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The expendibles: do sports people really assume the risk of injury?[1]

Part two[2]

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Consent as a defence is not without restriction and will apply only if the defendant can prove that the plaintiff's conduct meets all the requirements for the defence. This is where consent to injury, as a defence in the context of sports, becomes increasingly problematic.

The first requirement is that the consenting party must have the capacity to act. This means that the party concerned should have the mental capacity to understand the risks involved and the ability to appreciate the consequences if such risks should be realised.[4] But it is not necessary that the party concerned should have full contractual capacity.

The position in respect of consent where children are involved, however, is not clearly defined yet.[5] Where a child cannot legally grant consent himself, the parent or legal guardian may consent on behalf of the child.[6] But it should be kept in mind that, in every matter that affects a child, the overarching principle is the best interest of the child.[7] It is by no means inconceivable that a court may find that the decision, whether by the child himself, whether by a parent or legal guardian, to participate in a certain sport, like boxing or rugby, and the apparent consent to injury associated with that, is not in the best interest of the child and, therefore, does not provide valid consent to injury. Consequently, consent as a defence where children are involved, is questionable.

Secondly, consent must be given freely. This means that a party can consent only if that party is aware of the risk, understands the risk and freely agrees to accept the risk. In *Union National South British Insurance Co Ltd v. South African Railways and Harbours*[8], Diemont JA[9], however, suggested that an employee or contractor is required by the employment contract to take the risks associated with their work and workplace and, therefore, cannot consent freely to the risk concerned. Such an approach makes sense, because to hold differently, would be in direct conflict with international treaties and local legislation on occupational health and safety.[10] Since professional players, at least as far as team sports are concerned, are generally regarded as employees of the various sports clubs or federations,[11] this would mean that consent to injury in the context of professional sport cannot justify otherwise unlawful conduct.

Thirdly, the permission must be granted with full knowledge of the extent of any possible harm or risk.[12]

Fourthly, the player must fully appreciate what the nature and extent of any obtrusion can be.[13] In other words, a player participating in sports must be aware of the risks normally associated with the particular sport, but must also understand what the consequences would be if the risk is actually realised. This aspect formed the basis for a claim that several retired football players instituted in the United States against the National Football League (NFL).[14] The players claimed that the NFL was aware of the dangers and long-term side-effects of concussions in football at all levels and that the NFL sought to downplay or conceal those risks.[15] There could, consequently, not be any suggestion that those football players would have consented to the risks of concussion when they played football. It is, therefore, little wonder that the NFL settled the case for US$ 675 million.[16]

More and more studies are also starting to shed light on the extent of sports injuries and it seems that the problem may be worse than originally thought.[17] This, in itself, means that participants may not understand the risks normally associated with their sports or what consequences, in particular, long-term consequences, can result if the risk actually occurs.

Here one should also ask whether a novice or social player can ever be aware of the extent of any possible harm or risks associated with their sports. One can rightly ask whether a novice or social player can fully appreciate the nature and extent of any obtrusion if the risk is realized. Injury is the world's largest single terminal and non-terminal medical condition from which people between the ages of 5 and 44 suffer.[18] In addition, it was found that sports-related injuries in the US make up as much as 16% of all injuries treated in hospital.[19] In children between the ages of 10 and 14 years, the figure goes up to 46% of injuries, and among young people between 15 and 19 years, sports-related injuries make up 31% of all injuries.[20] In other words, the risk of injury in sports is quite high and it is highly questionable whether any social player or beginner cannot foresee that participation in social or organised sports exposes them to such risks of injury.

