

Sports Dispute Resolution Frameworks and the Right of Access to the Courts in South Africa

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Summary

This article examines the subtle tension between sports dispute resolution frameworks and the constitutional right of access to courts in South Africa. The right to access the courts is a fundamental entitlement enshrined in the South African Constitution. It holds historical importance because, during the oppressive apartheid era, people were either extrajudicially executed or statutorily denied access to courts to challenge executive or legislative actions. Consequently, this right remains a vital part of the country's new transformative constitutional project. However, sports bodies, under the revered notion of sports autonomy, tacitly or explicitly exclude courts from their dispute resolution processes. The main question is whether this practice infringes upon the right to access the courts as outlined in section 34 of the Constitution. Using doctrinal legal analysis of the founding statutes of major sporting organisations in the country—the South African Sports Confederation and Olympic Committee (SASCOC), the South African Football Association (SAFA), and Cricket South Africa (CSA)—this study examines the issue. It concludes that by systematically placing a premium on sports autonomy, sporting bodies effectively establish de facto ouster clauses that restrict access to the courts.

Keywords: sports dispute resolution, access to courts, procedural human rights, constitutional law, sporting autonomy, Republic of South Africa

1. INTRODUCTION

The intersection of sports governance and constitutional rights protection presents one of the most complex challenges facing contemporary South African jurisprudence.¹ As sporting bodies exercise increasingly sophisticated quasi-judicial powers over athletes, coaches, and other stakeholders, fundamental questions arise about the compatibility of specialised dispute resolution frameworks with constitutional guarantees of procedural fairness and access to justice. This tension has become particularly acute in post-apartheid South Africa, where the Constitution's transformative vision demands that all exercises of public and quasi-public power remain subject to constitutional scrutiny and human rights protection.² The South African Constitution's section 34 guarantees everyone the right to have disputes resolved through fair public hearings before courts or independent and impartial tribunals.³ This right extends beyond state courts to encompass all adjudicatory mechanisms, including those operated by private entities exercising regulatory authority over individuals within their jurisdictions.

Yet, sporting bodies have developed increasingly sophisticated mechanisms that effectively limit access to constitutional remedies while maintaining superficial compliance with procedural fairness requirements. These mechanisms create what this article terms "de facto ouster clauses" – structural arrangements that achieve the practical effect of excluding judicial oversight without explicitly contravening constitutional prohibitions against ousting court jurisdiction. The significance of this tension extends beyond individual cases to implicate broader questions about the universality and integrity of South Africa's constitutional order. When parallel systems of justice emerge that systematically undermine fundamental rights protections, they challenge the coherence of constitutional democracy itself. The sporting context presents a particularly revealing case study because of the high stakes involved for individual participants, the public interest in sporting integrity, and the increasingly globalised nature of sports governance that often claims exemption from national constitutional requirements.

Hence, the purpose of this article is to examine the subtle tension between sports dispute resolution frameworks and the constitutional right of access to courts in South Africa. The right to access the courts is a fundamental entitlement enshrined in the South African Constitution. It holds historical

¹ *Chess South Africa v South African Sports Confederation and Olympic Committee and Another* (62189/2023) [2024] ZAGPPHC 601 (25 June 2024) at paras 65–68

² *President of the Republic of South Africa v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); [1999] 10 BCLR 1059 (CC) at para 143.

³ Constitution of the Republic of South Africa, 1996, s 34

importance because, during the oppressive apartheid era, people were either extrajudicially executed or statutorily denied access to courts to challenge executive or legislative actions. Consequently, this right remains a vital part of the country's new transformative constitutional project. However, sports bodies, under the revered notion of sports autonomy, tacitly or explicitly exclude courts from their dispute resolution processes. The main question is whether this practice infringes upon the right to access the courts as outlined in section 34 of the Constitution. Using doctrinal legal analysis of the founding statutes of major sporting organisations in the country—the South African Sports Confederation and Olympic Committee (SASCOC), the South African Football Association (SAFA), and Cricket South Africa (CSA)—this study examines the issue. It concludes that by systematically prioritising sports autonomy, sporting bodies effectively establish *de facto* ouster clauses that restrict access to the courts.

2. CONCEPTUAL FRAMEWORK

2.1. Right of Access to the Courts

The right of access to the courts is a cornerstone of constitutional democracy and a key element of human rights protection. It encompasses both the formal availability of judicial remedies and the practical capacity of individuals to obtain meaningful redress for rights violations.⁴ Historically, this right evolved from a narrow procedural guarantee to a comprehensive principle aimed at dismantling systemic barriers that obstruct justice. Consequently, the role of alternative dispute resolution (ADR) mechanisms has come under scrutiny to ensure that such processes meet constitutional standards of fairness, impartiality, and accessibility.⁵

The theoretical foundation of access to courts lies in the rule of law, which demands that all exercises of power remain subject to legal constraint and judicial oversight. The European Court of Human Rights (ECtHR) has consistently affirmed that access to court forms an inherent component of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. The Court has made clear that restrictions on this right are permissible only if they do not

⁴ Cappelletti M & Garth B “Access to justice: The newest wave in the worldwide movement to make rights effective” (1978) 27 (2) *Buffalo Law Review* 181 at 183

⁵ Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6th ed Cape Town: Juta (2013) ch “Access to courts” (updated by Kevin Iles).

impair its very essence.⁶ Over time, the ECtHR has developed nuanced frameworks distinguishing between legitimate procedural regulations and impermissible barriers that undermine meaningful access to justice.

In South Africa, Section 34 of the Constitution guarantees everyone the right to have disputes resolved through fair public hearings before courts or independent and impartial tribunals. This reflects the Constitution's transformative objective of ensuring equal access to justice irrespective of social, economic, or political status.⁷ The Constitutional Court has underscored both the foundational importance and the practical implications of this right, particularly in relation to the operation of ADR mechanisms within South African jurisdiction.

The Court's decision in *Affordable Medicines Trust and Others v Minister of Health and Another* established a crucial precedent concerning the relationship between access to courts and administrative or specialised procedures.⁸ It held that while specialised frameworks may serve legitimate regulatory purposes, they cannot completely exclude judicial oversight of constitutional rights compliance. This principle holds significant relevance for sports dispute resolution mechanisms, which often claim autonomy from ordinary legal systems while exercising quasi-judicial power over individuals.

Access to justice extends beyond mere formal availability to include practical and effective accessibility. The ECtHR has identified several essential components of effective access: adequate notice of proceedings and reasons for decisions, sufficient opportunity to prepare and present one's case, availability of legal representation where the complexity or importance of a matter so requires, reasonable timeframes balancing efficiency and fairness, and proportionate costs that do not prevent those of limited means from seeking redress.⁹

Economic barriers remain among the most serious obstacles to effective access. Modern legal systems, with their increasing complexity, often necessitate professional legal assistance beyond the financial reach of ordinary citizens. The ECtHR has ruled that states must ensure the availability of legal aid in civil cases where the interests of justice require representation,

⁶ *Golder v United Kingdom* (1975) 1 EHRR 524 at para 36

⁷ Woolman S & Bishop M *Constitutional Law of South Africa* 2nd ed Cape Town: Juta (2013) ch 59

⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

⁹ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22 at paras 59–72

particularly where fundamental rights or complex legal questions are at stake.¹⁰ This principle has direct implications for sports arbitration, where technical rules and financial disparities often disadvantage individual athletes or complainants against resource-rich sporting bodies.

