

**Specific performance as remedy for breach of athletes' contracts**

by

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## SUMMARY

### SPECIFIC PERFORMANCE AS REMEDY FOR BREACH OF ATHLETES' CONTRACTS

**By Kenneth Lindsay Mould, submitted in partial fulfillment for the degree Doctor Legum in the Department of Private Law, University of Pretoria, under the supervision of Professor SJ Cornelius.**

The aim and object of this thesis are to determine the most suitable, but more importantly, effective, remedy for breach of the athlete's contract. Sport as a profession, but also a business, has never been more profitable. This has inevitably led to athletes' contracts being repudiated on an alarming and global scale. Contractually-determined formulae for remunerating parties who have, or will be, suffering damages due to the repudiation of either a professional athlete or a professional sports club, union or franchise of the athlete's contract between them, has failed to stem the ever-rising tide of breach of athletes' contracts. Therefore, this thesis has set out not to suggest ways in or formulae by which a disadvantaged party may be remunerated if a professional athlete or his/her "employer" repudiates the professional athletes' contract between them, but to determine and suggest to courts which contractual remedy would be most suitable in case of breach of said type of contract, but also most effective in ensuring that parties to an athlete's contract respect the nature of the legal tool that binds them. Ultimately, the thesis aims to establish how the maxim *pacta sunt servanda*, which forms the cornerstone of the law of contract, may be protected.

Specific performance is considered the primary contractual remedy in South African law. Current South African case law suggests that South African courts would have no objection to compelling a professional athlete who wishes to rescind his contract prematurely (that is, before the contract expires) to honour said contract through an order of specific performance. However, one of the unique challenges presented by this thesis is the fact that sport is a global profession. This means that athletes ply their trade in various jurisdictions in which they are not necessarily domiciled. Whereas, for example, specific performance is the primary contractual remedy in South African law, it is but a secondary one in English law, which would only be granted if equity so demands. Many professional South African athletes of several different sporting codes are under contract with English sports clubs, but represent South Africa at international level- often in terms of a totally different athlete's contract. If

one set of rules were to apply to breach of the former, and a different set of rules to the latter, it is rather obvious that no legal certainty would be created. Therefore, this thesis investigates the different contractual remedies available for breach of athletes' contracts, but also the preferred remedies in different jurisdictions across the world. Ultimately, the thesis suggests a "common denominator" as far as remedies are concerned which is not only acceptable to various jurisdictions, but would also be effective in decreasing the regularity at which athletes' contracts are repudiated.

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## CHAPTER 1: INTRODUCTION AND BACKGROUND

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### 1.1.Introduction

Selected sporting codes have been regulated according to rules of professionalism for decades, even centuries. Other codes have acquired professional status more recently, while even other sporting codes function on either semi-professional or amateur bases. Professionalism in sport has provided the greatest of its participants, aptly referred to as “athletes”, with the opportunity of earning a living through practicing and exhibiting their God-given talents and skills for the enjoyment of the remaining majority of the human race (that is, those not blessed with the potential to play sport on a professional basis). It is vitally important to establish the meaning of the terms “athlete” and “sport” at the commencement of this thesis. The Oxford English Dictionary defines an “athlete” as someone who is good at sports, or a person who competes in track and field events. This definition is, however, too narrow for the purposes of this thesis. The Dictionary’s definition of “sportsman” is “a person who takes part in sport” or “a person who behaves in a sporting way”. A combination of these definitions does provide one with a more inclusive indication of what the term “athlete” entails, but the term “athlete” as it applies in this chapter is much broader.

From the basic definitions above it may be gathered that an athlete is someone who participates in sport. This is confirmed by the South African Institute for Drug-Free Sport’s<sup>1</sup> definition of an athlete, which reads as follows:

“(An athlete is) any person who participates in sport at the international level (as defined by each International Federation), the national level (as defined by each National Anti-Doping Organization, including, but not limited to those persons in its registered testing pool), and any other competitor in sport who is otherwise subject to the jurisdiction of any signatory or other sports organization accepting the Code.”

The term “sport” is in itself one that must be defined in order to clarify the use thereof throughout this thesis. According to Anderson,<sup>2</sup> “sport” in a traditional sense may refer either to “localised, non-competitive, quasi-physical leisure pursuits of a custom-based nature”, or, in a more contemporary sense, to “codified competitive and highly regulated physical

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<sup>1</sup> “SAIDS”.

<sup>2</sup> Anderson (2010) 4.

activities that have global appeal.” Gardiner<sup>3</sup> adds that sport is a human activity that exists somewhere along the continuum of work and play. It is the latter two explanations of what “sport” entails that is alluded to in this thesis.<sup>4</sup> Anderson lists a number of questions which may be considered in determining whether a certain activity could in fact be considered a “sport”, and the participants in such activity “athletes”. The first of these questions is aimed at establishing whether the activity in question involves physical skills, and whether these physical skills can be developed (as opposed to these skills being inherent in the individual).<sup>5</sup> A positive answer to this question will serve as an indication of the activity in fact being sport. A second question, or rather issue, raised by Anderson is whether all members of the community have access to the activity. This refers to the cost of the activity in question, but also to potentially exclusive factors such as gender or race.<sup>6</sup> Closely related to this question or issue, is the question of whether the activity is governed by rules and organisation, both nationally and internationally.<sup>7</sup> If so, it is certainly more likely to be classified as a *bona fide* sport. The last few questions suggested by Anderson to ascertain whether an activity does in fact constitute a sport, deal exclusively with the skills required to participate effectively in such sport. The nature and exclusivity of these skills are key aspects of what is discussed in this chapter: parties to a contract who possess unique skills, require a unique contract to manage and regulate these skills. Anderson states that once an activity is unique in nature, requires strategy and tactics in order to be performed effectively, poses both physical and mental challenges to participants therein, and involves any degree of (acceptable) risk to the participants, the activity will most likely classify as a sport,<sup>8</sup> and participants as sportsmen or “athletes”.

The abovementioned questions and issues aid in establishing a definition of sport and an athlete in a lay sense. However, the need for a legal definition of “sport”, and, consequently,

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<sup>3</sup> Gardiner *et al* (2012) 14.

<sup>4</sup> Another very important point that should be mentioned is that “sport” as it is used in the context of this thesis refers exclusively to those activities that are regulated in a lawful way. A person who participates in illegal “sporting” activities which, for example, involves cruelty to animals, is not considered an “athlete”

<sup>5</sup> Anderson 5.

<sup>6</sup> Anderson 6; Gardiner *et al* 20. Louw (2012) at 23 makes specific mention of the political situation in the Republic of South Africa, whose sport was for several years prior to 1994 organised and played according to strict regulations aimed at separating the different races of the country. In considering the question posed by Anderson, this could have resulted in any sport in South Africa played at the time being considered merely an illegal activity, and not a sport at all.

<sup>7</sup> Anderson 6; Gardiner *et al* 20.

<sup>8</sup> *Ibid*. In England, another requirement is added to the list discussed in the text: the activity in question must have at least five thousand regular participants within the United Kingdom alone.

the term “athlete” was first raised by Gardiner in 1996.<sup>9</sup> In the United Kingdom, the question of what exactly “sport” entails has been answered on an *ad hoc* basis in British case law. However, for the purposes of this chapter and this thesis, I shall depend on Anderson and Gardiner’s guidelines as to what exactly the terms “sport” and “athlete” entail.

The business of professional sport, especially in codes such as Federation and American football, golf, basketball, baseball and tennis, has become one of the highest-remunerated professions in the world. As a result of this, commercial regulation of sport by means of contract has become inevitable.

The object of a contract is to regulate the voluntary distribution of money, other assets and services within any given society.<sup>10</sup> Different countries with different systems of law have however developed different approaches to the treatment of contracts. Among the variables, however, there are certain elements and features which are identical in all contracts, regardless of the jurisdiction in which they are created. In Roman law, contracts required some special formal feature to make them binding.<sup>11</sup> Centuries of development have led to the global notion that a contract is based on consensus between the parties thereto: the so-called “meeting of the minds”. What this entails is that if two parties are *ad idem* as to the contents and (legal) consequences of their agreement, they will be bound thereto.<sup>12</sup> The requirement of consensus as the basis of a contract is founded in Roman law, and developed into the doctrine of *pacta sunt servanda* in Roman-Dutch law as a result of canonical influence.<sup>13</sup> The effect of *pacta sunt servanda* is that a party to a contract who has entered into said contract freely, willingly and while of sound mind, must be held bound to the terms of the contract in question.<sup>14</sup> This principle is accepted universally in all systems of contract law.<sup>15</sup>

Human nature inevitably dictates, however, that despite the doctrine of *pacta sunt servanda*, contracts entered into freely and willingly are sometimes dishonoured by the parties thereto

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<sup>9</sup> Gardiner “Sport: a need for a legal definition?” 1996 4(2) *Sport and the Law Journal* 31.

<sup>10</sup> Joubert in Visser (Ed) (1989) 319.

<sup>11</sup> *Ibid.*

<sup>12</sup> Voet 2 14 9; Lee (1953) 28; Joubert (1987) 28; Christie (2011) 12; *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

<sup>13</sup> Visser “The principle *pacta sunt servanda* in Roman and Roman Dutch law, with specific reference to contracts in restraint of trade” 1984 *SALJ* 646.

<sup>14</sup> *Gr 2 11 1 1 and 3*, as translated by Steyn. *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

<sup>15</sup> According to Hefer “Billikheid in die kontraktereg volgens die Suid-Afrikaanse Regskommissie” 2000 *TSAR* 142.

for reasons often plausible but just as often not. Equity<sup>16</sup> demands that a contractual party, against whom breach of contract has been committed, should have a valid remedy in order to rectify said breach. The primary remedy for breach of contract in Roman-Dutch law, and consequently South African law, is that of specific performance of the contractual obligations.<sup>17</sup> Compelling a party, who has committed breach of contract, to specifically perform his contractual obligations, is in alignment with the doctrine of *pacta sunt servanda*, and therefore has remained the primary remedy in South African law of contract despite the significant influence of the Constitution<sup>18</sup> as well as English doctrine. In fact, Cameron JA (as he was at the time) stated specifically in the landmark case of *Brisley v Drotosky*<sup>19</sup> that the values enshrined in the Constitution required courts to uphold contracts rather than striking them down, as contractual autonomy informs the constitutional value of dignity.

The main contribution this thesis aims to make, is to determine whether the remedy of specific performance, although the primary contractual remedy in South African law, is the most suitable remedy in case of breach of a so-called “athlete’s contract”. Recent South African decisions<sup>20</sup> have indicated a willingness to hold professional athletes bound to their contracts should they decide to repudiate said contracts for whatever reason. Although this does seem to create some legal certainty, there are two significant problems as far as the mentioned courts’ willingness to grant specific performance as remedy in case of breach of athletes’ contracts is concerned: firstly, it differs from foreign jurisdictions’ viewpoints<sup>21</sup> on the granting of specific performance of contracts involving personal services, such as professional athletes’ contracts. These viewpoints, especially the ones followed in Anglo-American systems of law,<sup>22</sup> probably originated in the *locus classicus* of English law, *Lumley v Wagner*.<sup>23</sup> *In casu*, the court decided that while injunctions<sup>24</sup> have previously been granted

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<sup>16</sup> The term “equity” is derived from English law and is unfamiliar to South African law. However, the principles governing equity as a concept are firmly established in the Constitution of the Republic of South Africa, 1996.

<sup>17</sup> Voet 6 1 31, as translated by Gane (1955); Lambiris (1989) 35.

<sup>18</sup> The Constitution of the Republic of South Africa, 1996.

<sup>19</sup> 2002 (4) SA 1 (SCA).

<sup>20</sup> Most notably *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 5 SA 697 (C) and *Vrystaat Cheetahs (Edms) Bpk v Mapoe and Others* (Unreported case number 4587/2010 delivered by the Free State Provincial Division of the High Court on 29 September 2010).

<sup>21</sup> The specific and relevant jurisdictions referred to mostly in this thesis are those in several states in the United States of America, the United Kingdom, several jurisdictions within Europe, as well as selected states in Australia and finally New Zealand. The reason for this is that the jurisprudence relating to athletes’ contracts in these jurisdictions has developed significantly since sport became professional at different points in time.

<sup>22</sup> The systems referred to here are the ones which have strong English common law roots.

<sup>23</sup> 42 E.R. 687 (1852).

by English courts to restrain the sale of goods, “it has never restrained an actor or a singer, for this reason that it cannot compel the specific performance and make a Defendant act or sing”.<sup>25</sup> By implication, courts basing their decisions on English common law would be extremely reluctant to order specific performance of athlete’s contracts. The reason why this is a significant legal problem, is because of the fact that sport is a global profession. This implies that professional South African athletes often ply their trade overseas, return, and then go overseas again. If different sets of rules and values were to apply to the same sporting code practiced in different countries, legal certainty would never be created as far as the most suitable remedy for breach of athletes’ contracts is concerned. There is no doubt whatsoever that the regularity at which athletes’ contracts are repudiated by both employers and employees is disconcerting. This may be a seemingly controversial statement, but one may simply pay attention to daily media reports to realise that it is indeed accurate. In fact, Le Roux<sup>26</sup> has stated that “the repudiation of contracts of personal services is commonplace. Even in sport, the repudiation of contracts is pretty much a seasonal occurrence.” Anderson<sup>27</sup> agrees, stating that “it is of particular note that players terminating their contracts prematurely has become a contentious one in football...” Different professional sporting codes have implemented regulations and formulae in an attempt to stem the tide of “contract hopping” by professional athletes, as well as to create a framework in which player transfers should take place. While plausible, these have done little to solve the problem. The solution to the disconcerting rate at which professional athletes’ contracts are being repudiated does not lie in transfer rules and/or formulae for compensation to parties against whom breach of contract has been committed. It lies in determining the most suitable remedy for breach of an athlete’s contract both in South Africa and abroad. The aim of this thesis is to suggest to South African courts the most suitable remedy for breach of an athlete’s contract from the viewpoint of South African common law, but also as perceived by foreign jurisdictions in which professional South African athletes ply their trade. The aimed contribution is made all the more significant by the fact that there has been no decision in South Africa by the Supreme Court of Appeal on the question as to the most suitable remedy for breach of an athlete’s contract, which is the second problem with the two South African decisions referred to above.

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<sup>24</sup> Injunctions are Court orders compelling a person to do something specific or to refrain from doing something specific (negative injunction). The remedy is better known in South African law as “interdict”.

<sup>25</sup> *Lumley v Wagner* 42 E.R. 687 690.

<sup>26</sup> Le Roux “How divine is my contract? Reflecting on the enforceability of player or athlete contracts in sport” 2003 SA *Merc LJ* 120.

<sup>27</sup> Anderson 257.

Because of the *sui generis*<sup>28</sup> nature of the athlete's contract, it cannot merely be accepted that because specific performance is the primary contractual remedy for breach of contract in South African law, it should automatically possess similar status as far as the athlete's contract is concerned. Other options must be considered and discussed, and very importantly the question must be answered as to why foreign countries with a more established record as far as professional sport is concerned, are reluctant to order specific performance of athletes' contracts.

## 1.2. Background

In order to address the questions posed above effectively, it is imperative that the origins of the contractual obligation are established. The development of a contract since Roman law will be traced and discussed in chapter 2 of this thesis, in order to determine whether the remedies which have been assigned for breach of contract by different jurisdictions would be both suitable to and effective in case of breach of athletes' contracts (and more importantly, which of these remedies would be *most* suitable). In order to establish the extent to which contracts are enforceable, chapter 2 contains a detailed analysis of the origins and development of the contract as a way of creating legal consequences between contracting parties. The main challenge of such an analysis is the fact that especially in early Roman law<sup>29</sup> little heed was paid to contracts as a manner of creating legal obligations between parties. The chapter discusses the first occurrence of what may be deemed a "contract" in Roman law – the so-called *nexum*, and continues to dissect and discuss its development throughout Roman and Roman-Dutch law, as well as English law, up to current South African law's perception of the term "contract". The aim of establishing the true origins of the modern notion of "contract" is to eventually establish the origins of the athlete's contract. If the true nature of the athlete's contract is uncertain, it would be irresponsible and quite frankly impossible to determine the most suitable contractual remedy in case of breach of said type of contract.

Chapter 3 of this thesis will examine and discuss how the meaning of the term "athlete" has developed through the ages to what (or rather, who) is perceived as an "athlete" in modern professional sports law. While the layman's definition of an "athlete" does not provide one with a clear understanding of what the term entails, chapter 3 will provide similar definitions,

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<sup>28</sup> "Unique".

<sup>29</sup> More specifically 753-509 BC, the so-called period of Monarchy.



among others that of “sport”, in order to establish an encompassing definition of a person participating as a professional in the business of sport. In order to establish the instances in which a person would be considered a professional athlete, chapter 3 contains a list of questions provided by Anderson<sup>30</sup> which may be used to guide one in determining whether a particular person is a professional athlete or not. The list of questions includes considerations such as whether the relevant activity involves physical skills, is governed by rules and regulations and to what extent specialised skills of a certain level are required to participate in the activity.

In chapter 3, it will be indicated that the closest resemblance to the modern day athlete’s contract found in *Roman-Dutch* law was the *locatio conductio operarum*<sup>31</sup> and the *locatio conductio operis*.<sup>32</sup> Athletes’ contracts, depending on the sporting code involved, could very well resort under any of these. It will be indicated, however, that although the athlete’s contract resembles occurrences of the abovementioned two groups of contract, it contains too many elements that make it different from ordinary contracts of service or piece work for it to be merely classified as such. Roman-Dutch law did provide elements which should be present in all contracts in order to ensure the validity thereof. These elements are both mentioned and discussed briefly in chapter 3.

It has been stated above that the athlete’s contract is *sui generis*. This is not a statement that can be made without proper substantiation. The reason is that many prominent writers on sports law perceive said contract merely as an occurrence of the contract of service or the contract of piece work.<sup>33</sup> This, as will be explained, is an oversimplification, as there are too many factors that point to the absolute uniqueness of the athlete’s contract for it to be classified as merely one of either service or piece work. The ultimate question which will be posed in chapter 3 is subsequently what the true nature of the athlete contract is. If it is alleged that the athlete’s contract is something different from the contracts of service or piece work, then the *sui generis* elements of such contract must be identified and dissected. This will be done in chapter 3, and finally a detailed definition of an “athlete’s contract” will be provided in said chapter.

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<sup>30</sup> Anderson 4.

<sup>31</sup> Contract of service. A detailed discussion of its origins and meaning is found in chapter 2.

<sup>32</sup> Contract of piece work. A detailed discussion of its origins and meaning is found in chapter 2.

<sup>33</sup> Among other Louw 222 and Gardiner *et al* 394.

The primary question posed in this thesis is, however, not what an athlete's contract entails. Rather, this thesis is aimed at contributing to solve the problem of constant and regular breach of athletes' contracts on a global scale. The pertinent question that is posed is whether the contractual remedy of specific performance could stem the tide of repudiation of athletes' contracts. Put differently: will compelling an athlete or club (who repudiates a contract) aid in ensuring that athletes' contracts are honoured rather than repudiated? The reason why this is such an important question, is because, as will be shown, contractual remedies such as damages have proved insufficient for purposes of avoiding breach of contract. This is probably due to the incredibly large amounts of money that are being paid for the services of professional athletes in particular. The consequence of this is that if a club desperately requires the services of a particular athlete, it will pay whatever amount needed –including any amount of damages for breach of contract. For the very same reason, penalty clauses in athletes' contracts and the payment of transfer fees have likewise failed to reduce the regularity of breach of athletes' contracts. Because of their *sui generis* athletic abilities, people pay huge amounts of money to see athletes plying their trade, and therefore, “punishing” such an athlete or club by demanding him or it to pay an amount of money, would have very little influence.

It is a fact, though, that compelling any person to perform services of a personal nature (such as the playing of sport) against his will, will probably cause such person to do so with diminished enthusiasm.<sup>34</sup> For this reason, a critical question posed by this thesis is to what extent a court may enforce the remedy of specific performance, if doing so would possibly infringe on the athlete's right to freedom of trade.<sup>35</sup> In order to provide a satisfactory answer to this question, this thesis will trace and discuss the origins and development of the remedy of specific performance. In chapter 4, the seeming divide between academia such as Van der Merwe<sup>36</sup> and Christie,<sup>37</sup> who (among others) state that the remedy of specific performance was unknown in Roman law, and authors such as Du Plessis<sup>38</sup> and Lambiris,<sup>39</sup> who state that the former submissions are an oversimplification, will be addressed and suggestions offered

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<sup>34</sup> This has been argued in many cases. See for example the South African decision by Desai J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 5 SA 697 (C).

<sup>35</sup> The right to freedom of trade is specifically provided for in section 22 of the Constitution of the Republic of South Africa, 1996. However, it is a globally acknowledged right that applies to professional athletes in particular, as can be gathered from cases such as the landmark decision in *Union Royale Belges des Sociétés de Football ASBL v Bosman* [1995] ECR I-4 1 9 2.

<sup>36</sup> Most notably in *Van der Merwe et al* (2012).

<sup>37</sup> Most notably in *Christie* (2011).

<sup>38</sup> Du Plessis “Spesifieke nakoming: ‘n Regshistoriese herwaarding” (1988) *THRHR* 349.

<sup>39</sup> *Lambiris* (1989).

as to these differing points of view. In order to address this rather significant difference in viewpoints, chapter 4 will trace the possible origins of the contractual remedy of specific performance throughout the different periods of Roman law. The reasoning behind this approach is that the creators of law differed from period to period, which led to a situation where there was no certainty as to whether a person could be held bound to a promise he had made freely and willingly. Justinian's *Corpus Iuris Civilis* remains the most accurate and complete codification of Roman law, and the possible presence of remedies resembling that of specific performance will be addressed in chapter 4. The importance of this chapter lies in determining whether specific performance has its roots in Roman law, in order to indicate whether the current South African legal system, which finds many of *its* roots in Roman law, is entitled to claim specific performance as its primary contractual remedy.

Whereas Roman law has undoubtedly influenced current South African law of contract, it is the Roman-Dutch system of law that serves as the common law system of the Republic. Consequently, it is important to establish whether the existence of specific performance, while uncertain in Roman law, was indeed used in Roman-Dutch law. Chapter 5 of this thesis will indicate that while the remedy was indeed well-known in Roman-Dutch law, its status as primary remedy for breach of contract was debated heavily among jurists of the time. According to Wessels,<sup>40</sup> there had always been a debate amongst Roman-Dutch jurists as to the availability of the remedy of specific performance. He states that the origin of the debate is settled in the time of the *Quatour Doctores*, where jurists such as Donellus believed that no one could be compelled to perform a certain act. On the other hand, jurists such as Cujacius opined that a party to a contract could indeed be compelled to perform an act in terms of that contract.<sup>41</sup> Chapter 5 attempts to discover the reasons for these differing opinions, by examining the points of view of the greatest Roman-Dutch writers such as Grotius, Voet, Groenewegen, Huber, Van der Keessel, Van der Linden and Van Leeuwen on the topic of specific performance as contractual remedy and the availability thereof in Roman-Dutch law. Using the writings of these authors as basis, chapter 5 discusses furthermore the Roman-Dutch procedure of “*gijzeling*” as a way of ensuring specific performance of contractual obligations in case of breach of contract. The procedure as well as the effect of “*gijzeling*” is discussed and suggested as a possible supersession of the remedy of specific performance known to South African law. The different uses of “*gijzeling*” are likewise discussed in

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<sup>40</sup> Wessels (1908) 612.

<sup>41</sup> Wessels 612; Gross “Specific performance of contracts in South Africa” 1934 *SALJ* 347 349.

chapter 5. Finally, it is established to what extent the remedy of specific performance available in South Africa is derived from Roman-Dutch law. This is important, as the remedy of specific performance could, as explained above, infringe on an individual's constitutional freedoms and right, and therefore no doubt should exist as to its status as primary contractual remedy in South African law.

Although the Roman-Dutch system of law is perceived as the common law system of South Africa, English legal influence is noticeable in especially early South African decisions on the right to and availability of specific performance as contractual remedy. This is particularly problematic, as it will be explained in chapter 6 that the English perception of specific performance differs fundamentally from the Roman-Dutch perception thereof. In a nutshell, the former system perceives specific performance as a mere equitable or secondary remedy, whereas according to the latter, as will be argued in chapter 5, specific performance is the primary contractual remedy for breach of contract. Chapter 7 will set out to indicate how South African courts throughout the twentieth century have confused the status of specific performance, up to a point where the *pacta sunt servanda*-maxim came under serious threat. Depending largely on the authoritative work of Glanvill and Blackstone, the origins and nature of English law is discussed in chapter 6, in order to illustrate how the English notion of specific performance originated and developed. The nature of the employment contract in English law is discussed to determine whether the same remedial approach would apply in English law to that type of contract. The question is also asked pertinently whether English law will ever allow specific performance of any contract involving personal services to be granted.

Ultimately, as stated above, the influence of the English notion of specific performance as contractual remedy on South African courts is discussed in chapter 7. This influence, it will be submitted, is severe, and has led to uncertainty regarding if and when specific performance should be ordered for breach of contract involving personal services that remains to this day. Chapter 7, is aimed at providing South African courts with the necessary guidelines to determine whether their "discretion" to grant specific performance of personal services should be a consideration at all and if so, to what extent.

Because of the global occurrence of repudiation of athlete's contracts,<sup>42</sup> chapter 8 of this thesis will set out to compare the treatment of athletes' contract in general, but more

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<sup>42</sup> Le Roux "How divine is my contract? Reflecting on the enforceability of player or athlete contracts in sport"

specifically the remedies available and preferred in different jurisdictions experiencing the same problem. Because of their vast experience in dealing with professional athletes' contract, case law of selected jurisdictions within the United States of America,<sup>43</sup> the United Kingdom,<sup>44</sup> as well as selected cases decided within the dominium of the European Union,<sup>45</sup> Australia and New Zealand are discussed in detail in this chapter. The primary focus of each separate discussion is to establish the most suitable contractual remedy for breach of athletes' contracts as perceived by each of the abovementioned jurisdictions. Because of the global nature of sport and the contracts governing them, South African courts cannot merely turn a blind eye towards international practices as far as the treatment of these contracts are concerned. Herein lies the contribution of chapter 8 to the thesis in general.

Because of its long tradition of professional sport,<sup>46</sup> decisions by US courts will be discussed first and foremost in chapter 8. Despite the federal system of law, in terms of which each state within the US has its own laws applicable to that state, principles guiding the treatment of athletes' contracts are applied more or less reject state borders. The reason for this is because sport in the US (as well as internationally) is played on a national scale, and the same principles apply throughout.<sup>47</sup> From the earliest US decision relating to the most suitable remedy for breach of an athlete's contract, it was clear that US courts would not easily transgress from their English common law roots. In the case of *Allegheny Base-ball Club v Bennett*,<sup>48</sup> the Pennsylvania Circuit Court was requested to restrain an athlete in breach of contract from plying his trade as professional baseball player at any other club.<sup>49</sup> In considering the application, the court stated that the contract in question "required the exercise of special knowledge, skill or judgment."<sup>50</sup> This was a clear reference to the *sui generis* nature of the athlete's contract, and pre-supposed that it would require a unique approach to determining the most suitable remedy in case of breach of said type of contract. Although specific performance was not applied for directly, the application of negative

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2003 SA *Merc LJ* at 120. See also Anderson 257, referred to in the text above.

<sup>43</sup> Hereinafter referred to as the "US".

<sup>44</sup> Hereinafter referred to as the "UK".

<sup>45</sup> Hereinafter referred to as the "EU".

<sup>46</sup> For example, the National League of baseball was founded in 1876.

<sup>47</sup> It is submitted that this is basically the same reason why this thesis investigates the availability of different contractual remedies for breach of athletes' contracts on a global scale: whilst different jurisdictions have different approaches to the suitability of the same contractual remedies, the business of sport is global and therefore demands at least some uniformity in the treatment of its contracts.

<sup>48</sup> 14 F. 257 C.C. Pa. 1882.

<sup>49</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 258.

<sup>50</sup> *Idem* at 259.

injunction<sup>51</sup> would have had the effect of compelling the athlete in question to perform his contractual duties. The court decided that on principles of equity, a contract of personal services may never be enforced, as the plaintiff in the matter possessed a remedy in law: damages.<sup>52</sup> Although subsequent US decisions followed suit, it will be indicated in chapter 8 that these courts seem to have realised the inadequacy of contractual damages as remedy for breach of athletes' contracts in particular. Subsequent decisions by US Courts as well as academic articles on the topic have indicated a willingness by US courts to grant injunctive relief to a club against whom repudiation of a contract has been committed by one of its employee-athletes.<sup>53</sup> However, whether it can be stated that US courts are willing to enforce contractual obligations, will be analysed and discussed in chapter 8.

As far as the treatment of athletes' contracts in the European Union is concerned, no other case has had such an important impact as that of *Union Royale Belges des Sociétés de Football ASBL v Bosman*.<sup>54</sup> This impact is discussed in chapter 8, as far as it has contributed not only to an explanation of what the term "athlete's contract" entails, but also the treatment of such type of contract in case of breach thereof, and the nature and enforceability of restraints of trade in athletes' contracts. According to Gardiner *et al*, the intersection of sport with the European Union is one of the most important aspects of modern sports law from a global perspective.<sup>55</sup> This is saying a lot, because of the fact that when the EU was incepted by the Treaty of Rome in 1957, it was not granted any competence as far as sport was concerned.<sup>56</sup> This position was amended in the case of *Walrave & Koch v Union Cycliste Internationale*<sup>57</sup> and confirmed in *Dona v Mantero*.<sup>58</sup> However, it was in *Bosman* that the nature of the athlete's contract and its application within the EU were alluded to for the first time within the European community. This allusion is discussed in detail in chapter 8.

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<sup>51</sup> The practical effect of this remedy would be to restrain the athlete from plying his trade with any other club but his current one. In many cases, a good argument may be made that this remedy, if granted, is actually more restrictive than that of specific performance, as explained in chapter 8. The injunction is more familiar to South African law as an "interdict".

<sup>52</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 259-260.

<sup>53</sup> Several cases and articles are discussed to support this submission, one of the most significant articles being Whitehill "Enforceability of professional sports contracts – What's the harm in it?" 1981-1982 *SW L.J.* 803. According to McCutcheon "Negative enforcement of employment contracts in the sports industries" 1997 *Legal Studies* 65, US Courts are much more inclined to prevent professional sports participants from "jumping contracts".

<sup>54</sup> [1995] ECR I-4 1 9 2.

<sup>55</sup> Gardiner *et al* 146.

<sup>56</sup> *Idem* 147.

<sup>57</sup> [1974] ECR 1405.

<sup>58</sup> [1976] ECR 1333.

The UK possesses one of the richest histories as far as the treatment of sport and the contracts governing it is concerned. For this reason, English courts' treatment of the athlete's contract will be discussed in chapter 6 of this thesis. Very importantly, Anderson<sup>59</sup> states that there are four points of note as far as the treatment of athletes' contracts in the UK is concerned. These points of note are that a professional athlete is at any given time involved in a series of contractual obligations, that minors could enter into athletes' contract with clubs, that athletes' contracts are treated in a unique way by English courts, and that the continuous nature of athletes terminating their contracts prematurely is a major concern.<sup>60</sup> In the discussion of the treatment of athletes' contracts by courts within the UK, one should constantly remind oneself of the fact that English courts would probably never grant specific performance of contracts involving services of a personal nature, such as the playing of sport. This much was established in the *locus classicus* as far as the treatment of athletes' contracts by English courts is concerned: *Walker v Crystal Palace Football Club*.<sup>61</sup> The arguments made in that case will be discussed in detail in chapter 8, in order to illustrate how English courts perceive the professional athlete's contract, but more importantly, the most suitable remedy for breach of said type of contract. The advantages and disadvantages of the preferred contractual remedy in English law – damages – are also discussed in detail in chapter 8.