Fifthly, the party concerned must indeed agree to the risk of harm or injury. As mentioned above, consent can be inferred from the facts and is usually found to exist if a party understands the nature and extent of the risk, as well as the consequences if harm may befall him.[21] "*Knowledge, appreciation, consent,*" as Chief Justice Innes put it in *Waring and Gillow Ltd v. Sherborne*.[22]

Finally, the consent must be lawful.[23] This means that the relevant consent must be acceptable according to the legal convictions of society. As far as sports are concerned, consent to even relatively serious injuries is admissible if the player causing

the injury plays according to the rules of the sport.[24]

But it is sometimes said that a player also consents to injury even if there is a transgression of the rules, provided that the kind of conduct can be accepted as inherent in the sport concerned.[25] This cannot be correct. As already mentioned, consent requires that a player must be aware of the nature and extent of the risk to which he is exposed.[26] Where a player plays in accordance with the rules and an opponent gets injured, one can argue that both the player and the opponent had the opportunity beforehand to consider the rules of the relevant sports and consciously or subconsciously appreciate the risks associated with that sport. In the case, where a player transgresses the rules of the particular sport and in the process an opponent gets hurt, it is problematic to argue that the player and the opponent could foresee certain transgressions as inherent in the sport and will necessarily assume the risks associated with such transgressions. By definition, play according to the rules is limited and it is largely possible to anticipate the risks involved. By contrast, the possible ways in which the rules of the game can be transgressed, are endless and it is, therefore, not possible to appreciate the risks associated with foul play. In addition, transgression of the same rule can have a different impact from one case to the next. In rugby, for instance, a high tackle, where the defensive player grabs the ball carrier by the neck, is unlawful.[27] Where the game is fairly static and the defender holds the ball carrier by the neck while both players stay on their feet, the rule is being infringed, but the risk of injury is quite low. Where both players, however, run at full speed in opposite directions and the defender then grabs the ball carrier by the neck, it is extremely dangerous and the risk of serious or even life-threatening injury is very high. To say that a player accepts the risk of injury in the first instance, but not in the second example, requires a value judgment that is not compatible with any of the requirements for consent as defence against a claim.

A further problem arises where a player deliberately contravenes a rule and an opponent is injured in the process. If consent can also relate to certain transgressions of the rules, it would be irrelevant, whether the transgression occurred intentionally or due to over-eagerness, loss of concentration, lack of skill or fatigue. After all, a rugby player, who plays strictly within the rules of the game, acts with clear intent when he tackles an opponent or a boxer fighting within the rules, clearly intends to punch his opponent. If consent could also relate to transgressions of the rules, a boxer, who deliberately punches his opponent below the belt, or a rugby forward who deliberately collapses a scrum so that an opponent gets injured, would be able to raise consent as a defence against a claim for the resulting injury. It is difficult to see how this problem can be resolved under the legal requirements for valid consent.

The controversy can also be explained on the basis of another, non-sports example. A person wishes to enter residential premises and finds at the gate a notice: "Beware of the dog". The position of the person entering the premises compared to the person who remains at the gate, must be considered. The person entering the premises, assumes the risk that there is indeed a dog on the premises and that the dog can actually be dangerous and it can attack and bite. This person may find an angry Chihuahua on the premises that rips the seam of his trousers. Or he may encounter an aggressive Rottweiler that mauls him, so that hospital treatment is required. It is equally possible that the person may find absolutely no dog on the premises, or perhaps only an overly friendly old Poodle which can do no harm, except perhaps by drooling on his shoes. Regardless of what the reality is, by entering the premises, the person accepts the risk that there might be a dog and that he may get bitten.[28]

For the person who remains at the gate, there is realistically the risk that the dog concerned might even bite him outside the premises. This can happen because the dog jumps the fence, or there may be a hole in the fence, or someone may have left a gate open. Or the person can stand too close to the fence or maybe peer over the fence, with the result that the dog grabs hold of him through or over the fence. The reason is not really important. The point is that it is not reasonable to now say that the person who remains at the gate, assumes the risk that the dog can bite him outside the premises.

In sport, transgression of the rules, which leads to the injury of a player, can be compared to the dog that bites the person who remains at the gate. It cannot be said that the person at the gate in the case of the dog, or the player in the case of sports, consented to that risk. This does not mean that every person who transgresses the rules and in the process injures another player, is necessarily liable. Where a player transgresses the rules because of over-eagerness, loss of concentration, lack of skill or fatigue and in the process an opponent is injured, and the kind of behaviour can be accepted as inherent or reasonably expected in the particular sport, it can be said that the offender has not acted with negligence. In the absence of negligence there can, in general, be no liability where a player injures an opponent.