The requirement of independence encompasses both institutional and decisional aspects. Institutional independence requires that adjudicatory bodies be structurally separate from administrative or executive control, with transparent appointment procedures, secure tenure, and financial autonomy from entities whose decisions they review.¹¹ Decisional independence requires that adjudicators be free to determine cases solely according to law and evidence, free from influence by superiors, political actors, or external pressures.

The ECtHR has elaborated this principle in cases such as *Langborger v Sweden*, holding that independence must be assessed both subjectively (regarding adjudicators' personal attitudes) and objectively (considering whether institutional arrangements generate reasonable apprehensions of bias).¹² Objective independence therefore requires not only the absence of direct conflicts of interest but also institutional structures that dispel any reasonable suspicion of partiality.

Closely linked to independence is impartiality, which functions both as a procedural safeguard and a substantive guarantee of fair adjudication. Procedural impartiality demands that adjudicators avoid ex parte communications, ensure equal participation rights, and maintain neutrality throughout proceedings. Substantive impartiality requires that judgments rest solely on relevant evidence and legal reasoning, rather than on extraneous factors or predispositions.¹³ The ECtHR has recognised that structural biases within adjudicatory frameworks can compromise impartiality even where individual decision-makers remain subjectively neutral.

Fairness integrates several procedural guarantees that together ensure a genuine opportunity to present and respond to legal arguments. The ECtHR has identified the key components of procedural fairness as timely and adequate notice of claims, sufficient time and facilities for case preparation, the right to examine evidence and cross-examine witnesses, access to interpretation services, and reasoned decisions explaining the factual and legal bases of determinations.¹⁴ The

¹⁰ *P, C and S v United Kingdom* (2002) 35 EHRR 31 at para 91

¹¹ *Findlay v United Kingdom* (1997) 24 EHRR 221 at paras 73–77

¹² *Langborger v Sweden* (1989) 12 EHRR 416 at para 32

¹³ *Hauschildt v Denmark* (1989) 12 EHRR 266 at paras 46–50

¹⁴ *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 at para 33

absence of any single element can undermine overall fairness even if other procedural safeguards are observed.

The public hearing requirement serves essential democratic purposes, including transparency, accountability, and public confidence in adjudicatory institutions. Open proceedings enable scrutiny of decision-making quality, support the development of precedent, and reinforce institutional legitimacy. While the ECtHR recognises that exceptional circumstances—such as privacy or national security—may justify closed hearings, the presumption strongly favours publicity as integral to democratic justice.¹⁵

The relationship between access to courts and ADR mechanisms has become increasingly complex in constitutional and human rights jurisprudence. The ECtHR has accepted that ADR procedures may satisfy Article 6 requirements if they offer equivalent guarantees of independence, impartiality, fairness, and accessibility.¹⁶ However, ADR processes cannot completely replace judicial review, particularly where fundamental rights are implicated or where procedural standards fall below constitutional norms.

The doctrine of ouster clauses provides a useful framework for analysing when ADR arrangements impermissibly exclude judicial remedies. Explicit ouster clauses that seek to bar judicial review are generally unconstitutional in both European and South African contexts, which recognise the judiciary's inherent authority to review compliance with fundamental rights.¹⁷ Yet subtler mechanisms may achieve the same result indirectly—through procedural complexity, restrictive time limits, financial barriers, or contractual provisions that make access to courts practically impossible despite formal availability.

Recent jurisprudence has addressed these forms as de facto ouster clauses, referring to institutional or procedural designs that effectively eliminate judicial oversight. Examples include mandatory exhaustion of lengthy internal remedies, prohibitive arbitration costs, restrictive timeframes impeding proper case preparation, and excessive procedural technicalities demanding specialised

¹⁵ *Pretto and Others v Italy* (1983) 6 EHRR 182 at para 21

¹⁶ *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 at paras 29–31

¹⁷ *Harris v Minister of the Interior* 1952 (2) SA 428 (A) at 460–461

legal knowledge. Collectively, these mechanisms can render constitutional rights illusory, particularly for individuals with limited means.¹⁸

The transformative nature of South Africa's constitutional order lends special significance to the right of access to courts. The Constitutional Court has repeatedly affirmed that robust procedural protections are essential to prevent arbitrary exercises of power, particularly in light of the country's history of exclusion and discrimination.¹⁹ A transformative interpretation therefore demands consideration not only of formal equality before the law but also of substantive barriers that perpetuate disadvantage.

Contemporary challenges to effective access include increasingly sophisticated institutional arrangements designed to limit judicial scrutiny while maintaining superficial compliance with procedural norms.²⁰ Distinguishing genuine efficiency measures from tactics intended to evade constitutional accountability requires vigilant judicial interpretation. The sporting context illustrates these tensions vividly: disputes often involve high personal stakes, pronounced power asymmetries between athletes and federations, and global regulatory systems asserting autonomy from domestic legal standards.²¹

The intersection between access to courts and international law introduces further complexity. While international human rights norms generally reinforce domestic constitutional guarantees, global sporting regulations sometimes conflict with national constitutional principles. The ECtHR has clarified that international obligations cannot justify systemic violations of procedural rights. States remain responsible for ensuring that international arrangements either conform to constitutional standards or provide equivalent protections through effective alternative mechanisms.²²

¹⁸ *Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom* (1998) 27 EHRR 249 at paras 72–77

¹⁹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT 31/99) [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)

²⁰ Dyzenhaus D *The Constitution of Law: Legality in a Time of Emergency* Cambridge: Cambridge University Press (2006) 3–4

²¹ Duval A “Lex Sportiva: A playground for transnational law” (2013) 19 (6) *European Law Journal* 822 at 824

²² *Waite and Kennedy v Germany* (1999) 30 EHRR 261, paras 67–73

2.2 Sports Dispute Resolution Frameworks

Sports dispute resolution frameworks represent sophisticated institutional arrangements that have evolved to address the distinctive characteristics of sporting governance while claiming varying degrees of exemption from general legal principles.²³ These frameworks encompass the procedural rules, adjudicative mechanisms, and institutional structures through which sporting bodies resolve disputes involving athletes, coaches, administrators, and other stakeholders within their regulatory jurisdictions. Understanding their operation requires comprehensive analysis of both their formal architectures and practical implementation, particularly regarding their compatibility with constitutional human rights frameworks and democratic governance principles.