Although Australian law is based on the English system of common law, it will be indicated how Australian case law has made a significant contribution to determining the true nature of the athlete's contract as well as the most suitable remedy for breach thereof. The case of *Buckenara v Hawthorn Football Club*,<sup>62</sup> which will be discussed in chapter 8, provides a relatively good idea of the above. Although the essence of the decision is the validity of a restraint of trade in an athlete's contract, which is discussed in detail in chapter 8 of this thesis, it is also an indication of Australian courts' perception on the sanctity of contract. A significant contribution of Australian law to the current chapter and the thesis in general, is that it sets out three prerequisites to be complied with if a specific employer were to claim to be a "sporting contestant".<sup>63</sup> These prerequisites are listed and discussed critically in chapter 8. Although Australian law is, like the US, administered according to federal and state law, the global nature of sport once again means that the states look towards each other for clarity

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<sup>59</sup> Anderson 279.

<sup>60</sup> Anderson 257.

<sup>61</sup> [1910] 1 K.B. 87.

<sup>62</sup> [1988] VR 49.

<sup>63</sup> These prerequisites are set out in section 16(1) of the Australian Accident Compensation Act. They were raised and decided on in the case of *Whitehead v Carlton Football Club Ltd* [2005] VSC 257.

on matters relating to athletes' contracts. The treatment of athletes' contracts by New Zealand courts will conclude the comparative study conducted in chapter 8. The significance of this discussion is found in a number of cases dealing with contractual regulation of New Zealand's main spectator sport: rugby union. As mentioned above, the importance of the comparative study conducted in chapter 8 lies in the fact that sport is a global business, and South African courts in deciding on the most suitable remedy for breach of athletes' contracts have no option but to take heed of applicable tendencies in foreign jurisdictions.

Because of the need to consider foreign case law on the treatment of athletes' contracts, particularly the most suitable remedy in case of breach thereof, it is essential to consider all the applicable contractual remedies available to a party against whom contractual repudiation has occurred. Chapter 9 of this thesis will provide detailed discussions of the origins, development and most importantly the suitability of the remedies of interdict (known in Anglo-American legal systems as "injunction"), penalty clauses and finally, damages. The main question posed in chapter 9 is whether, while specific performance is the primary contractual remedy in South Africa, the *sui generis* nature of the athlete's contract would not perhaps demand a different remedy for breach of said type of contract motivated by factors such as fairness and global precedent. The suggestions made in chapter 9 are all important, as they will be indicative of whether South African courts will have sufficient reason in future *not* to order specific performance for breach of athletes' contracts, thereby effectively diminishing the status of the remedy as perceived by role players within South African common law.

The interdict has been mentioned as potential contractual remedy and will be discussed as such in chapter 9 of this thesis. However, the actual remedy effected through an interdict is the contractual clause in restraint of trade. This clause has caused so much debate on a global scale as far as its suitability to athletes' contracts is concerned, that a discussion of its origins, development and ultimately, its suitability, requires an entire chapter to be dedicated thereto. In chapter 10, the question is once again posed pertinently whether the restraint of trade doctrine has firm roots in South African common law. Tracing the development of the doctrine from its medieval canonical roots throughout the Roman-Dutch law to how it is perceived in South African law today, chapter 10 will aim to establish whether the contractual clause in restraint of trade has any significant contribution to make in stemming the tide at which athletes' contracts are repudiated. Furthermore, the English perception of the doctrine of restraint of trade will be discussed in chapter 10, in order to establish whether



said doctrine may be the common denominator between the treatment of athletes' contract by South African courts and courts within Anglo-American legal systems. The landmark English decision of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*<sup>64</sup> will be discussed not only to indicate the perception of English courts (in the persons of the House of Lords in this case) on the doctrine in restraint of trade, but also to indicate how, once again, early South African decisions were influenced by English doctrine. The main challenge posed by the questions raised and discussions made in chapter 10 will be to focus on the discussion of (especially) South African cases that could really contribute to the main question posed in said chapter: could restraint of trade clauses in athletes' contracts diminish the regularity at which these contracts are currently repudiated on a global scale? In an attempt to meet this challenge, chapter 10 will contain only a discussion of case law relevant to the purpose mentioned above. No discussion on South African courts' perception of the doctrine in restraint of trade would be complete without a thorough analysis of the landmark decision in *Magna Alloys and Research (Pty) Ltd v Ellis*,<sup>65</sup> and this case will subsequently be discussed in detail in chapter 8, once again with the focus on the primary purpose of said chapter.

The perception does exist among especially members of the broader public that professional athletes are exclusively to blame for repudiation of athletes' contracts. This is a fallacy, and is addressed as such in chapter 11 of this thesis. The question is posed whether actions such as constructive dismissal of employee-athletes and dismissal through non-renewal of fixed-term contracts by employer clubs, unions and/ or franchises contribute to the continuing problem of breach of athletes' contracts. In order to provide a satisfactory answer to the abovementioned question, examples from both South African and foreign case law are discussed. The reason why local and foreign cases are discussed interchangeably is because the same general principles apply to the issues of dismissal by employers. However, chapter 9 will also contain a discussion of the most suitable remedy for breach of an athlete's contract by an employer, whilst the focus will be exclusively on breach of *athletes'* contracts. Because an in-depth analysis of possible contractual remedies for breach of said type of contract will be provided in chapter 9, chapter 11 will not attempt to reconfirm the information already provided in the former chapter. Such information will be used as basis for determining the most suitable remedy in case of breach of athletes' contracts by employer clubs, unions or franchises. The relevance of this chapter lies therein that it will provide a blueprint for

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<sup>64</sup> [1894] AC 35.

<sup>65</sup> 1984 (4) SA 874 (A).

employers as to the treatment of professional athletes in their employ. Furthermore, it will provide courts with a clear indication of the most suitable contractual remedy for breach of athletes' contracts by employer-clubs, unions and/or franchises.

## CHAPTER 2: THE DEVELOPMENT OF THE CONTRACTUAL OBLIGATION IN ROMAN LAW, ROMAN DUTCH LAW AND ENGLISH LAW

### 2.1. Introduction

The aim of this chapter is to establish the meaning of the term “contract”, and trace its origins and development throughout Roman law, Roman Dutch law and English law. The importance of this exercise lies in eventually determining the nature of the athlete’s contract, which is a relatively fresh concept as far as South African law, but also other jurisdictions, are concerned. The three systems of law have been selected because of the significant influence they have had on the current South African concept of a contract.

The contribution this chapter aims to make lies therein that one cannot determine the suitability of the remedy of specific performance to breach of athletes’ contracts if one does not understand the true nature of said type of contract. This chapter therefore addresses the origins of the possible predecessors to the athlete’s contract, and attempts to contribute to the question as to whether specific performance is indeed the most suitable and effective remedy for breach of contract.

### 2.2. The development of the contract in Roman law

The current South African notion of what a contract entails can only be described by means of a thorough investigation into the development of this legal tool. Justinian dealt with the broader term “obligation” by defining it as *est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura.*<sup>66</sup> It must be kept in mind, however, that the *obligationes* referred to by Justinian included any and all types of legal bonds that could be created between two parties, including delicts (or torts) and contracts.<sup>67</sup> During the early period of Roman law,<sup>68</sup> no distinction was made between obligations that arose from delictual acts and those that arose from contractual relations.<sup>69</sup> The reason for this state of affairs is that business was seldom conducted through granting credit. If a person wanted to

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<sup>66</sup> “A legal bond, whereby we are bound as of a necessity to perform something according to the law of our state.” / 3 13, as quoted in Jolowicz (1972) 159; Van Warmelo (1976) 147; Christie (2011) 3. It should be noted that in every obligatory relationship there is, on the one hand, a duty to perform, and on the other hand a right to receive performance. This is evident from the explanations of the term “obligation” provided by Christie 3; Van der Merwe *et al* (2012) 2.

<sup>67</sup> Christie 3. These legal bonds, which created obligations between the parties, were known as *vinculae iuris*.

<sup>68</sup> Generally accepted as the period before 450 b.C.

<sup>69</sup> Jolowicz 160; Van Warmelo 149; Lambiris (1989) 15; Du Plessis “Spesifieke nakoming: ‘n Regshistoriese herwaarding” 1988 *THRHR* 351.

buy a product, such person went to the vendor in question with ready currency, paid for the product and received same immediately. Before money was used as a means of payment, barter was the most common manner of commerce. It involved the exchange of goods of the same value.<sup>70</sup>

### 2.2.1. *Nexum*

The first occurrence (as far as Roman law<sup>71</sup> is concerned) of what could be deemed a “contract” was the so-called *nexum*.<sup>72</sup> In accordance with this practice, moneys were lent to certain persons, most notably plebeians, called *nexi*.<sup>73</sup> Attached to the lending of the moneys were certain formalities in accordance with which the creditor weighed the monies in the presence of witnesses and then presented same to the debtor.<sup>74</sup> A future date was agreed upon between the parties by which date the debtor had to repay the debt, failing which the creditor would receive a right to the debtor’s body.<sup>75</sup> This meant that the latter was bound to work for the former, and even in some instances be chastised by him.<sup>76</sup> If the debtor persisted in his failure to repay his debt, the creditor had the right to kill the debtor or to sell him in slavery.<sup>77</sup> The harsh “punishment” for non-compliance with the contract was intended to bring about performance. Some authors have argued that *nexum* was in fact the very first occurrence of the contractual remedy of specific performance as it is known today. This matter will be dealt with in chapter 3. Suffice to mention that while *nexum* disappeared relatively early in history,<sup>78</sup> it was the first occurrence of an actual agreement or contract between parties which created an obligation between such parties. At that point in time, it was certainly considered

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<sup>70</sup> Van Warmelo 169.

<sup>71</sup> The developmental periods of Roman law are (in broad terms) the following:

- The period of the kings (753-509 BC);
- The Roman Republic (509-27 BC);
- The Principate (27 BC- 284 AD);
- The Dominate (284-527 AD);
- Codification of Roman law under Justinian (527-565 AD).

<sup>72</sup> Jolowicz 164; Van Zyl (1983) 277.

<sup>73</sup> *Nexi* literally means “bound”.

<sup>74</sup> / 3 168; Jolowicz 164; Van Warmelo 147-148; Van Zyl 277; Du Plessis 1988 *THRHR* 351.

<sup>75</sup> / 3 168; Jolowicz 164; Van Warmelo 147-148; Van Zyl 277; Du Plessis 1988 *THRHR* 351.

<sup>76</sup> / 3 168; Jolowicz 164; Van Zyl 277.

<sup>77</sup> / 3 168; Jolowicz 164; Van Warmelo 147-148; Du Plessis 1988 *THRHR* 351. It is interesting to note that Cornelius stated in his article “Sanctity of contract and players’ restraints in South African Sport” 2003 *TSAR* 27 that “while slavery may have been outlawed in all civilised legal systems today, the trade in human beings is still a business in which billions of Rands are turned over annually – and what is more, that trade is legal and is tolerated to some extent by modern legal systems all over the world.”

<sup>78</sup> Van Warmelo 148. Van Zyl 277 mentions that a prohibition was placed on *nexum*, perhaps as early as the fourth century BC, on the ground of social considerations.

*sui generis*, and may therefore be viewed as a forerunner (as far as characteristics of a *sui generis* legal instrument is concerned) of the modern day contract *sui generis*.

In order to trace the development of the contract throughout the specific stages of Roman law efficiently, one has to investigate the specific forms of contract that existed and developed in Roman law since *nexum*.<sup>79</sup> This would provide one with a clear indication of the exact origins of the athlete's contract as it is known presently, and would contribute to the identification of the nature of such contract.

## 2.2.2. The development of the contract in Roman law since *nexum*

### 2.2.2.1. *Contractus verbis*<sup>80</sup>

The disappearance of *nexum* coincided with the appearance of another method of holding a debtor bound to a creditor. This method was known as *sponsio*, by which a creditor would ask the debtor verbally whether the latter promised to perform in terms of the transaction between them, and the latter would then promise to do so in a verbal manner.<sup>81</sup> This was the only formality for the creation of a valid obligation between the creditor and the debtor, as neither the presence of witnesses nor writing was a requirement for the obligation to be binding.<sup>82</sup> The exact origin of *sponsio* is uncertain, but it is believed that it has religious associations,<sup>83</sup> in the sense that if the debtor had uttered the promissory words, he would be bound to the creditor in a religious sense. The promise would take the form of a religious oath, and were the debtor to break such oath, he would invoke the fury of the gods.<sup>84</sup> It is furthermore argued by Van Warmelo that the use of formal wording had a certain "magical" quality, which meant that the obligation in question was seen not merely as an abstract legal bond, but as something very practical and real. In time, the religious connotation to the *sponsio* disappeared, which meant that the obligation between the creditor and the debtor was, however abstract, recognised by law and could be enforced by means of an action.<sup>85</sup>

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<sup>79</sup> These specific forms of contract were the *contractus verbis*, *contractus re*, *contractus litteris* and *contractus consensu*.

<sup>80</sup> Van Zyl 283 defines this category of contracts as "such contracts as were characterised by the use of formal words."

<sup>81</sup> / 3 115-123; Van Warmelo 148; Jolowicz 279-280. In practice, the creditor would ask the debtor the following: "Do you promise to build a house according to the following specifications?" The debtor would then answer: "I promise to do so." This formality would effect a valid obligation between the two parties.

<sup>82</sup> Jolowicz 279.

<sup>83</sup> Jolowicz 280; Van Warmelo 148.

<sup>84</sup> *Ibid.*

<sup>85</sup> Van Warmelo 148.

Lambiris<sup>86</sup> has stated that *sponsio* by the time of the XII Tables<sup>87</sup> only created valid obligations where a specific sum of money was involved, and not in respect of a particular item of property, nor in respect of an obligation to perform or do anything uncertain. However, *sponsio* may be viewed as a logical sub-category of the category of contracts that came to be categorised in Roman law as *contractus verbis*.

A second sub-category of *contractus verbis* was the so-called *stipulatio*. This was in essence similar to *sponsio*- it involved the creation of an obligation through dialogue. The obligation was created by a unilateral (verbal) promise to make performance by one person to another by way of responding in a particular way to a particular question posed.<sup>88</sup> Van Zyl makes it clear that an affirmative answer to the question of whether the debtor would perform, may not have been qualified by making the answer subject to either a condition or a time clause. If the answer, similarly, contained superfluous wording, but the original question was indeed answered, in other words the promise to perform was made, the superfluities were ignored.<sup>89</sup> It was possible for *stipulatio* to be reduced to writing, especially during the Republican era.<sup>90</sup> This was done for purposes of evidence, and developed to such an extent that by the Classical period<sup>91</sup> the written record of the promise was emphasised to a higher degree as the original verbal question and answer.<sup>92</sup> *Stipulatio* gradually diminished in importance up to a point where, in the fifth century AD, basically any form of words or expression could be used to create a binding obligation, provided the performance as well as the parties' intention appeared clearly from the document or wording in question.<sup>93</sup> At the time of Justinian's codification of Roman law, the latter recognised the practice of *stipulatio*, but added a further requirement that the two parties had to be in each other's presence at the time of the promise.<sup>94</sup>

#### **2.2.2.2. *Contractus litteris***

The logical successor of *sponsio* and *stipulatio* is probably the *contractus litteris*. The *causa* of this type of contract was the setting down of the agreement in writing to accord with

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<sup>86</sup> Lambiris 28.

<sup>87</sup> The XII Tables were formulated between 451 and 450 BC.

<sup>88</sup> I 3 92, 93, 105, 136; Van Zyl 284; Jolowicz 280.

<sup>89</sup> Van Zyl 284.

<sup>90</sup> Approximately 509-27 BC.

<sup>91</sup> The second and third centuries AD are generally referred to as the "Classical period" of legal development in Roman law.

<sup>92</sup> D 44 7 1 7; Van Zyl 284.

<sup>93</sup> *Ibid.*

<sup>94</sup> D 45 1 1; Van Zyl 285.

certain formalities,<sup>95</sup> but also because of the obvious advantage of providing sufficient proof of the existence and contents of the agreement in question. The *contractus litteris* created an obligation to pay money. It came into effect when two parties agreed to enter a debt by copying such debt in a ledger which belonged to the creditor.<sup>96</sup> Two entries of this kind existed, according to Gaius.<sup>97</sup> The first was the so-called *a re in personam*, which materialised in the entry of an existing debt between the contracting parties. This entry would lead to a situation where any previous debts were obliterated and superseded by the *contractus litteris*.<sup>98</sup> The second entry of this kind was known as *a persona in personam*. This entailed that the debtor as person was replaced by another person, who then became the new debtor. This replacement led to the falling away of the previous liability in order to be replaced by a new liability for which the new debtor could be held responsible.<sup>99</sup> It is important to note that the *contractus litteris* demonstrated the advantages of agreements in writing. In fact, it became practice in Roman law to put transactions of a legal nature in writing, because of the obvious advantage of proof it provided.<sup>100</sup> When the *contractus litteris* later fell into disuse, the practice of recording contracts in documentary form was persevered with. If an agreement were recorded in writing, the claim of a creditor in terms of such an agreement would succeed as a rule.<sup>101</sup> The debtor had the option of proving that the document in question did not reflect the correct state of affairs by making use of the defences of *exceptio non numeratae pecuniae*<sup>102</sup> or the *exceptio doli*.<sup>103</sup>

### 2.2.2.3. *Contractus re*<sup>104</sup>

In order to evaluate *contractus re* and its significance to this chapter, one has to evaluate the sub-categories of this category of contracts.<sup>105</sup> This will enable one to determine whether any characteristics of this category of contracts have been inherited by the modern day athlete's contract. The sub-category of *mutuum* is considered the oldest of the *contractus re*. It referred

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<sup>95</sup> I 3 128-133; Van Warmelo 166.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> I 3 128-133; Van Warmelo 166.

<sup>100</sup> I 3 134; Van Warmelo 167.

<sup>101</sup> *Ibid.*

<sup>102</sup> The defence that the money had not been paid.

<sup>103</sup> The defence that there had been fraud.

<sup>104</sup> Van Zyl mentions that the characteristic of this type of contract was that there had to be *consensus* between the parties, but also a form of delivery or transfer of a thing.

<sup>105</sup> These sub-categories are *mutuum*, *commodatum*, *depositum* and *pignus*. They are discussed in the text.

to a loan for consumption, and as such is related to *nexum*, discussed above.<sup>106</sup> *Mutuum* was established when an amount of money or a specific quantity of things was transferred to another person in exchange for an equal amount of money or quantity of things, obviously of the same kind and quality.<sup>107</sup> Van Warmelo<sup>108</sup> refers to *mutuum* as an agreement on the part of a certain party that he would lend a specific object to another party. The obligation only arose once both parties had performed their respective duties – before this occurred, no obligation existed between the parties and the contract between them was unenforceable.<sup>109</sup> *Commodatum* referred to a loan for use of a thing. Practically, it entailed that a thing was lent to another person free of charge, but only for a fixed period of time and for a specific purpose.<sup>110</sup> After the elapse of the fixed period of time, or after the specific purpose for which the object was used was met, the object was returned to the lender. The nature of the obligation of *commodatum* was similar to that of *mutuum*, in the sense that the obligation was only created after actual delivery of the object or thing in question had taken place.<sup>111</sup> The difference between the two sub-categories, however, was that in case of *commodatum*, ownership was never transferred to the borrower; in fact, the borrower was not even a protected possessor. The reason for this state of affairs was that *commodatum* was not recognised as a transaction by the old *ius civile*, although the *Praetor* did recognise the relationship in so far as an action was available to the borrower against the lender, should the need have arisen to institute such action.<sup>112</sup>

According to the contract of *depositum*,<sup>113</sup> one person entrusted a movable thing to another person, while the latter undertook to care for the thing or to keep it safe and return it at the

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<sup>106</sup> / 3 90; D 12 1 2 2-4; Van Zyl 277; Van Warmelo 152; Jolowicz 284-285. The essential difference between *nexum* and *mutuum*, however, was the fact that the former was a transaction for the loan of money, whereas in case of the latter any object could be given as a loan for consumption.

<sup>107</sup> / 3 90; Van Zyl 277; Van Warmelo 152; Jolowicz 285.

<sup>108</sup> / 3 90; Van Warmelo 152.

<sup>109</sup> / 3 90; Van Zyl 278; Van Warmelo 152.

<sup>110</sup> / 4 47; D 13 6 3 6; Van Zyl 278; Van Warmelo 155. It is important to note that the object of the contract was one that could not be consumed by use thereof.

<sup>111</sup> Van Zyl 279; Van Warmelo 154.

<sup>112</sup> Van Zyl 279; Van Warmelo 155.

<sup>113</sup> Literally “deposit”. Roman law recognised three special forms of *depositum*: *Depositum necessarium*, in terms of which a specific person deposited a movable thing with another person because the former was in an emergency situation, for example an earthquake, fire or shipwreck, which caused the depositor’s inability to choose his deposittee; *Depositum in sequester*, which applied when two parties were in dispute over a thing, and then proceeded to deposit the thing in dispute to a third party (*sequester*) for the duration of the dispute. Once the dispute was settled, the *sequester* would present the thing to the party who was successful in the dispute; *Depositum irregulare*, which form of deposit arose when either money or other consumable goods were deposited by one person to another, whom in turn received ownership of such money or consumable goods.



former's request.<sup>114</sup> The person in possession of the movable thing was held responsible for destruction of or damage to the thing, if such destruction or damage was due to his (the person in possession's) malicious intent or gross negligence.<sup>115</sup> An important difference between *depositum* and *commodatum* is the fact that with the former, the person in possession of the thing had no right of use of such thing. If the person did make physical use of the thing in question, such person would be guilty of theft.<sup>116</sup> Such person merely had physical control over the thing in order to protect it, and did not enjoy the protection which was usually available to a possessor.<sup>117</sup> *Pignus*, probably recognisable to the modern reader as pledge, was a form of real security in terms of which either the debtor or a third party transferred the possession of a thing to a creditor in a specific transaction, in order for such thing to serve as security for the performance of the debtor's obligations towards the creditor. The creditor did not have the right to use the thing in his possession, unless the parties had agreed otherwise.<sup>118</sup>

#### 2.2.2.4. *Contractus ex consensu*

This group of contracts is probably the most relevant to the ultimate purpose of this chapter: to determine the nature of the athlete's contract. It is also a fact that this group of contracts is relevant to South African law of contract, as the foundation of the latter is mostly based on this group of contracts.<sup>119</sup> The four contracts<sup>120</sup> that constituted *contractus ex consensu* had

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The recipient had the obligation to restore goods of the same nature, quality and quantity to the presenter.

<sup>114</sup> I 4 47; D 16 3 1 39; Van Zyl 280; Van Warmelo 157; Jolowicz 286.

<sup>115</sup> *Ibid.*

<sup>116</sup> I 4 47; D 16 3 1 39; Van Zyl 280.

<sup>117</sup> *Ibid.*

<sup>118</sup> I 3 14 4; D 44 7 1 6; Van Zyl 282; Van Warmelo 154; Jolowicz 286-287.

<sup>119</sup> Van Zyl 287.

<sup>120</sup> These were the following: *emptio venditio* or contract of sale, which involved a person obtaining an object from another person which the former could not produce himself. Van Zyl 288 states that the *emptio venditio* was a transaction where the two parties agreed to sell a certain thing (*merx*) at an agreed price (*pretium*). The only requirement for the conclusion of the *emptio venditio* was an agreement between the parties regarding the three material elements of this contract, namely the nature of the contract, the object of sale and the purchase price. For a discussion of the *emptio venditio*, see Van den Bergh "The Roman tradition in the South African contract of sale" 2012 *TSAR* 53. The second contract that constituted *contractus ex consensu* was the *locatio conductio* or contract of letting and hiring, which involved letting (*locatio*) and hiring (*conductio*) of specific services. In order for this type of agreement to be valid, the parties had to agree of what exactly was to be let and hired, as well as the amount to be paid therefor. The third sub-category was the *societas* or contract of partnership. This sub-category referred to a situation where two or more persons agreed to pursue a common goal by using common assets. It originated in the early Roman *consortium ercto non cito*, namely the community of *sui heredes* in respect of the estate of a testator, and is alluded to in Gaius's *Institutes* (I 3 154a). The final sub-category of *contractus ex consensu* was the *mandatum* or contract of mandate, which was concluded when one person (the *mandator*) instructed another person (the *mandatarius*) to do something gratuitously for him. Such instruction,

one characteristic in common: they were created because the parties to the contracts had agreed on certain essential and specific points. This resulted in agreement being the actual *causa* of the contract itself.<sup>121</sup>

Two sub-categories of *contractus ex consensu*, *locatio conductio operarum* and *locatio conductio operis*, are probably direct ascendants of the modern day athlete's contract. The development of these two types of contract since Roman law is discussed in the next chapter.

### 2.3. The concept of a contract in Roman-Dutch law

Whereas the concept of a contract as legal tool emerged in early Roman law and was refined through the centuries up until Justinian codified the Roman legal system, it was only in Roman-Dutch law that every agreement entered into seriously and deliberately was perceived as a valid contract.<sup>122</sup> Roman-Dutch writers carried on the Roman law tradition of perceiving the contract as a legal instrument creating an obligation, but added that a contract was in fact an agreement from which an *enforceable* obligation arose.<sup>123</sup> It is in the Roman-Dutch system of law that the doctrine of *pacta sunt servanda* was firmly established, effectively stating that a person who has entered into an agreement freely and willingly, was bound by such agreement.<sup>124</sup> This is also the philosophy which underlies specific performance as a primary remedy in South African law. In Roman-Dutch law, seven elements had to be present to constitute a valid contract. The first of these was that the parties must have been in agreement.<sup>125</sup> Although this element seems simple enough, it must be kept in mind that there had to be a valid acceptance of all elements of the offer in order for there to be actual

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according to Van Zyl 310, was then accepted by the mandatary. This acceptance created the contract based on consensus between the two parties. It is clear that the athlete's contract (as far as its nature and requirements are concerned) is a direct successor of the *locatio conductio* and its two sub-categories, *locatio conductio operarum* (contract for the letting and hiring of services) and the *locatio conductio operis* (contract for the letting and hiring of specific piece of work).

<sup>121</sup> Van Zyl 287; Van Warmelo 169.

<sup>122</sup> Christie 6.

<sup>123</sup> Joubert 28.

<sup>124</sup> Lee 220 mentions that there are seven elements of a valid contract according to Roman-Dutch law:

- (i) The parties must be agreed;
- (ii) The parties must intend, or be deemed to intend, to create a legal obligation;
- (iii) The object of the agreement must be physically and legally possible;
- (iv) The requisite forms or modes of agreement must be observed;
- (v) The agreement must not be impeachable on the ground of fraud, fear, misrepresentation, undue influence, or lesion;
- (vi) The agreement must not be directed to an illegal object;
- (vii) The parties must be competent to contract.

These elements are discussed in the text.

<sup>125</sup> Lee 220.

agreement. In Roman-Dutch law, this meant that an expression of a common intention constituted an agreement enforceable by law, whether such expression was made verbally, through conduct, or both.<sup>126</sup> If, however, the parties' minds and wills were not in unison as to the substance of what they had agreed on, no agreement could exist.<sup>127</sup> If an offer was purportedly accepted, but made subject to additions, restrictions, conditions or alterations of any kind, it would be perceived as a rejection of the original offer, and would constitute a counter-offer.<sup>128</sup> The second element of a valid contract in Roman-Dutch law demanded that the parties must have had the intention of creating legal obligations.<sup>129</sup> Van Leeuwen made it clear that because a contract rests on the foundation that the parties must intend on binding themselves in the legal sense of the word, the absence of such intention would result in no obligation coming into existence.<sup>130</sup> It was not always easy to determine the presence or not of the intention under discussion. It had to be established by the circumstances surrounding the transaction, as well as the actions and words of the parties at the time of entering into the contract and before.<sup>131</sup> The third element required that the object of the agreement had to be possible, both in a physical and legal sense.<sup>132</sup> The physical part of this element required the performance to be physically possible to the party who had the duty of delivering such a performance. The legal part, on the other hand, suggested that even if performance was physically possible, it might have been illegal. This would mean that a performance which was illegal, would likewise be impossible. The fourth element of a valid contract according to Roman-Dutch law dealt with the requirement that the forms or modes of agreement had to be observed. Attaching formalities to a contract indicated that such contract was of a serious character, and distinguished the contract in question from informal agreements and promises

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<sup>126</sup> Van Leeuwen 4.3.1; Lee 221.

<sup>127</sup> Grotius 3.3.45; Lee 221. If one of the parties was under a misapprehension of what exactly was agreed on, it is said that that party rendered under mistake or *error*. The types of *error* that were recognised in Roman-Dutch law were the following:

- (i) *Error in persona*, which entailed that one of the parties was under a misapprehension as to the identity of the party with whom he was contracting;
- (ii) *Error in negotio*, which occurred if there was a misunderstanding as to the nature of the transaction in question;
- (iii) *Error in corpore*, meaning a mistake as to the identity of the subject-matter of the contract;
- (iv) *Error in substantia*, which refers to a misapprehension regarding the quality of the subject-matter.
- (v) A general misapprehension as to the terms of the contract.

<sup>128</sup> *Watermeyer v Murray* [1911] AD 61; Lee 222.

<sup>129</sup> Lee 228.

<sup>130</sup> Van Leeuwen 4.1.3. See also Lee 228.

<sup>131</sup> Lee 228.

<sup>132</sup> *Idem* 229.

to which Roman law attached no consequences.<sup>133</sup> However, in Roman-Dutch law, the emphasis shifted from strict compliance with formalities to the question as to the presence or not of consensus. If the latter was present, a valid contract came into existence. Van Leeuwen<sup>134</sup> stated that three considerations existed for determining whether a valid action for performance had in fact arose: firstly, whether the persons in question were capable of binding themselves. Secondly, whether the agreement was entered into deliberately and voluntarily, and thirdly, whether the agreement possessed a physical and moral possibility of reasonable cause. This “informal” approach to entering into a contract was adopted by South African law in the case of *Goldblatt v Fremantle*.<sup>135</sup> The fifth Roman-Dutch element of a contract was that the consensus in question must not have been obtained by improper means such as fraud, fear, misrepresentation, undue influence or lesion.<sup>136</sup> The philosophy behind this element is the requirement that each and every agreement should be entered into through free and mutual consent of both parties.<sup>137</sup> Such free and mutual consent would be absent if a contract had been procured by one of the abovementioned factors. Once again, this element has been adopted by South African law. If a contract has come into existence because of misrepresentation of certain facts leading to the contract, duress by one of the parties or undue influence, the contract would be voidable.<sup>138</sup> The sixth Roman-Dutch element of a valid contract stated that the contract must not be directed at an illegal object.<sup>139</sup> The meaning of the term “illegal” object is explained by Voet as “an object which is improper in the sense that it is condemned by common law or by statute.”<sup>140</sup> If a contract is indeed illegal according to Voet’s definition, such contract would be null and void.<sup>141</sup> The seventh and last element of a valid contract constructed in Roman-Dutch law, requires that all parties to the contract must

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<sup>133</sup> *Idem* 229.

<sup>134</sup> Van Leeuwen 4.2.1; Lee 231.

<sup>135</sup> 1920 AD 123. *In casu*, the Court depended on Grotius 3.14.26 in deciding that any contract may be entered into verbally, unless it is clear that the parties intended the contract to be in writing. Whereas the contract need not be in writing, the parties do have the option of agreeing that the contract between them *must* be in writing. In the latter regard, see in this regard Voet 5.1.73.

<sup>136</sup> Lee 233.

<sup>137</sup> *Ibid.*

<sup>138</sup> The ground of “undue influence” was not developed by the Roman-Dutch writers. There has been some debate on whether this ground should form part of South African law at all. See in this regard Van der Merwe *et al* 125.

<sup>139</sup> Lee 239.

<sup>140</sup> Voet 2.14.16. See in this regard also Grotius 3.1.42-43. Examples of contracts made in breach of statute are contracts which are specifically prohibited by law, or is directed to an object which is condemned by law. Examples of contracts prohibited by the common law are agreements to commit a crime, promises inducing the commission of a crime or civil wrong, promises inducing the commission of a crime or civil wrong, promises made as an inducement to the promisees to abstain from such wrongful acts, and agreements aimed at undermining justice. As far as these examples are concerned, see Lee 242.

