

- 6.4 The result of all of the foregoing is that SARU holds statutory ownership rights under Trade Mark, Copyright and Heraldry legislation and common law proprietary rights and goodwill in and to the subject matter of its intellectual properties.
- 6.5 When regard is had to the definition of "National Colours" in the definition clause of the Draft Regulations, the Regulations are open to the construction that if the Regulations become law, they will purport to expropriate and vest all of the above property in SASCOG.
- 6.6 The same will apply to the intellectual properties of the National Federations of other major codes, such as SAFA.
- 6.7 The applicable Draft Regulation (Regulation 7) provides:

"The rights in all national colours and emblem shall vest in SASCOG which shall make such national colours available for use in the public interest subject to such conditions and the payment of such fees or royalties as the (National Colours) Commission may determine in writing, subject to such arrangements as may be agreed in writing between the Commission and the National Federations for payment of fees and royalties."

- 6.8 The provisions of Regulation, 7 are *ultra vires*. Neither the Minister nor the said Commission is empowered by Act 110/98 or any other statute to expropriate property and appropriate the statutory rights of any National Federation or other entity whether by way of Regulation (which is subordinate legislation) or otherwise.

- 6.9 In relation to this purported expropriation, regard must also be had to Draft Regulation 15, which will directly impede upon the merchandising and licensing businesses of SARU and other National Federations and even vest it in SASCOC if the term "national emblem" (which is not defined) is not appropriately restricted – which it needs to be.
- 6.10 In relation to the above, Draft Regulation 3(ix) implies that SASCOC, if the Regulations are implemented, will control the trade mark and other commercial usage of national emblems by the National Federations and their sponsors.
- 6.11 In the context of sponsorship, Draft Regulation 15(4) requires SASCOC to approve all national participation and merchandising items whilst Draft Regulation 17(2) limits the size and placement of sponsor's logos on playing kit.
- 6.12 The Draft Regulations (and also the Bill) take no cognisance of and make no provision for the fact that the lifeblood of the professional sports codes in South Africa – revenue derived from sponsorships and licences - are entirely based upon their marks and emblems and the goodwill and associative power which has been engendered commercially thereby over time.
- 6.13 Furthermore, there are numerous existing private law agreements between the National Federations and sponsors and licensees involving both national and international rights and obligations to which due regard has clearly not been given in the framing of the Draft Regulations.

7. THE PROPERTY CLAUSE IN THE CONSTITUTION OF THE RSA

- 7.1 The Draft Regulations conflict with the property clause in the Constitution of the Republic of South Africa.
- 7.2 Section 25(1) of the Constitution provides that "No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property."
- 7.3 The Draft Regulations do not comprise law of a general nature and any purported confiscation of a National Federation's property rights thereunder will be arbitrary.
- 7.4 It is to be noted that in terms of Section 25(4)(b) of the Constitution "property is not limited to land" and the SARU property which the Regulations will expropriate represents property covered by Section 25 of the Constitution.
- 7.5 Even were the Regulations to comprise law of general application the expropriation would, in terms of Section 25(2) of the Constitution, have to be for public purposes or in the public interest and subject to compensation (of which there is no mention in the Regulations).
- 7.6 In our view, the expropriation provisions of the Draft Regulations, if promulgated, will be unconstitutional.

8. NON COMMERCIAL PROVISIONS

We deal hereunder with a number of provisions in the Regulations which we and the other professional National Federations will also find troublesome and which require debate.

8.1 Team Selection

8.1.1 In order to select their national team, National Federations must in each instance hold national trials and apply a selection process approved by SASCOC (Regulation 13(1)). The relevant National Federations simply cannot hold national trials each time a test match or international is to be contested.

8.1.2 National Federations must submit a policy to SASCOC regarding the award of national and federation colours (both senior and junior) before making application for the first award of national colours to an athlete in terms of the Regulations (Regulation 13(6)).

8.1.3 Managers and coaches qualify for national colours but other members of managerial component will not (Regulations 13(7) and 13(8)).

8.2 Colours Procedure

8.2.1 National Federations must make an application in writing for the award of national colours to a player by the NCB on the prescribed form within 30 days of the event in which the player is to be capped (i.e. to be awarded national colours) (Regulations 14(1) and 14(2)).

8.2.2 Even if a player has previously received colours, the form must still be filled in and submitted (Regulation 14(3)).

8.2.3 The decision of the NCB regarding whether or not it will award or withhold national colours in a particular case is final (Regulation 14(6)).

8.2.4 The award of national colours are reserved for competitions consistent

with the "SASCOC High Performance System" which is not defined but which appears to be "continental and world championships" against international teams. This does not cover test matches or internationals which are not part of "championships" contests (Regulation 12(2)).

8.3 National Federations Colours

8.3.1 A National Federation can have its own colours, emblems and insignia which it can award as it pleases but not at international match level.

8.3.2 It may not, therefore, award such colours in relation to the national team (i.e. the Springboks or Bafana Bafana).

8.3.3 All team match kit must be approved by SASCOC (Regulation 15(4)).

8.3.4 The overriding concept in respect of "first team" colours (e.g. national colours) is one of basic uniformity amongst all sporting codes which would exclude the colours or emblems of SARU (or SAFA or the UCB in one day internationals) (Regulations 16(3), 16(4) and 17).

8.4 Code of Conduct

8.4.1 Each code must have a code of conduct approved by the NCB.

8.4.2 Guidelines as to what the code of conduct must contain are set out in Regulations 18(4) – 18(8) inclusive of the Regulations.