The theoretical foundation for sports dispute resolution frameworks rests on the doctrine of sporting autonomy—the principle that sporting bodies possess legitimate authority to regulate technical and disciplinary matters within their domains without external interference. This doctrine emerged from judicial recognition that sporting contexts present unique regulatory challenges requiring specialised knowledge, uniform global standards, and rapid decision-making capabilities that general legal systems may struggle to accommodate effectively.²⁴ The European Court of Justice's landmark analysis in *Meca-Medina and Majcen v Commission* established that while sporting rules may restrict competition and individual rights, such restrictions can be justified where they serve legitimate sporting objectives and remain proportionate to those objectives.²⁵

However, the scope and legitimacy of sporting autonomy claims remain contested, particularly regarding procedural rather than substantive aspects of sports governance. While courts generally acknowledge sporting bodies' technical expertise in rule-making and competitive determinations, procedural fairness requirements should apply universally to all adjudicatory mechanisms regardless of their specialised context.²⁶ The European Court of Human Rights' decision in *Mutu and Pechstein v Switzerland* marked a watershed moment by finding that even the Court of Arbitration for Sport (CAS), widely regarded as the pinnacle of specialised sports adjudication,

²³ Court of Arbitration for Sport (ICAS Statutes & CAS Code, 1 July 2020) arts R27, R47, R57–R58

²⁴ Gardiner S, Welch R, Boyes S & Naidoo U *Sports Law* 4th ed London: Routledge (2012).

²⁵ *Case C-519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991

²⁶ Duval A “The Court of Arbitration for Sport and EU Law: Chronicle of an encounter” (2015) 22 (2) *Maastricht Journal of European and Comparative Law* 224 at 226

had violated athletes' fundamental rights to fair trial under Article 6 of the European Convention on Human Rights.²⁷

Contemporary sports dispute resolution frameworks typically operate through multi-tiered institutional architectures that combine internal disciplinary mechanisms, specialised arbitration panels, and limited appeal procedures. These systems characteristically require mandatory exhaustion of internal remedies before external review becomes available, creating sequential procedural hurdles that complainants must navigate successfully to achieve resolution. The European Court of Human Rights has recognised that such exhaustion requirements can serve legitimate administrative purposes but emphasised that they cannot operate as absolute barriers to meaningful judicial oversight.²⁸

The institutional design of sports dispute resolution frameworks reveals several recurring characteristics that have significant implications for constitutional rights protection. First, appointment mechanisms for adjudicators often lack independence from the sporting bodies whose decisions they review, creating structural conflicts of interest that compromise impartial judgment. The European Court of Human Rights emphasised in *Bakery v Switzerland* that adjudicative independence requires not merely subjective impartiality but also objective structural arrangements that eliminate reasonable apprehensions of bias.²⁹

Second, procedural complexity within these frameworks often serves multiple functions beyond legitimate case management. While demonstrating superficial commitment to procedural fairness through multiple review opportunities, complex procedures simultaneously create practical barriers that discourage challenges to organisational authority and generate technical requirements that advantage legally sophisticated parties over individual complainants. The European Court of Justice has recognised that procedural arrangements cannot be so complex as to render rights protection illusory or excessively difficult to achieve.³⁰

²⁷ *Mutu and Pechstein v Switzerland* (Applications nos 40575/10 and 67474/10) (European Court of Human Rights, 2 October 2018) at paras 114–128

²⁸ *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at para 57

²⁹ *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, para-78

³⁰ *Case C-279/09 P DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* [2010] ECR I-13849 at para 59

Third, resource asymmetries between individual complainants and institutional defendants create systematic advantages for sporting bodies in dispute resolution processes. These asymmetries manifest through direct costs for proceedings, mandatory legal representation requirements, and time-intensive procedural compliance obligations that disproportionately burden individual parties. The European Court of Human Rights has established that access to justice cannot be conditioned on financial capacity, requiring states to ensure that procedural arrangements do not create insuperable barriers for those lacking substantial resources.³¹

The international dimension adds considerable complexity to contemporary sports dispute resolution frameworks. Global sporting federations increasingly require national bodies to adopt particular procedural arrangements as conditions for continued international participation, creating potential tensions between international sporting obligations and national constitutional requirements. The European Court of Human Rights addressed these tensions in *Semenya v Switzerland*, recognising that international sporting requirements cannot justify systematic violation of fundamental human rights protections.³²

The Court of Arbitration for Sport exemplifies both the potential benefits and inherent limitations of specialised international sports adjudication. Established under Swiss law but exercising quasi-judicial authority over athletes and sporting bodies worldwide, CAS has developed sophisticated jurisprudence addressing complex technical and legal issues in sporting contexts.³³ However, its institutional arrangements have been criticised for compromising independence through structural relationships with international sporting federations, limiting representation rights through restrictive procedural rules, and creating barriers to meaningful participation through prohibitive costs and complex procedures.³⁴

Recent scholarly analysis has increasingly emphasised that traditional public-private distinctions fail to capture the complexity of contemporary sporting governance arrangements. Sporting bodies exercise significant quasi-public authority through licensing, disciplinary, and exclusionary functions that substantially impact individuals' opportunities and livelihoods, creating what

³¹ *Airey v Ireland* (1979) 2 EHRR 305 at para 26

³² *Semenya v Switzerland* Application no 10934/21 (ECtHR, 11 July 2023) at paras 89–102

³³ Kaufmann-Kohler G & Rigozzi A *Arbitration at the Olympics: Issues of Fast-Track Dispute Resolution and Sports Law* The Hague: Kluwer Law International (2006)

³⁴ Duval A “The Olympic Charter: A transnational constitution without a state?” (2018) 45 *Journal of Law and Society* S245–S269

administrative law scholars term "hybrid governance" arrangements that blur conventional regulatory boundaries.³⁵ This quasi-public character should theoretically trigger enhanced rather than reduced procedural protections, particularly regarding independence, transparency, and accessibility requirements.

The doctrine of regulatory capture provides important analytical tools for understanding how sports dispute resolution frameworks can systematically favour organisational interests over individual rights protection. When adjudicators remain structurally dependent on the organisations they ostensibly regulate, when procedural complexity advantages repeat institutional players over individual complainants, and when transparency deficits prevent effective scrutiny of decision-making quality, the resulting arrangements primarily serve to legitimise rather than effectively constrain organisational authority.³⁶

The concept of "proceduralisation" offers another critical lens for analysing sports dispute resolution frameworks. Rather than providing substantive constraints on organisational power, complex procedural arrangements can function as legitimising mechanisms that create the appearance of fairness while preserving fundamental power imbalances. The European Court of Human Rights has recognised this dynamic in contexts where procedural complexity serves primarily to obscure rather than enhance meaningful rights protection.³⁷

Contemporary developments in international human rights law have begun to challenge the traditional immunity of sporting bodies from general legal principles. The United Nations Human Rights Council's resolution on human rights and sport explicitly recognised that sporting activities must comply with international human rights standards, rejecting claims that sporting specificity justifies exemption from fundamental rights protections.³⁸ This development signals growing international recognition that sporting governance cannot operate outside established human rights frameworks regardless of claims to technical specialisation or autonomous authority.