<sup>141</sup> Grotius 3.1.

be competent to enter into a contract.<sup>142</sup> In Roman-Dutch law, this meant effectively that the following classes of persons were considered incompetent for purposes of entering into a contract:<sup>143</sup> minors, married women, lunatics, prodigals and juristic or artificial persons. The elements of a valid contract discussed above form the basis of the requirements of a valid contract in modern South African law.<sup>144</sup> For the sake of clarity, it can be stated that the Roman-Dutch concept of a contract proclaimed that every contract entered into freely and willingly by both parties who were *ad idem* as to the contents of their agreement at the time of entering into such, was valid and enforceable.

#### 2.4. The concept of a contract in English law

Information on the rules relating to obligations in general, but especially to contracts before the Norman Conquest of England<sup>145</sup> is rudimentary to say the least.<sup>146</sup> The reason for this has already been alluded to above. Pollock and Maitland make mention of an Anglo-Saxon custom which required men who trafficked in cattle to make their purchases “openly and before good witnesses.”<sup>147</sup> This custom, however, had very little to do with the enforcement or even creation of a contract of sale. On the contrary, the purpose of the custom was merely to protect honest buyers against claims by outsiders that the cattle in question were stolen from the latter.<sup>148</sup> Anglo-Saxon society had little comprehension of the granting of credit and subsequent regulation thereof by way of contract. This came as a result of the withdrawal of the Roman system of law which was used in the Roman province of Britain until the end of the fifth century.<sup>149</sup> The Germanic races in return had no general notion of a promise or an

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<sup>142</sup> Lee 247.

<sup>143</sup> *Ibid.*

<sup>144</sup> These requirements are generally accepted as the following: consensus between contracting parties, compliance with any agreed-upon formalities, the performance must be possible, the performance must be legal, the performance must be certain or ascertainable, and finally the parties must be capacitated to enter into the contract.

<sup>145</sup> In 1066 William of Normandy seized the English throne from Harold Godwinson, then Earl of the Kingdom of Wessex. The installation of William, known as the Conqueror, as the King of England was achieved by bloody conquest and pitiless subjugation, although apparently dressed up in legal justification. The Norman Conquest marked the end of Anglo-Saxon England, which had consisted of seven kingdoms: Northumbria, Kent, East-Anglia, Essex, Mercia, Sussex and Wessex. The legal customs of these kingdoms were also effectively replaced by those of the conquering Normans. See Crofton (2006) 42.

<sup>146</sup> Pollock and Maitland (1968) 184; Guest 3.

<sup>147</sup> Pollock and Maitland 184.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Idem* 185. According to Blair (1962) 1-3 Britain formed a part of the Roman Empire for about four centuries. The province was under constant threat during this time from the Celtic peoples of the north and Germanic seafarers from the east and south. By the time the fifth century A.D. came to an end, Roman political and military authority had withdrawn from Britain, and the abovementioned tribes controlled most of the island.

agreement as basis of a civil obligation, although they did recognise Formal and Real contracts.<sup>150</sup> This accords with Blackstone's classification of a contract as merely one of the ways in which a title to property could be acquired.<sup>151</sup> He defines a contract as "an agreement upon sufficient consideration, to do or not to do a particular thing".<sup>152</sup> It was implied by Blackstone's definition of a contract that such contract conveyed an interest merely in action, and consequently consisted of only three elements: the agreement itself, the consideration, and the species (or type) of the contract, in other words that which had to be done or omitted in terms of the contract between the parties.<sup>153</sup> Before discussing the detailed origins of formal English law of contract, it is imperative to establish how the formalities that regulate English law of contract came about.

Canon law probably played the most important role in the origins of formal law of contract in England. In order to bring sinners to repentance, the Christian church established courts and started distributing penances to those who did not honour their commitment to the church and to God.<sup>154</sup> The church established something which was less than an oath, but could still be regarded as a transaction which concerned the Christian faith in a direct manner.<sup>155</sup> The earliest form of the promise which has become a well-known foundation of the modern day contract, was the canonical oath. It was these oaths that eventually and finally substituted the Germanic imprecations and other primitive rules mentioned above.<sup>156</sup> Penances issued by the church for dishonouring oaths must well be seen as the origin of contractual remedies in English law. In this sense, Pollock and Maitland state that just like a person's religious faith, such person's worldly honour could be regarded as an object that is pawned to a creditor.<sup>157</sup> Put differently, the making of an oath in the form of a promise to do something was perceived by English law as an action that may create a binding obligation.<sup>158</sup>

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<sup>150</sup> Pollock and Maitland 185. An example of their recognition of these types of contract was the contract of sale, which was perceived as a Real, and certainly not a Consensual transaction.

<sup>151</sup> Blackstone (2009) 221. This is a written copy of the "The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England" published in 2009 by the American Bar Association with a foreword by Goldstone. The other ways of acquiring a title in property was by gift or grant, succession, marriage, judgment, custom, occupancy, prerogative and forfeiture.

<sup>152</sup> Blackstone 222.

<sup>153</sup> *Ibid.*

<sup>154</sup> Pollock and Maitland 189.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> The term "promise" is defined by Guest at 4 as "a declaration or assurance made to another person, stating that a certain state of affairs exists, or that the maker [of the promise] will do, or refrain from, some specified act, and conferring on that other a right to claim the fulfilment of such declaration or assurance."

Early English law<sup>159</sup> made provision for an agreement to be either express or implied. The former entailed that the terms of the agreement were expressed openly and avowed to at the time of such expression.<sup>160</sup> The latter were dictated mainly by reason and justice, and consequently included those agreements that were expected to be performed by every man.

Interestingly, the physical act of the shaking of hands was considered the accepted manner in which to solemnly create a bond or obligation between two contracting parties.<sup>161</sup>

An example from early English law of an agreement which was expected to be performed by every man, was where one person had undertaken to employ another person. In such a case, there would have been an automatic reciprocal duty on the former to remunerate the latter at a rate which the latter's labour deserves.<sup>162</sup> It would be fair to state that the contract of service (and subsequently the athlete's contract) originated from the implied contract as alluded to by Blackstone. A distinction was drawn in early English law of contract between an *executed* contract and an *executory* one. The former entailed immediate simultaneous performance of the obligations in question, whereas the second dealt with some future date of performance of the obligation in question. Blackstone described the former as a *chose in possession*, and the latter as a *chose in action*.<sup>163</sup>

Whereas the abovementioned classification of contracts indicated the nature of available contracts in early English law, the *consideration* upon which a contract was founded proves to be much more informative about early English law's treatment of contracts. The primary question that was asked in English law related to the *reason* for the contracting parties entering into a contract.<sup>164</sup> The basic principle applicable was that a contract would only be valid if the reason or object of the contract was lawful.<sup>165</sup> Typical examples of contracts that were perceived to be *prima facie* lawful, were the ones regulating marriage, transactions involving money, work done and any other reciprocal contracts. It is very interesting to note that Blackstone states that lawful contracts could never be impeached, and if such contracts

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<sup>159</sup> Although customs regulated society in Britain since Anglo-Saxon times, England started developing a general law of contract different from the ones in Europe from the thirteenth century onwards. Before the end of the thirteenth century, it is said that both Roman and canon law had lost their power to control the development of English temporal law.

<sup>160</sup> Blackstone 222.

<sup>161</sup> Pollock and Maitland 188-189.

<sup>162</sup> Blackstone 222.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> Blackstone 222 uses the description "valuable", as opposed to a contract of which the reason for or purpose of was unlawful.

were of a sufficient and adequate value, they could “never [be] set aside by equity”.<sup>166</sup> The reason for this is that a contracting party in the case of a lawful contract had previously given a “right in recompense, and is therefore as much an owner, or a creditor, as any other person.”<sup>167</sup> This seems to be in contrast to the English perception of specific performance as a mere secondary remedy for breach of contract, which will only be granted if damages were to prove inadequate in the circumstances.

Blackstone is of the opinion that consideration was such a vital element of a contract in English law that a *nudum pactum*<sup>168</sup> was void and therefore without any legal consequences. As soon as the obligation became reciprocal, however, a valid contract would come into existence.<sup>169</sup> Once again, one must assume that English law attached at least some importance to a contract which was entered into freely and willingly. This assumption is supported by Blackstone, who states the following:<sup>170</sup>

“For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration to evade the payment: for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration.”

A vital element of a contract in English law identified by Blackstone and mentioned above, was the species of the contract, in other words (as Blackstone calls it) the “thing” to be done or omitted. On this ground, four specific contracts were identified by Blackstone as “the most usual contracts, whereby the right of chattels personal may be acquired in the laws of England.” These are the contract of sale or exchange, the contract of bailment, the contract of hiring and borrowing, and finally the contract of debt.<sup>171</sup> The most common of these was definitely the contract of sale or exchange, by which property was transferred from one person to another in consideration of some price or recompense in value. This type of contract was based upon the notion that there could be no sale without recompense; there had

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<sup>166</sup> Blackstone 222.

<sup>167</sup> *Ibid.*

<sup>168</sup> By *nudum pactum* is meant an agreement to do or pay something from one side without any compensation on the other side, in other words a unilateral act.

<sup>169</sup> Blackstone 223.

<sup>170</sup> *Ibid.* However, Guest 5 makes mention of the fact that freedom of contract is a social ideal only to the extent that equality of bargaining power exists between contracting parties can be assumed. He submits also that economic equality often does not exist in any real sense, and that individual interests have to be made to subserve those of the community. This is in contrast to the point made in chapter 2 of this thesis, namely that in the case of the athlete’s contract, the parties bargain and eventually contract on equal footing, both financially and socially.

<sup>171</sup> Blackstone 223.



to be a *quid pro quo* in order for a valid contract of sale to come into existence.<sup>172</sup> The difference between the contract of sale and that of exchange was that the former entailed a transfer of an amount of money or goods, whereas the latter merely entailed the transfer of goods.<sup>173</sup> The law applicable was however the same in both types of contract, and therefore the rules of practice which applied to contracts of sale and exchange were similar. What this type of contract entailed, was that if a specific person possessed a right to property, such person could dispose of that property to another person of his choice at any time and in any manner, provided the property in question was not attached in debt or by judgment.<sup>174</sup> Blackstone provides a detailed and somewhat tedious account of how exactly goods of any kind were sold and purchased in English law, the content of which is inapplicable to this chapter. The second type of contract identified by Blackstone was one of bailment, which entailed the delivery of goods in trust, upon a contract either expressed or implied, that the contract shall be faithfully executed on the part of the bailee.<sup>175</sup> An example of this type of contract was in the instance where a tailor was provided with cloth in order to make clothes. In such an instance, the tailor automatically became party to an implied contract demanding of him to return the cloth once the clothes had been made in a “workmanly” manner.<sup>176</sup> If the tailor in the example provided had performed his duties in terms of the contract of bailment, an obligation rested on the other party to the same contract to remunerate said tailor for the work done (it is submitted that the example provided here resembles the *locatio conductio operis* or contract of piece work of Roman law very closely). Similarly, if a person left his property in the care of another person, such property had to be made available to the owner by the possessor at the former’s demand.<sup>177</sup>

The contract of hiring and borrowing is not only the third type of contract most commonly in existence in English law, but also the contract that bears the closest resemblance to the one which forms the focus of this thesis: the athlete’s contract.<sup>178</sup> Although Blackstone distinguishes between the contract of hiring and that of borrowing, he exclaims that the law relating to both is the same.<sup>179</sup> The similarity between them is that they are both contracts in

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<sup>172</sup> Blackstone 223-224.

<sup>173</sup> Blackstone 224.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Idem* 227.

<sup>176</sup> *Idem* 227.

<sup>177</sup> *Idem* 227.

<sup>178</sup> The reason for this submission is the fact that the athlete’s contract involves and regulates the hiring (and sometimes borrowing) of professional services.

<sup>179</sup> The difference between the two, according to Blackstone, is that the contract of hiring was always for a

terms of which the possession and a transient property are transferred for a particular time or use, on condition that the hired or borrowed goods in question are restored as soon as the time has expired or the use thereof performed.<sup>180</sup> Together with the restoration of the goods in question, the reciprocal price or stipend must likewise be paid.<sup>181</sup>

An interesting and relevant issue raised by Blackstone as far as the contract for hiring and borrowing is concerned, is when money is lent in terms of a contract to receive back not only the principal amount lent, but also an increase in the form of compensation for the use of the initial amount.<sup>182</sup> The reason why this is relevant to the primary focus of this thesis, is because of the fact that this type of contract in English law relates not only to money lent, but also to services “lent” or provided by professional athletes. In the latter’s case, their unique athletic services are lent to an institution that pays them for their services. Because of the unique athletic nature of these athletes (alluded to in chapter 2) the institution that remunerates them in more cases than not will show a profit. This means that the mere fact that the institution borrows the services of a professional athlete and then puts the skills of the athlete on display, generates a significant income for that institution.<sup>183</sup> This bears a close resemblance to the example mentioned by Blackstone above in terms of which an income is generated by providing a service, even if such “service” merely involves the lending of money at a rate of interest. If a club or board displays the services of a professional athlete for monetary benefit, the monetary benefit derived from the display of such services could certainly be perceived as interest on an investment, or at least profit made on services provided or displayed. It is important, according to Blackstone, to distinguish between a moderate and an exorbitant profit. Whereas the former is necessary for the functioning of any “civil state”, the latter “ought never to be tolerated in any civil society.”<sup>184</sup>

The fourth and last species of contract identified by Blackstone, is that of debt. In terms of this type of contract, a “chose” in action or right to a certain sum of money was mutually acquired and lost.<sup>185</sup> This species of contract is actually supplementary to the other three

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price, a stipend or recompense, whereas the contract of borrowing was gratuitous.

<sup>180</sup> Blackstone 227.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Idem* 227-228.

<sup>183</sup> The “institution” mentioned here to refers to a professional club, board or body that regulates sport and “employs” athletes.

<sup>184</sup> Blackstone 228.

<sup>185</sup> *Idem* 230.

forms of contract, or could arise from these. In fact, Glanvill<sup>186</sup> states that a debt may also arise from lending, sale, borrowing, letting and deposit. Such a debt as referred to by both Glanvill and Blackstone arose when one person had entrusted another with any property that could be weighed, numbered or measured.<sup>187</sup> This means that if something is due to someone in terms of a contract between two people, an additional obligation – to pay a debt – was created.<sup>188</sup> Blackstone divides the contract created because of debt into three categories or classes, namely debts of record, debts by special contract, and debts by simple contract. The former involves an amount of money which is due according to a court of record, and basically means that money is owed by a defendant to a plaintiff as a result of an action or law suit.<sup>189</sup> Debts upon recognizance, statutes merchant and statutes staple fall under this class of debts.<sup>190</sup> The second class of debts identified by Blackstone is that by specialty, in terms of which a sum of money becomes due by deed or sale, by lease reserving rent, or by bond or obligation.<sup>191</sup> The third and final class of debts mentioned by Blackstone is that of debts by simple contract. This class encompasses contracts in terms of which the relevant obligation is not ascertained by way of record, deed or special instrument, but by mere oral evidence.<sup>192</sup> This basically entailed that a debtor had to “answer to damages” out of his own estate, and that no other person were obligated to stand in for the damages caused by another.<sup>193</sup> Pollock and Maitland add that in the case of the contract of debt, a creditor was seldom compelled to bring an action for the recovery of money lent. The reason was because in practice, the creditor in this type of contract had obtained either a judgment or a recognizance before the loan was even made.<sup>194</sup> This procedure would be similar to a contract in which specific performance has been agreed upon as primary remedy for breach of contract, but an interdict<sup>195</sup> is obtained by the judgment creditor against the judgment debtor for performance of the contractual obligation in question. It was possible in English legal practice during the time alluded to by Blackstone, as well as Pollock and Maitland, for a

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<sup>186</sup> Glanvill (1812) 246. This is the translation of Glanvill’s *Tractatus de legibus et consuetudinibus regni Angliae* of approximately 1554 by John Beames.

<sup>187</sup> Glanvill 246.

<sup>188</sup> Blackstone 230-231.

<sup>189</sup> Blackstone 231.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.* Pollock and Maitland at 215 state that in the action of debt, the plaintiff demands a sum of money together with “damages” for the unjust detention. The authors also state that these damages were often very high, which is an indication that it would have been better for the debtor to rather perform in terms of the contract than be obliged to pay a high amount of damages.

<sup>194</sup> Pollock and Maitland 203.

<sup>195</sup> The interdict as remedy for breach of contract is discussed in more detail in chapter 9 of this thesis.

creditor to obtain judgment for the repayment of money before such money was even advanced. Furthermore, it was possible for a debtor to confess to owing a sum of money and promising to pay said sum by a specific date. If the debtor then neglected to pay the sum of money by the set specific date, the sheriff may levy it from his (the debtor's) lands and goods.<sup>196</sup> Although not intentional, there is a strong argument to be made for the fact that this procedure had as its indirect aim specific performance of the obligation in question. The reason for this statement is the fact that the debtor in question would have made a significant effort to perform before the set date, as he would have wanted to prevent a scenario where his lands and goods had to be levied by the sheriff. A more familiar method of ensuring performance of a debt in terms of an agreement in English law was the pledge.<sup>197</sup> If the principal debtor in a contract of pledge became unable to discharge his duties in terms of said contract, the creditor in the matter had the right to demand by way of a court order specific performance of the debt in question, regardless of holding the debtor's property as pledge for the debt.<sup>198</sup> Once again this is a clear indication that although specific performance was considered merely a remedy found in equity in English law, the *philosophy* behind compelling a person to perform his contractual duties was well-founded and certainly familiar to early English law. This is illustrated even more thoroughly by Glanvill's reference to property being pledged in the form of a mortgage for a loan.<sup>199</sup> According to Glanvill, when movables were given to a creditor in terms of a contract of loan as pledge or mortgage, the creditor was obliged to maintain such property. If this was indeed done by the creditor for a determined period of time, the debtor was obliged to render performance of the debt in question (in this particular instance repayment of a loan) to the creditor by the end of the determined period between them.<sup>200</sup> If by the end of the determined period of time between them the debtor has not repaid the loan in question, the ownership of the property given in pledge (in the form of a mortgage) transferred to the creditor.<sup>201</sup> The risk of losing something of significant value which had previously been given as pledge to the creditor, would

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<sup>196</sup> Pollock and Maitland 204.

<sup>197</sup> Glanvill 247. The pledge or *pignus* available as a contract in Roman law has been discussed in chapter 2 of this thesis. In early English law, and more specifically in the Norman Code, pledges were divided into *simplices*, for example a pledge that ceased with the life of the person who had entered into it and did not form part of such person's estate, and *debiti retinentes*, in terms of which the person entering into the agreement served as both debtor and pledge.

<sup>198</sup> Glanvill 248-249.

<sup>199</sup> *Idem* 252.

<sup>200</sup> *Idem* 253.

<sup>201</sup> *Idem* 253-254.

certainly compel the debtor to do everything in his control to ensure proper performance of the debt in question.

Glanvill makes specific mention of the contract of letting and hiring in English law. This in itself contributes significantly to the discussion of whether English law in the time of Glanvill's writings acknowledged the fact that things, but possibly also services, could be let and hired. According to Glanvill, things could be let and used by another in his service, and returned upon the completion of the use thereof.<sup>202</sup> If the thing mentioned were destroyed whilst being used by the borrower, the latter was "absolutely bound" to return a reasonable price to the lender for the thing in question.<sup>203</sup> It is very interesting to note that there was uncertainty as to whether the owner of the property (in other words the lender) could, if he needed to use said property during the existence of the contract of letting and hiring, recall his property from the borrower.<sup>204</sup> This should have been arranged by the "private agreement", as Glanvill refers to it, because "the King's Court does not usually take cognizance of them (private agreements); nor, indeed, with such Contracts, as may be considered in the light of private agreements, does the King's Court intermeddle."<sup>205</sup> This is an indication that although there were certain practical ways in which specific performance of a contractual obligation in English law could be ensured, the King's Court refused to "intermeddle" in private agreements between parties, especially as far as the letting and hiring, or the loaning and borrowing of both things and probably services, were concerned.

It is clear from the discussion of the development of contracts in English law that the practices and types of contract that existed in English law (and still do) have had a significant influence on the current perception of contracts in South African law. To illustrate this, the latter is discussed consequently.

## **2.5. The concept of a contract in current South African law**

For the purposes of this chapter, a contract may be defined as an agreement between two parties, one who has a right to performance (the creditor) and the other (the debtor) who has a

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<sup>202</sup> Glanvill 265.

<sup>203</sup> *Ibid.*

<sup>204</sup> Glanvill 266. It is common practice in contemporary professional sport that athletes are borrowed to other clubs if the services of such athlete are not needed immediately by the club or union that employs the athlete. The question obviously arises to what extent the borrower-club can demand that the player *not* be recalled to his employer club or union (in other words to the lender) for fear and risk of jeopardising the borrower's game plan.

<sup>205</sup> Glanvill 373-274.

duty to perform because of a legal obligation that exists between these two parties.<sup>206</sup> The legal obligation is borne of the doctrine *pacta sunt servanda*, as explained above. Because the South African concept of a contract consists of certain elements, most notably that it is an agreement between parties creating an obligation between such parties, the athlete's contract should contain these elements as well. It should be kept in mind that the contract is a global phenomenon which must comply with global legal requirements, and therefore the athlete's contract will also be a global legal tool, to be used and applied in foreign jurisdictions as well as in the South African context.

## 2.6. Conclusion

The aim of this chapter is to establish the origins and trace the development of contractual obligations in Roman law, Roman Dutch law, English law and current South African law. It would be impossible to determine the nature of the athlete's contract if one does not have a thorough grasp on the origins of this type of obligation. Ultimately, determining the origins and development of contractual obligations will assist in establishing the most suitable remedy for breach of not only contract in general, but more specifically, athletes' contracts.

Justinian referred to "obligations" as legal bonds arising from delictual or contractual actions.<sup>207</sup> In fact, during the early period of Roman law, no distinction was made between obligations that arose from delictual acts or contractual relations.<sup>208</sup> The first occurrence (as far as Roman law<sup>209</sup> is concerned) of what could be deemed a "contract" was the so-called *nexum*.<sup>210</sup> In accordance with which moneys were lent to certain persons, most notably plebeians, called *nexi*.<sup>211</sup> Attached to the lending of the moneys were certain formalities in accordance with which the creditor weighed the monies in the presence of witnesses and then

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<sup>206</sup> This is the author's definition. Joubert 28 defines a contract as "an agreement from which an enforceable obligation arises. Van der Merwe *et al* 8 define a contract as "an obligatory agreement", while Christie 23 defines a contract as "an agreement (arising from either true or quasi-mutual assent) which is, or is intended to be, enforceable at law."

<sup>207</sup> Christie 3.

<sup>208</sup> Jolowicz 160; Van Warmelo 149; Lambiris 15; Du Plessis 1988 *THRHR* 351.

<sup>209</sup> The developmental periods of Roman law are (in broad terms) the following:

- The period of the kings (753-509 BC);
- The Roman Republic (509-27 BC);
- The Principate (27 BC- 284 AD);
- The Dominate (284-527 AD);
- Codification of Roman law under Justinian (527-565 AD).

<sup>210</sup> Jolowicz 164; Van Zyl 277.

<sup>211</sup> *Nexi* literally means "bound".

presented same to the debtor.<sup>212</sup> A future date was agreed upon between the parties by which date the debtor had to repay the debt, failing which the creditor would receive a right to the debtor's body.<sup>213</sup> This meant that the latter was bound to work for the former, and even in some instances be chastised by him.<sup>214</sup> If the debtor persisted in his failure to repay his debt, the creditor had the right to kill the debtor or to sell him in slavery.<sup>215</sup> The harsh "punishment" for non-compliance with the contract was intended to bring about performance. Some authors have argued that *nexum* was in fact the very first occurrence of the contractual remedy of specific performance as it is known today.

The disappearance of *nexum* coincided with the appearance of another method of holding a debtor bound to a creditor. This method was known as *sponsio*, by which a creditor would ask the debtor verbally whether the latter promised to perform in terms of the transaction between them, and the latter would then promise to do so in a verbal manner.<sup>216</sup> The exact origin of *sponsio* is uncertain, but it is believed that it has religious associations,<sup>217</sup> in the sense that if the debtor had uttered the promissory words, he would be bound to the creditor in a religious sense. The promise would take the form of a religious oath, and were the debtor to break such oath, he would invoke the fury of the gods.<sup>218</sup> It is furthermore argued by Van Warmelo that the use of formal wording had a certain "magical" quality, which meant that the obligation in question was seen not merely as an abstract legal bond, but as something very practical and real. In time, the religious connotation to the *sponsio* disappeared, which meant that the obligation between the creditor and the debtor was, however abstract, recognised by law and could be enforced by means of an action.<sup>219</sup> Lambiris<sup>220</sup> has stated that *sponsio* by the time of the XII Tables<sup>221</sup> only created valid obligations where a specific sum of money was involved, and not in respect of a particular item of property, nor in respect of

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<sup>212</sup> / 3 168; Jolowicz 164; Van Warmelo 147-148; Van Zyl 277; Du Plessis 1988 *THRHR* 351.

<sup>213</sup> *Ibid.*

<sup>214</sup> / 3 168; Jolowicz 164; Van Zyl 277.

<sup>215</sup> / 3 168; Jolowicz 164; Van Warmelo 147-148; Du Plessis 1988 *THRHR* 351. It is interesting to note that Cornelius stated in his article "Sanctity of contract and players' restraints in South African Sport" 2003 *TSAR* 27 that "while slavery may have been outlawed in all civilised legal systems today, the trade in human beings is still a business in which billions of Rands are turned over annually – and what is more, that trade is legal and is tolerated to some extent by modern legal systems all over the world."

<sup>216</sup> / 3 115-123; Van Warmelo 148; Jolowicz 279-280. In practice, the creditor would ask the debtor the following: "Do you promise to build a house according to the following specifications?" The debtor would then answer: "I promise to do so." This formality would effect a valid obligation between the two parties.

<sup>217</sup> Jolowicz 280; Van Warmelo 148.

<sup>218</sup> *Ibid.*

<sup>219</sup> Van Warmelo 148.

<sup>220</sup> Lambiris 28.

<sup>221</sup> The XII Tables were formulated between 451 and 450 BC.

an obligation to perform or do anything uncertain. However, it has been submitted in this chapter that *sponsio* may be viewed as a logical sub-category of the category of contracts that came to be categorised in Roman law as *contractus verbis*.

A second sub-category of *contractus verbis* was the so-called *stipulatio*. This was in essence similar to *sponsio*- it involved the creation of an obligation through dialogue. The obligation was created by a unilateral (verbal) promise to make performance by one person to another by way of responding in a particular way to a particular question posed.<sup>222</sup> Van Zyl makes it clear that an affirmative answer to the question of whether the debtor would perform, may not have been qualified by making the answer subject to either a condition or a time clause. If the answer, similarly, contained superfluous wording, but the original question was indeed answered, in other words the promise to perform was made, the superfluities were ignored.<sup>223</sup> At the time of Justinian's codification of Roman law, the latter recognised the practice of *stipulatio*, but added a further requirement that the two parties had to be in each other's presence at the time of the promise.<sup>224</sup>

The logical successor of *sponsio* and *stipulatio* is probably the *contractus litteris*. The *causa* of this type of contract was the setting down of the agreement in writing to accord with certain formalities,<sup>225</sup> but also because of the obvious advantage of providing sufficient proof of the existence and contents of the agreement in question. The *contractus litteris* created an obligation to pay money. It came into effect when two parties agreed to enter a debt by copying such debt in a ledger which belonged to the creditor.<sup>226</sup> Two entries of this kind existed and have been discussed in this chapter, according to Gaius.<sup>227</sup> The first was the so-called *a re in personam*, which materialised in the entry of an existing debt between the contracting parties. This entry would lead to a situation where any previous debts were obliterated and superseded by the *contractus litteris*.<sup>228</sup> The second entry of this kind was known as *a persona in personam*. This entailed that the debtor as person was replaced by another person, who then became the new debtor. This replacement led to the falling away of the previous liability in order to be replaced by a new liability for which the new debtor could

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<sup>222</sup> I 3 92, 93, 105, 136; Van Zyl 284; Jolowicz 280.

<sup>223</sup> Van Zyl 284.

<sup>224</sup> D 45 1 1; Van Zyl 285.

<sup>225</sup> I 3 128-133; Van Warmelo 166.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*



be held responsible.<sup>229</sup> The *contractus re* and its significance to this chapter, has been discussed in terms of its sub-categories. It has been submitted that *mutuum* is considered the oldest of the *contractus re*. It referred to a loan for consumption, and as such is related to *nexum*, discussed above.<sup>230</sup> *Commodatum* referred to a loan for use of a thing. Practically, it entailed that a thing was lent to another person free of charge, but only for a fixed period of time and for a specific purpose.<sup>231</sup> After the elapse of the fixed period of time, or after the specific purpose for which the object was used was met, the object was returned to the lender. According to the contract of *depositum*,<sup>232</sup> one person entrusted a movable thing to another person, while the latter undertook to care for the thing or to keep it safe and return it at the former's request.<sup>233</sup> The person in possession of the movable thing was held responsible for destruction of or damage to the thing, if such destruction or damage was due to his (the person in possession's) malicious intent or gross negligence.<sup>234</sup> The final category of *contractus re*, *pignus*, was a form of real security in terms of which either the debtor or a third party transferred the possession of a thing to a creditor in a specific transaction, in order for such thing to serve as security for the performance of the debtor's obligations towards the creditor. The creditor did not have the right to use the thing in his possession, unless the parties had agreed otherwise.<sup>235</sup>

The group of contracts known as *contractus ex consensu* has been identified in this chapter as probably the most relevant to the ultimate purpose of this chapter: to determine the nature of the athlete's contract. The four contracts<sup>236</sup> that constituted *contractus ex consensu* had one

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<sup>229</sup> *Ibid.*

<sup>230</sup> *I* 3 90; *D* 12 1 2 2-4; Van Zyl 277; Van Warmelo 152; Jolowicz 284-285. The essential difference between *nexum* and *mutuum*, however, was the fact that the former was a transaction for the loan of money, whereas in case of the latter any object could be given as a loan for consumption.

<sup>231</sup> *I* 4 47; *D* 13 6 3 6; Van Zyl 278; Van Warmelo 155. It is important to note that the object of the contract was one that could not be consumed by use thereof.

<sup>232</sup> Literally "deposit". Roman law recognised three special forms of *depositum*:  
*Depositum necessarium*, in terms of which a specific person deposited a movable thing with another person if the former was in an emergency situation, for example an earthquake, fire or shipwreck, which caused the depositor's inability to choose his deposittee;  
*Depositum in sequester*, which applied when two parties were in dispute over a thing, and then proceeded to deposit the thing in dispute to a third party (*sequester*) for the duration of the dispute. Once the dispute was settled, the *sequester* would present the thing to the party who was successful in the dispute;  
*Depositum irregulare*, which form of deposit arose when either money or other consumable goods were deposited by one person to another, whom in turn received ownership of such money or consumable goods. The recipient had the obligation to restore goods of the same nature, quality and quantity to the presenter.

<sup>233</sup> *I* 4 47; *D* 16 3 1 39; Van Zyl 280; Van Warmelo 157; Jolowicz 286.

<sup>234</sup> *Ibid.*

<sup>235</sup> *I* 3 14 4; *D* 44 7 1 6; Van Zyl 282; Van Warmelo 154; Jolowicz 286-287.

<sup>236</sup> See fn 120 above.

characteristic in common: they were created because the parties to the contracts had agreed on certain essential and specific points. This resulted in agreement being the actual *causa* of the contract itself.<sup>237</sup>

Two sub-categories of *contractus ex consensu*, *locatio conductio operarum* and *locatio conductio operis*, have been submitted as direct ascendants of the modern day athlete's contract.

