approximately 30 minutes into the match, one of the Llanharan front row forwards dislocated his shoulder and left the field as a result. There was, however, no front row forward on

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[100] 1997 ELR 115. Upheld on appeal: 1997 ELR 249.

[101] *Law and the Business of Sport* (1997) 23.

[102] [2003] 1 WLR 1607 (CA).

the reserve bench to replace the injured player and the referee was informed accordingly. The referee then informed the captain of Llanharan that they could opt for uncontested scrums,[103] in which case they would forfeit the points in the league competition in respect of that match. Rather than opt for uncontested scrums, one of the Llanharan flankers, who had years earlier at a lower level occasionally played a few matches at front row, offered to scrum at front row. The referee agreed to this course of action without any further enquiry or consultation and the game continued. After that replacement, the scrums were plagued with collapses and disruptions as the front rows struggled to engage properly. Towards the end of the match, Llanharan held a 3-0 lead over rivals Tondu. However, Tondu launched an attack which culminated in a scrum being awarded 5 metres from the Llanharan try line. The Tondu forwards aimed for a push-ver try to clinch the match in the last seconds. The two packs of forwards did not engage properly for the scrum and the referee blew the whistle for them to break up. At that point, the claimant collapsed with what was clearly a serious injury. The referee ended the match and an ambulance was called. It transpired that, because of incorrect binding in the final scrum, the claimant's head had been thrust against the shoulder of one of the Tondu forwards. As a result, the claimant sustained an injury to his neck which left him with permanent incomplete tetraplegia. The court held that a referee owes a duty of care towards players and found that the referee in this case had abrogated his responsibility on two counts. Firstly, the referee should have conferred with the captain of Llanharan to determine whether another player was suitably trained or experienced to play at front row as directed under law 3 (12) of the Laws of Rugby. Secondly, the referee should not have allowed the Llanharan players to decide whether or not they would opt for uncontested scrums. In this regard, it is significant that law 6 (5) of the Laws of Rugby provide that

> [d]uring the match, the referee is the sole judge of fact and of law. All his decisions are binding on the players...

As a result, the court held that the referee was negligent in his handling of the match and in breach of his duty of care.

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[103] Law 3 (12) of the Laws of the Game, as issued by the Council of the International Rugby Football Board provides, *inter alia*, that "[w]hen there is no other front row forward available due to a sequence of players ordered off or injured or both, then the game will continue with non-contestable scrummages which are the same as normal scrummages except that: there is no contest for the ball; the team putting in the ball must win it; neither team is permitted to push...".

5.3 Liability Towards Third Parties

The next question to consider with regard to incorrect decisions taken by sport officials, concerns the officials liability toward third parties who may suffer loss as a result of such an incorrect decision. Such losses may result from various causes and could be manifested in various ways. Traders who sell branded merchandise may experience a reduction in sales or punters may loose not only the amount they wagered on an event, but also the lucrative pay-outs which result from an accurate prediction of the final result.

In *Bain v Gillespie*,[104] the Iowa Court of Appeals held[105] that, in the absence of corruption or bad faith, an official who makes a decision at a sport event, does not generally foresee that third parties may suffer loss if he or she should make an incorrect decision. Consequently, an official will not generally be liable to third parties for loss or damage which they may suffer as a result of an incorrect decision. While it could well be imagined that third parties may suffer loss as a result of a bad decision by an official, loss to third parties does not generally comply with the requirement of foreseeability of harm or probability of injury.[106]

5.4 Vicarious Liability

Another question which arises, is whether and to what extent the relevant club or association may be liable for decisions taken by event officials. Is there, arising from the contract between the club or association and the participants or any other grounds, an obligation concerning the competency of an official on the club or association? In the Australian case of *Sinclair v Cleary and others*,[107] the court refused to impart vicarious liability for wrong decisions of an official on the club which appointed the official. It would seem as if the court viewed the official as an independent contractor,[108] rather than an employee of the club. Similarly, in the case

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[104] 357 NW 2d 47.

[105] 49.

[106] *Bain v Gillespie* 357 NW 2d 47 49.

[107] 1946 StR Qd 74.

[108] 77, 78.

of *Lyra v Marchand and others*[109] a Belgian court refused to hold the Belgian football authorities liable where the court found that a referee was guilty of negligence when, in match drawn after regulation time, the referee had failed to allow the prescribed extra time but moved directly to a penalty shootout to determine the result of a football match. However, in *Vowles v Evans and another*[110] it was accepted that the Welsh Rugby Football Board was vicariously liable for an injury sustained by a player as a result of negligence on the part of a referee.

In South Africa, the English law principle of vicarious liability has been adopted, which means that a sport club or association will be liable for delicts committed by officials if certain requirements are met. Firstly, there should have been an employer-employee relationship between the club or association and the official at the time when the delict was committed and, secondly, the official should have been acting in the course of his or her duties when the delict was committed.[111] As sports people become more professional, officials are also being appointed and remunerated in a way that seems to create employer-employee relationships between the club or association and the officials of the sport. As a result, the club or association could be liable for injuries sustained by participants when the officials do not perform their functions properly.

5.5 Conclusion

As long as an official makes an honest attempt at enforcing the rules and looking after the safety of participants, such an official should not be liable if participants do get injured or even killed. An official will only be liable to a participant in the event of gross negligence on his or her part, when the action or inaction by the official is so unsatisfactory that no reasonable official would tolerate such action or inaction. However, it seems that loss suffered by third parties are too remote and that officials will not generally be liable for such loss.

6. CRIMINAL LIABILITY

6.1 General

If it is accepted that a referee has a legal duty to ensure the safety of participants within reasonable limits, one has to question whether a referee could be held criminally liable if he or she should fail to comply with that duty. While most legal

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109 Malines Court of First Instance, 8 February 2001.

110 [2003] 1 WLR 1607 (CA).

111 Neethling, Potgieter and Visser *Deliktereg* 3 ed (1996) 362 *et seq*.

systems rarely provide for criminally liability in respect of injuries to others that are caused negligently, people who negligently cause the death of others are generally held liable on the basis of culpable homicide or involuntary manslaughter.

While there are, as far as I could establish, no reported case in which a referee had been held criminally liable where failure to enforce the rules of the sport had resulted in the death of a participant, the approach of the courts in *Smoldon v Whitworth*[112] and *Vowles v Evans and another*[113] gives a clear indication that those courts would in a criminal case, in all likelihood, have found the referee guilty of culpable homicide if the injuries to the player concerned had been fatal. One can also imagine that a boxing referee, who allows a grossly one-sided contest to continue round after round, could be charged with and found guilty of culpable homicide if a boxer should die as a result of injuries sustained in the ring.

6.2 Conclusion

It is very rare indeed for officials to be held criminally liable for making incorrect decisions at a sport event. As in the case of delictual liability, an official who makes an honest attempt at enforcing the rules and looking after the safety of participants, should not be liable if participants do get killed in the course of an event.

7. CONCLUSION

As I have indicated above, the question whether judicial or other intervention in decisions taken by an official at a sport event is possible, is more complex than a simple "yes" or "no" would permit. In all instances, it seems clear that honest mistakes by officials are both expected and accepted. Officials who act reasonably, honestly and in good faith, should not have to fear legal action. However, it is equally clear that officials who act in bad faith or in a way that is grossly unreasonable, may have to answer to the courts.

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[112] 1997 ELR 115. Upheld on appeal: 1997 ELR 249.

[113] [2003] 1 WLR 1607 (CA).