³⁵ Black J "Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory' world" (2001) 54 *Current Legal Problems* 103 at 105

³⁶ Stigler G "The theory of economic regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3 at 5.

³⁷ *Tsfayo v United Kingdom* Application no 60860/00 (ECtHR, 14 November 2006) at paras 39–47

³⁸ UN Human Rights Council *Promoting human rights through sport and the Olympic ideal* (Res A/HRC/RES/44/5, adopted 2 July 2020)

The relationship between sports dispute resolution frameworks and broader constitutional and legal systems remains an area of ongoing theoretical and practical development. While sporting bodies increasingly acknowledge formal commitments to human rights principles, practical implementation often reveals significant gaps between rhetorical acknowledgment and operational reality. These gaps suggest that current approaches to balancing sporting autonomy with constitutional compliance require fundamental reconsideration rather than minor procedural adjustments.

3. The Right of Access to the Courts under the Constitution of South Africa

The right of access to courts is a cornerstone of South Africa's constitutional democracy, serving both as a mechanism for rights vindication and a symbolic affirmation of the supremacy of law over arbitrary power. Section 34 of the Constitution of the Republic of South Africa, 1996, provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."³⁹ This provision embodies not only formal access to courts but also substantive accessibility, procedural fairness, and institutional independence.

The Constitutional Court has consistently emphasised that section 34 reflects more than a procedural guarantee; it represents a transformative commitment to ensuring all individuals can access effective remedies irrespective of social, economic, or political status.⁴⁰ Access requires not merely the theoretical availability of remedies but the practical ability to obtain redress without prohibitive barriers. The Court has observed that access to justice is "the foundation of the rule of law" and must ensure that "the door to the courts is open to all who seek to come".⁴¹

The historical context of section 34 underscores its importance. Under apartheid, ouster clauses and privative provisions routinely excluded judicial oversight of executive actions.⁴² The Sobukwe clause, which authorised indefinite detention without trial and excluded judicial review, exemplifies how denial of court access entrenched systemic human rights violations.⁴³ The

³⁹ Constitution (n 3) s 34

⁴⁰ *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 105.

⁴¹ *ibid* para 106.

⁴² Haysom N & Plasket C "The war against law: Judicial activism and the Appellate Division" (1988) 4 *South African Journal on Human Rights* 303 at 305

⁴³ General Law Amendment Act 37 of 1963, s 5 (repealed)

democratic Constitution thus deliberately entrenched section 34 to prevent recurrence of such abuses, requiring heightened scrutiny of any arrangements that compromise meaningful access to justice.

The Constitutional Court's jurisprudence outlines several elements defining meaningful access to courts. First, section 34 guarantees access to appropriate forums, whether traditional courts or alternative mechanisms that satisfy independence and impartiality.⁴⁴ In *Affordable Medicines Trust v Minister of Health*, the Court affirmed that while administrative tribunals may legitimately regulate disputes, they cannot fully replace judicial oversight where constitutional rights are implicated.⁴⁵ Second, the right demands fair public hearings, incorporating natural justice principles such as adequate notice, the opportunity to be heard, and reasoned decision-making.⁴⁶ Public hearings enhance transparency, accountability, and legitimacy. Although exceptions exist for confidentiality, the presumption strongly favors openness as integral to democratic accountability.⁴⁷ Third, independence and impartiality require structural separation of adjudicatory functions from administrative control, along with decisional autonomy free from external influence.⁴⁸ In *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd*, the Court held that independence must be objectively assessed, considering whether institutional arrangements could create a reasonable apprehension of bias from the perspective of informed observers.⁴⁹

The relationship between section 34 and alternative dispute resolution has been particularly significant. Arbitration and consensual mechanisms may satisfy constitutional requirements if they ensure independence, impartiality, and fairness.⁵⁰ However, in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*, the Court emphasized that parties cannot contract out of fundamental constitutional rights; agreements that undermine access to justice are unenforceable as contrary to public policy.⁵¹

⁴⁴ Constitution (n 3) s 34

⁴⁵ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 9)

⁴⁶ *ibid* para 49

⁴⁷ *Ibid* para 52

⁴⁸ Constitution (n 3) s 34

⁴⁹ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* 2000 (3) SA 705 (CC)

⁵⁰ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC)

⁵¹ *ibid*

The doctrine of ouster clauses remains central. Explicit statutory provisions excluding judicial review are inconsistent with the Constitution.⁵² In *Lesapo v North West Agricultural Bank*, the Court invalidated provisions excluding judicial review of administrative decisions.⁵³ Yet, more subtle “de facto ouster clauses” also pose challenges. These arise where mandatory exhaustion of internal procedures, prohibitive arbitration costs, restrictive timeframes, or excessive procedural complexity make remedies practically inaccessible.⁵⁴ The Court has recognised that such barriers may violate section 34 even where remedies remain formally available.⁵⁵

The transformative ethos of the Constitution further enriches section 34’s meaning. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*, the Court stressed that robust procedural protections guard against arbitrary power, especially given apartheid’s history of exclusion.⁵⁶ Transformative constitutionalism requires that section 34 analysis consider substantive barriers—such as poverty or marginalisation—that perpetuate disadvantage despite formal equality.⁵⁷

Economic barriers present particularly acute challenges. Where legal representation is essential, high costs may deny effective access. The Court has affirmed that rights must be substantively, not merely formally, accessible.⁵⁸ In *Lawyers for Human Rights v Minister of Home Affairs*, it emphasised that access to justice cannot depend solely on financial capacity where fundamental rights are involved.⁵⁹ Timeliness is another key dimension. Excessively restrictive limitation periods may deny meaningful access by preventing adequate preparation or representation. The Court has held that limitation periods must be reasonable and proportionate, allowing complainants sufficient time to understand rights, gather evidence, and formulate claims.⁶⁰

Section 34 also interacts with contractual arrangements. While freedom of contract is respected, agreements cannot override constitutional rights where doing so offends public policy.⁶¹ In *Bredenkamp v Standard Bank of SA Ltd*, the Court held that contractual provisions must comply

⁵² *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409

⁵³ *Ibid*

⁵⁴ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* (n 50)

⁵⁵ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 8) at para 50

⁵⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)

⁵⁷ *ibid* para 25

⁵⁸ *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 (CC) at para 28

⁵⁹ *Ibid*

⁶⁰ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 9) at para 53

⁶¹ *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA)

with constitutional values, especially in standard-form agreements involving power imbalances.⁶² The provision's reach extends to quasi-public entities exercising regulatory authority. The Bill of Rights applies directly or indirectly to private actors where their actions significantly affect rights.⁶³ In *Chirwa v Transnet Ltd*, the Court confirmed that private bodies with public regulatory functions may be constitutionally constrained.⁶⁴

This has particular implications for sports governance organisations, which, though formally private, exercise substantial quasi-public authority through licensing, disciplinary, and exclusionary functions that profoundly affect livelihoods.⁶⁵ Their decisions should therefore be subject to constitutional scrutiny, especially concerning fairness and access to justice.⁶⁶ Internal dispute resolution mechanisms cannot operate as complete substitutes for judicial oversight where procedural fairness or fundamental rights are compromised.