9. NATIONAL SPORTS COLOURS FRAMEWORK

9.1 As a result of the circulation during 2001 of the draft National Sports

Colours Regulations, 2001 (the 2001 Draft) which are largely of the same import as the Draft Colours Regulations (2006) and because the 2001 Draft presented same difficulties as the National Federations presently face in relation to the 2006 Draft, SARFU (as it then was) entered into discussions with SASC with a view to arriving at a National Sports Colours Framework which could accommodate the particular circumstances of the National Federations charged with professional sports.

9.2 As a result an agreement in principle between SARFU and SASC was reached to the following effect:

9.2.1 that the South African Sports Commission's (SASC's) primary objective was to protect National Colours from being misused and to safeguard their prestige;

9.2.2 that the abovementioned objective could be achieved without necessarily involving the expropriation, rendering illegal or redundant of the intellectual property of SARFU (now SARU) and other National Federations.

9.3 It was specifically agreed that SARFU would draft a National Sports Colours Framework which would form the basis for the issuing of new National Colour Regulations and which:

9.3.1 would give effect to the principle of autonomy of the National Federations then enshrined in Section 12(1)(h) of Act 19 of 1998 (now repealed);

9.3.2 would give effect to the principle of financial self sufficiency of the National Federations as enshrined in Section 10(1)(b) of Act 110 of 1998;

9.3.3 would give effect to the principle of collaboration between the SASC and the National Federations as then enshrined in Section 4 of Act 109 of 1998;

9.3.4 would recognise that certain existing national colours and symbols were used by and were particular to certain National Federations such as SARFU, SAFA and the UCB and would acknowledge that such national colours and symbols constitute valuable intellectual property necessary to sustain the future financial viability of such specified National Federations;

9.3.5 would recognise that the National Federations are best placed to award national colours in respect of their particular codes in view of the fact that they are involved in the day to day administrative affairs of the individual sports codes which they control and in relation to which they are affiliated to the governing international bodies for the code;

9.3.6 would specifically give National Federations the power to award national colours;

9.3.7 would give the National Colours Board an advisory role and the task of maintaining records of persons and individuals who have been awarded national colours.

10. HALLMARKS OF THE FRAMEWORK

The hallmarks of the framework would be the following:

- 10.1 The National Colours Board would be officially established by the Minister by way of Regulation;
- 10.2 The Regulations would provide that the function of the Board must in relation to the major professional codes be to maintain an accurate register of national colours, processes and procedures (codes) under which National Federations would award national colours, and maintain information about persons or individuals that have been awarded national colours over time.
- 10.3 On their part, the National Federations would register their national colours with the National Colours Board within a certain time period after the promulgation of the Regulations.
- 10.4 In such applications, the National Federations would define colours currently in use and submit a "code" which details the processes and procedures under which such colours were awarded or were proposed to be awarded.
- 10.5 The Board would evaluate such applications only as to form and not substance, register the colours and issue a certificate. It might however refuse to register on limited grounds such as that the application lacked sufficient information.
- 10.6 Thereafter and on a continuous basis, the National Federations would be obliged to notify the National Colours Board of individuals who were awarded national colours as soon as possible after such colours had been awarded.
- 10.7 The National Colours Board would work together with the National

Federations to identify and deal with instances of the abuse of national colours.

- 10.8 The actual awarding of national colours would be carried out by the National Federations in accordance with codes determined by them and then registered with the National Colours Board.
- 10.9 Once registered and approved by the National Colours Board, National Federations would not use or award different colours without the constructive input of the National Colours Board.
- 10.10 In sum, the system was designed to recognise that different National Federations use different colours especially SARU, SAFA and the UCB in one day internationals.
- 10.11 It was also designed to permit or allow the National Federations to award national colours to players and in relation to which the Board would have an advisory role.
- 10.12 Seen from the perspective of the National Federations, in the light of the intrusive nature of and the appropriation of rights in the Draft Regulations, 2006, the foregoing National Colours Framework provides a framework around which those National Federations which are charged with the governance of major professional sports could effect changes thereto which recognise their established rights and particular requirements.

11. CONCLUSION

- 11.1 The promulgation as law of the Draft Regulations as they now stand will be detrimental to the financial interests and autonomy of the National

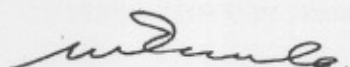
Federations of South African professional sports in general and of SARU, SAFA and the UCB in particular.

- 11.2 It is to be expected therefore that a strategy will be formulated in relation thereto by SARU and the other National Federations which are adversely affected and this strategy directed at bringing about the requisite amendments to the Draft Regulations to take cognisance of and give effect to the particular established rights and international status of the National Federations concerned.
- 11.3 It will also be imperative for SARU and the other equally affected National Federations to regard the Draft Regulations as a manifestation of a larger picture constituted by the Bill which, should its provisions become law, will provide the statutory powers under which SASCOG could take effective control of the affairs and constitutions of the National Federation and by means of which the autonomy and control – including financial control – over their own particular codes of sport would in effect be largely excluded by SASCOG.
- 11.4 Furthermore, the provisions of the Bill and the Draft Regulations are unconstitutional and *ultra vires* in many respects and these provisions will be illegal if enacted.
- 11.5 In sum, therefore, both the NSR Bill, 2006, and the Draft Regulations, 2006, will require urgent attention and concerted action by SARU and its brother National Federations.

We trust that the Honourable Minister will, in having regard to the submissions set out herein, assist us in facilitating the necessary changes to the Bill and Regulations so as to secure the interests, position and well-being of the

professional sports codes in the Republic.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mveleli Ncula', written in a cursive style.

MVELELI NCULA
DEPUTY CHIEF EXECUTIVE OFFICER
MN/pd