In order to follow a logical progression, this chapter has subsequent to the discussion of the development of contractual obligations in Roman law, traced their development in Roman-Dutch law. It has been submitted that it was only in Roman-Dutch law that every agreement entered into seriously and deliberately was perceived as a valid contract.<sup>238</sup> Roman-Dutch writers carried on the Roman law tradition of perceiving the contract as a legal instrument creating an obligation, but added that a contract was in fact an agreement from which an *enforceable* obligation arose.<sup>239</sup> It is in the Roman-Dutch system of law that the doctrine of *pacta sunt servanda* was firmly established, effectively stating that a person who has entered into an agreement freely and willingly, was bound by such agreement. This is also the philosophy which underlies specific performance as a primary remedy in South African law. In Roman-Dutch law, seven elements had to be present to constitute a valid contract. These elements have been discussed in detail in this chapter, and it has been submitted that these elements form the basis of the requirements of a valid contract in modern South African law.<sup>240</sup> In conclusion, it has been established that the Roman-Dutch concept of a contract proclaimed that every contract entered into freely and willingly by both parties who were *ad idem* as to the contents of their agreement at the time of entering into such, was valid and enforceable.

Because of the influence that English law has had on South African law of contract, the nature and development of contractual obligations in English law has been discussed in this chapter. Information on the rules relating to obligations in general, but especially to contracts

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<sup>237</sup> Van Zyl 287; Van Warmelo 169.

<sup>238</sup> Christie 6.

<sup>239</sup> Joubert 28.

<sup>240</sup> These requirements are generally accepted as the following: consensus between contracting parties, compliance with any agreed-upon formalities, the performance must be possible, the performance must be legal, the performance must be certain or ascertainable, and finally the parties must be capacitated to enter into the contract.

before the Norman Conquest of England is rudimentary to say the least.<sup>241</sup> Blackstone defines a contract as “an agreement upon sufficient consideration, to do or not to do a particular thing”.<sup>242</sup> It was implied by Blackstone’s definition of a contract that such contract conveyed an interest merely in action, and consequently consisted of only three elements: the agreement itself, the consideration, and the species (or type) of the contract, in other words that which had to be done or omitted in terms of the contract between the parties.<sup>243</sup> It has been submitted that canon law probably played the most important role in the origins of formal law of contract in England.

Early English law<sup>244</sup> made provision for an agreement to be either express or implied. The former entailed that the terms of the agreement were expressed openly and avowed to at the time of such expression.<sup>245</sup> The latter were dictated mainly by reason and justice, and consequently included those agreements that were expected to be performed by every man.

Interestingly, the physical act of the shaking of hands was considered the accepted manner in which to solemnly create a bond or obligation between two contracting parties.<sup>246</sup>

An example from early English law mentioned in this chapter of an agreement which was expected to be performed by every man, was where one person had undertaken to employ another person. In such a case, there would have been an automatic reciprocal duty on the former to remunerate the latter at a rate which the latter’s labour deserves.<sup>247</sup> It would be fair to state that the contract of service (and subsequently the athlete’s contract) originated from the implied contract as alluded to by Blackstone. The basic principle applicable in early English law of contract was that a contract would only be valid if the reason or object of the contract was lawful.<sup>248</sup> Blackstone is of the opinion that consideration was such a vital element of a contract in English law that a *nudum pactum*<sup>249</sup> was void and therefore without

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<sup>241</sup> Pollock and Maitland 184; Guest 3.

<sup>242</sup> Blackstone 222.

<sup>243</sup> *Ibid.*

<sup>244</sup> Although customs regulated society in Britain since Anglo-Saxon times, England started developing a general law of contract different from the ones in Europe from the thirteenth century onwards. Before the end of the thirteenth century, it is said that both Roman and canon law had lost their power to control the development of English temporal law.

<sup>245</sup> Blackstone 222.

<sup>246</sup> Pollock and Maitland 188-189.

<sup>247</sup> Blackstone 222.

<sup>248</sup> Blackstone 222 uses the description “valuable”, as opposed to a contract of which the reason for or purpose of was unlawful.

<sup>249</sup> By *nudum pactum* is meant an agreement to do or pay something from one side without any compensation on the other side, in other words a unilateral act.

any legal consequences. As soon as the obligation became reciprocal, however, a valid contract would come into existence.<sup>250</sup>

A vital element of a contract in English law identified by Blackstone and mentioned in this chapter was the species of the contract. On this ground, four specific contracts were identified by Blackstone as “the most usual contracts, whereby the right of chattels personal may be acquired in the laws of England.” These are the contract of sale or exchange, the contract of bailment, the contract of hiring and borrowing, and finally the contract of debt.<sup>251</sup> This chapter contains a detailed analysis and discussion of each of these types of contract.

For the purposes of this chapter, a contract in current South African law has been defined as an agreement between two parties, one who has a right to performance (the creditor) and the other (the debtor) who has a duty to perform because of a legal obligation that exists between these two parties. The legal obligation is borne of the doctrine *pacta sunt servanda*, as explained above. Because the South African concept of a contract consists of certain elements, most notably that it is an agreement between parties creating an obligation between such parties, it has been submitted in this chapter that the athlete’s contract should contain these elements as well. It should be kept in mind that the contract is a global phenomenon which must comply with global legal requirements, and therefore the athlete’s contract will also be a global legal tool, to be used and applied in foreign jurisdictions as well as in the South African context. The nature of said legal tool has been established in this chapter.

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<sup>250</sup> Blackstone 223.

<sup>251</sup> *Ibid.*

## CHAPTER 3: ORIGINS AND NATURE OF THE ATHLETE'S CONTRACT

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### 3.1. Introduction

The generally accepted point of view is that the athlete's contract is an employment contract.<sup>1</sup> This chapter aims to establish that while the athlete's contract certainly possesses similar characteristics to those of the contract of employment, it would be an oversimplification to perceive it as such. In order to establish this fact, one must first establish what exactly the ordinary contract of employment entails. This will allow one to indicate exactly why the athlete's contract is not a regular contract of employment, but a *sui generis* legal tool. The importance of this chapter lies therein that one cannot determine the suitability of the remedy of specific performance for breach of athletes' contracts if one does not understand the true nature of this type of contract. Subsequently, although the athlete's contract has been described as a contract of employment,<sup>2</sup> it is submitted in this chapter that it is in fact *sui generis*.<sup>3</sup> This chapter will address the reasons why the athlete's contract is considered *sui generis*, in order to indicate that whilst the remedy of specific performance is considered a primary one for breach of contract in South African law, it is not necessarily the most suitable remedy for breach of the athlete's contract. The development of the athlete's contract and its probable predecessors will be examined throughout Roman law, Roman Dutch law, English law and also South African law. However, in order to eventually address the question as to whether the athlete's contract is in fact *sui generis*, one must first determine the meaning of the term "*sui generis*" contract.

### 3.2. The meaning of *sui generis* as it relates to contracts

It is imperative to examine what exactly is meant by the term *sui generis* as far as it relates to contracts, and what the general characteristics of a *sui generis* contract entail (in other words,

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<sup>1</sup> *Walker v Crystal Palace Football Club Ltd* 1910 KB 87 92; *Dempster v Addington Football Club (Pty) Ltd* 1967 3 SA 262 265; *Highlands Park Football Club Ltd v Viljoen and Another* 1978 3 SA 191 (W) 192; *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 5 SA 73 (C) 79; Louw (2012) 210; Anderson (2010) 257; Gardiner *et al* (2012) 477.

<sup>2</sup> Louw 222; Gardiner *et al* 394; Jordaan in Basson and Loubser (Eds) (2000) 1; Prinsloo "Enkele opmerkinge oor spelerskontrakte in professionele spansport" 2000 *J.S. Afr. L.* 230.

<sup>3</sup> From the Latin meaning "of its own kind". This literally means that the contract is unique.

what makes a contract *sui generis*?). This must be done in order to indicate that the unique characteristics of the athlete's contract are sufficient to qualify such contract as *sui generis*.

According to Hawthorn and Hutchison,<sup>4</sup> the *sui generis* theory for determining the nature of a specific contract involves rendering the *naturalia*<sup>5</sup> of ordinary contracts inapplicable.<sup>6</sup> If one considers that the *naturalia* of a specific contract is an aid to determine the rights and duties of parties to a contract, as well as the effects and consequences of their contract, it is clear that the *naturalia* of a specific contract will determine the nature of such contract.<sup>7</sup> If the *sui generis* theory mentioned above were to be applied in order to determine whether an athlete's contract is in fact *sui generis*, the *naturalia* of the ordinary contract of service should be rendered inapplicable. The rights and duties of the parties to an athlete's contract differ from those of the ordinary contract of employment, along with the effects and consequences of such contract.<sup>8</sup> Cooper<sup>9</sup> states that a contract should be classified by turning on the true intention of the parties thereto, which is to be inferred from the *purpose* of the agreement. According to the *sui generis* theory, this means that the athlete's contract, while possessing attributes of the ordinary contract of employment, is *sui generis*, because the purpose or object of the athlete's contract differs from that of the ordinary contract of employment, as indicated above. In discussing the nature of the labour tenancy contract, Krause J in *Mvubu v Herbst*<sup>10</sup> stated that such contract was *sui generis* in nature because it was "sanctioned by law- a law which does not require it to be in writing and does not provide that the service must in fact commence within a month of the date of the contract..."<sup>11</sup> Whereas the meaning

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<sup>4</sup> Hawthorn and Hutchison in Murray and O' Regan (eds) (1990) 199.

<sup>5</sup> *Naturalia* are the legal principles of the law of contract that will apply to such contract in the absence of clauses to that effect in the contract itself. They refer to the terms automatically attached by law to a specific type of contract without them having to be inserted by the parties. See in this instance Christie 165; Van Huyssteen *et al* (2010) 39; Van der Merwe *et al* 283; Joubert 23.

<sup>6</sup> See also *Zulu and Others v Van Rensburg and Others* 1996 4 SA 1236 (LCC) 1261. The *sui generis* theory stands opposed to the absorption theory, which determines that should a specific contract contain characteristics of more than one type of contract, the former should be relegated to the dominant type of contract involved. The combination theory, however, entails that should a specific type of contract contain characteristics of more than one type of contract, the *naturalia* of each type of contract involved may be applied to the relevant portion of the agreement should this be possible.

<sup>7</sup> Van der Merwe *et al* 283.

<sup>8</sup> Commenting on the rights, duties and obligations that arise out of a marriage contract (which is considered a contract *sui generis*), Centlivres JA in *Frankel's Estate and Another v The Master and Another* 1950 1 SA 220 243, quoting Lord Robertson in *Story's Conflict of Laws* states such rights, duties and obligations arising out of a marriage are matters of so much importance to the State "that they are regulated not by the private contract but by the public laws of the State, which are imperative upon all who are domiciled within its territory."

<sup>9</sup> Cooper (1973) 43.

<sup>10</sup> 1924 TPD 741.

<sup>11</sup> *Mvubu v Herbst* 1924 TPD 741 747.

of the words “sanctioned by law” is not entirely clear, one may assume that it has a similar meaning to a deed of settlement being made an order of court, as in the case of *Thutha v Thutha*.<sup>12</sup> The mere fact that an agreement (in the form of a deed of settlement) was made an order of the court in the latter case, classified this type of agreement as *sui generis*. Also, it is a fact that the athlete’s contract is sanctioned by law in more than one way. It has been mentioned above that most professional athletes’ contracts are subject to the rules and regulations of the governing bodies that regulate the sporting code in question. In South Africa, professional sport is also governed by sports legislation.<sup>13</sup> In the *Thutha*-case, being sanctioned by law also had a significant effect on the type of remedy that was considered the most relevant in the circumstances: because the agreement between the parties had been made an order of the court, specific performance was obsolete as remedy, as breach of the contract would have led to contempt of court.<sup>14</sup> One can conclude from this that the nature of the contract will have an effect on the remedy most suitable in case of breach of contract. If for instance damages are difficult to assess in case of breach of contract, specific performance would be the most appropriate remedy for that specific type of contract. Innes J in *Farmer’s Co-operative Society v Berry*<sup>15</sup> stated that an agreement for the delivering of crops by a farmer to a co-operative society was “very much *sui generis*”, as it was a contract “in respect of a breach of which by a member it must be extremely difficult to assess damage to the society on a money basis.” Consequently, if a specific type of remedy would be the only suitable one for breach of a specific type of contract, such type of contract would be *sui generis* in nature. Put differently, if the nature or type of the contract in question excludes certain remedies in case of breach of such contract, the contract will most likely be considered *sui generis* in nature. This fact contributes greatly to the argument that the athlete’s contract is *sui generis*, but also to the question as to the most appropriate remedy in case of breach of such contract.

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<sup>12</sup> 2008 (3) SA 494 (ThH).

<sup>13</sup> The *National Sport and Recreation Act* 110 of 1998 for example, regulates the relationship between the government and national sports bodies. This act has as a primary consideration the correcting of racial imbalances in sport caused by South Africa’s Apartheid regime.

<sup>14</sup> *Thutha v Thutha* 2008 3 SA 495 (TkH) 507.

<sup>15</sup> 1912 AD 343 350.

### 3.3. The contract of employment in Roman law

In Roman law, two types of employment contract existed, namely the contract for the letting and hiring of services<sup>16</sup> and the contract for the letting or hiring of piece work.<sup>17</sup> It is imperative to discuss both these occurrences, as versions of them developed into the contracts used today in professional sport. The *locatio conductio operarum* was entered into when a person let his (personal) services to another at a fixed tariff.<sup>18</sup> If such services could (for whatever reason) not be rendered by the employee or *locator*, without any fault on the latter's part, and the latter could prove that his inability to render the services in question was due to conduct (or lack thereof) of the employer or *conductor*, the latter carried the risk and was still compelled to pay the *locator* his due fee.<sup>19</sup> If however, the inability to provide the services in question was caused by the employee, the latter bore the risk and was not entitled to any payment, even if he had been faultless.<sup>20</sup> The object of the *locatio conductio operis* in Roman law was to perform a particular service or task. The foremost duty of the independent contractor was the conclusion of this piece of work agreed upon.<sup>21</sup> The work was performed at an agreed rate of remuneration.<sup>22</sup> Whereas the contract of service involved a standing employment relationship for a specified period of time, the contract of piece work referred to a brief relationship of employment for a specified piece of work.

In order to determine whether athletes in Roman times were subject to contractual relations at all, it is important to investigate who the participants in sport were during those times. This will provide one with an idea of whether people who participated in sport did so for their own benefit or for the entertainment of others, or both. According to Kyle,<sup>23</sup> the Roman concept of entertaining sport was based on “war, conquest and oppression”, while spectators expected to see bloodbaths at sporting events. These bloodbaths included gladiators fighting to death against each other, animals being slaughtered for fun, and Christians being devoured by lions.<sup>24</sup> The greatest of the Roman spectacles must however be the well-known chariot races

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<sup>16</sup> *Locatio conductio operarum*.

<sup>17</sup> *Locatio conductio operis*.

<sup>18</sup> Van Zyl 304.

<sup>19</sup> *Ibid*. Examples of instances in which the employer would be at fault and hence would have to pay the employee's fee, are if vague instructions were issued by the employer or if the employee's working conditions were unbearable.

<sup>20</sup> *Ibid*. Examples of instances in which the employee would be responsible for not being able to perform, are illness of the employee, the lack of ability to do the job or urgent domestic problems.

<sup>21</sup> Van Zyl 304; Van Warmelo 182; Feenstra (1994) 227.

<sup>22</sup> Van Zyl 304.

<sup>23</sup> Kyle (2007) 251. See also Harris (1972) 184.

<sup>24</sup> *Idem* 252.



in the *Circus Maximus*.<sup>25</sup> Significantly, while the earliest entries for participation in these races were made by individuals, a system of professional chariot racing associations<sup>26</sup> arose in Rome after the Second Punic War.<sup>27</sup> The purpose of these factions was to ensure efficiency and professionalism in the races, as the state funded these spectacles regularly.<sup>28</sup> The factions were owned by private persons, and effectively owned the chariots, horses, stables and equipment needed for races.<sup>29</sup> “Employees” of these factions consisted of a broad variety of persons, for example drivers of chariots, wheelwrights, those who cooled the horses down by throwing water on them, and also persons who merely shouted encouragement and strategies from horseback.<sup>30</sup> What is important for the purposes of this chapter, was that these “employees” were in fact paid for participating in sporting events by these factions. Most charioteers were either Greek or Hellenistic slaves, who were purchased and trained by a specific faction, or hired freedmen.<sup>31</sup> Interestingly, Kyle<sup>32</sup> mentions that successful charioteers could become “rich stars”, much like professional athletes today. Charioteers in Roman times received a portion of the prize money for victories and placements, and it eventually even became possible for slaves to purchase their freedom and then negotiate compensation as free agents.<sup>33</sup> It was also possible for charioteers to be sold by one faction to another. Having considered this, there is no doubt that the factions of Roman times and the relationships which they governed, were of a sporting nature and were aimed at governing a relationship of employment for the playing of sport. Although not identified as such directly, these relationships would probably have been classified as either one of *locatio conductio operarum* or one of *locatio conductio operis*.

### 3.4. The contract of employment in Roman Dutch law

In Roman-Dutch law, the contract for hire of services referred to those agreements which regulated the relationships between “masters” and “servants”.<sup>34</sup> According to Lee, the Roman-Dutch law relating to the hire of services correspond very closely with Roman law on

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<sup>25</sup> An ancient stadium that hosted chariot racing and other sporting events.

<sup>26</sup> Known as factions from the Latin *factiones* referring to team and colours.

<sup>27</sup> Kyle 258.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Idem* 259.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Idem* 308.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Lee 304.

these subjects.<sup>35</sup> Voet states, however, that while services of both freemen and slaves may have been let in Roman-Dutch law, these referred to mercenary services only.<sup>36</sup> These services excluded the ones, such as those provided by advocates, to whom a fee, and not a wage, was paid.<sup>37</sup> In Roman-Dutch law it was an important requirement for this type of contract that every person was provided with the choice of whose services he wanted to hire and employ. The reason for this was the fact that among ordinary workmen, there were great differences in aptitude, disposition, knowledge, training, trustworthiness, diligence, sedulousness as well as other qualities.<sup>38</sup> Interestingly enough, this choice was disallowed where the services in question concerned those performed by millers situated in a specific area. The reason for this is that millers of corn had the privilege that the inhabitants of a specific district were not allowed to provide their corn to any other millers for grinding, unless a third or other share of the remuneration for the work were to be paid to the miller who had the privilege of doing the work.<sup>39</sup>

### **3.5. The contract of employment in English law**

The contract of employment must be regarded as the logical forerunner of the athlete's contract in South Africa. This is the case in English law as well. Therefore, it is essential to examine English law's treatment of the employment contract, in order to eventually establish whether English law's perception of specific performance as mere secondary remedy for breach of especially contracts of a personal nature is justified.

The contract of employment in English law was traditionally known as a "master and servant" contract, in terms of which service of a specific nature was performed.<sup>40</sup> Blackstone identified three "sorts" of servants, namely menial servants or domestics, apprentices and labourers. The first group of servants' contracts with their masters arose upon hiring.<sup>41</sup> If such contract was not fixed, the law fixed a term of one year to the contract. During this time, the servant had to serve the master, and the latter had to maintain the servant upon a principle of equity. The second group of servants mentioned by Blackstone were apprentices. In terms of the contract of apprenticeship between a master and his apprentice, the latter was maintained

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<sup>35</sup> *Ibid.*

<sup>36</sup> Voet 19.5.

<sup>37</sup> *D* 50.13.

<sup>38</sup> *D* 46.3.

<sup>39</sup> *D* 46.3.

<sup>40</sup> Beale (Ed) (2010) 937. The term "contract of service" was coined in the case of *Simmons v Heath Laundry* [1910] 1 K.B. 543 at 550.

<sup>41</sup> Blackstone 49.

and instructed for a fixed period by his master in order to learn such master's "art and mystery".<sup>42</sup> What is both interesting and very applicable to the question as to the most appropriate remedy for breach of contract as perceived by English law, is the fact that if an apprentice ran away before serving out his contract of apprenticeship, his master could compel him to serve out his time of absence.<sup>43</sup> This is none other than the remedy of specific performance for breach of contract, and it must be stated that this was odd, as specific performance has always been perceived as a mere equitable or secondary remedy in English law, as explained below. The third group of servants identified by Blackstone were the so-called labourers, who were only hired "by the day or week", in other words they were seen as the traditional version of the modern day independent contractors.<sup>44</sup>

Interestingly enough, there currently exists no clear definition of the contract of employment in English law (although the Employment Rights Act of 1996 as amended does go a long way to consolidate enactments relating to employment rights). There are but factors whose presence would indicate that a contract is indeed one of employment, but there are also factors whose presence would indicate that a certain contract is in fact *not* one of employment.<sup>45</sup> This is the exact same argument made by the author of this thesis in chapter 2 hereof. Although the athlete's contract resembles the contract of employment, there are too many factors that indicate that the athlete's contract is not one of employment. In order, however, to identify the contract of employment in English law, a specific approach is followed. Traditionally, emphasis was placed on the amount of power or control the employer had over the employee.<sup>46</sup> Whereas in the case of a contract between an employer and an independent contractor,<sup>47</sup> the former could merely dictate to the latter *what* work had to be done, in the case of the employment contract,<sup>48</sup> the employer could dictate to the employee *how* the work was to be done.<sup>49</sup> Furthermore, Blackstone stated that a master could correct his apprentice for negligence or other misbehaviour. If a servant went so far as to assault his master or dame, such servant could be imprisoned for a period of up to one year.<sup>50</sup> This was a strong indication of the degree of power asserted by the employer or master over

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<sup>42</sup> Blackstone 50.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Beale (Ed) 937.

<sup>46</sup> *Idem* 938.

<sup>47</sup> *Locatio conductio operis.*

<sup>48</sup> *Locatio conductio operarum.*

<sup>49</sup> Beale (Ed) 938.

<sup>50</sup> Blackstone 50.

the employee or servant. Currently, eight factors are considered in order to determine whether a contract is in fact one of employment. The first of these is the traditional one of the degree of control exercised by the employer over the employee. In the contract of employment, the employer possesses the power to direct and control the work of the employee. However, in the case of *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd*,<sup>51</sup> the court stated that the ultimate question was not whether any specific orders had been given by the employer to the employee, but who was entitled to give orders as to how the work in question should be done. The greater the amount of control exercised over the details of the work to be done, the more likely the inference that the relationship is one of employment.<sup>52</sup> This has become known in English law as the “control test”. According to Le Roux<sup>53</sup> the early use of this test was neither exclusively nor primarily aimed at distinguishing between *locatio conductio operis* and *locatio conductio operarum*. Rather, it was used for establishing a basis for the employer’s vicarious liability or at identifying the correct employer. Whereas the control test was adopted by South African law (most notably in the case of *Colonial Mutual Life Assurance Society Ltd v MacDonald*<sup>54</sup> discussed below) for determining whether a person in a specific relationship was a “workman” (employee), it was not used in the same doctrinal sense as in England.<sup>55</sup>

The second factor considered in determining whether a contract is one of employment, is to determine whether the worker’s interest in the relationship involved any prospect or risk of loss.<sup>56</sup> It is implicated by this factor that if a worker should possess a prospect or risk of loss brought about by the contractual relationship, such worker will not be an employee, but rather a partner or merely an independent contractor.<sup>57</sup>

The third factor to be considered, is whether the worker in question was properly regarded as part of the employer’s organisation. If so, chances are that the worker would be considered an employee of such organisation.<sup>58</sup>

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<sup>51</sup> [1947] A.C. 1 at 17.

<sup>52</sup> Beale (Ed) 944-945.

<sup>53</sup> Le Roux (2010) *ILJ* 143.

<sup>54</sup> 1931 AD 412.

<sup>55</sup> Le Roux (2010) *ILJ* 143.

<sup>56</sup> Beale (Ed) 943.

<sup>57</sup> *Idem* 948.

<sup>58</sup> *Idem* 943-944.

The fourth factor which must be considered is whether the worker was carrying on business on his own account or carrying on the business of the employer. Obviously, in case of the former, the worker would less likely be considered an employee in the existing relationship.<sup>59</sup>

The fifth factor for determining the existence of a relationship of employment is the provision of equipment, in other words, if the employer were to supply equipment necessary for performance of the contractual obligation in question, the worker who uses such equipment in order to fulfil his contractual obligations, will most likely be considered an employee.<sup>60</sup>

The sixth factor relates to the incidence of tax and national insurance. The duty to pay tax and national insurance of a worker would be indicative of whether such worker is an employee or not.<sup>61</sup>

The seventh and penultimate factor to be considered in determining whether a contract is an employment contract, is the consideration of the parties' own view of their relationship.<sup>62</sup> In many ways, it is submitted that this should actually be the most important consideration, as it would take into account whether there was consensus on the type of contract the parties wished to create.

The final factor to be considered is the traditional structure of the trade or profession concerned as well as the arrangements within it.<sup>63</sup>

It must be kept in mind that these factors should be regarded as mere considerations or guidelines for determining whether a relationship or contract is one of employment. In modern times, a test known as the "organisation test" has been promulgated in order to incorporate the abovementioned factors or considerations and determine whether a contract is one of employment. The "organisation test" asks the following question: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"<sup>64</sup> If the answer is affirmative, the person in question would not be considered an employee. It was confirmed in the case of *Lee Ting-Sang v Chung Chi-Keung and Shung*

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<sup>59</sup> Beale (Ed) 944.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Beale (Ed) 948.

*Shin Construction and Engineering Company Limited*<sup>65</sup> that the organisation test should be considered one of the most significant criteria for identifying the contract of employment.

Having investigated English law's perception of the contract of employment, it is clear that while such perception is definitely one of a *sui generis* contract, there are too many factors that point towards an employment contract not being an athlete's contract for the latter to be perceived merely as an occurrence of the former. However, a recent development in English law has led to the coining of the phrase "personal contract of employment", which seems to antagonise the point of view expressed in chapter of this thesis that the athlete's contract is not merely a sub-type of the employment contract, but entirely *sui generis*. In order to comment satisfactorily on the English categorisation of certain types of contract (including probably the athletes' contract) as mere "personal employment contracts," this recent categorisation should be investigated.

As a solution to the problem of employment law having become "extremely incoherent in the way that it defines the contracts that come within its scope", Freedland has devised a new category of contract, namely that of "personal employment contracts".<sup>66</sup> The reason why this contemporary classification must be alluded to, is because there is a good chance that the athlete's contract as defined in this thesis might be classified under the category known as "personal employment contracts" by English law, which would be a fundamental mistake.

The reason why Freedland felt it necessary to create a sub-category of employment contract is not entirely clear. He states that "it has become extremely difficult to decide whether certain employment relationships, or sets of arrangement for employment, fall into any of those categories and if so which of them."<sup>67</sup> It must be argued that the most likely reason for categorising contracts is to establish the most effective and suitable remedy for breach of that category of contracts. Otherwise, categorisation would be futile. The personal employment contract is defined by Freedland as "comprising contracts for employment or work to be carried out normally in person and not in the conduct of an independent business or professional practice."<sup>68</sup> From this definition it seems that the category of "personal employment contract" has been created in order to differentiate more clearly between the

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<sup>65</sup> [1990] 2 A.C. 374. For a discussion of the case, see McCormick "Employees' compensation: Employee or independent contractor?" (1991) *Hong Kong L.J.* 109.

<sup>66</sup> Freedland (2003) 13.

<sup>67</sup> *Ibid.*

<sup>68</sup> Freedland 28.

traditional employment contract (*locatio conductio operarum*) and the contract of piece work (*locatio conductio operis*). The former would obviously then constitute a “personal employment contract” because of the fact that the services in question will be rendered by the employee personally and for the sole benefit of the employer, while in the case of the latter the services in question will be performed by the independent contractor and/or his workforce, and for such independent contractor’s financial benefit. Therefore, one must come to the conclusion that the category of contract in English law known as the “personal employment contract” does not affect the stance of this thesis, namely that the athlete’s contract is not a sub-category of the employment contract in any way, but a unique (*sui generis*) contract, even though it involves the rendering of services of a *personal nature*.

In the case of *Lumley v Wagner*,<sup>69</sup> which is considered the *locus classicus* in English law as far as determining the most appropriate remedy in case of breach of the *locatio conductio operis* is concerned, the father of a minor woman, acting on the latter’s behalf, had entered into a contract with the manager of Her Majesty’s Theatre in London to perform six operas at said theatre.<sup>70</sup> The contract contained a clause which specifically forbade the woman to “use her talents at any other theatre, or in any other concert or reunion, public or private, without the written consent of the manager.”<sup>71</sup> It was evident from the contents of the contract that the “master and servant”-relationship did not apply to the current circumstances. If anything, the contract could be described as one of piece work, as discussed above. However, the court made specific mention of the unique nature of the woman in question’s talent. In considering the most appropriate remedy for breach of contract (the woman, through the representation of her father, subsequently committed breach of contract by entering into an agreement with another theatre company, and in doing so repudiated the contract with the manager of Her Majesty’s Theatre), the court stated the following:<sup>72</sup>

“The Courts have granted injunctions to restrain the sale of goods contrary to a prohibitory clause of an agreement, but it never has restrained an actor or a singer, for this reason that it cannot compel the specific performance and make a Defendant act or sing.”

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<sup>69</sup> 42 E.R. 687 (1852).

<sup>70</sup> *Lumley v Wagner* 42 E.R. 687 688; Christie 556.

<sup>71</sup> *Lumley v Wagner* 42 E.R. 687 688.

<sup>72</sup> *Idem* 690. This statement found resonance in the decision of Desai J in *Santos Professional Football Club v Igesund and Another*.

The court found that specific performance would probably not be the most suitable remedy for breach of a contract of piece work requiring services of a very personal nature.<sup>73</sup> It ought to be noted that specific performance has always been considered a secondary or “equitable” remedy in English law, which is contrary to the Roman-Dutch and South African legal positions. Although the suitability of the remedy of specific performance is only discussed further on in this thesis, the case of *Lumley v Wagner* is relevant to the purpose of this subsection, as it provides a practical example of the contract of piece work involving services of a *sui generis* nature.

As with the discussion of the contract of employment in Roman law, it would be beneficial and also relevant to discuss the early occurrences of contractual relations involving athletes in English law. In England, sport during the Middle Ages consisted mainly of the hunting of animals of various kinds.<sup>74</sup> Archery, bowls and horse racing are further examples of sports dating back to the sixteenth century.<sup>75</sup> According to Birley, hunting as a sport was introduced to Britain by the Celtic tribes at about 1000 BC.<sup>76</sup> During the Roman occupation of Britain, ball games and chariot racing were also introduced, followed by swimming, running, archery and horse racing up until the Norman invasion alluded to in chapter 5.<sup>77</sup> As soon as sport began to be played, regulation thereof became necessary. So, for instance, Birley states that after the Norman invasion of Britain, restrictions on hunting that had been in force before the invasion continued.<sup>78</sup> Hunting was limited to the ruling classes and certain areas of land. The Church also attempted to control the misuse of holy days.<sup>79</sup> Interestingly enough, Edward I banned all tournaments and swordplay in 1285. Football in particular was the cause of major concern for the authorities, as it was seen to impede the progress of archery.<sup>80</sup>

Although it is quite clear that sport in the UK is as old as the country itself, it wasn't until the reign of Queen Victoria<sup>81</sup> that regulation of sport was modernised. Sport became increasingly codified, and formal rules of the main sporting codes in Britain were initiated during this

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<sup>73</sup> A contract of personal services, according to Sagi “Specific performance of enlistment contracts” 2010 *Military Law Journal* 150 at 151 is described as “a contract in which one of the sides agrees to render to the other side services that are continuous and involve skill, personal labour, and cultivated judgment.

<sup>74</sup> Gardiner *et al* 13.

<sup>75</sup> Gardiner *et al* 13.

<sup>76</sup> Birley (1993) 16; Gardiner *et al* 16.

<sup>77</sup> Birley 16; Gardiner *et al* 16.

<sup>78</sup> *Ibid.*

<sup>79</sup> Gardiner *et al* 16.

<sup>80</sup> Birley 35; Gardiner *et al* 17.