The Court's jurisprudence provides three guiding principles for assessing compliance with section 34. First, adjudication mechanisms must ensure independence and impartiality, judged objectively through structural arrangements.⁶⁷ Second, procedural safeguards must guarantee meaningful participation, including notice, adequate preparation, access to evidence, and opportunities to challenge adverse claims.⁶⁸ Third, decisions must be open to meaningful review for legal error and constitutional compliance, with judicial remedies available where fundamental rights are at stake.⁶⁹ Importantly, the Constitution prohibits both explicit and de facto ouster clauses. Arrangements that create cumulative barriers-such as prohibitive costs, procedural complexity, or unreasonable delays-violate section 34 by rendering remedies practically inaccessible.⁷⁰ The constitutional guarantee thus imposes both negative constraints against unjust barriers and positive obligations to ensure remedies are genuinely available.

⁶² Ibid

⁶³ *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC)

⁶⁴ Ibid

⁶⁵ Foster K "Is there a global sports law?" (2003) 2 *Entertainment and Sports Law Journal* 1 at 18

⁶⁶ Gardiner S (n 24) 87.

⁶⁷ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* (n 49) at para 18

⁶⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 9) at para 49

⁶⁹ Ibid para 51.

⁷⁰ *Matsepe and Another v Director of Public Prosecutions and Others; In Re: S v Ramavhunga and Others* (CC11/2021) [2024] ZAGPPHC 894

4. THE DISPUTE RESOLUTION FRAMEWORKS FOR MAJOR SPORTS ORGANISATIONS

South African sporting bodies have developed sophisticated dispute resolution architectures that ostensibly promote procedural efficiency while creating substantial barriers to constitutional court access. Analysis of constitutional provisions from the South African Sports Confederation and Olympic Committee (SASCOC), South African Football Association (SAFA), and Cricket South Africa (CSA) reveals systematic patterns of structural design that privilege organisational autonomy over individual rights protection.

4.1 Ouster and Finality Clauses

Ouster clauses operate to exclude or substantially restrict judicial oversight of administrative decisions, traditionally through explicit statutory language prohibiting court jurisdiction.⁷¹ While direct ouster clauses stating that decisions 'shall not be questioned in any court' are constitutionally impermissible under section 34, contemporary sporting constitutions employ more sophisticated finality provisions that achieve similar practical effects without explicit jurisdictional exclusions.

CSA's Memorandum of Incorporation exemplifies this sophisticated approach through Article 37.7.8, which provides that arbitrator decisions “shall be final and binding on the parties and may be made an order of court on application by any party”.⁷² This provision creates a virtually hermetic system where arbitral determinations become immune from substantive judicial review, with courts relegated to rubber-stamping enforcement roles. The clause's surface-level acknowledgment of court involvement for enforcement purposes masks its deeper function: preventing meaningful judicial scrutiny of decision-making quality, procedural fairness, or constitutional compliance.

The constitutional deficiency in this arrangement becomes apparent when examined against section 34's requirement for accessible dispute resolution before independent tribunals. By declaring arbitral decisions 'final and binding', CSA's constitution attempts to foreclose judicial review even where fundamental procedural irregularities or constitutional violations have

⁷¹ Wade HW & Forsyth CF *Administrative Law* 11th ed Oxford: Oxford University Press (2014) 628–645

⁷² *Cricket South Africa Memorandum of Incorporation* art 37.7.8

occurred. This contravenes established Constitutional Court jurisprudence that procedural finality provisions cannot preclude judicial oversight where constitutional rights are implicated.⁷³

The practical effect was demonstrated in *Cricket South Africa v Graeme Smith*,⁷⁴ where CSA initiated arbitration against its former Director of Cricket following allegations in the Social Justice and Nation-Building report. Although the arbitrator ultimately exonerated Smith, the finality clause meant that had the decision gone against him, meaningful judicial review would have been practically foreclosed despite potential procedural irregularities. This structure creates asymmetric risks where complainants face binding adverse decisions with minimal recourse while benefiting organisations secure finality that insulates their interests from constitutional scrutiny.

SASCOC's Constitution Article 50.7 employs similar finality language, providing that arbitration decisions under the Arbitration Foundation of Southern Africa rules 'shall be final and binding upon the parties'.⁷⁵ This provision explicitly excludes appeal rights, stating that 'neither party shall have any right to appeal against the decision of the arbitrator except to a court of law on a question of law'. The exception for 'questions of law' appears to preserve judicial oversight but operates as an illusory safeguard: distinguishing pure legal questions from factual or mixed determinations proves extraordinarily difficult in practice, and South African courts have historically demonstrated reluctance to interfere with arbitral awards even where legal errors are apparent.⁷⁶

The *Alexander Peternell v SASCOC and SAEF* case illustrates how finality provisions frustrate constitutional remedies.⁷⁷ Despite being South Africa's highest-ranked equestrian rider, Peternell was excluded from the 2012 Olympic team in favour of a substantially lower-ranked competitor. SASCOC's internal appeals process dismissed his challenge without properly considering objective selection criteria. Even after the Court of Arbitration for Sport ruled in Peternell's favour, SASCOC initially refused implementation, requiring additional emergency proceedings. This resistance to external accountability demonstrates how finality clauses enable organizational defiance of legitimate oversight.

⁷³ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 8)

⁷⁴ Cricket South Africa "Independent Arbitration Panel Clears Graeme Smith of Racism Allegations" (25 April 2022) <https://cricket.co.za/independent-arbitration-panel-clears-graeme-smith-of-racism-allegations/>

⁷⁵ *SASCOC Constitution* art 50.7.

⁷⁶ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

⁷⁷ *Alexander Peternell v SASCOC and SAEF* CAS 2012/A/2845

SAFA's Constitution Article 71.5 takes a more direct approach to limiting court access, providing that 'no Party to a dispute will be entitled to approach any court of law except in circumstances which require urgent relief'.⁷⁸ This provision functions as an explicit ouster clause, directly contravening section 34 by categorically excluding judicial jurisdiction except in undefined 'urgent' circumstances. The vague criterion of 'urgency' creates interpretive ambiguity that enables SAFA to resist court involvement by characterising disputes as non-urgent.

The constitutional deficiency becomes particularly acute where athletes face career-threatening sanctions requiring immediate resolution. In *Ajax Cape Town Football Club v Mokhari*,⁷⁹ Ajax challenged disciplinary sanctions imposed for fielding player Tendai Ndoro in matches. The dispute's complexity regarding jurisdictional boundaries between different football governing bodies demonstrated urgent need for judicial clarification, yet SAFA's finality clause initially prevented court involvement.