Similarly, where a player knowingly violates the rules and in the process an opponent is injured, that amounts to battery and such a player cannot raise consent as a defence. That is why a rugby player was held liable in *Roux v. Hattingh*[29] for an injury to an opponent. In this case, during a rugby match, the appellant intentionally and in violation of applicable rules, forced his head to the right and into the wrong channel during a scrum. The respondent sustained a serious neck injury in the process. The court rejected the defence of consent, because the appellant committed a flagrant violation of the rules.

The comment of Brand JA[30] that even where a player deliberately violates the rules and in the process another player gets injured, may be excused in certain cases based on consent, cannot be supported. This condones wilful misconduct and is contrary to the established principle that a party cannot evade liability for its own wilful misconduct.[31] It is also contrary to the applicable common law principles in South Africa. Voet[32] explains, for example, that someone is not liable for injuries sustained during a public match if the injuries were not inflicted *animus nocendi* (with ill intent). It can hardly be said that a player, who deliberately breaks the rules, is not playing with ill intent.

Moreover, such an approach is also diametrically opposed to the principles of fundamental rights in South Africa. Section 12 (1) of the Constitution[33] states that everyone has the right to liberty and security of person and this includes the rights to be free from all forms of violence, whether public, whether from private sources.[34] In addition, section 12 (2) provides that everyone has the right to bodily and psychological integrity, which includes security and control over their own bodies.[35]

Although the parties may, to a large extent, waive their rights under the Constitution,[36]

any such waiver is always construed narrowly so that we deviate as little as possible from the existing legal rules and the relevant rights may be disregarded as little as possible.[37] Such a narrow approach would necessitate some degree of consent that can relate only to the risks inherent in the game which takes place strictly according to the rules.

One should also keep in mind that organised sport takes place in accordance with some complex contractual relationships.[38] A conscious disregard of a rule in sport is, therefore, not only wilful misconduct, it also amounts to the deliberate breach of a contractual obligation to play a certain way. Thirdly such an approach would also undermine attempts by sports federations to improve the safety of players. In South Africa art. 6 (1) of the Sports and Recreation Act[39] states:

> *"National federations must assume full responsibility for the safety issues within their sport and recreation disciplines."*

One way in which sports federations address safety issues in their sport is by regular reviews of the rules to eliminate dangerous play. The Laws of the Game of Rugby Union, for example, provides in law 10:

> *"Foul play is anything a player does within the playing enclosure that is against the letter and spirit of the Laws of the Game. It includes obstruction, unfair play, repeated infringements, dangerous play and misconduct which is prejudicial to the Game."*

Law 10 lists certain kinds of dangerous play, in addition to other violations, that are particularly unlawful. It is significant that law 10 refers to the "letter and spirit of the rules" of the game and by no means accepts the "customs and culture" of the game. In other words, the rules themselves require only play in accordance with the rules and transgressions of the rules are not permitted. Why would the legal position be any different? In this regard Opie[40] correctly remarks:[41]

> *"If the contact was deliberate then battery would be committed and, in particular, the plaintiff would be considered not to have consented to any intentional contact in deliberate breach of a rule designed to protect player safety."*

Consequently, it is not legally tenable that transgressions of the rules can be condoned under the guise of consent to injury, and it cannot, as Brand JA[42] would have it, be said that the public interest accepts even conscious violations of the rules as incidental to or something inherent in sport.

Opie[43] believes that ordinary principles of torts should be applied to sport and that a player's behaviour on the field should be assessed on the basis of what is reasonable in the relevant circumstances of the particular sport. The value judgment concerning consent in the case of foul play, as occurred in *Roux v. Hattingh*[44], where the court had to decide whether a flagrant breach of the rules has been committed, can be avoided in this way. A court should simply apply the ordinary principles of the law of torts, in particular negligence, where conduct can generally be expected in a particular sport.