<sup>81</sup> 20 June 1837 to 22 January 1901.



era.<sup>82</sup> Rule structures and sporting governing bodies began to emerge in the 1860's: the Football Association in 1863, the Amateur Athletic Club in 1865, the Queensbury rules of boxing in 1867, Rugby Union in 1871, Wimbledon Lawn and Tennis Club in 1877, the Amateur Swimming Association in 1886, the English Football League in 1888 and the Rugby League in 1894. It is in this context that the treatment of athletes' contracts by UK Courts should be discussed.

A specific sporting code that deserves a closer look as far as English law relating to athletes' contracts is concerned, is cricket. The reason for this is that there are numerous indications that cricket has, from its infancy, been a professional sport with individuals being remunerated for playing the game. In fact, Webber<sup>83</sup> states that an inter-county match between Kent and London was played in the 1719 season "for a considerable sum of money". Due to said sums of money involved, it was imperative to codify the rules of the game, and in 1744 the "Laws of Cricket" was published "since large amounts of money were wagered on the results".<sup>84</sup> Furthermore, it is also relatively well-known that for some matches during the first half of the eighteenth century, "Articles of Agreement" were drawn up for specific matches. The primary purpose of these "Articles" was to regulate the deciding of bets and supplementing laws generally accepted for common use.<sup>85</sup> As the century moved on, Webber states that the amounts of money wagered at cricket increased.<sup>86</sup> With these ever-rising stakes, it was inevitable that participants would eventually be paid to perform services of a "cricketing nature". From early in the eighteenth century, amateur cricketers were referred to as "gentlemen" while professional cricketers were simply referred to as "players".<sup>87</sup> Although the number of professionals in teams was initially limited, eventually entire teams consisted of professionals exclusively.<sup>88</sup> Because of the fact that cricket towards the end of the eighteenth century became one of the aristocracy's favourite pastimes, professional contracts had to be introduced in order to regulate the relationships between clubs and players representing them.<sup>89</sup> There is little doubt that these were the first occurrences of "employment" contracts in English law governing sporting relations.

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<sup>82</sup> Gardiner *et al* 22.

<sup>83</sup> Webber (1960) 11.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Idem* 13.

<sup>87</sup> Pycroft (1862) 29-30.

<sup>88</sup> *Idem* 63.

<sup>89</sup> Hawkins (2012) 3-4; Szymanski (2009) 20.

### 3.6. The contract of employment in South African law

According to Fouché,<sup>90</sup> the ordinary contract of employment can be defined as follows:

“A reciprocal contract in terms of which an employee places his services at the disposal of another person or organization, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the services.”

Van Jaarsveld *et al*<sup>91</sup> add hereto the following definition:

“A reciprocal contract in terms of which an employee, for a specific period and remuneration, places his services under the authority of an employer.”

A third definition is provided in Nagel *et al*,<sup>92</sup> and reads as follows:

“The employment contract is a reciprocal agreement in terms of which the employee makes available to the employer his services for a determined period and usually for remuneration, under the authority of the employer.”

From these definitions, it is clear that the contract of service possesses certain identifiable elements or characteristics.<sup>93</sup>

Firstly, it is a contract in the Roman-Dutch sense of the word, as discussed above.<sup>94</sup> This implies that if the parties to the contract enter into the agreement freely and willingly and with the necessary *consensus ad idem*, an obligation, or possibly even multiple obligations, will be created between the parties, to which they will be bound. Failure to perform in terms of the obligation by any of the parties will result in breach of the contract in question and consequent legal action against the breaching party. The second element or characteristic of the contract of service is that the employee has a duty towards the employer to make available his personal services to the latter.<sup>95</sup> Joubert JA in *Smit v Workmen's Compensation*

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<sup>90</sup> Fouché in Du Plessis *et al* (2012) 12.

<sup>91</sup> Van Jaarsveld *et al* (2006) 46.

<sup>92</sup> Nagel *et al* (2011) 538.

<sup>93</sup> It is important to note that the definitions provided here refer to the contract of service or *locatio conductio operarum*, as opposed to the contract for the hiring and letting of piece work or *locatio conductio operis* between an employer and an independent contractor. The nature of the *locatio conductio operis* is discussed in the text under 1.6.2.

<sup>94</sup> Fouché in Du Plessis *et al* 13; Van Jaarsveld *et al* 47.

<sup>95</sup> *Ongevallekommissaris v Onderlinge Versekeringsvennootskap AVBOB* 1976 4 SA 446 (A) 461; *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158; Fouché in Du Plessis *et al* 22; Van Jaarsveld *et al* 54; Prinsloo (2000) *J.S Afr. L.* 230.

*Commissioner*<sup>96</sup> noted that the rendering of personal services amounted to the object of the contract of service.<sup>97</sup> By “personal” services is meant that the employee himself, and not an agent, should be available to the employer to perform the relevant services in terms of the contract.<sup>98</sup> The employee should as a matter of fact be at the “beck and call” of the employer to render the personal services at the behest of the latter.<sup>99</sup> Should the services for some reason not be available to the employer, or should the employee not be able to render the services in question personally, the latter will not be entitled to the agreed salary or wages.<sup>100</sup> Mention should be made that the nature of the services in question is an important identifiable characteristic of the contract of service as well as the contract of piece work. The nature of the services in question will also contribute largely to the determination of the nature of the athlete’s contract further on in this chapter. A third element of the contract of service is that the services in question are performed by the employee subordinate to the employer.<sup>101</sup> According to Joubert JA in *Smit v Workmen’s Compensation Commissioner*, the employee must obey all lawful commands, orders and instructions of the employer. The latter has the right to dictate to the former how these instructions should be conducted.<sup>102</sup> This element is probably the most indicative of the fact that a particular contract is a contract of service.<sup>103</sup> The test for whether this element is present is known as the “control test”. It first emerged in South African case law in the case of *Colonial Mutual Life Assurance Society Ltd v MacDonald*,<sup>104</sup> in which De Villiers CJ explained the “control test” as follows:

The test is the existence of a right of control over the agent in respect of the *manner* in which his work is to be done (Author’s emphasis). The relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract.<sup>105</sup>

Le Roux<sup>106</sup> argues that this element does not require actual control over the employee’s work, but rather a right to control. It is even possible for actual control to be absent.<sup>107</sup> This is an

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<sup>96</sup> 1979 1 All SA 152 (A).

<sup>97</sup> *Smit v Workmen’s Compensation Commissioner* 1979 1 All SA 152 (A) 158.

<sup>98</sup> *Ongevallekommissaris v Onderlinge Versekeringsvennootskap AVBOB* 1976 4 SA 446 (A) 461; *Smit v Workmen’s Compensation Commissioner* 1979 1 All SA 152 (A) 158; Fouché in *Du Plessis et al* 22; Van Jaarsveld *et al* 54.

<sup>99</sup> *Smit v Workmen’s Compensation Commissioner* 1979 1 All SA 152 (A) 158.

<sup>100</sup> Fouché in *Du Plessis et al* 22.

<sup>101</sup> *Ongevallekommissaris v Onderlinge Versekeringsvennootskap AVBOB* 1976 4 SA 446 (A) 461; *Smit v Workmen’s Compensation Commissioner* 1979 1 All SA 152 (A) 158; Fouché in *Du Plessis et al* 22; Van Jaarsveld *et al* 47, Prinsloo (2000) *J. S. Afr. L.* 230.

<sup>102</sup> *Smit v Workmen’s Compensation Commissioner* 1979 1 All SA 152 (A) 158.

<sup>103</sup> *Idem* 160.

<sup>104</sup> 1931 AD 412.

<sup>105</sup> *Colonial Mutual Life Assurance Society Limited v MacDonald* 1931 AD 412 435.

interesting element as far as the employment relationship between a professional athlete and his employer is concerned, as will be explained hereunder.<sup>108</sup>

Fourthly, compensation is a vital element of the contract of service.<sup>109</sup> This is also the employer's most important duty in terms of the contract.<sup>110</sup> The final element of the service contract is that it expires at the end of the period of service agreed upon between the parties.<sup>111</sup> This is why the contract of service is often referred to as a "fixed-term contract".

It is evident from these characteristics or elements that the contract of service is unique in itself. However, since the contract of employment in the broad sense also includes the contract of piece work or *locatio conductio operis*, and since a specific form of the latter also features prominently between professional athletes and coaches and the clubs or unions that employ them, it is important to explain what this sub-occurrence of the contract of employment entails, and also to explain in detail what the differences between the *locatio conductio operarum* and *locatio conductio operis* entail. Fouché<sup>112</sup> defines the latter as follows:

"A reciprocal contract between an employer and an independent contractor in terms of which the latter undertakes to build, manufacture, repair or alter a corporeal thing within a certain period, and the employer undertakes to pay the contractor a reward as counter-performance therefor."

In this relationship of employment, the independent contractor is in control of the performance (piece work) and not subject to the control of the employer at all. Although Van

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<sup>106</sup> Le Roux 2010 *ILJ* 139.

<sup>107</sup> *Ibid.*

<sup>108</sup> It should be noted at this stage, however, that the 'control test' was created in order to establish the existence of a so-called "master and servant"-relationship between two contracting parties. Although it resembles the historical "master and servant"-relationship, the relationship between a professional athlete or coach and his employer can definitely not be described as one of "master and servant". The professional athlete or coach is a "master" in his own right and possesses what a court in Philadelphia has described as "unique skills" (See the case of *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; A 973 976). The argument that an athlete possesses extraordinary skills was raised as early as the case of *Walker v Crystal Palace Football Club Limited* 1910 KB 87, discussed in the text below. This is a vital indication, and will be stressed further on in the text, that the contract between a professional athlete or coach and his employer is *sui generis*, and not a regular contract of employment.

<sup>109</sup> *Ongevallekommisaris v Onderlinge Versekeringsvennootskap AVBOB* 1976 4 SA 446 (A) 461; *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158; Fouché in *Du Plessis et al* 22; *Van Jaarsveld et al* 46, *Prinsloo* (2000) *J. S. Afr. L.* 230.

<sup>110</sup> Fouché in *Du Plessis et al* 18.

<sup>111</sup> *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158; Fouché in *Du Plessis et al* 18; *Van Jaarsveld et al* 47.

<sup>112</sup> Fouché in *Du Plessis et al* 12. Joubert JA in *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 154-155 makes mention of some of the professionals on this list as well.

Jaarsveld *et al*<sup>113</sup> mention that the list of independent contractors usually includes professionals such as building contractors, road contractors, drilling agents, electrical contractors, painters and carpenters, the once-off services of a professional athlete (such as a professional tennis player, golfer or boxer) at a tournament would definitely fall within the ambit of the *locatio conductio operis*. The reason for this is because in the case of a professional tennis player, boxer or golfer, the athlete in question does not conclude a fixed-term employment contract with an employer, but merely a contract to participate in a specific tournament. Once said participation has been concluded satisfactorily, the contract will come to an end. According to Joubert JA in *Smit v Workmen's Compensation Commissioner*, the independent contractor is the party who undertakes to complete the piece of work agreed on, thereby acting as “hirer” of the work, while the employer acted as the “lessor” of the work.<sup>114</sup> The subject matter therefore is the product or the result of the independent contractor's labour.<sup>115</sup>

Having discussed the origins and development of both the *locatio conductio operarum* and the *locatio conductio operis* in Roman law, Roman Dutch law, English law and current South African law, it is clear that there are significant differences between the two. For the sake of clarity, these differences are summarised as follows:

### Object of the contract

In the case of the contract of service, the object is the rendering of personal services by the employee to the employer, whereas in the case of the contract of piece work, the object is the performance of a specified piece of work in order to bring forth a product.<sup>116</sup>

### Services

By implication the services in question as far as the contract of service is concerned, must be performed personally by the employee. The services in question as far as the contract of piece work is concerned, need not be performed by the independent contractor himself, but may be performed by people under his auspices or control.<sup>117</sup> This differs significantly from the

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<sup>113</sup> Van Jaarsveld *et al* 61.

<sup>114</sup> *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 154.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158; Le Roux 2010 *ILJ* 158. Feenstra states that “de voornaamste verplichting van de aannemer, de conductor, was het totstandbrengen van het aangenomen werk.”

<sup>117</sup> *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 158; Le Roux 2010 *ILJ* 157.

professional athlete who participates in a specific tournament as an independent contractor, like a golfer or tennis-player. In the latter instance, it would be impossible for the contractant (the athlete) to delegate his duties in terms of the contract. The reason for this is because the athlete possesses athletic skills in that specific code which are so unique that only that specific athlete possesses them, and no-one else.

### Subordination

The employer in the case of the contract of service has the right to choose when to make use of the personal services of the employee, and the latter can therefore be said to be subordinate to the will of his employer. Additionally, the employee is obliged to perform the employer's commands or instructions, provided these are reasonable and lawful. However, in the case of the contract of piece work, the independent contractor is in control of the specified work to be done, and not under the subordination or control of the employer at all.<sup>118</sup> Labour legislation<sup>119</sup> applies to the relationship between an employer and employee, but not to that between an employer and an independent contractor.<sup>120</sup> This fact is indicative of not only the difference between an employee and an independent contractor, but also of the vast differences between an employee or independent contractor and an athlete.

### Period

The contract of service, being a fixed-term contract, terminates after the expiry of the period stipulated in the contract itself, or at the death of the employee, whereas the contract of piece work terminates at the completion of the specified work. The latter does not necessarily terminate at the death of the independent contractor, as the object of this contract is the work or product, and not the party who has to perform such work.<sup>121</sup>

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<sup>118</sup> *Ibid.*

<sup>119</sup> "Labour legislation" in the South African context refers to the following statutes: the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act, 55 of 1998, the Unemployment Insurance Act 63 of 2001, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Skills Development Act 97 of 1998.

<sup>120</sup> The definition of "employee" in section 1 the Basic Conditions of Employment Act 75 of 1997 states that an employee is "any person, *excluding an independent contractor*, who works for another person or for the State and who receives, or is entitled to receive, any remuneration." See also Jordaan in Basson and Loubser (eds) (2000). According to the author, this implies that independent contractors are not protected by Labour legislation as far as the termination of their services is concerned. The contract between their employers and them is the only source of the parties' respective rights and services.

<sup>121</sup> *Smit v Workmen's Compensation Commissioner* 1979 1 All SA 152 (A) 159; *Le Roux* 2010 *ILJ* 157.

The fact that the employment contract (especially the South African notion thereof) possesses two sub-categories is important as far as the identification of the nature of the athlete's contract is concerned. The reason is obvious: the *locatio conductio operarum* and *locatio conductio operis* differ in nature. Therefore, the nature of a contract between, for example, a professional rugby player and the club, province or franchise which he represents will differ from that of a contract between a professional boxer and the organisers of a once-off boxing match in which said professional boxer will feature. It is imperative that the distinction is stressed throughout this chapter and this thesis, as one will have to establish whether specific performance would be a suitable remedy for breach of either type of employment contract. Although it is trite law that the specific performance is the primary remedy for breach of an employment contract,<sup>122</sup> it may or may not be the most suitable remedy for breach of the athlete's contract.

### 3.7. The nature of the athlete's contract

It has been stated above and well-documented elsewhere<sup>123</sup> that the relationship between professional athletes and their employers is one of employment, and therefore subject to statutes, rules and regulations pertaining to labour law. However, it is one of the main objects of this chapter to demonstrate that there are certain characteristics that contracts between professional athletes and their employers, or organisers of events and professional athletes as independent contractors, possess that make them unique in nature, or *sui generis*. In order to substantiate this, I shall focus foremost on what the term "athlete's contract" entails, what makes it unique (in other words, what constitutes a "*sui generis* contract" in general) and lastly how the athlete's contract, either resembling a contract of service or a contract of piece work, ultimately differs in nature from its ordinary employment-counterpart.

Le Roux<sup>124</sup> has stated that "the attraction of sport is the uncertainty of the result." That is perhaps the one feature that distinguishes it from other forms of entertainment where the scriptwriter or director predetermines the outcome. Inherent to the success of sport is the existence of the competition. This is also what distinguishes sport from any other form of

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<sup>122</sup> This fact was established in *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A).

<sup>123</sup> Most notably in *Walker v Crystal Palace Football Club Ltd* 1910 KB 87 92; *Dempster v Addington Football Club (Pty) Ltd* 1967 3 SA 262 265; *Highlands Park Football Club Ltd v Viljoen and Another* 1978 3 SA 191 (W) 192; *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 5 SA 73 (C) 79; Louw 222; Anderson 257 and Gardiner *et al* 394.

<sup>124</sup> Le Roux "Under starter's orders: Law, Labour law and Sport" 2002 *International Law Journal* 23. See in this regard also Smailes "Sports law and labour law in the age of (rugby) professionalism: collective power, collective strength" 2007 *Industrial Law Journal* 57.

business.” It may be argued, then that if the performance regulated by the contract in question is unique, so too is the contract. The term “athlete’s contract” or “sports contract”<sup>125</sup> usually applies to the legal tool regulating relationships within professional sport. However, the aim of this discussion is to determine the characteristics of this type of contract, and therefore contracts between amateur sportsmen and governing bodies of certain sporting codes should not be ignored when attempting to determine these characteristics. In order to determine the substantial differences between the athlete’s contract and the employment contract, it would be feasible to determine firstly what the characteristics of the athlete’s contract are, in order to indicate that there are too many factors or characteristics which are unique only to the latter for it to be classified merely as an employment contract. Foreign case law as well as South African case law contain hints, definitions and discussions as to the *sui generis* characteristics of the athlete’s contract, as the athlete’s contract is in nature a global legal phenomenon (as mentioned above), and not confined to the boundaries of a single jurisdiction.

Louw<sup>126</sup> lists the following characteristics of the “relationships of these people (professional athletes) to the unions or governing bodies to whom athletic or sporting services are rendered”:

- (i) “The standard players’ contracts all provide for an obligation on the part of the player to perform personal sporting services to the other party.
- (ii) These athletic services are rendered subject to the control and direction of such other party- although the measure of such control may differ from that found with other employees, the inherent control is always present and especially evident in for instance the practice of selection of players for matches.
- (iii) These agreements all provide for the absorption of the player’s labour power in respect of the rendering of athletic services, either to the exclusion or semi-exclusion of other employers.
- (iv) The remuneration payable as a reciprocal obligation in return for services rendered contains traditional elements found in the employment of other employees, e.g. medical aid and retirement contributions paid by the employer.

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<sup>125</sup> The reason why the term “athlete’s contract” is preferred for the purposes of this thesis, is because the term “sports contract” is potentially a much wider one, and open for potential misinterpretation. Cloete (2005) 17 states that “a single sport event may involve a substantial number of different contractual obligations.”

<sup>126</sup> Louw 234-235.



- (v) These agreements provide for power on the part of the employer to discipline and dismiss players for misconduct or poor work performance, which in some cases exceed the measure of control (as found in “ordinary” employment contracts over the autonomy of the employee in respect of their physical integrity and the pursuit of outside or personal interests and activities).
- (vi) The wording of the players’ contracts in all these cases explicitly refer to the relationship as one of “employment”, and to the parties as “employer” and “employee”.
- (vii) The relationship between the parties falls squarely within the legislative definition of employment, and such players are nowhere expressly excluded from the ambit of such legislation.”

The characteristics listed by Louw above create the dominant impression that the contract between a professional athlete and his “employer” is one of employment. This is an oversimplification. It is essential to show that while there are certain characteristics of the athlete’s contract that do correspond with those of the employment contract, there are too many characteristics of the former that are too unique to be perceived merely as a *sui generis* contract of employment.

As early as 1910, the issue of the nature of the athlete’s contract was addressed in the King’s Bench’s decision of *Walker v Crystal Palace Football Club Limited*.<sup>127</sup> The contents of the contract in question included the duty of the club, to pay the athlete.<sup>128</sup> It also included the athlete’s duty to “play in all matches when required by the club and keep himself temperate, sober and in good playing form.”<sup>129</sup> The contract was concluded for a period of one year.<sup>130</sup> Regarding the uniqueness of the contract, however, an interesting argument was made by one Russell, counsel on behalf of the club. Counsel argued that there was a “certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill, e.g., the club would have no right to dictate to him *how* he should play football.”<sup>131</sup> Counsel’s argument insinuated that while the contract between the professional athlete and the club that employed him was one of employment, there was something unique about the element of subordination as explained above. The element of uniqueness was found in the fact that the employee in question- a professional athlete- possessed certain skills that an “ordinary workman” did not

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<sup>127</sup> 1910 KB 87.

<sup>128</sup> *Walker v Crystal Palace Football Club Ltd* 1910 KB 87 87.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Walker v Crystal Palace Football Club Ltd* 1910 KB 87 92.

possess, and therefore was not subordinate to his employer as far as the way in which he played the sport was concerned. Of course, the player still had to abide by his employer's demands as far as discipline, game plans and the like were concerned, but because he possessed a certain special talent, counsel was arguing that the employer had no control over the player's unique skills. The argument was thus not that the player was acquitted of having to comply with the team captain's instructions or discipline, but that the player, because he possessed certain unique sporting skills, was free to exhibit these skills as he wished. Professional athletes have different ways and methods of exhibiting their unique skills, and would not have become professional had they not been allowed to do so as they thought best.<sup>132</sup> This is possibly the primary difference between the "personal services" performed by an employee in an ordinary contract of employment, and a professional athlete in an athlete's contract. The latter is gifted in a way that the former is not - an athletic way. The argument here is not that the services performed by an athlete are the only type of unique services that can be performed under a contract. The services performed by a pilot,<sup>133</sup> for instance, are also unique. However, there is a vast difference between the services performed by a pilot working for a commercial airline company and those performed by a show pilot who participates in flying competitions, such as the Red Bull Air Race,<sup>134</sup> which attract large crowds and are broadcast in many nations. While there are many professions that may be considered unique, sport is the only profession in which it is essential for the professional participant to possess unique athletic skills in the sport in question. The issue is that the services performed by an athlete are specific ones that require unique *athletic* skills in a unique practice - that of sport. In the case of *Philadelphia Ball Club v Lajoie*,<sup>135</sup> the Pennsylvania Supreme Court simply referred to these as "unique skills",<sup>136</sup> meaning in fact unique skills aimed at participating in sport. It goes without saying that these skills are of such a nature as to attract spectators - people pay money to see these special skills exhibited. Traverso J in *Coetzee v Comititis*<sup>137</sup> exclaimed that "the fate of professional soccer players is of public interest,"<sup>138</sup> hinting on the fact that because of their unique athletic skills, the public

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<sup>132</sup> An example of this would be a cricketing batsman's unique batting style. While an employer or coach can make suggestions to improve the style, they would have no right to change the batsman's style completely, especially if such batting style has contributed in earning the batsman professional status as a cricketer.

<sup>133</sup> As in the case of *Nationwide Airlines (Pty) Ltd v Roediger and Another* 2008 (1) SA 293 (W).

<sup>134</sup> This race involves pilots using their flying skills by navigating light aircraft through a series of obstacles.

<sup>135</sup> 202 Pa. 210; A. 973; 1902. A detailed discussion of how especially Courts in the United States of America perceive the athlete's contract follows in chapter 6.

<sup>136</sup> 202 Pa. 210; A. 973; 976.

<sup>137</sup> 2001 1 SA 1254.

<sup>138</sup> *Coetzee v Comititis* 2001 1 SA 1254 1264.

shows an extraordinary amount of interest not only in the athlete's skills, but also his private life. While there are many professions that require unique skills as explained above, none attracts as many spectators as sport does. It should also be mentioned at this stage that the principles governing athlete's contracts are similar all over the world, notwithstanding different jurisdictions' treatment of employment contracts in general. Therefore there is no reason why the principles applied in *Walker* (which was an English case) and *Lajoie* (an American case) should not be applied to South African law as well. Le Roux<sup>139</sup> has stated that the attraction of sport lies in the uncertainty of the result, and that this is the one feature that distinguishes sport from other forms of entertainment. The result is uncertain because of the fact that people with more-or-less equal athletic capabilities –all of them unique- compete against each other by exhibiting their special athletic skills. Furthermore, because sport, unlike any other business, places extreme demands on the bodies of the participants involved, the career of a professional athlete is extremely limited.<sup>140</sup> This fact makes the question as to the most appropriate remedy in case of breach of an athlete's contract all the more relevant. Would it be fair to compel an athlete, who has a limited career as far as time is concerned, to settle for lesser remuneration because he has signed an athlete's contract? That is the main question posed by this thesis. Although the initial argument as to these special skills possessed by an athlete was raised in an English case, the exact same argument has been raised in South African case law.<sup>141</sup> In *Dempster v Addington Football Club*<sup>142</sup> the athlete's contract demanded from the latter to do the following:

- (a) "Apply his mind and body diligently to the art of association football.

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<sup>139</sup> Le Roux 2002 *ILJ* 1195.

<sup>140</sup> This fact is acknowledged by section 15 of the South African Football Association's regulations on the status and transfer of players, among other documents. It reads as follows:

15.1. It shall be misconduct for a player to repudiate his/her contract of employment without sporting just cause and to sign a contract of employment with another club –

15.1.1. in all cases, if the repudiation occurs before the end of the second year of the player's contract,

15.1.2. where the player is under the age of 31, if the repudiation occurs before the end of the third year of the player's contract, and

15.1.3. in cases where the player is 31 years or older and the repudiation occurs during the third year of the player's contract, if the player did not give reasonable notice to the club of his/her intention to join another club. The philosophy behind this regulation is that leniency should be exercised as far as repudiation of contracts is concerned towards professional footballers who are older, because of the fact that the remainder of their professional careers is much shorter. This argument was raised with much merit in the unreported case of *Botha v Blue Bulls Company (Pty) Ltd and Another*, number JR1965/2005.

<sup>141</sup> There has, however, never been an Appeal Court decision addressing the nature of the athlete's contract and the most suitable remedy in case of breach thereof. This is the contribution this thesis aims to make.

<sup>142</sup> 1967 3 SA 262 (D).

- (b) Attend all training sessions and matches and all other functions as directed, and at the sole discretion of the team manager, in regard to professional soccer.”

The first requirement is a clear indication that the physical attributes of the athlete had to be protected to such an extent that he would be capable of performing the demanding physical exercises required to play football. Although some other professions also require physical health, none requires the subject to be in such peak physical condition as in the case of sport. This is also the reason why athletes are constantly tested for the presence of prohibited substances in their systems.<sup>143</sup> Because sport involves (to the greatest extent) activity of a physical nature, it would be unfair towards competitors if athletes were to enhance their physical attributes in an unnatural manner.<sup>144</sup> This fact distinguishes sport from any other profession, in which employees would be expected to improve their performance by any legal means (which is to say means that are not criminal in nature) necessary. An athlete who increases his athletic performance by taking stimulants, will most likely be expelled, whereas a regular employee will most likely be awarded for doing huge amounts of work due to his taking stimulants. The opposite is also true as far as sport is concerned: whereas an athlete should refrain from doing anything to enhance his performance in an unnatural manner, he should also take care not to engage in any type of activity that would lead to the restriction of his abilities. This is why many standard athletes’ contracts contain clauses which prohibit athletes from participating in activities which could potentially be detrimental to such

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<sup>143</sup> The purpose of the World Anti-doping Code is to “protect the athletes’ fundamental right to participate in drug-free sport and thus promote health, fairness and equality for athletes worldwide.” This purpose is reiterated in article 2 of the South African Institute for Drug-Free Sport’s (SAIDS) Anti-doping rules, which states that “it is each athlete’s personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish an anti-doping rule violation...”. In the well-known American case of *United States v Curtis Strong* CR 85-129, a professional baseball player was charged with distributing cocaine among other professional baseball players. One of the state witnesses, Dave Parker, also a professional baseball player, testified that he had, while under contract from 1979 to 1983, abused cocaine on a regular basis, and that this had caused his game to suffer. Based on this submission, his former club, the Pittsburgh Pirates, attempted to reclaim part of the salary they had paid him while still under contract. This claim was based on the fact that the athlete did not keep himself in peak physical condition, as stated in the athlete’s contract. This case is alluded to in chapter 8 of this thesis.

<sup>144</sup> Whereas an athlete should not enhance his performance through unnatural means, he is obviously free to enhance his physical skills through natural means, such as better training opportunities, coaching, etcetera. In the case of *Golden Lions Rugby Union v Venter*, unreported case number 2007 of 2000, the court decided that factors such as superior coaching staff and the opportunity to train on the beach and swim in the sea provided sufficient motivation for an athlete to change clubs. In no profession other than sport would better opportunities to improve one’s physical condition and attributes be regarded as sufficient grounds to move from one “employer” to another by a court of law.

athletes' physical health and wellbeing. Because of the uniqueness of the athletic skills required by the persons under discussion, the nature of the services in question is obviously also unique. In a word, these services can be described as "highly personal". In the case of *Troskie en 'n Ander v Van der Walt*,<sup>145</sup> Wright J held the following:

"The nature of the services which had to be rendered in the matter at hand, is the playing of rugby for a specific club. The rendering of the relevant services depends not only on the enthusiasm, willingness and perseverance of the player in question, but said services demand a fair amount of expertise, skill and aptitude of a personal nature which will be dependent on the specific player's characteristics and also his relationship with the club for which he plays."<sup>146</sup>

The relevance of Wright J's decision to this chapter lies in the very first sentence of his decision above. He hints on the fact that the services in question are of a nature that requires a significant amount of knowledge and skill of a personal nature, and also that the services in question would demand specific characteristics (as well as capabilities) of the athlete. Desai J in *Santos Professional Football Club v Igesund and Another*<sup>147</sup> made specific mention of the fact that the "the nature of the services are of such a highly personal nature that it would be virtually impossible to determine whether the first respondent is functioning optimally."<sup>148</sup> Considering the fact that Hefer JA had already confirmed in *Benson v SA Mutual Assurance Society*<sup>149</sup> that specific performance was a primary remedy in South African law, one must assume that Desai J's decision not to grant this remedy was based on the view that the contract in question was not an ordinary contract of employment, but one that involved "services of a highly personal nature", therefore making it extraordinary. Although the contract in question was one between a professional football coach and a club, the legal principles governing the contract were exactly the same as what would have been the case had it been a contract between a professional athlete and a club.<sup>150</sup> Foxcroft J on appeal to the Full Bench<sup>151</sup> in *Santos* made great strides towards indicating that the contract in question

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<sup>145</sup> 1994 3 SA 545.

<sup>146</sup> *Troskie en 'n Ander v Van der Walt* 1994 3 SA 545 552. The original Afrikaans text reads as follows: *Die aard van die dienste wat in die onderhawige saak gelewer moes word, is die speel van rugby vir 'n besondere klub. Die lewering van die betrokke diens is nie alleen afhanklik van die persoonlike entoesiasme, bereidwilligheid en deurstellingsvermoë van die besondere speler nie, maar ook is daar aan die betrokke dienste 'n groot mate van kundigheid, bedrewenheid en vaardigheid van persoonlike aard verbonde en wat afhanklik sal wees van die besondere speler se spesifieke eienskappe en ook sy verhouding met die klub vir wie hy rugby speel.*

<sup>147</sup> 2002 5 SA 697 (C).

<sup>148</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 5 SA 697 (C) 701.

<sup>149</sup> *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 782.

<sup>150</sup> Champion (2005) 8 states that contracts for coaches are similar to players' contracts.