The finality provisions across sporting constitutions share common structural features that collectively undermine section 34 protections. First, they attempt to convert arbitral or internal adjudicatory decisions into unreviewable final determinations despite Constitutional Court jurisprudence establishing that all exercises of public or quasi-public power remain subject to constitutional scrutiny.⁸⁰ Second, they create artificial distinctions between factual, legal, and procedural grounds for review, exploiting practical difficulties in categorization to limit judicial oversight. Third, they impose undefined criteria like 'urgency' that enable organizations to resist constitutional accountability.

These finality clauses violate section 34 on multiple dimensions. They compromise the right to fair hearings by preventing judicial correction of procedural irregularities occurring in internal or arbitral proceedings. They undermine tribunal independence by insulating potentially biased decision-makers from external oversight. Most fundamentally, they contradict constitutional supremacy by attempting to place sporting governance decisions beyond the reach of constitutional scrutiny.

⁷⁸ SAFA Constitution, art 71.5

⁷⁹ *Ajax Cape Town Football Club and Another v Mokhari N.O and Others* (18413/18) [2018] ZAGPJHC 404 (18 May 2018).

⁸⁰ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (n 19).

The jurisprudential foundation for challenging these clauses derives from *Affordable Medicines Trust v Minister of Health*,⁸¹ where the Constitutional Court established that specialized administrative procedures cannot constitute complete barriers to judicial oversight of constitutional compliance. The Court emphasised that while alternative dispute resolution mechanisms may serve legitimate functions, they must remain subject to judicial review where fundamental rights are implicated.

4.2 Exhaustion of Internal Remedies Clauses

The doctrine of exhaustion of internal remedies serves legitimate administrative purposes by enabling organisations to correct errors through internal review before external judicial intervention.⁸² However, sporting constitutions have transformed this reasonable procedural principle into formidable barriers to constitutional court access through mandatory multi-tiered internal procedures that exhaust complainants' resources and extend timeframes beyond practical utility.

SASCOC's Constitution Article 50.1.1 exemplifies this problematic approach, mandating that disputes 'must first be referred in writing to the CEO of SASCOC' and that parties 'must first exhaust all available internal remedies, at all appropriate levels' before approaching courts.⁸³ The deliberately ambiguous language 'all appropriate levels' creates procedural uncertainty that SASCOC can exploit to indefinitely delay constitutional oversight by claiming additional internal review tiers remain available.

The six-layer procedural architecture established through Articles 50.1 through 50.6 demonstrates the exhaustion requirement's oppressive complexity.⁸⁴ Disputes must progress through: (1) internal member organisation resolution; (2) SASCOC's Judicial Body review; (3) mediation facilitated by SASCOC's CEO; (4) arbitration under AFSA rules; (5) potential international arbitration before CAS; and (6) specialised disciplinary proceedings under distinct procedures. Each layer introduces additional time delays, costs, and procedural requirements that disproportionately burden individual athletes and smaller sporting bodies seeking redress.

⁸¹ *Affordable Medicines Trust and Others v Minister of Health and Another* (n 8)

⁸² Hoexter C *Administrative Law in South Africa* 2nd ed Cape Town: Juta (2012) 124–128

⁸³ *SASCOC Constitution*, art 50.1.1

⁸⁴ *SASCOC Constitution*, arts 50.1-50.6

The constitutional deficiency lies not in requiring reasonable internal review but in constructing procedural labyrinths designed to frustrate rather than facilitate justice. The cumulative effect creates barriers violating section 34's guarantee of accessible dispute resolution in multiple ways. Temporally, exhausting all internal remedies can consume months or years, rendering final judicial review meaningless for athletes whose career windows are measured in seasons. Financially, each procedural tier imposes costs including representation fees, arbitration deposits, and travel expenses that create insurmountable barriers for less-resourced complainants.

Juliana Barrett v SASCOC illustrates these exhaustion requirements' devastating practical impact.⁸⁵ Barrett's exclusion from the 2016 Rio Olympics team despite meeting African qualifying standards led to a five-year legal battle that continued long after her Olympic opportunity had passed. The mandatory progression through SASCOC's multiple internal review tiers meant that by the time judicial review became available, the underlying dispute was moot—Barrett had retired, and the Olympic Games had concluded.

CSA's Memorandum of Incorporation Articles 37.3 and 37.8 establish similarly burdensome multi-tiered requirements.⁸⁶ Article 37.3 mandates initial resolution attempts through internal club and member mechanisms before CEO referral, while Article 37.8 requires appeal deposits determined by the Board on case-by-case bases for accessing arbitration review. This structure creates sequential procedural hurdles where failure at any tier prevents progression to meaningful external review.

The *Western Province Cricket Association v Cricket South Africa* case exposed these procedural obstacles' real-world impact.⁸⁷ When WPCA challenged CSA's suspension of its board over the Newlands Cricket Ground redevelopment project, mandatory progression through mediation with CSA's CEO delayed resolution by several months while substantially increasing costs. The eventual arbitral ruling in WPCA's favour vindicated the challenge but came too late to prevent significant institutional disruption and financial harm.

SAFA's Constitution Article 58 establishes the Dispute Resolution Committee as the initial mandatory forum for disputes within SAFA and its affiliates, requiring exhaustion of this internal

⁸⁵ *Juliana Barrett v SASCOC*, South Gauteng High Court, Johannesburg

⁸⁶ *CRA Memorandum of Incorporation*, arts 37.3, 37.8

⁸⁷ *Western Province Cricket Association v Cricket South Africa* (Arbitration Decision, 2019)

mechanism before external review becomes available.⁸⁸ Articles 68 and 69's provision for progression to the National Disciplinary Committee and National Appeal Board creates additional mandatory tiers.⁸⁹ Article 71's establishment of an Arbitration Tribunal as the 'final' internal forum before potential court access means complainants must successfully navigate at least three internal review levels before section 34's constitutional guarantee of court access becomes practically available.⁹⁰

The *Royal AM Football Club v South African Football Association* case demonstrates how courts have problematically deferred to these exhaustion requirements even where substantial justice concerns are apparent.⁹¹ When Royal AM challenged SAFA's relegation and promotion procedures, the court dismissed the application on grounds that Royal AM had failed to exhaust SAFA's internal mechanisms. This judicial deference to procedural formalism over substantive justice represents concerning prioritization of organizational autonomy over constitutional rights protection.

The exhaustion requirements violate section 34 through multiple mechanisms. First, they create temporal barriers that render constitutional remedies meaningless for time-sensitive disputes involving competitive selections, disciplinary sanctions, or contract terminations. Second, they impose financial burdens that disproportionately disadvantage less-resourced complainants who cannot afford to litigate through multiple procedural tiers. Third, they create procedural complexity that advantages legally sophisticated repeat players—the sporting organizations—over individual athletes lacking insider knowledge of arcane procedural requirements.