In fact, in the majority of cases where claims on the basis of sports injuries were considered, the judges clouded the discourse on this issue because they often alluded to the assumption of risk which participation in sports supposes. But when the comments are analysed, it becomes clear that the courts decided the various cases mainly on the basis of the ordinary principles of negligence.

This is the approach the court followed in *Van Wyk v. Thrills Incorporated (Pty) Ltd*[45], where a spectator was fatally injured when a racing car crashed through a gate. The court held that the defendant had taken reasonable precautions to ensure the safety of spectators and did not even consider the defence of consent.[46] This is also the reason why the claim of the golfer in *Clark v. Welsh*[47] was unsuccessful. Even in the Australian decision Agar v. Hyde Chief Justice Gleeson remarks that:[48]

> *"After all, opposing players can already sue each other for intentionally and negligently inflicted injuries; they can sue the referee for negligent failure to enforce the rules; and the sports administrator that dons the mantle of an occupier assumes well-established duties of care towards players, spectators and (in the case of golf clubs) neighbours. A duty of care is not negated merely because participation in the sport is voluntary."*

Even in the earlier Australian case of Rootes v. Shelton[49], Judge Kito explained that the defendant's conduct that led to the injury of the plaintiff must be weighed against what would be reasonable in all the circumstances of the case. Lord Donaldson refers with approval to this approach in the English case of *Condon v. Basi*, where he found a footballer liable for causing an injury to an opponent.[50] The same standard of negligence was applied earlier by Judge Wrangham in *Simms v. Leigh Rugby Football Club Ltd*[51] when he held[52] that the club was not liable for the injury to the player. It was also applied where the courts in *Smoldon v. Whitworth*[53] and *Vowles v. Evans*[54] found that referees were liable for injuries sustained by players after the referees had failed to apply certain rules strictly.

In Germany also, the Federal Supreme Court*55* had to determine whether a basketball player could be liable under art. 823 of the German Civil Code (BGB) for injuries sustained by an opponent. A personal foul occurs when a player, contrary to the rules of the game, makes physical contact with an opponent by bumping, punching, or blocking him, etc. The court had to determine whether the particular player, who committed the foul, was negligent as contemplated in art. 276 BGB. The court held that not every minor infraction of the rules would be considered negligent. It is clear that any basketball player, who competes for the ball, will occasionally commit personal fouls. Accordingly, a player cannot be held liable for injuries arising from conduct which is a fairly common occurrence in the sport and is, therefore, reasonable.

Despite what is often said,[56] it would, therefore, appear that the courts in various jurisdictions have moved away from the premise that participants consent to the risks associated with the sports. On the contrary, in more and more cases, the principle is being diluted or simply ignored.

In South Africa, the defence of consent to injury has only once been successfully raised in a case concerning liability due to a sports injury.[57] Even then, the use of consent to injury as a defence can be questioned. If a player accidentally and in a reasonable way injures an opponent, as Judge Kotze found,[58] there is no question of negligence and the player can consequently not be held liable for the injury to his opponent. This is probably what Judge Kotze hinted at when he explained[59] that no wrongful act had been committed against the plaintiff as an incident which

can reasonably be expected to occur in a game of squash, does not constitute negligence.

In view of what is set out above, it is clear that consent to injury in the context of sport, particularly in cases where the rules of the game are broken, rests on rather shaky foundations.

Extent of sports injuries

There is still one more policy consideration that should sound the final death knell for consent to injury as a defence against a claim for sports injuries. Statistics show that sport, especially professional sport, today is one of the most hazardous activities in which a person can participate.