<sup>151</sup> 2003 5 SA 697 (C).

was not an ordinary contract of employment. In fact, Foxcroft J's decision led to some scrutiny, most notably by Naudé,<sup>152</sup> discussed below. *In casu*, Foxcroft J stated the following:

“It is important, in my view, to bear in mind that this was not a case of an ordinary contract of employment. It differed from an ordinary contract (of employment), both in respect of the signing-on fee and the job description dealt with below.”<sup>153</sup>

This statement was followed up by the following:

“First respondent in this appeal is certainly no ordinary servant, but a contracting party, contracting on equal terms with applicant, and being able to command a high sum of money to do so. He is also given *carte blanche* in the exercise of his duties.”<sup>154</sup>

What made the contract a unique one as opposed to one of employment, according to Foxcroft J, was the fact that it made provision for a “signing-on” fee and that the job description of the professional coach included the fact that the employer-club had no right to prescribe to the coach how to do his job. Naudé<sup>155</sup> reiterates this characteristic identified by Foxcroft J, by stating that interference by the club in the execution of the professional coach's duties would even have led to breach of contract by the club. It is evident then that the working relationship did not imply one in which the employee was subordinate to the employer.<sup>156</sup> This is clearly a move away from the ordinary contract of employment discussed above, and it is fair to say that the contract in the *Santos*-case would not pass the “control test”. Naudé went even further in explaining why the contract in question was not an ordinary contract of employment. The fact that the professional coach had contracted on equal terms with the club's representatives, and was consequently able to demand a large sum of money for his services, was another *sui generis* characteristic of the contract in question.<sup>157</sup> The coach possessed an increased amount of bargaining power, based on the fact that he was a “highly successful and respected coach”.<sup>158</sup> There was therefore not a situation where the “employee” was presented with a unilateral contract favouring the employer's interest.<sup>159</sup>

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<sup>152</sup> Naudé “Specific performance against an employee. *Santos Professional Football Club Ltd v Igesund*” 2003 SALJ 269. Le Roux (2003) S.A. Merc. L.J. 116 also provides some valuable input on the decision in question.

<sup>153</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 5 SA 73 (C) 76.

<sup>154</sup> *Idem* 79.

<sup>155</sup> Naudé 2003 SALJ 271.

<sup>156</sup> *Ibid.*

<sup>157</sup> Naudé 2003 SALJ 271.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* This rang true to what Louw 215 describes as follows: “In line with developments elsewhere, and in parallel with more general developments in South African society and its new constitutional order in the movement towards democracy, freedom and respect for human rights, South

Naudé makes mention of a potential characteristic that the Court did not identify, and that is the fact that if any damages were to be caused by the breach of the type of contract in question, it would be more difficult to quantify than would be the case in ordinary employment sectors. This characteristic would be even more of a substantial one if the party in breach of contract (if such breach were to occur) was very difficult to replace because of the possession of certain “special skills”, discussed above.<sup>160</sup> Something that must also be kept in mind, according to Naudé, is that the loss of a professional player or coach may even affect the interests of potential sponsors and fans. Once again, damages caused by such loss will be near impossible to calculate.<sup>161</sup> Recently Seedat C in the private arbitration matter of *Mmethi and Bloemfontein Celtics Football Club*<sup>162</sup> reiterated the fact of “special skills” possessed by professional athletes in no uncertain terms. The arbitrator stated that professional football clubs sought out players with “exceptional talent and deft skills”<sup>163</sup> because of the fact that (South African, but certainly also foreign one of all sporting codes) “rampage for glory.”<sup>164</sup>

Because of the fact that athletes are considered assets to the clubs, unions or franchises which they represent,<sup>165</sup> they certainly do possess increased bargaining power when negotiating the terms of their contracts and thereafter, a fact alluded to above. Blackshaw<sup>166</sup> has stated that one must also keep in mind that an athlete’s image rights are considered to be capital assets, and that these image rights are naturally always transferred when an athlete is transferred. This is in itself a move away from the traditional relationship between “master” and “servant” and is certainly a *sui generis* characteristic of the athlete’s contract. The other *sui generis*

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African employment law saw the development of a more rights-based approach to the employment relationship in a bid to counter the traditionally strong employer-biased relationship occasioned by the nature of the common law contract of employment.” Whereas it is agreed with Louw that there has indeed been a shift of focus, the culture of the “strong employer-biased relationship” is still very problematic as far as labour relations are concerned. This is evident from the one-sided contractual negotiations which allegedly took place in *Vrystaat Cheetahs (Edms) Bpk v Mapoe and Others*, discussed in the text below. In the case of *SARPA on behalf of Bands & Others v SA Rugby (Pty) Ltd* (2005) 26 ILJ 176 (CCMA); [2005] 2 BALR 209 (CCMA) it was argued that because the contract of a professional rugby player in South Africa is a standard one, players could not really negotiate the terms of their contract, and had to accept most of the contents as it stood.

<sup>160</sup> Naudé 2003 SALJ 272.

<sup>161</sup> *Ibid.*

<sup>162</sup> (2012) 33 ILJ 1307 (ARB).

<sup>163</sup> *Mmethi and Bloemfontein Celtics Football Club* (2012) 33 ILJ 1307 (ARB) at 1317.

<sup>164</sup> *Ibid.*

<sup>165</sup> In *Highlands Park Football Club Ltd v Viljoen and Another* 1978 3 SA 191 (W), 192 the Court stated that “the applicant’s (Highlands Park Football Club Ltd) only assets consist of contractual rights which bind its football players to play football for the applicant. These rights are commonly regarded as cedable and saleable amongst football clubs.” See detailed discussion of this case in chapter 8.

<sup>166</sup> Blackshaw I “The Professional Athlete” 2006 1.

characteristic mentioned by Foxcroft J in *Santos*, was the payment of a signing-on fee. This characteristic is but a small requirement which has its origin in the general requirement of athletes having to be registered with national and international federations regulating the sporting code in question. Regulation 4.1 of the South African Football Association's Regulations on the status and transfer of players reads as follows:

"4.1. No player, whether amateur or professional, may play for any club falling under the jurisdiction of SAFA or one of its members unless s/he has been registered by that club with the relevant member."

The South African Rugby Union Regulations on Player status, Player contracts and Player movements contain a similar regulation which reads as follows:

"3.4. Only a Player who is currently registered shall be able to participate in competitions organised, recognised or sanctioned by that Province or SARU."<sup>167</sup>

These are but two examples of regulations demanding of athletes to be registered with a national and/or international sporting body or federation. It is a fact that no organised sport can function without regulation by governing bodies. Such regulation provides that the rules according to which sport is played, but also according to which the participants in the sport are regulated, are honoured.<sup>168</sup> Because the contracts of professional athletes are subject to these regulations, it sometimes occurs that a professional athlete may at any given time be a party to several athletes' contracts at once. So, for instance, a professional rugby player in South Africa may be a party to a contract with his provincial union, another contract with a Super Rugby franchise, and also with his Rugby Championship franchise;<sup>169</sup> or a professional cricket player may at any given time have a contract with his South African provincial franchise, an Indian Premier League franchise and an English county side. Furthermore, if such a player is selected for the national side, he will enter into yet another athlete's contract with the national body. This is an occurrence which is absolutely unique as far as mercantile law is concerned. No other occupation would create the possibility of a single "employee"

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<sup>167</sup> The South African Rugby Union.

<sup>168</sup> Examples of these national and international governing bodies are the South African Rugby Union (SARU), which governs professional rugby in South Africa and its international counterpart, the International Rugby Board (IRB). Reference has also been made in this chapter to the National Soccer League (NSL) which governs professional football in South Africa, and its international counterpart, Federation Internationale de Football Association (FIFA). Football players in South Africa, for example, may also be registered with (and therefore subject to the rules and regulations of) the South African Football Association (SAFA), the Premier Soccer League (PSL), the Confederation of African Football (CAF), the South African Sports Confederation and Olympic Committee (SASCOC) as well as the International Olympic Committee (IOC).

<sup>169</sup> The Rugby Championship is an annual one competed between the top provincial sides of South Africa, New Zealand and Australia.



being a contractant in up to three different contracts, but required to perform the same type of services in all three. As far as the subjectivity of these contracts to the regulations of governing bodies is concerned, Waglay J in *McCarthy v Sundowns Football Club and Others*<sup>170</sup> made great strides in explaining why the contract in question differed “substantially from the contracts which one finds with other employees.”<sup>171</sup> The Court stated that a professional footballer (read: professional athlete) may not resign his current employment during the existence of his contract with the employer, without agreement of this (current) employer. Also, even if the contract between the athlete and his current club has expired, the employer still needs to furnish the player with a clearance certificate in order to make the player eligible to play for his new club.<sup>172</sup> Each and every professional football player in South Africa had (and still has) to sign a standard National Soccer League<sup>173</sup> Player’s Contract as well as a registration form demanding of the player in question to bind himself to the NSL Constitution and Regulations. The contract mentioned is a fixed-term one, which would obviously terminate unless new agreements have been entered into and the player has been registered with his new employer.<sup>174</sup> All these stipulations, it was argued by Waglay J, contributed to the uniqueness of the contract between a professional, duly registered football player in South Africa and his “employer”. The same arguments were made by Traverso J in *Coetzee v Comitis*<sup>175</sup> and in *Botha v Blue Bulls Company (Pty) Ltd and Another*<sup>176</sup> In the latter case, the contract in question was in fact a standard player’s contract subject to a collective agreement between the South African Rugby Players’ Association<sup>177</sup> of which the player (applicant) was a member, and the South African Rugby Employers’ Association<sup>178</sup> of which the employer (first respondent) was a member.<sup>179</sup> Furthermore, the labour relationship between the two parties in question was also subject to the rules and regulations of the International Rugby Board.<sup>180</sup> The effect of this unique type of contractual agreement is that the athlete’s contract is more often than not subject to another, collective contract, and failure to comply with the provisions of the latter would probably render the former invalid. In the

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<sup>170</sup> Unreported case number J4373 of 2002, delivered in the Labour Court on 30 September 2002.

<sup>171</sup> *McCarthy v Sundowns Football Club (Pty) Ltd and Others* at 4.

<sup>172</sup> *Ibid.*

<sup>173</sup> Widely known by its acronym, “NSL”.

<sup>174</sup> *McCarthy v Sundowns Football Club (Pty) Ltd and Others* at 4.

<sup>175</sup> 2001 1 SA 1254 (C).

<sup>176</sup> Unreported case number JR1965/2005, delivered by the Labour Court of South Africa on 27 June 2008.

<sup>177</sup> SARPA.

<sup>178</sup> SAREO.

<sup>179</sup> *Botha v Blue Bulls Company (Pty) Ltd and Another* at 15.

<sup>180</sup> IRB.

case of *Vrystaat Cheetahs (Edms) Beperk v Mapoe and Others*,<sup>181</sup> an interesting argument in favour of the uniqueness of the athlete's contract as opposed to it merely a type of employment contract was made on behalf of the applicant. The latter argued that because of the fact that all the rugby unions in South Africa were under a lot of pressure to select black players, they (the applicant) should be granted an order compelling the respondent (a black player) to stay at the union, as it was difficult to find black players of the respondent's calibre.<sup>182</sup> The applicant would not have been under so much pressure to select the player had it not been for the fact that they were subject to the governing body's (The South African Rugby Union's) auspices. This requirement entails that the colour of an athlete's skin may also contribute to the uniqueness of such an athlete, especially in a system that differentiates between athletes based on their racial profiles. It entails furthermore that the contract between an athlete and the club or province that employs him may be significantly influenced by the rules and regulations governing the sport in general.

The contractual relationship that exists between an athlete who participates in a professional team sport and the club, province, union or franchise for which such athlete plays, is significantly different from the contract which exists between an athlete competing as independent contractor and the organisers of a certain professional event. It is of cardinal importance to discuss the situation of the latter, before attempting to derive the *sui generis* characteristics of the athlete's contract from the various discussions in this chapter.

In the case of *Lumley v Wagner*,<sup>183</sup> which is considered the *locus classicus* in English law as far as determining the most appropriate remedy in case of breach of the *locatio conductio operis* is concerned, the father of a minor woman, acting on the latter's behalf, had entered into a contract with the manager of Her Majesty's Theatre in London to perform six operas at said theatre.<sup>184</sup> The contract contained a clause which specifically forbade the woman to "use her talents at any other theatre, or in any other concert or reunion, public or private, without the written consent of the manager."<sup>185</sup> It was evident from the contents of the contract that the "master and servant"-relationship did not apply to the current circumstances. If anything, the contract could be described as one of piece work, as discussed above. However, the Court

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<sup>181</sup> Unreported case number 4587/2010 delivered by the High Court on 29 September 2010. For a case discussion, see Mould 2011 PER 189.

<sup>182</sup> *Vrystaat Cheetahs (Edms) Beperk v Mapoe and Others* 4587/2010 at 24-25.

<sup>183</sup> 42 E.R. 687 (1852).

<sup>184</sup> *Lumley v Wagner* 42 E.R. 687 688; Christie 556.

<sup>185</sup> *Lumley v Wagner* 42 E.R. 687 688.

made specific mention of the unique nature of the woman in question's talent. In considering the most appropriate remedy for breach of contract (the woman, through the representation of her father, subsequently committed breach of contract by entering into an agreement with another theatre company, and in doing so repudiated the contract with the manager of Her Majesty's Theatre), the Court stated the following:<sup>186</sup>

"The Courts have granted injunctions to restrain the sale of goods contrary to a prohibitory clause of an agreement, but it never has restrained an actor or a singer, for this reason that it cannot compel the specific performance and make a Defendant act or sing."

The court found that specific performance would probably not be the most suitable remedy for breach of a contract of piece work requiring services of a very personal nature.<sup>187</sup> It ought to be noted that specific performance has always been considered a secondary or "equitable" remedy in English law, which is contrary to the Roman-Dutch and South African legal positions. Although the suitability of the remedy of specific performance is only discussed further on in this thesis, the case of *Lumley v Wagner* is relevant to the purpose of this subsection, as it provides a practical example of the contract of piece work involving services of a *sui generis* nature.

In the milieu of sport, the *locatio conductio operis* will typically refer to the contract between a self-employed professional athlete, such as a boxer, tennis player or snooker player, and the organiser of a professional event for one of these sporting codes. Anderson<sup>188</sup> uses the example of a professional tennis player who may have contractual obligations with the organisers of several individual tournaments, such as Wimbledon (which is organised by the All England Tennis Club), the Association of Tennis Professionals (who organises the ATP events) and the International Tennis Federation (which is the global governing body for tennis). It is important to remember that the relationship between a professional sportsman as independent contractor and the organisers of a specific sporting event is governed exclusively by the contract between them, and not also by labour legislation, as is the case with the

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<sup>186</sup> *Idem* 690. This statement found resonance in the decision of Desai J in *Santos Professional Football Club v Igesund and Another*.

<sup>187</sup> A contract of personal services, according to Sagi "Specific performance of enlistment contracts" 2010 *Military Law Journal* 150 at 151 is described as "a contract in which one of the sides agrees to render to the other side services that are continuous and involve skill, personal labour, and cultivated judgment."

<sup>188</sup> Anderson 258. Blackshaw 2 has stated that "professional boxers, snooker and tennis players are not considered in law to be employees, because, even though they may be under the guidance or control of an agent or manager, as well as being subject to the rules of their particular sport, they negotiate their own entries into competitions and the payments they receive for rendering their services. They are effectively and essentially working for themselves and their own account."

relationship between a professional athlete and a club that employs the latter.<sup>189</sup> Furthermore, there is obviously the absence of any type of employment contract between the independent contractor and the event organisers. This implies that independent contractors would inevitably not be protected by labour legislation if the organiser of an event were to cancel said event and the independent contractor suffered damages as a result of such cancellation. Similarly, an independent contractor would not enjoy social security benefits such as unemployment insurance or coverage in terms of (in the South African context) the Compensation for Occupational Injuries and Diseases Act.<sup>190</sup> In *Steyn v LSA Motors*,<sup>191</sup> an amateur golfer with a low handicap participated in a “pro-am” golf tournament at the Durbanville Golf Club. Next to the 17<sup>th</sup> green a car was on display, and next to the car a board with the following wording:

Hole-in-one prize sponsored by Reeds Delta.<sup>192</sup>

The appellant subsequently hit a hole-in-one at the 17<sup>th</sup> hole. He claimed that the board next to the 17<sup>th</sup> green represented a valid offer, and that he had accepted this offer by hitting the hole-in-one. The respondent, however, refused to deliver the performance on the ground that in terms of the rules of the Royal and Ancient Golf Club of St Andrews, by which the tournament in question was played, no amateur player was entitled to any prize worth in excess of R600. Therefore, the Court decided that although the board constituted a valid offer, such offer was only intended for professional players.<sup>193</sup> It is agreed with the court that the appellant’s claim was founded in contract.<sup>194</sup> However, Cornelius argues that while the court in this case came to the correct decision, the decision was reached for the wrong reasons.<sup>195</sup> Because the appellant had entered the tournament due to a notice of invitation to enter the tournament which was posted at a local golf club, he (the appellant) offered his participation in the tournament, which offer was accepted when he was allowed to play in the tournament. Therefore, a valid contract had already come into existence when the appellant hit the hole-in-one at the 17<sup>th</sup> hole.<sup>196</sup> The wording on the board mentioned above constituted

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<sup>189</sup> Louw 211; Jordaan in Basson and Loubser (eds) (2000) ch. 8-13.

<sup>190</sup> Act 89 of 1993.

<sup>191</sup> 1994 1 SA 38 (A).

<sup>192</sup> *Steyn v LSA Motors* 1994 1 SA 38 54. “Reeds Delta” was the trade name of the respondent.

<sup>193</sup> *Ibid.* The Court went so far as to state that a reasonable man in the position of the appellant would not have believed that the respondent intended the board at the 17<sup>th</sup> hole to constitute an offer by the respondent which was open for acceptance by the appellant.

<sup>194</sup> *Idem* 55.

<sup>195</sup> Cornelius in Cloete (2005) 21.

<sup>196</sup> *Ibid.*

a term of the contract, while another (implied) term of the contract was that no amateur golfer could win the prize.<sup>197</sup> It is submitted that Cornelius's argument is indeed correct. This case is a very good example of the relationship that exists between the organisers (or even sponsors<sup>198</sup>) of an event and athletes who participate in such an event, whether they are independent contractors or amateurs.

A very important aspect that relates to the professional athlete as independent contractor is that different tax regimes apply to employees and independent contractors.<sup>199</sup> In the case of *Sports Club PLC v Inspector of Taxes*,<sup>200</sup> Arsenal Football Club successfully argued that two of their players were not considered employees but independent contractors for tax purposes, because their image rights were seen as capital assets for tax purposes, even though image rights *per se* are not recognised as separate species of property in the United Kingdom.<sup>201</sup> Finally, it goes without saying that while an employee possesses a preferential claim in terms of the South African Insolvency Act<sup>202</sup> for arrear wages, the unsecured independent contractor merely possesses a concurrent claim against the insolvent estate.<sup>203</sup>

The fact that the professional athlete's contract of piece work differs so much from the professional athlete's contract of service, raises the question as to the suitability of the remedy of specific performance for breach of these two forms of employment contracts. It is not necessarily so that the same remedy would apply to breach of both these forms of contract. Once again, the argument as to "unique skills" possessed by a professional athlete finds application. If, for example, a professional soccer player is injured before a match, chances are that he will be replaced by a more or less equally-skilled back-up player. Although the team might miss the special skills of the injured player (especially if such

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<sup>197</sup> *Ibid.*

<sup>198</sup> Although it does not strictly speaking fall within the ambit of this chapter, the relationship which exists between a sponsor and a professional athlete does appear similar in nature to the *locatio conductio operis*. In *Roberts and Another v Martin* 2005 4 SA 163 (C), the respondent had agreed to sponsor the first applicant, a young tennis protégé. The respondent had the duty of providing the first applicant with necessary funds in order for the latter to gain successful entrance into professional tennis, while the first applicant, if such entrance was successfully made, had to part with 75% of her professional income in favour of the respondent. Because of an injury suffered by the first applicant, the respondent seized his financial contributions, and was ordered by the Court in terms of the contract of sponsorship to resume these contributions. Because the contract in question related to a specific piece of work to be performed by an independent contractor (in this case a tennis player looking to gain professional status in the sport), in exchange for remuneration, it logically resorts under the category of *locatio conductio operis*.

<sup>199</sup> Jordaan in Basson and Loubser (eds) ch 8-13.

<sup>200</sup> [2000] STC (SCD) 443.

<sup>201</sup> Blackshaw 2.

<sup>202</sup> Act 24 of 1936.

<sup>203</sup> Louw 211; Jordaan in Basson and Loubser (eds) 8-13.

player is one of the best in the sport) the chances are good that the replacement will be a more than adequate one. However, if the organisers of a major golf tournament have entered into a contract with a star player, and such player is injured before the tournament and has to withdraw, the organisers will most probably lose huge sums of money, as spectators would have paid to see the star golfer in action.<sup>204</sup> Similarly, if an independent contractor commits breach of contract by withdrawing from a major tournament two days before such an event without a *iusta causa*, or performs in a sub-standard manner during the event, the organisers will probably lose much more money from spectator revenue than would a soccer team if one of its players committed breach of contract and went to play for another team.<sup>205</sup> The argument is that supporters would still support the team, even though one of its star players has left such team. There is a strong argument to be made that specific performance would be a more suitable remedy in case of breach of contract committed by an independent contractor in the way described above than in the case of an employee leaving his team. Furthermore, it has already been mentioned that labour legislation will in the case of breach of contract by an employee probably favour the employer, whereas in the case of the contract between an independent contractor and the organiser of an event, the latter will only have the contract (and remedies flowing from breach thereof) to depend on for compensation.

From this discussion it becomes evidently clear that the athlete's contract cannot be considered a contract of employment. To summarise the argument, the *sui generis* characteristics of the athlete's contract are as follows:

#### Personal services of a unique *athletic* nature

The services regulated by the contract are unique sporting services able to be performed by an individual who possesses unique athletic talents in the sporting code concerned. These unique talents were referred to in the case of *Philadelphia Ball Club Ltd v Lajoie* as "unique skills".<sup>206</sup> Prinsloo<sup>207</sup> has referred to the skills in question as "uniek en buitengewoon".<sup>208</sup> In

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<sup>204</sup> Tenorio "The Economics of Professional Boxing Contracts" 2000 *Journal of Sports Economics* 364 states that "the market value of a (boxing) fight... is largely determined by the boxers' reputation". This is also argued as being a *sui generis* characteristic of the athlete's contract of service in the text above.

<sup>205</sup> Tenorio (2000) *JSE* 363 makes mention of the professional boxing match between James Douglas and Evander Holyfield on 25 October 1990. Douglas had been guaranteed \$20 million for the fight, and consequently delivered a poor performance which saw him punched out within three rounds of the match. Tenorio states that "many boxing fans felt ripped off by Douglas's performance. From the fans' perspective, the contract Douglas was given did not elicit appropriate work incentives."

<sup>206</sup> *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; A. 973 978. While the trial court in this case refused to grant negative injunction, based on the fact, firstly, that the defendant did not possess such unique abilities as to make him impossible to replace and secondly, that the contract lacked the requisite mutuality, the

order to be able to perform these unique athletic services, the contract demands from the employee to keep himself in fit physical condition, even when not actually performing the service in question. This requirement also demands that the player does not partake in the use of substances which are banned because they improve the player's performance in an unnatural manner.<sup>209</sup> What makes the services even more unique in some instances (as in *Vrystaat Cheetahs (Edms) Bpk v Mapoe and Others*), is the fact that an athlete may in some cases be considered even more unique because of his skin colour. The attraction of sport lies in the uncertainty of the result. Blackshaw has stated that "the uncertainty of outcome of sporting competition...is the very nature and attractive aspect of sport and sporting endeavour."<sup>210</sup> Athletes who possess unique athletic skills compete against each other in order to bring about a certain result. Because the result is important to "employers" as well as the broader public, the services used to achieve such results are of a highly personal nature, much more so than in the case of the ordinary contract of employment. In the case of an athlete participating in a tournament as independent contractor, the same rules apply, but the contract which governs the relationship is not one between the athlete and the club he represents, but between the organisers of the specific event and the athlete.

### Equal bargaining power

Athletes, as established, are considered assets to the clubs, provinces, unions and franchises that employ them. The public usually show a tremendous amount of interest not only in a professional athlete's sporting career, but also such an athlete's personal life. Because of this, the athlete certainly possesses equal bargaining power to that of the "employer" in the pre-contractual negotiation phase. Similarly, the elite athlete is in no way subordinate to the "employer" as far as the way in which he plays sport is concerned, as is the case in the regular contract of employment. Because of the immense public interest<sup>211</sup> in the activities of

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Pennsylvania Supreme Court rejected these reasons and ordered the defendant to remain in the plaintiff's service for the remainder of the contract in question. *In casu*, it was established that if a player possessed "unique skills" and contributed to the sport he or she played or the employer he or she represented in a unique manner, then equity would demand that such a player be forced to honour his contract with his employer. See in this regard also Whitehill (1981-1982) "Enforceability of Professional Sports Contracts-What's the harm in it?" *Southwestern Law Journal* 803; Uberstine and Grad (1987) "The enforceability of sports contracts: A practitioner's playbook" *Loyola Entertainment Law Journal* 1; Mould 2011 *PER* 189.

<sup>207</sup> Prinsloo (2000) *J.S. Afr. L.* 232.

<sup>208</sup> Literally: "Unique and extraordinary".

<sup>209</sup> See in this regard particularly *Champion 7*.

<sup>210</sup> Blackshaw "Match fixing in sport: a top priority and ongoing challenge for sports governing bodies" 2013 *De Jure* 945 948.

<sup>211</sup> *Champion 7* states that athletes "are paid as entertainers who are playing a game".

athletes, the latter will also be required to perform services necessary to market their “employer”, such as public appearances, autograph-sessions and charity events. Despite possessing increased bargaining power, an athlete’s services are still dependant on his being selected to perform such services. This in itself is a unique characteristic. The athlete as independent contractor’s bargaining power will be important when negotiating, for example, appearance fees.

#### Subjectivity to rules and regulations governing a specific sporting code.

The professional athlete must comply with the constitution, rules and regulations that govern the sporting code exercised by such athlete.<sup>212</sup> This means that the contract entered into between the athlete and his “employer” will more often than not be subject to another, collective contract, as well as regulations. This implies that in some instances, a single athlete may during a season perform his services under three different contracts, as explained above. This is different from any other form of “employment”.

#### Limited professional career

One of the primary differences between the athlete’s contract and the contract of employment is the fact that whereas an employee’s professional career lasts the majority of that employee’s life, the athlete’s professional career is extremely limited. In the private arbitration of *Mmethi and Bloemfontein Celtics Football Club*, Seedat C stated that football players had a “short productive capacity”, which was also subject to a coach’s idiosyncrasies and game plans.<sup>213</sup> This has a direct impact on the question as to the most appropriate remedy for breach of an athlete’s contract, as discussed later in the thesis.

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<sup>212</sup> An example of these rules is the requirement in most sport codes that a player with a certain club should be issued with a clearance or transfer certificate by such club before he can represent another club in the same code. All professional athletes’ contracts are to various extents subject to the rules and regulations of the body governing that specific sporting code. It should be kept in mind that amateur athletes also have to abide by the rules and regulations of the governing body in that specific code. In the case of *Rowles v Jockey Club of SA and Others* 1954 1 SA 363 (A), Van den Heever JA in his minority judgment stated that “The Club’s Rules are the domestic statutes of a voluntary association. In order to achieve its objects its rules also refer to the conduct of non-members (and by implication, members). This is a clear indication that a body of governance, whereas in the form of a club or merely a governing body, has the authority to regulate the relationship between itself and people who participate in the sporting code governed by it. The same approach was adopted in the cases of *Ricardo v Jockey Club of South Africa* 1953 3 SA 351 (W), *Theron v Jockey Club of South Africa* 1954 4 SA 723 (E), *Jockey Club of SA v Transvaal Racing Club* 1959 1 SA 441 (A), *Elsworth v Jockey Club of South Africa* 1961 4 SA 142 (W), *Turner v Jockey Club of SA* 1974 3 SA 633 (A), *Carr v Jockey Club of SA* 1976 2 SA 717 (W) and *Jockey Club of South Africa v Forbes* 1993 1 SA 649 (A).

<sup>213</sup> *Mmethi and Bloemfontein Celtics Football Club* (2012) 33 ILJ 1307 (ARB) at 1317. See in this regard also Champion 7.



### 3.8. Conclusion

The aim of this chapter is to establish the true nature of an athlete's contract, in order to eventually establish which contractual remedy would be most suitable in case of breach of such contract. It is impossible to determine the most suitable remedy for breach of a specific type of contract if one is not entirely certain as to the nature of the contract in question. The analysis of the development of the modern South African notion of a contract since its origin in Roman law has indicated that the predecessors of the modern day athletes' contract are the Roman law *locatio conductio operarum*, or contract of service and the *locatio conductio operis*, or contract of piece work. Both these types of contract find application in the current chapter.

The athlete's contract has been classified as a contract of employment. However, this chapter has set out to indicate that there is many a valid reason to believe that this is certainly an oversimplification. As far as the athlete's contract is concerned, these reasons lie in the object of the athlete's contract, which is the rendering of highly personal, unique sporting services by the professional athlete to his employer. It also lies in the nature of the services in question, which could be described as unique athletic services able to be performed by an individual who possesses unique talents in the sporting code concerned. Furthermore, the reasons why an athlete's contract is not an ordinary contract of employment, but a *sui generis* one, include the characteristic of subordination, which means that the athlete must at all times abide by his employer's rules and regulations, but also to the stipulations of any collective agreements and national legislation, which regulate the playing of a particular code of sport. The level of subordination is lower in the case of the relationship between an athlete and his employer than in the case of an ordinary employee and his employer. As a matter of fact, an athlete has *carte blanche* as far as the exhibition of his unique skills is concerned. The athlete's contract of employment is a fixed-term one, and because the calculation of damages in case of breach of contract by an employee is very difficult, current South African case law seems to prefer specific performance as the most suitable remedy for breach of an athlete's contract by the athlete in question. However, it is the aim of this thesis to determine whether this is a correct point of view. A very important consideration in considering the most suitable remedy in the case of breach of an athlete's contract, is the fact that a professional athlete has at most a very limited professional career. This consideration is important, as compelling an athlete to remain with a club that does not remunerate him as much as the next

club would, might intrude on the athlete's right to provide for himself and his family as best he can.<sup>214</sup>

As far as the athlete's contract of piece work is concerned, it has been submitted in this chapter that while it does differ from the athlete's contract of service, it is nonetheless also a *sui generis* legal tool. The *sui generis* characteristics of this type of contract relate firstly to the object of the contract, which is the participation in a single, professionally-organised sporting event. Secondly, the services in question must be performed by a specific individual (the professional athlete in his personal capacity). Herein lies a significant difference between the athlete's contract of piece work and the ordinary contract of piece work: in case of the latter, the services need not be performed by the independent contractor *personally*. Thirdly, the professional athlete as independent contractor is not subordinate to the organisers of a sporting event in as far as the way he plays the game is concerned. Such player must, however, comply with the tournament and event rules and regulations. Fourthly, the contract between the professional athlete as independent contractor and the organisers of an event is not a fixed-term one. It expires as soon as the athlete has participated in the tournament satisfactorily. Fifthly and finally, there is at this early stage a strong argument to be made in favour of specific performance as most appropriate remedy in case of breach of the type of contract in question, especially if such breach was committed by the professional athlete. The reason in this case is because the organiser of an event can only depend on the contract between itself and the athlete, as labour legislation does not apply to a contract of piece work between two parties.

In order to establish effectively whether an athlete's contract is a *sui generis* legal tool, this chapter also focused on the meaning of *sui generis* in relation to other types of contract, and what exactly it means to be a contract *sui generis*. It has been established that according to the *sui generis* theory for determining the nature of a specific contract, the *naturalia* of ordinary contracts should be rendered inapplicable. Because the *naturalia* of a specific contract (in other words the principles of the law of contract that would apply if something specific is excluded from the contract) determine the rights and duties of parties to a contract, as well as the effects and consequences thereof, the *naturalia* of a specific contract would determine the nature of such contract. Considering the *naturalia* of an athlete's contract

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<sup>214</sup> In the South African context, the right to freedom of trade, occupation and profession is provided by section 22 of the Constitution of the Republic of South Africa, 1996.

determined above, as well as its unique characteristics, it is clear that such contract is in nature a *sui generis* contract of employment.

For the purpose of determining the most suitable remedy for breach of an athlete's contract, this type of contract may be defined as follows:

“A reciprocal contract in terms of which an athlete, who possesses unique athletic talents in the sporting code concerned, must render services of a highly personal, unique sporting nature to an organisation (in the form of a governing body, club, union or franchise) or to an event organiser for a fixed period or until his participation in a specific tournament comes to an end.”