The Constitutional Court's jurisprudence establishes that administrative law principles cannot be weaponized to undermine constitutional rights.⁹² In *Minister of Health v New Clicks South Africa (Pty) Ltd*,⁹³ the Court emphasized that while reasonable procedural requirements serve legitimate administrative purposes, they cannot create insurmountable barriers to constitutional remedies. The Court held that exhaustion requirements must be reasonable, proportionate to legitimate

⁸⁸ *SAFA Constitution*, art 58

⁸⁹ *SAFA Constitution*, arts 68-69

⁹⁰ *SAFA Constitution*, art 71

⁹¹ *Royal AM Football Club (Pty) Ltd v National Soccer League and Others* (2025/054266) [2025] ZAGPPHC 664 (7 July 2025)

⁹² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (n 56)

⁹³ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

objectives, and subject to exceptions where internal remedies would be inadequate, ineffective, or unduly delayed.⁹⁴

Sporting constitutions' exhaustion clauses fail these constitutional standards. They are unreasonable in requiring navigation of six or more procedural tiers before constitutional court access. They are disproportionate in imposing temporal and financial burdens that exceed any legitimate administrative efficiency gains. They lack meaningful exceptions for circumstances where internal remedies cannot provide adequate relief.

4.3 Independence and Impartiality Deficiencies

Section 34's requirement for dispute resolution before 'independent and impartial' tribunals embodies fundamental principles of natural justice demanding that adjudicators remain structurally and decisionally free from conflicts of interest or external pressure.⁹⁵ Sporting constitutions systematically compromise these requirements through controlled appointment processes, financial dependencies, and institutional relationships that create reasonable apprehensions of bias.

SASCOC's Constitution Article 50.2 establishes a Judicial Body comprising at least five members appointed by SASCOC's board, with the requirement that not less than 50% plus one member be senior advocates or retired judges.⁹⁶ While the professional qualification requirement suggests commitment to legal expertise, the appointment mechanism creates fundamental independence problems. The board whose decisions the JB reviews controls selection of its purported overseers, creating structural conflicts of interest that compromise impartial adjudication.

This arrangement violates Constitutional Court precedent establishing that adjudicative independence requires both subjective impartiality of individual decision-makers and objective structural arrangements eliminating reasonable apprehensions of bias.⁹⁷ In *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd*,⁹⁸ the Court emphasised

⁹⁴ Ibid [96]-[102].

⁹⁵ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

⁹⁶ *SASCOC Constitution*, art 50.2

⁹⁷ *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A).

⁹⁸ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* 2000 (3) SA 705 (CC).

that independence must be assessed from the perspective of reasonable observers evaluating whether institutional arrangements create legitimate concerns about impartiality.

The *Chess South Africa v SASCOC* case demonstrates how compromised independence enables arbitrary organizational actions.⁹⁹ SASCOC suspended Chess SA without specific allegations or evidence, effectively preventing participation in competitions. The organization's internal review mechanisms failed to provide meaningful oversight because the JB members reviewing the suspension were appointed by the same board that imposed it. Only external judicial intervention revealed that SASCOC's procedures lacked transparency and failed to meet basic fairness requirements.

CSA's Memorandum of Incorporation Article 37.7.3 exemplifies similar independence problems through its controlled arbitrator selection mechanism.¹⁰⁰ The provision requires CSA's CEO to provide a list of three possible arbitrators from which parties select one by mutual consent. This arrangement creates inherent conflicts of interest as the selection process remains under CSA's administrative control. The CEO, as CSA's chief executive officer accountable to the board, has institutional incentives to propose arbitrators likely to favor organizational interests.

The requirement that arbitrators be legally qualified with minimum ten years' experience, while enhancing formal credentials, cannot remedy structural bias inherent in CSA-controlled selection.¹⁰¹ Even highly qualified adjudicators operating within institutionally captured frameworks face subtle pressures to align with organizational expectations when future appointment opportunities depend on satisfying the entity controlling selection.

SAFA's Constitution Articles 67.4, 68, and 69 attempt to address independence through provisions prohibiting judicial body members from belonging to other SAFA bodies simultaneously and requiring legal qualifications for committee chairpersons.¹⁰² These provisions represent minimal and insufficient guarantees of adjudicative independence. Article 67.4 addresses only the most blatant forms of structural bias without addressing subtle forms of institutional capture including financial dependence, career incentives, and organizational loyalty pressures.

⁹⁹ *Chess South Africa v SASCOC* (n 1)

¹⁰⁰ *Cricket South Africa Memorandum of Incorporation*, art 37.7.3.

¹⁰¹ *ibid*

¹⁰² *SAFA Constitution*, arts 67.4, 68-69

The inadequacy of these nominal protections was exposed in *Sinenkani FC v South African Football Association Eastern Cape*,¹⁰³ where Sinenkani FC alleged that a disciplinary committee member held concurrent roles within executive structures in direct contravention of Article 67.4's prohibition. SAFA EC summarily dismissed these allegations without investigation or reasoned explanation, forcing external redress.

The financial dimension of independence receives inadequate attention across sporting constitutions. None explicitly address how adjudicators are compensated, whether remuneration comes directly from organisational budgets, or whether adjudicators have secure tenure protecting against arbitrary removal. These omissions enable subtle financial dependencies that compromise decisional independence.¹⁰⁴

The *South African Football Association v Mangope* case revealed how independence deficiencies enable procedural injustices.¹⁰⁵ The National Disciplinary Committee disciplined an official in his absence after providing inadequate notice, failing to provide crucial documentation, and denying opportunity to present witnesses. The South Gauteng High Court condemned these procedural failures and set aside the decision for violating natural justice principles.

The European Court of Human Rights' decision in *Mutu and Pechstein v Switzerland* provides instructive comparative jurisprudence regarding independence requirements in sports arbitration.¹⁰⁶ The Court held that even the Court of Arbitration for Sport violated Article 6's fair trial guarantee due to insufficient independence from the International Olympic Committee and international sports federations. The Court emphasized that adjudicative independence requires structural arrangements ensuring freedom from institutional pressure. South African sporting constitutions fall substantially short of these international standards. Their controlled appointment mechanisms, financial dependencies, organisational relationships, and inadequate conflict-of-interest safeguards create systemic independence and impartiality deficiencies that violate section 34's requirements.

¹⁰³ *Sinenkani FC v South African Football Association Eastern Cape (SAFA EC)* (Arbitration Tribunal)

¹⁰⁴ Forsyth C "The provenance and protection of legitimate expectations" (1988) 47 *CLJ* 238 at 240

¹⁰⁵ *South African Football Association v Mangope*

¹⁰⁶ *Mutu and Pechstein v Switzerland* Apps nos 40575/10 and 67474/10 (ECtHR, 2 October 2018).