A study of current and former professional football players conducted in 2013 by the *Fédération Internationale des Associations de Footballeurs Professionnels* (FIFPro) has revealed that 32% of current football players have suffered severe injuries and 22% had undergone surgery to repair those injuries.[60] The study also revealed that 17% of players have suffered three or more severe injuries and 18% have had to undergo three or more surgeries.[61] Among former players, 80% have had at least one severe injury during their playing career, while 70% have had to undergo at least one surgery to repair such injuries.[62] A follow-up study in 2014 involving current and former players from eleven countries, revealed that the players had, on average, experienced three severe injuries and two surgeries during their football careers.[63]

When the number of injuries that results in a player taking time off from "work"" (i.e. from training and/or matches) is reviewed, an even bleaker picture begins to form. The injury rate in English professional football is 8.5 "time loss" injuries per 1,000 working hours.[64] When only matches are taken into consideration, the injury rate is 27.7 injuries per 1,000 hours.[65]

In professional rugby, the injury rate is 13.6 injuries per 1,000 hours.[66] During matches, the injury rate is as high as 81 injuries per 1,000 hours.[67] A study of South African rugby players during the 2012 Super Rugby tournament, in which professional teams from South Africa, New Zealand and Australia participated, shows that the injury rate among professional rugby players in this tournament is 9.2 injuries per 1000 hours.[68] The injury rate during matches was 83.3 per 1000 hours, while 2.1 injuries were recorded per 1,000 hours during training.[69]

If one considers that the average injury rate in the South African mining industry, which is particularly hazardous, because of the depths at which some operations take place, is 2.6 injuries per one *million hours*,[70] it becomes apparent that sport is facing an injury crisis. The risk that a rugby player can sustain an injury during a match that will require absence from training and/or matches, is about 4,000 to 5,000 times higher than the risk of a miner sustaining an injury that will require absence from work. If the mining industry would record between 9,000 and 14,000 injuries per one million hours, as professional rugby effectively does if one does the maths, it would not only be viewed as a national disaster, but the mining industry would not be able to bear the economic burden. In addition, it is inconceivable that state authorities would not urgently intervene to improve safety and protect the interests of workers. And it is inconceivable that courts should find that mining companies are not liable to workers for such injuries. So why is the extremely high rate of injuries in sport then seemingly acceptable? As the daughter of professional football player Jeff Astle remarked after his death at a tender age of 54 years:[71]

> *"The coroner ruled industrial disease, dad's job had killed him and in any other profession that would have had earthquake-like repercussions, but not football. It was like [The FA] were trying to wriggle out of it and that's wrong."*[72]

However, this is by no means the full picture. The statistics also show, in contrast to other industries, where the safety record has improved, that the number of injuries in sport has increased dramatically over the past decades. In the United States, it was found that sports injuries increased disproportionately. In 1955, only 1.4% of all injuries requiring hospital treatment were sports injuries, but, by 2001, sports injuries accounted for 16% of all injuries treated in hospitals.[73]

One explanation may be that more people are physically active today and participate in sport, but this cannot explain the full extent of the increase. The same trend is also evident elsewhere. In Australia, it was found that the number of injuries sustained by international rugby players increased from 47 injuries per 1,000 hours during the period 1994-1995, to 74 injuries per 1,000 hours during the period 1996-2000.[74] In Scotland, it was found that the percentage of senior players in club rugby who were injured increased from 27% of players during the period 1993-1994 to 47% of players during the period 1997-1998.[75] In addition the injury rate in Scottish rugby during 2008-2009 stood at 100 injuries per 1,000 hours.[76]

One explanation may be that rugby was an amateur sport prior to 1995, but became a professional sport in 1995.[77] However, it can once again not be the only reason for the drastic increase in injuries. And the counter-argument could be that one would expect professional players to be fitter and better conditioned and, therefore, less prone to injury.