## CHAPTER 4: THE REMEDY OF SPECIFIC PERFORMANCE IN ROMAN LAW

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### 4.1. Introduction

In the third chapter of this thesis, the nature of the athlete's contract was investigated and established. In order to determine whether the contractual remedy of specific performance would be the most appropriate for breach of the athlete's contract, it is imperative to establish the true nature of this remedy, including its legal aims and purposes. This chapter aims to establish the origins of the remedy of specific performance in Roman law. As this chapter deals with the origin and development of the remedy in Roman law exclusively, the remedy will be discussed in the context of the different stages of legal development in Roman law. It is essential to focus on each stage of development separately, because of the fact that unique legal practices and principles developed within each stage, especially as far as the remedy of specific performance was concerned. So, for instance, Beinart<sup>1</sup> has mentioned that while the remedy of specific performance was unavailable during the classical period of Roman law, during the reign of Justinian the remedy was permitted. Ultimately, this chapter sets out to determine whether the remedy of specific performance existed in Roman law at all, and if so, what exactly it entailed. Like Beinart, modern South African academic authors have opined that the contractual remedy of specific performance was unknown in Roman law.<sup>2</sup> This view is based on the maxim *nemo potest praecise cogi ad factum*,<sup>3</sup> according to which an aggrieved party to a contractual obligation could only claim damages in case of non-performance by the other party to the obligation.<sup>4</sup> Du Plessis<sup>5</sup> states that these opinions are odd, since the very same authors mention that the remedy was a well-known one in Roman-Dutch law. Joubert, for instance, although of the opinion that an order of specific performance was not possible in Roman law, admits that there was indeed a development in the Civil system "of the law of procedure for enforcing contracts, starting from the principle of enforcement against the debtor and his person and ending with enforcement against his

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<sup>1</sup> Beinart "Roman law in South African Practice" 1952 *SALJ* 145 at 158. See also Beck "The coming of age of specific performance" 1987 *CILSA* 190.

<sup>2</sup> Most notably Joubert (1987) 223; De Wet and Yeats (1978) 189; Van der Merwe *et al* (2012) 383. See in this regard also Joubert in Visser (Ed) (1989) 321.

<sup>3</sup> Literally: "No one can be compelled to carry out just what he had undertaken to do."

<sup>4</sup> Gross "Specific performance of contracts in South Africa" 1934 *SALJ* 347; Beck 1987 *CILSA* 190.

<sup>5</sup> Du Plessis 1988 *THRHR* 349.

estate”.<sup>6</sup> This admission is confirmed by Winkel, who participated in the Dutch translation of Justinian’s Code, who states that “specific performance is not a problem in the early stages of Roman law. It certainly existed then.”<sup>7</sup> The contradictory opinions of these modern writers necessitate a thorough analysis of the probable origin of the remedy of specific performance in Roman-law.

#### 4.2. The meaning of “specific performance”

Lambiris<sup>8</sup> points out an important fact: that there is a difference between the terms “specific performance” and “order of specific performance”. Whereas the former merely refers to one of the ways in which contractual obligations may be discharged,<sup>9</sup> the latter in fact refers to the actual contractual remedy. This remedy is described by Brassey<sup>10</sup> as “any order compelling a party to the contract to comply with his obligations under the contract.” Although this remedy refers to both orders *ad factum praestandum*<sup>11</sup> and orders *ad pecuniam solvendam*,<sup>12</sup> it may be interpreted as widely as to include interdicts or declaratory orders, because the relief sought in terms of these orders is similar in nature to that sought in specific performance.<sup>13</sup> This remedy is available, as far as South African law is concerned, to a plaintiff in a matter in which the debtor in the contractual relationship refuses to perform voluntarily.<sup>14</sup> The order of specific performance in South African law has been described as a

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<sup>6</sup> Joubert in Visser (Ed) 320.

<sup>7</sup> Winkel in Hallebeek and Dondorp (eds) (2010) 9.

<sup>8</sup> Lambiris 12.

<sup>9</sup> Gross 1934 *SALJ* 347 at 347 states that a contract is specifically performed “when each of the parties to it does the very thing or things which he contracted to do, and when, accordingly, each party gets *in specie* what he by the contract bargained for.” This explanation of Gross clearly refers not to the contractual remedy of specific performance, but to the way in which contractual obligations may be discharged.

<sup>10</sup> Brassey “Specific performance – A new stage for Labour’s Lost Love” 1981 *ILJ* 57.

<sup>11</sup> An order to perform a specific act.

<sup>12</sup> An order to pay an amount of money.

<sup>13</sup> Brassey 1981 *ILJ* 157 fn 1. A comparison between the remedy of specific performance and other contractual remedies such as the interdict is done in chapter 7 of this thesis.

<sup>14</sup> Lambiris 12. Innes J in *Farmer’s Co-operative Society v Berry* 1912 AD 343 at 350 quoted Storey in deciding that “it is against conscience that a party should have the right to election whether he would perform his contract or only pay damages for the breach of it.” The election, according to Innes J, is with the injured party, subject to the discretion of the Court. This position was re-established by Hefer JA in *Benson v Mutual Life Assurance Society* 1986 1 SA 776. In English law, specific performance is considered merely an equitable, rather than a primary remedy for breach of contract. The English position is discussed in detail in chapter 5 hereof. It will suffice at this stage to note that while the phrase “specific performance” is derived from English law, the remedy referred to in this chapter is not the equitable remedy of English law which has been imported into South African law. It refers rather to the remedy which has been called a product of the divergence between civil law (the Roman system) and common law (the English system), most notably by Dondorp “Decreeing specific performance: a (Roman-) Dutch legacy 2010 *Fundamina* 40 at 40. The remedy is, consequently, a concept of a mixed legal system. It is further submitted, and is discussed in detail in chapter 7 of this thesis, that while Innes J in *Berry* reached the correct conclusion as far as specific

remedy by which specific performance of contractual obligations is enforced.<sup>15</sup> Human J stated the following in *Olivier v Stoop*:<sup>16</sup>

“In my opinion, the words “specific performance” refers to the specific performance of a contractual duty.”

Lambiris feels that the phrase “daadwerklike vervulling” or performance *in forma specifica* represents the remedy as applied in South Africa most accurately, whereas the phrase “reële eksekusie” is probably derived directly from Roman-Dutch law.<sup>17</sup>

Christie<sup>18</sup> states that any one of three meanings may be given to specific performance, namely firstly an order to perform a specified act<sup>19</sup> in pursuance of a contractual or other obligation, secondly, an order to perform a specified act or to pay money<sup>20</sup> in pursuance of a contractual obligation, and thirdly to perform a specified act in pursuance of a contractual obligation. It is the latter which is analysed primarily in this thesis.

### **4.3. The origin and development of the remedy of specific performance in Roman law**

#### **4.3.1. The period of the kings<sup>21</sup>**

Since its origin, seven kings<sup>22</sup> had reigned over Rome until the demise of the kingdom in what is believed to be 509 BC. The functions of these kings played a primary role in the commencement and development of the law in Rome. The reason for this is because the kings were appointed by the Roman senate and popular assembly.<sup>23</sup> Once a king had been selected, he remained as such for the remainder of his life.<sup>24</sup> The functions of the king were threefold: firstly, he was the head of the State’s religious activities. This is significant, as the priests of

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performance was concerned, he erred in depending on an English source (Storey) in order to come to his conclusion. As will be discussed further on, the English and Roman-Dutch notions of specific performance are fundamentally different.

<sup>15</sup> Lambiris 27.

<sup>16</sup> 1978 1 SA 196 (T) at 202. The original Afrikaans text reads as follows: *Na my mening beteken die woorde ‘daadwerklike vervulling’ die daadwerklike vervulling van ‘n kontraktuele verpligting.*

<sup>17</sup> Lambiris 13.

<sup>18</sup> Christie 522.

<sup>19</sup> *Ad factum praestandum.*

<sup>20</sup> *Ad pecuniam solvendam.*

<sup>21</sup> Generally accepted as the period from 753 until 509 BC.

<sup>22</sup> These were Romulus (after whom Rome was named), Pompilius, Hostilius, Marcius, Priscus, Tullius and Superbus.

<sup>23</sup> Van Zyl 4.

<sup>24</sup> The lifelong power of the king was known as *imperium*.

the Roman kingdom acted as judiciary.<sup>25</sup> The reason for the significance hereof is the fact that justice was actually administered by the priesthood.<sup>26</sup> The king's second function was as the head of State administration. This function included the management of defence and foreign affairs. The third and most significant function of the king for the purposes of this discussion was the administration of justice.<sup>27</sup> It must be kept in mind, as Van Zyl<sup>28</sup> mentions, that the legal and religious precepts were intertwined, which is the reason why the priests were in fact responsible for the administration of justice as well.

It is trite that orders of specific performance have no *distinct* origin in specific law or a specific event.<sup>29</sup> The reason for this is because the law of the period of the kings was marked by "utmost simplicity".<sup>30</sup> Rules of a religious nature<sup>31</sup> were handed down by the king, and the rest of the law developed from customs and usages within the community,<sup>32</sup> up to a point at which law or *ius* and religious rules or *fas* were distinguished.<sup>33</sup> During the period of the kings, the right to private property or *dominium* was recognized for the first time in Roman law.<sup>34</sup> According to Gaius, orders for the delivery of a particular piece of property were well-known during this time.<sup>35</sup> The problem however was that it was very difficult for the State to ensure that such orders were indeed honoured.<sup>36</sup> The philosophy underlying orders of specific performance has however always been one in which there must be an attempt to ensure performance, instead of merely ensuring a surrogate for such performance. During the earliest period of Roman law, a person who had been disadvantaged either by a contractual or a delictual matter, obtained the right to avenge such disadvantage.<sup>37</sup> This right to avenge was materialised in the system of *legis actio*, in terms of which an innocent party was allowed to

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<sup>25</sup> Van Zyl 5; Van Warmelo (1978) 26.

<sup>26</sup> Van Zyl 5.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Lambiris 27.

<sup>30</sup> Van Zyl 5.

<sup>31</sup> Known as *leges regiae*.

<sup>32</sup> Van Warmelo (1978) 26.

<sup>33</sup> Van Warmelo (1978) 26. See also Van Warmelo (1976) 4.

<sup>34</sup> Van Warmelo (1976) 4.

<sup>35</sup> Gaius / 4 48. See also Du Plessis (1988) *THRHR* 350.

<sup>36</sup> Jolowicz 189-190; Du Plessis (1988) *THRHR* 350-351. The exact same problem constituted one of the main reasons why Desai J in *Santos Professional Football Club and Another (Pty) Ltd v Igesund and Another* (2002) 5 SA 697 (C) refused to grant an order of specific performance against a professional football coach wishing to repudiate his contractual duties. *In casu*, Desai J stated that "*the nature of the services are of such a highly personal nature that it would be virtually impossible to determine whether the first respondent (the professional coach) is functioning optimally.*" The validity of this reason is argued elsewhere in this thesis.

<sup>37</sup> Van Warmelo (1978) 252; Du Plessis (1988) *THRHR* 351.

attach the body of the guilty party with the purpose of killing the latter.<sup>38</sup> The purpose of this exercise was not primarily to kill the “guilty” party, but to *compel* the latter by threat of physical harm to perform. There is little doubt that the system of *legis actio* was the first occurrence of the modern notion of the remedy of specific performance to ensure that obligations were honoured.

Mention has been made in this thesis of the formal act known as *nexum*,<sup>39</sup> in terms of which moneys were weighed and lent to debtors in the presence of witnesses. The significance of this action to the current chapter is the fact that a very primitive form of specific performance originated from the transaction in question. This form entailed that if the debtor failed to repay the borrowed moneys, he was bound to work for the lender, as the latter would have received a claim to the former’s body.<sup>40</sup> The process according to which the body of the debtor was attached was known as *manus iniecto*.<sup>41</sup> The purpose of this attachment was to kill the debtor or to sell the debtor into slavery, should he continue in his inability to pay the principal debt.<sup>42</sup> However, Muirhead<sup>43</sup> has stated that the fact that the creditor could actually kill the debtor because of the latter’s outstanding debt, is one that is not supported by any distinct authority. On the contrary, it is submitted that the purpose of *manus iniecto* was not primarily to kill the debtor because of non-compliance with the obligation between him and the creditor, but to *compel* the debtor by way of fear of being chastised or killed to perform his duties, as was the case with *nexum*. Lambiris<sup>44</sup> states that perceived in this way, *nexum* (and subsequently *manus iniecto*) allowed extra-judicial enforcement of an obligation, and did not necessitate judicial orders of specific performance. Nevertheless, *manus iniecto* did bring about performance of obligatory duties, as it was effected through personal execution of the granted Court order, initiated by the *manus iniecto* and resulted in the killing of the debtor or his enslavement if he did not redeem himself timeously. This procedure was, according to Kaser,<sup>45</sup> in accordance with the law of the Twelve Tables and existed in order to bring about specific performance of not only the contractual obligation in question, but also the Court

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<sup>38</sup> Du Plessis (1988) *THRHR* 351.

<sup>39</sup> The formal acts of *nexum*, *sponsio*, *mancipatio* and *legis actio* all originated during the period of the kings.

<sup>40</sup> I 3 168; Jolowicz 164; Van Zyl 277.

<sup>41</sup> Du Plessis (1988) *THRHR* 351.

<sup>42</sup> Du Plessis (1988) *THRHR* 351; Winkel in Hallebeek and Dondorp (eds) 9.

<sup>43</sup> Muirhead (1916) 151.

<sup>44</sup> Lambiris 28.

<sup>45</sup> Kaser (1984) 421.



order. Winkel has no doubt that the *legis actio* of *manus iniecto* was the origin of the modern remedy known as specific performance.<sup>46</sup>

It is clear from this discussion that Roman law during the Period of the Kings acknowledged the fact that certain transactions, whether of a contractual or delictual nature, brought about obligations which could be enforced. Although the process of enforcement of these obligations was of an extra-judicial nature, transactions such as *nexum* and the subsequent *manus iniecto* definitely had as a primary purpose the enforcement of performances owed by a debtor to a creditor. Therefore, it is submitted that the modern remedy of specific performance originated during the period of the kings, more specifically in the procedure of *legis actio* and yet more specifically the action of *manus iniecto*.<sup>47</sup> This is confirmed by Gaius, who states that the *legis actiones* were in fact the earliest form of judicial procedure known to the Roman law for both the collection of claims and the enforcement of obligations.<sup>48</sup> These actions were based upon the Twelve Tables and more particularly upon customs which, by continuous usage, had acquired full legal authority.<sup>49</sup>

#### 4.3.2. The Roman Republic<sup>50</sup>

During the period in which Rome was administered as a Republic, the government was led by two consuls, who effectively replaced the king.<sup>51</sup> The period was characterised by conflict between the Roman aristocracy or *patricii* on the one hand and the proletariat or *plebeii* on the other.<sup>52</sup> This conflict led to the origin of a large part of Roman law in the sense that disputes between citizens on certain matters (which were previously decided by priests) were now solved by a judiciary.<sup>53</sup> Such disputes were solved in accordance with what was

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<sup>46</sup> Winkel in Hallebeek and Dondorp (eds) 9.

<sup>47</sup> *Manus iniecto* was not the only legal action by which a contractual creditor could claim either property or services of a specific nature owed to him by the contractual debtor in question. According to Gaius, five actions were brought under the ancient form of judicial procedure (See Gaius / 4 12). These actions were *sacramentum*, a general action used in cases where the law provided no other action for bringing a suit with (Gaius / 4 13), *judicis postulatio*, by which an application was brought to the magistrate in a particular case to appoint a judge or arbiter to hear the case in question after joinder of issue (Gaius / 4 15), *condictio*, a personal action for the recovery of a certain sum of money which had either been loaned or paid by mistake (Gaius / 4 15) and *pignoris capio*, an action for the enforcement of obligations available to soldiers for subsistence and pay, as well as to enable magistrates to compel parties against whom judgments had been rendered to comply with these judgments (Gaius / 4 15).

<sup>48</sup> Gaius / 4 12.

<sup>49</sup> *Ibid.*

<sup>50</sup> Generally accepted as the period between 509 and 27 BC.

<sup>51</sup> Van Warmelo (1976) 5; Van Zyl 5.

<sup>52</sup> Van Warmelo (1976) 5; Van Zyl 5.

<sup>53</sup> Van Warmelo (1976) 8.

considered “right”, in other words they were solved in an equitable manner. For this reason, the *ius Gentium* differed significantly from the *ius Civile*, mainly because it was based on equity and good faith between parties to a transaction.<sup>54</sup> The greatest development as far as the law in general is concerned during the Republic was the writing of the Twelve Tables<sup>55</sup> from 451 to 450 BC. These Tables consisted of a number of legal adages, grouped according to system.<sup>56</sup> The Twelve Tables were a modest attempt at codification of the law and the creation of a legal system, according to Van Warmelo.<sup>57</sup> However, there are clear indications within the Twelve Tables that performance of an obligation could be demanded in case of non-performance by a party to such obligation. So, for instance, Law IV of Table III of the Twelve Tables states that a debtor who had acknowledged a debt and had judgment rendered against him requiring payment, could be given thirty days in which to pay the debt and satisfy the judgment.<sup>58</sup> This is a clear move away from the position of *nexum*, insofar as the mentioned Law provided for judicial compelling of obligations, as opposed to the position during the Period of the Kings when performance was regularly enforced extra-judicially. If the debt remained unpaid after the thirty days provided for in Law IV, then the creditor had the right to forcibly seize the debtor and to bring the latter before Court.<sup>59</sup> If the debtor were still unable to satisfy judgment against him after having been brought to Court a second time, then, according to Law VI of the third Table, the creditor could take the debtor with him, place him in fetters or bind him (in other words, take possession of his person).<sup>60</sup> Thereafter, the debtor would be brought before the *praetor*,<sup>61</sup> who had the power to order the debtor to be

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<sup>54</sup> Van Warmelo (1978) 48; Van Warmelo 9.

<sup>55</sup> The Twelve Tables were the result of a requirement by a tribune of plebeians to set the law of the time down in writing. In 452 BC it was decided that a commission consisting of ten people would be instituted in order to codify the law. Initially, ten tables of laws were established, and in the year 449 BC the Twelve Tables were completed and accepted as law, according to Van Warmelo 10.

<sup>56</sup> Van Warmelo (1976) 10; Van Warmelo (1978) 53.

<sup>57</sup> Van Warmelo (1978) 48 and 52; Van Warmelo (1976) 10.

<sup>58</sup> Tab 3 4.

<sup>59</sup> Tab 3 6.

<sup>60</sup> Tab 3 4 and 6.

<sup>61</sup> The office of the *praetor* was created in 367 BC. The *praetor* could be described as the *magistratus* in whom *imperium* was vested and to whom the *iurisdictio* was entrusted, according to Van Warmelo (1976) 11. The *praetor* created rules of procedure. Failure to follow these rules of procedure resulted in the dispute not being able to be brought to judgment. It was possible that a situation could arise in which a person considered himself aggrieved, but in which the *ius civile* supplied no remedy. In such a case, the *praetor* (by means of an *edicta*) could prescribe a procedure by which such a person could institute proceedings to claim redress. The *praetor* could adapt principles of *ius gentium* to the requirements of the society and therefore all remedies provided by him were considered to be based on equity and good faith and were certainly less occupied with formalities and the *ius civile*.

reduced to slavery.<sup>62</sup> Ultimately, if the debtor owed money to more than one creditor, the latter had the right to divide the debtor into different parts, thereby killing him.<sup>63</sup>

Although the Laws discussed above referred to orders for the payment of outstanding moneys, the whole process had the purpose of compelling the debtor to perform his contractual duties. If one considers that the remedy of specific performance is one in terms of which specific performance of contractual obligations is enforced, then it is quite clear that the Twelve Tables made provision for a judicial remedy which bore close resemblance to the remedy known in South African law today as specific performance. Keeping in mind that the Twelve Tables were also a codification of reigning law at the time, there is no doubt that they were a mere confirmation of a remedy that was already in existence and frequently applied in case of breach of obligations. Du Plessis<sup>64</sup> confirms this by stating that although the remedy of specific performance at the time of the Twelve Tables was not known as an actual remedy which could be granted by a court, the remedy was still an extra-judicial one for which proper judicial methods of compelling the debtor to perform existed. Very often, creditors would not have killed debtors as a matter of first instance (as they were allowed to do in terms of *nexum*), but would rather have entered into an agreement with the debtor in terms of which the latter could “work off” his debt.<sup>65</sup> Furthermore, the debtor also had the option of providing a child or family member to the creditor in the form of a pawn, to give the debtor the opportunity to collect money in order to pay off his debt.<sup>66</sup> Attachment of the body of the debtor was still possible as an indirect way of securing performance by the debtor. It was also still possible to compel the debtor to perform after attachment of his (the debtor’s) body had taken place.<sup>67</sup> There is little doubt that these possibilities of compelling a debtor to perform set the basis for the remedy of specific performance known in South African law today. Mention should be made, however, of the fact that during the system of *formula*, in terms of which *manus iniecto* was replaced by the praetorian *actio iudicati*, orders likened to those of specific performance were not regularly granted. The reason for this is very significant to this thesis: the effect of these orders were seen as extremely drastic to the person against whom

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<sup>62</sup> *Tab* 3 9.

<sup>63</sup> *Tab* 3 10.

<sup>64</sup> Du Plessis (1988) *THRHR* 353.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Du Plessis (1988) *THRHR* 353; Van Warmelo 3(1978) 308.

they were granted.<sup>68</sup> This reason would remain a valid one throughout the further development of Roman law, Roman-Dutch law and South African law to this day.<sup>69</sup>

Although orders for specific performance of contractual obligations were granted less often during the period mentioned above, they were by no means unknown. This is evident from the writings of Gaius during the Principate, of which a lot was based on the law laid down by the Twelve Tables.

### 4.3.3. The Roman Empire<sup>70</sup>

#### 4.3.3.1. The Principate

When Rome became an empire, the powers of the assemblies gradually started to wane,<sup>71</sup> with the result that the Senate became the actual governing body of the Empire of Rome. This led to governance by an emperor who had the armies under his control towards the end of the Republic, and the old republican institutions such as the assemblies and magistracies disappeared.<sup>72</sup> In the period immediately preceding the classical period of Roman law,<sup>73</sup> an

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<sup>68</sup> Du Plessis (1988) *THRHR* 352.

<sup>69</sup> In *Farmers' Co-Operative Society v Berry* 1912 AD 343 at 350 Innes J stated that orders of specific performance would not be issued "where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages." However, he goes further to state that "it is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money." In *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378 De Villiers AJA provided certain grounds upon which an order of specific performance could be refused in the discretion of the Court. These grounds were the following:

- (a) Where damages would adequately compensate the plaintiff;
- (b) Where it would be difficult for the Court to enforce its decree;
- (c) Where the thing claimed can readily be bought anywhere;
- (d) Where specific performance entails the rendering of services of a personal nature;
- (e) Where it would operate *unreasonably hardly on the defendant*, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances (author's emphasis).

For this last ground, De Villiers AJA depended largely on Wessels. In the case of *Benson v Mutual Life Assurance Society* 1986 (1) SA 776 (A) Hefer JA confirmed that "cases do arise where justice demands that a plaintiff be denied his right to performance- and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant."

<sup>70</sup> It is generally accepted that Rome functioned as an empire from 27 BC until 565 AD. Two specific periods are distinguished during the age of empire, namely the Principate from 27 BC until 284 AD and the Dominate or Absolute Monarchy from 284 until 565 AD. In 527 AD, Justinian became Emperor of the Eastern Part of the Roman Empire and commenced the codification of Roman law. This mammoth task was completed in between four and five years' time.

<sup>71</sup> Van Warmelo (1976) 15.

<sup>72</sup> Van Warmelo (1976) 15. Augustus was the first acclaimed Emperor of Rome.

<sup>73</sup> The classical period of Roman law is generally perceived to be the second and third centuries AD. This means that the classical period fell almost entirely within the Principate.

abundance of new types of agreement were accepted as creating legally enforceable contractual obligations. This basically entailed that the type of obligation which was considered legally enforceable was broadened.<sup>74</sup> These types of obligation at that specific period included both obligations relating to fixed sums of money and also contractual obligations to perform a variety of undertakings.<sup>75</sup> It was no longer necessary for the undertaking in question to be fixed, as the extent and content of contractual obligations might have been either fixed or unfixed.<sup>76</sup> The problem with the recognition of so many types of enforceable agreements was that execution of a judgment for performance still relied on *manus iniecto*, as well as the “self-help”-principle by which the creditor had to make use of alternative methods in order to establish performance by the debtor.<sup>77</sup> Lambiris<sup>78</sup> describes *manus iniecto* as a “blunt instrument” for the purpose of enforcing performance from a debtor (meaning that it was at most a way of putting pressure on the latter to perform) during the time of the Principate, and it was therefore desirable for a *iudex* to make a relatively uncomplicated order which could be enforced easily. The way in which the difficulty to enforce legal rights and obligations during the Principate was solved, contributed to the demise of specific performance during this period. The reason for this is that every order made by a *iudex* was expressed as an order to pay an amount of money, basically entailing that all court orders were given as an economic value of a legally enforceable claim.<sup>79</sup> In granting these orders, the courts did not distinguish between actions *in rem* and actions *in personam*, or between obligations which arose *ex delicto* and those which arose *ex contractu*.<sup>80</sup> In practice, this meant that if for instance an owner of property instituted proceedings in order to reclaim his property from a *mala fide* possessor, an order was usually made for the value of the property to be paid to the owner.<sup>81</sup> The same approach was followed in the case of personal obligations: if a debtor owed services of a personal nature, the monetary value of such services were calculated and the debtor was ordered to pay a surrogacy amount to the creditor.<sup>82</sup>

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<sup>74</sup> Lambiris 30.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Idem* 30-31. The practice of reducing all court orders to monetary terms was known as *condemnatio pecunaria*.

<sup>80</sup> Lambiris 31.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

Although it seems that the remedy of specific performance made no progression during the Principate, Lambiris<sup>83</sup> reasons that it should not be thought that by reducing all orders to monetary terms, a conscious and deliberate policy was adopted in this period by which obligations were discharged by compensation rather than by actual performance of the obligation. Although specific performance was not ordered by the *iudex*, the *condemnatio pecunaria* is said to have encouraged specific performance in an indirect manner.<sup>84</sup> Gaius mentions the *condemnatio pecunaria* in stating that at the time in question, specific performance of an object due was no longer ordered by a court *as was formerly the case* (implying that specific performance of objects due was indeed ordered before).<sup>85</sup> The reason for the theory that *condemnatio pecunaria* actually encouraged specific performance of contractual obligations during the Principate, is the fact that currency at the time was a scarce commodity. This entailed that it was actually seen as an easier option for a debtor to perform in terms of the obligation, rather than have to pay an amount of money.<sup>86</sup> Perceived in this way, the argument must stand that whilst a court would not easily order specific performance of an obligation in question (in other words, specific performance was not seen as a primary legal remedy) during the Principate, it was a “voluntary alternative” to risking a *condemnatio pecunaria*. The fact is that specific performance was still considered an available remedy for breach of obligations during the Principate. This fact is confirmed by the Institutes of Gaius, in which the latter proclaims that a personal action was one in terms of which a person could claim that another person or debtor was bound to “give something, to do something, or to perform some service”.<sup>87</sup> Personal actions by which a creditor in terms of a contract could claim for something to be given or some act to be performed, were known as *condictiones*.<sup>88</sup>

#### 4.3.3.2. The Dominate

Whereas development of the remedy of specific performance was somewhat strained during the Principate, significant developments of the remedy took place during the second period of

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<sup>83</sup> Lambiris 31. See also Van Zyl 275.

<sup>84</sup> *Ibid.*

<sup>85</sup> Gaius I 4 48. The original text reads as follows: “Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnation concept est. Itaque et si corpus aliquod petamus, veluti fundum, hominem, vestem, aurum, argentum, iudex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, et aestimata re pecuniam eum condemnat.”

<sup>86</sup> Lambiris 32. See also Van Zyl 275.

<sup>87</sup> Gaius I 4 2. The Latin text reads as follows: “*In personam action est, qua agimus, quotiens litigamus cum aliquo, qui nobis uel ex contractu uel ex delicto obligates est, id est, cum intendimus ‘dare facere praestare’ oportere.*”

<sup>88</sup> Gaius I 4 5.

the existence of the Roman Empire, known as the Dominate.<sup>89</sup> A significant event which occurred during this period was the division of the Empire into Western<sup>90</sup> and Eastern<sup>91</sup> parts.<sup>92</sup> As far as the law in general is concerned during the Dominate, it is said that vulgarization of the law in especially the Western part of the Empire was a result of the jurists during this period not being the driving force they had been before, and they merely thrived on the work of their predecessors.<sup>93</sup> This was less so in the Eastern part, in which the collapse of the law was not as extensive, mainly due to the fact that the law of the Classical period was studied in various law schools.<sup>94</sup> The fact that Classical Roman law was still studied in certain schools made it possible for Justinian to codify Roman law when he became emperor of the Eastern part of the Roman Empire in 527 AD.<sup>95</sup>

#### **4.3.4. The codification of Roman law by Justinian and the role of specific performance within this codification<sup>96</sup>**

During the reign of Justinian, and subsequently in so-called Justinianic law, formulary procedure was replaced by *cognitio extraordinaria*, and litigation took place in a single proceeding before either a magistrate or his deputy.<sup>97</sup> The fact that sufficient manpower resources existed and that greater assistance from the state in legal matters was available, led to the fact that disadvantaged creditors no longer had to depend only on themselves in enforcing orders *in forma specifica*.<sup>98</sup> During the Dominate, and especially at the time of Justinian's codification of Roman law, currency was less scarce, and therefore it became

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<sup>89</sup> Du Plessis (1988) *THRHR* 353.

<sup>90</sup> Rome was the capital of the Western part of the Roman Empire.

<sup>91</sup> Constantinople was the initial capital of the Eastern part of the Empire, but was later replaced by Byzantium.

<sup>92</sup> Van Warmelo (1976) 19, Van Zyl 8, Van Warmelo (1978) 107.

<sup>93</sup> Van Warmelo (1978) 207.

<sup>94</sup> Van Warmelo (1976) 20, Van Warmelo (1978) 132. The fact that Classical Roman law was still studied in certain schools made it possible for Justinian to codify Roman law towards the end of the Dominate in 527 AD.

<sup>95</sup> Van Warmelo (1976) 23.

<sup>96</sup> Justinian ruled the Eastern part of the Roman Empire from 527 until 565 AD. According to Van Zyl 8-9, he made the greatest contribution towards the continued existence of Roman law after the fall of the Roman Empire. In his attempt to revive the former greatness of Rome, Justinian ordered all existing law to be reduced to writing in a Latin codification that would supersede all other sources of law. The vast majority of legal systems in Europe owe their origins to Justinian's codification of Roman law, including the Roman-Dutch system which has been adopted as the common law legal system of South Africa. Justinian's codification is referred to as the *Corpus Iuris Civilis* and consists of preparatory legislation known as the *Codex Vetus* and the *Quinguginta Decisiones*, the Digest (*Digesta*), the Institutes (*Institutiones*) and the Novels (*Novellae*).

<sup>97</sup> *I* 4 17 2; Gaius *I* 4 183; Lambiris 33.

<sup>98</sup> Lambiris 33.

much easier to merely pay a monetary surrogate rather than render specific performance of an obligation.<sup>99</sup> However, if one were to search for clear-cut proof of the existence of the remedy of specific performance (as it is known today) in Roman law, one would probably be left disappointed. Although there is little doubt that the remedy existed in some form or another in Roman law, one will at most find examples of actions that *resemble* an action of specific performance of obligations. This is however definitely not to say that the remedy was unknown, and that therefore Justinian's codification of the law is mostly silent on that remedy, as will be discussed below.

Gaius states, and it is later alluded to by Justinian, that a court could order the defendant in a real action to return the property in question together with its fruits.<sup>100</sup> However, it was also current practice that if a person had made a promise to prevent a stipulator from suffering any harm, and failed to honour such promise, he would be condemned to pay monetary damages.<sup>101</sup> This practice is confirmed in the Institutes,<sup>102</sup> where it is stated that a judge should ensure that he always gave judgment of a specific sum of money *or thing* whenever possible.