4.4 Procedural Complexity and Resource Asymmetries

Section 34's guarantee of meaningful access to dispute resolution requires consideration of practical barriers including procedural complexity and resource asymmetries that may render constitutional remedies formally available but practically inaccessible.¹⁰⁷ Sporting constitutions create systematic advantages for well-resourced institutional defendants over individual complainants through complex procedures, specialised knowledge requirements, and financial barriers.

The procedural architecture established across sporting constitutions reveals deliberate complexity serving multiple functions beyond legitimate case management. SASCOC's Constitution Article 50 exemplifies this strategic complexity through its six-tier procedural framework requiring progression from internal member organization resolution through Judicial Body review, mediation, arbitration, international arbitration, and specialized disciplinary proceedings.¹⁰⁸ Each tier employs different procedural rules, creating fragmentation that advantages institutional parties.

This procedural fragmentation creates several constitutional problems. First, it requires complainants and their legal representatives to master multiple distinct procedural regimes. Second, it prevents development of coherent procedural precedents. Third, it enables strategic manipulation where sophisticated institutional parties can exploit procedural technicalities. Fourth, it creates information asymmetries where organizations possessing institutional memory navigate procedures efficiently while individual complainants struggle.

CSA's Memorandum of Incorporation Article 37 creates similar complexity through its multi-tiered dispute resolution approach.¹⁰⁹ Article 37.5's requirement that disputes be referred 'not later than 10 Business Days after the date on which the issue in dispute between the parties arose' imposes unreasonable temporal constraints that disproportionately disadvantage under-resourced complainants.¹¹⁰ This abbreviated timeframe provides insufficient opportunity to gather evidence, secure legal representation, and formulate claims.

¹⁰⁷ *Bel Porto School Governing Body v Premier; Western Cape* 2002 (3) SA 265 (CC)

¹⁰⁸ *SASCOC Constitution*, art 50.

¹⁰⁹ *CRA Memorandum of Incorporation*, art 37

¹¹⁰ *Ibid* art 37.5

The *Gauteng Cricket Board v Cricket South Africa* dispute over Wanderers Stadium hosting rights illustrated how procedural complexity advantages institutional parties.¹¹¹ CSA's dominant position enabled it to control mediation agenda-setting, mediator selection, and procedural timelines, compromising the purportedly neutral process. The financial dimension of resource asymmetries creates particularly acute access barriers. CSA's Article 37.7 deposit requirements, determined by the Board on case-by-case bases, establish inherent access barriers with disproportionate impact on financially constrained complainants.¹¹² SASCOC's alignment with AFSA for arbitration services imposes substantial economic barriers effectively denying access to many athletes.¹¹³ The commercial arbitration model imposes costs including arbitrator fees ranging from R15,000 to R50,000 per day, venue expenses, administrative fees, and mandatory legal representation that create prohibitive barriers for individual athletes.

The *Nyoka v Cricket South Africa* case exemplified how resource asymmetries compound procedural complexity to deny justice.¹¹⁴ Dr Mtutuzeli Nyoka challenged his dismissal as CSA president after raising concerns about financial irregularities. Despite the substantive merit of his claims, Nyoka struggled to navigate CSA's complex procedural requirements while facing an organisation with unlimited legal resources. The representation dimension creates additional asymmetries. While sporting organisations maintain dedicated legal departments or retain specialist sports law firms on ongoing bases, individual athletes must secure representation for each procedural phase. SASCOC's requirement for progression through commercial arbitration necessitates representation by counsel experienced in arbitration procedure, while potential CAS appeals require specialists familiar with Swiss law and international sports arbitration—expertise commanding premium fees beyond most athletes' means.¹¹⁵

The transparency deficits characterizing sporting constitutions' dispute resolution frameworks create additional information asymmetries. SASCOC's arbitration proceedings conducted according to AFSA rules operate under confidentiality requirements preventing public scrutiny.¹¹⁶

¹¹¹ Khanyiso Tshwaku, 'Cricket SA and Gauteng board set for collision over Wanderers hosting rights' *TimesLIVE* (28 April 2020) <https://www.timeslive.co.za/sport/cricket/2020-04-28-cricket-sa-and-the-gauteng-provincial-board-seem-headed-towards-a-collision/>

¹¹² *CRA Memorandum of Incorporation*, art 37.7

¹¹³ *SASCOC Constitution*, art 50.4

¹¹⁴ *Nyoka v Cricket South Africa* (2011/8727) [2011] ZAGPJHC 32 (15 April 2011)

¹¹⁵ *SASCOC Constitution*, art 50.5

¹¹⁶ *AFSA Arbitration Rules*, r 28

CSA's Article 37.7.8 makes arbitration decisions 'final and binding' without requiring public disclosure of reasoning or outcomes.¹¹⁷ This opacity prevents complainants from understanding how similar disputes have been resolved, denying access to precedential guidance.

The cumulative effect of procedural complexity and resource asymmetries is that sporting constitutions create systematic advantages for institutional defendants that violate section 34's guarantee of meaningful access to dispute resolution. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,¹¹⁸ the Constitutional Court emphasised that administrative law principles must be applied purposively to ensure substantive fairness rather than technical formalism.

5. Conclusion

The analysis of dispute resolution frameworks within South African sporting bodies reveals systemic constitutional violations that extend beyond isolated irregularities to pose fundamental challenges to constitutional democracy. Organisations such as SASCOC, SAFA, and CSA have developed parallel justice systems that shield decision-making from genuine constitutional scrutiny, while preserving a façade of procedural fairness. These frameworks institutionalise resistance to constitutional accountability, undermining both individual rights and the coherence of South Africa's transformative constitutional order.

Sporting constitutions employ interconnected mechanisms that effectively obstruct meaningful compliance with section 34. Finality clauses attempt to render internal and arbitral decisions immune from review despite clear Constitutional Court precedents. Exhaustion requirements function as disguised ouster clauses, forcing individuals through costly and time-consuming processes that discourage pursuit of remedies. Adjudicative independence is compromised by controlled appointments and structural dependencies that favour organisations. Added procedural complexity, financial asymmetries, and restrictive timelines further disadvantage athletes and complainants, ensuring that constitutional guarantees remain hollow in practice.

These barriers, replicated across multiple sporting codes, demonstrate deliberate institutional design rather than accidental failure, amounting to systemic exclusion from justice. In a

¹¹⁷ CRA Memorandum of Incorporation, art 37.7.8.

¹¹⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (n 56)

constitutional order shaped by apartheid's history of exclusion, such practices are particularly troubling. Section 34's promise of access to courts was intended to expand protections, not contract them. By frustrating this right, sporting bodies subvert South Africa's transformative constitutional commitments.

The international context underscores the urgency of reform. Decisions such as *Mutu and Pechstein v Switzerland* highlight the global expectation that sports governance adhere to human rights standards. To align with both domestic and international obligations, comprehensive reform is required. A Sports Dispute Resolution Act should establish minimum procedural safeguards, create an independent Sports Ombudsman, and guarantee accessibility, transparency, and independence. Only such reforms can restore constitutional accountability while safeguarding the integrity of sporting governance.

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