In addition, the FIFPro study[78] has shown that 38% of current football players and 35% of former players suffer from mental illness. By contrast, less than 17% of the general population show the same symptoms. The study also showed that players, who have suffered three or more severe injuries, are four times more likely to report mental problems than other players.[79]

All of this just confirms yet again the notion that athletes are seen as expendable commodities and injuries are viewed as an acceptable and inevitable by-product of sport.[80] Lawyers try in vain to justify it with *volenti non fit injuria*, consent to injury or assumption of the risk of injury. But in view of the high premium that human rights instruments everywhere attach to bodily integrity and the focus today that falls more on occupational health and safety, this mentality just cannot be tolerated anymore.[81]

Federations sit, as far as the frightening extent of sports injuries is concerned, on a ticking time bomb that threatens to explode spectacularly when former players begin to make demands for long-term side effects of sports injuries they sustained during their playing careers. For some sports federations, such as the NFL in the United States, at least as far as concussion is concerned, time has already run out, and it will put the NFL almost US$ 1 billion out of pocket if legal fees and other costs, such as fees for medical tests, are taken into account in addition to the settlement amount.[82]

This is just one medical condition, and there is every possibility that former play-

ers suffering from other medical conditions such as degenerative musculoskeletal conditions caused by overuse, could also institute claims to compensate them for such conditions. And this is just one sport. The possibility exists that other sports may be the target of similar claims. And there is no reason why claims will be limited to former players. In fact, the writing is already on the wall. Athletics South Africa has already learned this painful lesson and was brought to the verge of bankruptcy after the pole-vaulter Jan Blignaut, who sustained head injuries in a fall during the pole vault event at a track and field meeting, succeeded with a claim for ZAR 10 million against Athletics South Africa.[83]

In addition, ice hockey players in the United States have followed the example of their football colleagues and begun legal action against the National Hockey League,[84] while two professional wrestlers also initiated legal action because of head injuries against World Wrestling Entertainment.[85] In addition, football authorities in England have recently been warned that they may face a flood of claims if team managers do not do more to give concussed players sufficient rest.[86] There are already indications that former rugby players are beginning to blame the sport for long-term conditions of the brain due to concussion sustained on the playing field.[87] Time will tell whether these players follow the example of their American colleagues and eventually take legal action against the rugby authorities.

Conclusions

Sport can no longer hide behind consent to injury or assumption of risk of injury. As indicated above, the defence is, in any case, problematic in the context of sport and it is not so clear that the defence should find any application whatsoever in the context of sport. Chief Justice Gleeson summaries it nicely in *Agar v. Hyde*:[88]

> *"Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity."*

As Opie[89] rightly points out, it appears that courts in the past have largely confused the discourse on liability for sports injuries by referring to the risks associated with sports which players apparently assume when they participate in sport. At the same time, only a few cases have, in fact, been decided on the basis of consent to injury and even in those cases the usual principles of negligence would probably have yielded the same results.[90]

Sports federations establish the rules according to which each sport is played and it is, consequently, within their control to introduce the necessary rule changes or other measures to improve the safety of players.

Motorsport is a good example of what can be done. Where everybody seemed resigned to the fact that motorsport is dangerous and drivers would inevitably, from time to time, die in Formula 1,[91] several safety measures were gradually introduced since the 1980s, with the result that, in more than 20 years since the Italian Grand Prix at Monza in 1994 when Roland Ratzenberger died in a crash during practice and Ayrton Senna died in a crash during the race, Formula 1 has had no further deaths until Jules Bianchi died in 2015 from injuries he sustained in a freak accident during the Japanese Formula 1 Grand Prix on 5 October 2014.[92]

Other sports are also beginning to focus more and more on player safety. World Rugby for example, adopted a policy on dealing with concussion and established a separate website dedicated to player welfare, with detailed information on concussion and other injuries and slogans, such as "*recognise and remove, if in doubt sit them out*".[93]

These are all positive steps, but more needs to be done to bring the excessively high number of injuries in sports under control. If federations do not take decisive action, their survival may be threatened by claims for damages and compensation for sports injuries. Athletics South Africa and the NFL in the United States have already learnt this lesson.[94] It is time for other sports federations to take note and get their houses in order.

1 An earlier Afrikaans version of this article appeared on Litnet Akademies Regte at www.litnet.co.za/wat-die-drome-nie-genees-nie-kan-toestemming-tot-benadeling-steeds-aanspreeklikheid-weens-sportbeserings-uitsluit (accessed on 11 September 2015).

2 Part one of this article was published in *GSLTR 2015/4*.

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4 Neethling and Potgieter (2015) 111.

5 *Ibid*.

6 *Ibid*.

7 *Fraser v. Fraser* 1945 WLD 112 119; *Blume v. Van Zyl and Farrell* 1945 CPD 48 49; s 28(2) Constitution of the Republic of South Africa, 1996; Children's Act 38 of 2005. For a discussion of this principle in the United States, see L.M. Kopelman, "The Best-Interests Standard as Threshold, Ideal, and Standard of Reasonableness", in: *J Med Philos* (1997), 271; Child Welfare Information Gateway, *Determining the best interests of the child* (2013).

8 1979 1 SA 1 (A).

9 9A-H.

10 See e.g. the Convention concerning Occupational Safety and Health and the Working Environment of 22 June 1981 which, in terms of art. 1 "*applies to all branches of economic activity*".

11 R. Cloete (ed.), *Introduction to Sports Law in South Africa* (2005) 69 ff; A. Louw, *Sports Law in South Africa* (2010) 211. See also Mitten, *Sports Law in the United States* (2011) 106; S. Késenne and J. Garcia, *Governance and Competition in Professional Sports Leagues* (2007) 286; Blanpain, *The Legal Status of Sportsmen and Sportswomen Under International, European and Belgian National and Regional Law* (2003).

12 Neethling and Potgieter (2015) 112.

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21 Neethling and Potgieter (2015) 112.

22 1904 TS 340 344.

23 Neethling and Potgieter (2015) 113 .

24 *Roux v. Hattingh* 2012 6 SA 428 (HHA).

25 *Ibid*.

[26] Neethling and Potgieter (2015) 112.
[27] Rule 10.4(e).
[28] See e.g. *Maartens v. Pope* 1992 4 SA 883 (N).
[29] 2012 6 SA 428 (SCA).
[30] 442B-C.
[31] *Wells v. South African Alumenite Co* 1927 AD 69; *South African Railways and Harbours v. Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *ESE Financial Services (Pty) Ltd v. Cramer* 1973 2 SA 805 (C); *Russel and Loveday v. Collins Submarine Pipelines Africa (Pty) Ltd* 1975 1 SA 110 (A); *Van Streepen & Germs v. Transvaal Provincial Administration* 1987 4 SA 569 (A); *Minister van Wet en Orde v. Ntsane* 1993 1 SA 560 (A); *First National Bank of SA Ltd v. Rosenblum* 2001 4 SA 189 (SCA); *Nxumalo v. First Link Insurance Brokers (Pty) Ltd* 2003 2 SA 620 (T).
[32] 9.2.24.
[33] Constitution of the Republic of South Africa, 1996. See also A 3.1, A 6 en A 31.1 of the Charter of Fundamental Rights of the European Union.
[34] S 12(1)(c).
[35] S 12(2)(b).
[36] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews* 2009 4 SA 529 (CC) 592G ff.
[37] *Fey and Whiteford v. Serfontein* 1993 2 SA 605 (A); *First National Bank of SA Ltd v. Rosenblum* 2001 4 SA 189 (SCA) 195G ff.; *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews* 2009 4 SA 529 (CC) 593D ff.
[38] *Rowles v. Jockey Club of South Africa* 1954 1 SA 363 (A) 364D; *Jockey Club of South Africa v. Transvaal Racing Club* 1959 1 SA 441 (A) 446F, 450A; *Turner v. Jockey Club of South Africa* 1974 3 SA 633 (A); *Jockey Club of South Africa v. Forbes* 1993 1 SA 649 (A) 645B, 654D; *Natal Rugby Union v. Gould* 1999 1 SA 432 (SCA) 440F; *Johannesburg Country Club v. Stott* 2004 5 SA 511 (SCA).
[39] 110 of 1998.
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