In Justinian's Code,<sup>103</sup> there is a clear practical indication of a court's right of ordering specific performance of an obligation. It reads as follows:

“Where anyone has bequeathed his slave under the condition that the legatee should grant him his freedom, and the heir, acting dishonourably with reference to the legacy, refused to surrender the slave to the legatee, and suit having been brought against him, and the judge having ordered him not only to give up the slave, but also to pay his appraised value, the ancient interpreters of the law were in doubt whether an obstacle was not placed in the way of freedom by a decision of this kind; and when it was decided that freedom must be granted, whether this should be done by the heir or the legatee, and if the heir granted it, whether the legatee would be entitled to retain the amount which he had received as a pecuniary fine, either entirely, partially, or not at all.”

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<sup>99</sup> Lambiris 33.

<sup>100</sup> I 4 17 2; I 4 17 3- 4 17 6. Justinian also referred to the text of Gaius in his codification. See also Lambiris 33.

<sup>101</sup> D 42.1.13.1.

<sup>102</sup> I 4 6 32.

<sup>103</sup> C 7 4 17, as translated by Scott (1932) 457. The original text reads as follows: “*Cum quidam servum suum ita legavit, ut legatarius libertatem ei imponat, et heres as huiusmodi legatum improbe versatum servum dare legatario designatus est, ut etiam lite pulsetur, et iudex non in ipsum servum, sed in aestimationem litis condemnationem proferat: veteris iuris interpretes dubitabant, ne quid obstaculum libertati ex hac causa procedat et, si placuerit eandem deberi libertatem, a quo danda est utrumne ab herede an a legatario, et si heres imponat libertatem, an legatarius, quod ex pecuniaria condemnation accepit, firmiter detinet sive totum sive ex parte sive etiam nihil.*”



In addition to this, there are several indications in the Digest that, although not popular, orders *in forma specifica* were certainly possible and acceptable in Roman law. So for example there is authority for the fact that a debtor could be compelled to perform a certain act, such as the removal of stones or the building of a ship<sup>104</sup> or house.<sup>105</sup> Similarly, a seller could be compelled to transfer property to the purchaser,<sup>106</sup> and such seller only had the option of paying damages if the purchaser had previously agreed thereto.<sup>107</sup> Du Plessis makes mention of the Digest 42 1 13 1, which is a text often quoted as authority for the fact that an order of specific performance would never have been granted in Roman law. What the text does state, in fact, is that damages as a remedy was ordered in *ad faciendum*-cases.<sup>108</sup> It must be agreed with Du Plessis that this in itself is insufficient proof of the fact that the remedy of specific performance was a non-existent one in Roman law.<sup>109</sup>

It has been mentioned above that one will at most encounter orders that resemble that of specific performance in Roman law, and not examples of the exact order as it is known in South African law (and other jurisdictions) today. So, for instance, there is authority for the fact that a judge could by the nature of his office order specific performance of a performance that remained possible.<sup>110</sup> This applied especially in instances where a debtor was under an obligation to pay his debt.<sup>111</sup> In order to ensure that the debt was indeed settled by the debtor in question, it was possible for the debtor's personal rights as well as money to be attached.<sup>112</sup> Furthermore, it was possible to attach the debtor's personal property, and for this purpose the use of violence was permitted in order to give effect to the court order in question.<sup>113</sup> Finally, it was even possible for the debtor to be taken into custody until his debt had been settled.<sup>114</sup> It is clear then, that in Justinian's *Corpus Iuris Civilis*, actions were available to parties to a dispute which resembled the modern remedy of specific performance very closely, although the remedy was certainly not acknowledged as such to the extent it was in Roman-Dutch and

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<sup>104</sup> D 19 1 9; Du Plessis (1988) *THRHR* 354.

<sup>105</sup> D 45 3 31; Du Plessis (1988) *THRHR* 354.

<sup>106</sup> D 19 1 11 2; Du Plessis (1988) *THRHR* 354.

<sup>107</sup> D 39 1 21 4; Du Plessis (1988) *THRHR* 354.

<sup>108</sup> D 42 1 13 1, Du Plessis (1988) *THRHR* 354.

<sup>109</sup> The same argument applies to D 45 1 113 1, which has also been used to indicate the non-existence of specific performance in Roman law. This text, however, relates merely to the furnishing of guarantees, and cannot be seen as sufficient proof of the non-existence of specific performance in Roman law.

<sup>110</sup> Declareuil (1927) 326; Du Plessis (1988) *THRHR* 354.

<sup>111</sup> D 42 1 4 3; Du Plessis (1988) *THRHR* 354.

<sup>112</sup> D 42 1 15 8.

<sup>113</sup> Van Warmelo (1978) 333; Du Plessis (1988) *THRHR* 354.

<sup>114</sup> Van Warmelo (1978) 334-335; Du Plessis (1988) *THRHR* 354-355.

modern South African law. It must be made abundantly clear, though, that the remedy of specific performance was a well-known and available one in Roman law, and there is no doubt that it existed.<sup>115</sup>

#### 4.4. The requirement that contractual obligations should remain possible

In his Digest, Justinian clearly subscribes to the rule *impossibilium nulla obligatio est*.<sup>116</sup> The implication was that contractual performance had to remain possible for a court to order specific performance of the obligation in question. The relevance of the rule *impossibilium nulla obligatio est* lies therein that if specific performance of a contractual obligation was never granted, there would have been no logical explanation for the existence of the *impossibilium*-rule, as it would have been obsolete. In other words, the only logical explanation for the existence of the rule was that specific performance of a contractual obligation could not be ordered if said obligation had become impossible. By implication, then, the remedy of specific performance was a well-known one in Roman law and was ordered on a regular basis. The Roman law rule that specific performance of a contractual obligation will not be ordered in cases where the performance has become impossible, has been confirmed in South African cases such as *Van der Westhuizen v James*,<sup>117</sup> *Blou Bul Boorkontrakteurs v McLachlan*,<sup>118</sup> *Benson v SA Mutual Life Assurance Society*<sup>119</sup> and *Gassner v Minister of Law and Order*,<sup>120</sup> despite the fact that in Roman-Dutch law, the procedure of “gijzeling” could be ordered against a contractual debtor as a way of ensuring performance, even though such performance may have become impossible.<sup>121</sup>

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<sup>115</sup> For the sake of confirmation, Kaser and Hackl (1996) 609-610 provide three texts as proof of the existence of the remedy of specific performance in Justinianic law. These are C 6 2 22 3, which resembles the action of spoliation, C 7 54 3 3, in which Justinian that a judgment debtor had a grace period of four months in which to perform in terms of the relevant judgment, and C 7 39 8 3, in terms of which a *bona fide* possessor could be restored to his rightful ownership of property.

<sup>116</sup> D 50 17 185.

<sup>117</sup> 1898 5 OR 90.

<sup>118</sup> 1991 (4) SA 283.

<sup>119</sup> 1986 (1) SA 776 (A).

<sup>120</sup> 1995 (1) SA 322 (C).

<sup>121</sup> The procedure for ensuring specific performance in Roman-Dutch law known as “gijzeling” is discussed in detail in chapter 4 of this thesis.

## 4.5. Conclusion

The aim of this chapter is to confirm the probable origin of the contractual remedy of specific performance in Roman law. The value hereof lies therein that there are many contradicting stances on whether the remedy of specific performance existed in Roman law at all. Whereas it is agreed with modern authors like Beinart, Joubert, De Wet and Yeats and Van der Merwe (but also with a Roman-Dutch author like Voet) that the order of specific performance as the exact remedy we know today was largely unknown in Roman law, there are too many well-founded examples of remedies that resembled specific performance too closely to merely state that specific performance did not exist in the period under discussion.

The first problem with the statement that specific performance was non-existent in Roman law is that it is an oversimplification. It would be unwise to perceive the Roman law as a whole, without acknowledging the fact that the law developed differently during each period of Roman law. These different stages of development, as well as the actual development which took place during each period, laid the foundation of the remedy of specific performance as it is known in South African law (and probably in most continental legal systems) today. It is impossible to determine the suitability of the remedy of specific performance for breach of an athlete's contract if one does not truly grasp the origin, and subsequently the nature and characteristics, of this remedy.<sup>122</sup> In order to determine whether remedies resembling that of specific performance existed in the different periods of Roman law, this chapter set out to determine the actual meaning of the term "specific performance". It was established that one should take care in distinguishing between the terms "specific performance", which is merely one of the ways in which a contractual obligation may be discharged, and "order of specific performance", which refers to the actual contractual remedy.<sup>123</sup> The latter may take the form of an order to perform a specific act in pursuance of a contractual or other obligation (or *ad factum praestandum*), an order to perform a specified act or to pay money in pursuance of a contractual obligation (or *ad pecuniam solvendam*) and lastly the mere performance of a specified act in pursuance of a contractual obligation.<sup>124</sup> Having established what the term entailed, it was imperative to investigate the availability of

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<sup>122</sup> The nature and characteristics of the remedy of specific performance are compared to those of other remedies, most notably the interdict, penalty clause and damages, in chapter 9 of this thesis.

<sup>123</sup> See in this regard Lambiris 3.

<sup>124</sup> Christie 522.

remedies during each period of development of Roman law which might have resembled the current remedy of specific performance.

During the period of the kings, the monarchy played a significant and primary role in the development of the law, because the monarchs were appointed by the Roman senate and the popular assembly.<sup>125</sup> Because of this, the task to administer justice was largely that of the king's,<sup>126</sup> which resulted in legal rules being extremely simple and often religious in nature.<sup>127</sup> The part of the law not handed down by the king, consisted of customs and usages within the community.<sup>128</sup> Due to the recognition of rights to private property for the first time in Roman law during the period of the kings, orders for the delivery of property became well-known.<sup>129</sup> Even during this very early occurrence of the remedy of specific performance, the problem of monitoring whether the debtor in question actually performed (or alternatively, performed optimally) was a significant one which has survived to this day.<sup>130</sup> Modern day South African courts dealing with the question as to the appropriateness of the remedy of specific performance to breach of contracts of a highly personal nature (such as the playing of sport), have found it difficult to perceive how a court who orders the remedy would ensure that the debtor in question does in fact honour the court order. This problem was raised specifically in the case of *Santos Professional Football Club (Pty) Ltd v Igesund and Another*.<sup>131</sup> *In casu*, Desai J stated that it would be impossible for the Court to know whether its order (of specific performance) was in fact being honoured, both because of the court's "rudimentary knowledge" of the services in question (in that particular case, the coaching of football) and the fact that it was impossible for the court to attend all practice sessions and matches in which the coach performed his services.<sup>132</sup> This problem was seemingly solved (albeit temporarily) by Foxcroft J in the Full Bench decision of the same case, in which the court stated that it was not the task of the court to ensure that the party who was compelled to perform in terms of the contract, actually did so optimally.<sup>133</sup> If an applicant claims specific

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<sup>125</sup> Van Zyl 4.

<sup>126</sup> Van Zyl 5.

<sup>127</sup> *Ibid.*

<sup>128</sup> Van Warmelo (1976) 26.

<sup>129</sup> Gaius I 4 48.

<sup>130</sup> The fact that this was already a problem in early Roman law, even as early as the period of the kings, is established by Jolowicz at 189-190 and Du Plessis (1988) *THRHR* 350-351.

<sup>131</sup> 2002 5 SA 697 (C).

<sup>132</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 5 SA 697 at 700.

<sup>133</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 5 SA 73 at 86-87. In the case of *Ranch International Pipelines (Transvaal) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 at 880, the

performance, *such applicant* carries the risk of the defendant not performing optimally and in accordance with the court order, not the court who had granted the order. However, it is a primary question posed by this thesis whether this is a legally viable solution, and it must be agreed with Desai J that a person ordered to do something which he doesn't want to do, will do so with "diminished enthusiasm and commitment".<sup>134</sup>

However troublesome the abovementioned situation may have been, it was accepted during the period of the kings that a person who had been disadvantaged by malperformance in case of either a delictual or contractual matter, had the right to avenge such disadvantage<sup>135</sup> in terms of the *legis actio*. This legal action entailed that an aggrieved innocent party to a transaction received the right to take into possession the body of the party by whom he had been wronged with the purpose of killing the latter. It has been submitted in this chapter that the threat of death ultimately had a more noble aim, and that was to compel the "guilty" party by threat of death to perform his obligations in terms of the relevant transaction. If one were to accept the aim of the *legis actio* (to ensure performance of an obligation rather than be a death sentence), then the action is certainly one of the first occurrences of specific performance as it is known in South African law today.

Although the *legis actiones* were the first occurrence of the modern remedy of specific performance, it was the formal act of *nexum* which established Gaius's claim that the actual delivery of performance in accordance with a court order was well-known in early Roman law.<sup>136</sup> In terms of *nexum*, a creditor of money received a claim to the debtor's money in terms of a certain transaction between them.<sup>137</sup> On the face of it, the purpose of the attachment of the debtor's body was merely to kill the latter. Muirhead<sup>138</sup> states, however, that there is no substantive evidence for the fact that *nexum* actually involved the killing of the debtor in question. One must assume then that *nexum* had the same aim as *legis actio*: to secure performance of the obligation in question.

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court stated that courts in fact never actually supervised the execution of orders *ad factum praestandum*. The court herein emphasized that *the party applying for specific performance* carried the risk of non-performance of the court order, and not the court granting the order.

<sup>134</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 5 SA 697 at 700.

<sup>135</sup> Van Warmelo (1978) 252; Du Plessis (1988) *THRHR* 351.

<sup>136</sup> See Gaius / 4 48.

<sup>137</sup> / 3 168; Jolowicz 164; Van Zyl 277.

<sup>138</sup> Muirhead 151.

The period in which Rome functioned as a republic saw the first attempt at codification of Roman legal rules and customs in the form of the Twelve Tables. Much of what was considered Roman rules and customs at the time was born of the constant conflict between the *patricii* (aristocracy) and the *plebeii* (proletariat).<sup>139</sup> The reason for this was that grievances were solved based on what was considered “right”, in other words based on equity.<sup>140</sup> The Twelve Tables contained significant evidence of the fact that a party to a transaction could be compelled to actually perform in case of non-performance by such a party in such a transaction. The example provided in this chapter stems from Law IV of Table III, which stated that a debtor who owed a debt and acknowledged such debt could be compelled in a judicial manner to settle such debt within a period of thirty days, failing in which case the creditor could forcibly seize the debtor to be brought before court.<sup>141</sup> If the debtor remained unable or unwilling to settle the debt, the *praetor* had the authority to order the debtor to be reduced to slavery.<sup>142</sup> As in the cases of the *legis actio* and *nexum*, the primary purpose of the abovementioned procedure prescribed by the Twelve Tables was to secure performance by placing pressure on the debtor in question to perform. However, it is also trite that during the time in which Rome functioned as a republic, orders likened to that of specific performance was not granted regularly, for the reason that these orders were seen as extremely drastic to the person against whom they were granted.<sup>143</sup> This reason was echoed by Desai J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another*<sup>144</sup> when he pertinently asked the question whether granting specific performance against a professional soccer coach, which would compel said coach to coach a team he no longer wanted to coach, would not perhaps compromise that coach’s dignity. Once again, this is a question which to this day has not been answered satisfactorily, and one which reiterates the importance of the primary question posed by this thesis as to the suitability of the remedy of specific performance for breach of athletes’ contracts.

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<sup>139</sup> Van Warmelo (1976) 5; Van Zyl 5.

<sup>140</sup> It must be kept in mind that English law still perceives the remedy of specific performance as an equitable one which may only be granted when equity demands. It is an important question posed by this thesis whether equity or “fairness” as it is better known in South African law should play a role in determining the most appropriate remedy for breach of the athlete’s contract.

<sup>141</sup> Tab 3 4.

<sup>142</sup> Tab 3 9.

<sup>143</sup> Du Plessis (1988) *THRHR* 352.

<sup>144</sup> 2002 5 SA 697 (C) at 701.

The rise of the Roman Empire led to the demise of republican institutions like the assemblies and magistracies.<sup>145</sup> During the Principate (the first term of Empire) an abundance of new types of agreement were accepted as creating legally enforceable contractual obligations, which led to a new perception of the most appropriate remedy in case of breach of obligations.<sup>146</sup> Most importantly, court orders resembling specific performance of obligations were no longer limited to the payment of money, but also included orders for the performance of a variety of undertakings,<sup>147</sup> including (possibly) services of whatever nature. Furthermore, contractual obligations could have been either fixed or unfixed.<sup>148</sup> The problem with accepting so many types of enforceable agreements lay in the difficulty of enforcing these agreements. Enforcement at the time was still effected by means of the *manus iniecto* in terms of which a debtor's body was attached by the creditor, or the "self-help"-principle by which a creditor had to rely upon himself to exact performance by the debtor. These difficulties resulted in the demise in orders of specific performance during the Principate. *Iudeces* were expected to make their orders as uncomplicated as possible in order to ensure performance by debtors in certain transactions. Furthermore, it was common practice for the courts to rather order payment of the monetary value of the performance in question, rather than the performance itself. This was known as *condemnatio pecunaria*.<sup>149</sup> An important example of this practice is provided by Lambiris:<sup>150</sup> if a debtor owed services of a personal nature to the creditor, the monetary value of such services were calculated and the debtor was ordered to pay an amount as surrogate for performance to the creditor. This presented problems of its own, the most significant of which must be the fact that it is difficult to calculate the monetary value of, for argument's sake, a person's services. Once again, this is a problem that is as relevant today as it was at the time of the Principate. The problem also manifests itself in the determination of an adequate quantum of damages in cases of breach of a contract of service. The quintessential question here is how to determine the value (in monetary terms) of services performed by a debtor. In the context of this thesis, this question becomes all the more relevant: how does one determine how much *money* the personal sporting services performed by an athlete is worth to, firstly, his current employer, and, secondly, the establishment wishing to obtain such personal sporting services? What

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<sup>145</sup> Van Warmelo (1976) 15.

<sup>146</sup> Lambiris 30.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Lambiris 30-31.

<sup>150</sup> Lambiris 31.

complicates the matter even more, according to Naudé,<sup>151</sup> is that a claim for damages (or, as in the case of *condemnatio pecunaria*, a claim for the monetary value of specific performance of the obligation in question) does necessitate the “energy and costs of ascertaining facts, projections about future facts such as salary increases, and calculations”. Also, when a dispute should arise from the matter, one also has to take into account results such as unproductive energy, delay and possible costs of litigation.<sup>152</sup> It is interesting and relevant to note that the problems discussed above originated during the Principate, and that these problems currently still serve as valid motivation against damages as appropriate remedy in case of breach of contract, especially where services of a personal nature (such as the playing of sport) are involved.

Although there was a distinct move away from specific performance as remedy for breach of obligations during the Principate, it was certainly not policy to reduce all orders to monetary terms.<sup>153</sup> Because of the scarcity of currency during the Principate, the theory exists that *condemnatio pecunaria* in fact encouraged specific performance of obligations, as it was much easier to merely perform than to pay a surrogate for performance in the form of currency.<sup>154</sup>

Whereas the development of the remedy of specific performance was strained during the Principate, there were significant developments throughout the Dominate (the second term of Empire) and especially during the reign of Justinian. Currency became less scarce, which had an effect on the ease with which obligations could be fulfilled by merely paying a sum of money, even if the transaction in question actually demanded performance of a certain duty<sup>155</sup> which had nothing to do with the payment of money. However, although not clearly spelt out, there is little doubt that the concept of specific performance of obligations was all but alien during Justinian’s reign. In his codification, there are examples aplenty of practices and orders which resemble the modern remedy of specific performance very closely. Some of these examples include a real action for the return of property and its fruits,<sup>156</sup> orders for the

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<sup>151</sup> Naudé 2003 *SALJ* 273.

<sup>152</sup> Naudé 2003 *SALJ* 273.

<sup>153</sup> Lambiris 31; Van Zyl 275.

<sup>154</sup> Lambiris 32; Van Zyl 275.

<sup>155</sup> Lambiris 33.

<sup>156</sup> / 4 17 2; / 4 17 3-4; / 4 17 6; Lambiris 33.



release of slaves in accordance with the rules of contract<sup>157</sup> and orders in terms of which a debtor could be compelled to build a ship<sup>158</sup> or house.<sup>159</sup> More important to note is that a seller of property could be compelled to transfer said property to a purchaser in accordance with a specific transaction between them, and the seller only had the option of paying a surrogate of damages if such seller had in fact agreed to the latter remedy at the commencement of the transaction.<sup>160</sup> Finally, it has been argued in this chapter that the Justinianic rule *impossibilium null obligatio est*, which was prescribed specifically in the Digest,<sup>161</sup> would have been irrelevant but for the fact that specific performance of contractual remedies was granted on a regular basis in Roman law.

Having considered all possible remedies which existed in Roman law for breach of obligations, either of delictual or contractual origin, two things become clear: the remedy of specific performance as it is currently known in South African law did not exist in the form we know it today, but secondly, the root of the remedy we know today was definitely established in Roman law. To state that the remedy of specific performance did not exist in any form whatsoever during Roman times, would indeed be a gross oversimplification. Authors<sup>162</sup> have in the past advocated this point of view, but the value of this chapter lies therein that academic viewpoints are amalgamated with hard facts that stem from the *Corpus Iuris Civilis* and Gaius's Institutes. The fact that the remedy of specific performance finds its origin (although humble) in Roman law, confirms the fact that it is a primary one for breach of contract in South African law. When one looks at the types of agreement in Roman law for which, if breached, specific performance could be used as remedy, it is clear that courts in Roman times did not have objections to compel a debtor to even render services of a personal nature, such as the physical building of ships or houses. Although this is a strong argument in favour of the point of view that specific performance should be considered the primary remedy for breach of athletes' contracts in modern South African law (and possibly even internationally), it would be premature to conclude this, prior to having investigated the development of the remedy throughout Roman-Dutch law and English law to how the remedy is perceived today.

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<sup>157</sup> C 7 4 17.

<sup>158</sup> D 19 1 9; Du Plessis (1988) *THRHR* 354.

<sup>159</sup> D 45 3 31; Du Plessis (1988) *THRHR* 354.

<sup>160</sup> D 39 1 21 4; Du Plessis 354.

<sup>161</sup> D 50 17 185.

<sup>162</sup> Most notably Du Plessis and Lambiris.

## CHAPTER 5: THE REMEDY OF SPECIFIC PERFORMANCE IN ROMAN-DUTCH LAW

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### 5.1. Introduction

The term “Roman-Dutch law” typically refers to the system of law which applied in the province of Holland<sup>1</sup> from the middle of the fifteenth to the beginning of the nineteenth century.<sup>2</sup> The term itself was first used by Simon van Leeuwen as subtitle for his work *Paratila Juris Novissimi* which was published in 1652. The term was subsequently used as title of Van Leeuwen’s later treatise published in 1664 and simply entitled *Het Roomsche Hollandsch Recht*.<sup>3</sup> Although Roman-Dutch law finds its origins in early Roman law, Germanic Custom has also had a significant influence on the Roman-Dutch system of law.<sup>4</sup> Chapter 4 of this thesis established the origin and traced the development of the remedy of specific performance in Roman law. The purpose of this chapter is to investigate the development of the remedy of specific performance throughout Roman-Dutch law to how the remedy is perceived in South African law today. The research will be conducted through a discussion of the most significant authors on the topic of Roman-Dutch law and their views on the place of specific performance within this legal system.

The Roman-Dutch system is considered the common law of South Africa,<sup>5</sup> and for this reason its treatment of the remedy of specific performance, especially as far as it related to breach of contracts of service, is cardinal to determining the suitability of the remedy to breach of athletes’ contracts, especially in the South African context. It is important to constantly keep in mind that Roman-Dutch writers often based their views on the suitability of specific performance as remedy for breach of contract on the *type* of contract being

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<sup>1</sup> The province of Holland was one of seven provinces which, after having declared their independence from Spain in 1581, united to form the Republic of the United Netherlands. The other six provinces were Zeeland, Friesland, Overijssel, Groningen, Gelderland and Utrecht. The country is currently known officially as the Kingdom of the Netherlands and is generally referred to as “Holland”.

<sup>2</sup> Lee (1953) 2; Brand “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” 2009 (1) *SALJ* 71.

<sup>3</sup> Lee 2; Brand 2009 *SALJ* 71.

<sup>4</sup> Lee 2; Van Zyl (1983) 1; Kotzé (1881) 6-7.

<sup>5</sup> Lee 2; Brand 2009 *SALJ* 71; Van Zyl 1. The South Africa Act of 1909 made provision for this system of law to apply from the time of Union (31 May 1910). This law was based mainly on the Roman-Dutch system, with some English influence.

breached. So, for instance, specific performance was sometimes perceived as a suitable remedy in instances where property had to be delivered in accordance with a contract of sale, but in cases where services were to be delivered, the remedy was considered unsuitable, or at least less so. It was established in chapter 3 of this thesis that the athlete's contract is very much *sui generis*, which is a factor that must be kept in mind when determining if and when the remedy of specific performance would be a suitable one in the circumstances. There is a strong argument to be made, and it is to a certain extent agreed with Grotius,<sup>6</sup> that in instances where something had to be done (in other words, services performed), a respondent could always discharge his obligations by paying a surrogate of damages. The reasoning behind this has been this thesis, and comes down to the fact that a person expected to perform services of a personal nature<sup>7</sup> against such person's will, will do so with diminished enthusiasm and capacity. On the other hand, if a contractant has agreed contractually to the remedy of specific performance in case of breach of the contract to which such contractant is party (and because specific performance is considered a primary contractual remedy in South Africa and a number of other legal systems), the maxim *pacta sunt servanda* would demand that the contractant in question be held bound to what he agreed upon, regardless of the nature of the contract.<sup>8</sup> The following discussion of the perception of the remedy of specific performance in Roman-Dutch law is aimed both at finding a balance between the

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<sup>6</sup> Gr 3 3 41. See also Du Plessis 1988 *THRHR* 357.

<sup>7</sup> See chapter 2 of this thesis for a thorough explanation of the meaning of the term "personal services".

<sup>8</sup> The question as to the validity of the *pacta sunt servanda*-maxim in South African law has been debated quite extensively in the post-constitutional era. Calitz "Restraint of trade agreements in Employment contracts: Time for *pacta sunt servanda* to bow out?" 2011 *STELL LR* 51 at 62 states that during the pre-constitutional era, South African courts held the maxim in very high esteem and importance. A good example of this is Steyn JP's comment in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 4 SA 760 (A) at 767 that, in South African law, it is an "elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word." ("...it is an elementary and fundamental general principle that contracts entered into freely and seriously by capacitated parties must be enforced in the public interest." This point of view was supported in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) at 606, in which the court stated that "in administering the law the Dutch courts paid due regard to considerations of equity but only where equity was not inconsistent with the principles of law. That is also the position of our courts as regards their equitable jurisdiction", as well as in *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (K), in which the court stated that "the maxim *pacta sunt servanda* is still a cornerstone of the law of contract and...there should be the utmost freedom of contract." Post-constitutionally, the maxim that *pacta sunt servanda* has been confirmed by Hefer "Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommissie" 2000 (1) *TSAR* 2000, as well as by Cameron JA (as he was then) in *Brisley v Drotsky* 2002 4 SA 1 (SCA) at 34, in which he confirmed the principle applied by Steyn JP in *Shifren* mentioned above, and stated that "...neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine the enforceability on the basis of imprecise notions of good faith. On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive constraint. One of the reasons... is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity..."

abovementioned points of view, and ultimately to contribute to answering the question as to the most suitable remedy in case of breach of an athlete's contract.

## **5.2. The availability of the remedy of specific performance in Roman-Dutch law: Voet and Grotius's points of view**

Voet<sup>9</sup> states that a party in Roman-Dutch law who sought recovery of property in terms of a contract, had the right to the property itself, and not only a surrogate of the monetary value of said property. The fact that Voet would take this point of view, accords with the fact that this was also the case in Justinianic law, as explained in chapter 4 of this thesis. The question as to whether specific performance was a *primary* remedy<sup>10</sup> in case of breach of contract (for the moment: any contract) was in Roman-Dutch law by no means one with a simple answer, however. On the contrary, Wessels<sup>11</sup> states that with regard to the availability of specific performance of a contract of sale specifically, there has always been a debate between Roman-Dutch jurists. The origin of the debate, according to Wessels, lay in the twelfth century, and more specifically in the time of the *Quatour Doctores*.<sup>12</sup> On the one hand, jurists such as Donellus believed that no one could be compelled to commit a certain act, and that especially an *obligatio faciendi* could always be discharged by the payment of *id quod interest*. On the other hand, though, jurists such as Cujacius were of the opinion that, according to civil law, a party to a contract could indeed be compelled to perform an act in terms of the contract.<sup>13</sup> It is ironic that both these schools of thought were based essentially on Justinian's *Corpus Iuris Civilis*, which makes the conclusion in chapter 3 of this thesis regarding the availability of the remedy of specific performance in Roman law all the more relevant. As mentioned above, Grotius was a supporter of the former point of view, and has specifically stated the following:

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<sup>9</sup> Voet 6 1 31, as translated by Gane (1955). See also Lambiris 35.

<sup>10</sup> By "primary" remedy is meant that it was a contractual remedy available as first option to a contractual party in case of breach of contract, unlike in English law, in which a court will always grant an order of damages rather than compelling a party (who no longer wishes to be bound by his contract) to perform the obligation in question. In English law, specific performance is perceived as an "equitable" remedy, meaning that it will only be granted if it is fair or equitable to do so.

<sup>11</sup> Wessels (1908) 612. See also Lambiris 35 and Gross (1934) *SALJ* 349.

<sup>12</sup> Wessels 612; Gross (1934) *SALJ* 349.

<sup>13</sup> *Ibid.*

“Although by natural law a person who has promised to do something is bound to do it if it is in his power, he may, nevertheless, by municipal law release himself by paying the other contracting party or acceptor the value of his interest in the same or the penalty, if any has been agreed upon, in default of payment.”<sup>14</sup>

At this point it is important to note that Grotius probably distinguished between *ad faciendum* and *ad dandum* performances. In the quotation above, Grotius specifically refers to obligations *ad faciendum* and not obligations *ad dandum*, such as those that arise from a contract of sale.<sup>15</sup> In considering this, it is also agreed with Du Plessis<sup>16</sup> that Grotius’s opinion must be interpreted in the sense that he (Grotius) probably meant that a contractant had a *choice* between actual delivery of a thing and paying the monetary surrogate of such thing in the case of an obligation *ad faciendum*, as opposed to the payment of damages being the sole remedy available to a contractant. The reason why this explanation seems to make good sense, is because Grotius in a later passage of his *Inleydinge tot de Hollandsche rechtsgeleertheit* states the following:

“If delivery is delayed by the seller, the purchaser has the option of either claiming the delivery, together with all profits and compensation for loss, or merely compensation to the extent of his interest in the delivery, which frequently is more advantageous for him, for instance, when the property is destroyed or damaged.”<sup>17</sup>

From this passage it is clear that Grotius is of the opinion that, in cases which demanded delivery of a thing in terms of a contract of sale, specific performance of the obligation in the form of delivery of the thing in question was definitely an option. Wessels remarks that, as far as Grotius’s viewpoints on the availability of specific performance is concerned, it is quite certain that the latter opines that in cases where a person had agreed to perform a certain act *or* pay a penalty in case he should neglect to perform such act, he could discharge the obligation by mere payment of such penalty.<sup>18</sup> However, Grotius’s position on whether a person who has simply promised to perform a certain act *without* the alternative option of paying a penalty in case of non-performance of such act, is unclear. One must submit for the purposes of this chapter, however, that Grotius did not comply to the notion that specific performance was considered a primary remedy in case of breach of a contract of any nature whatsoever.

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<sup>14</sup> *Gr* 3 3 41, as translated by Steyn 31. In saying this, Grotius relied on *D* 42 1 13 1. See in this regard also Lambiris 35.

<sup>15</sup> Gross (1934) *SALJ* 349.

<sup>16</sup> Du Plessis (1988) *THRHR* 357.

<sup>17</sup> *Gr* 3 15 6, as translated by Steyn 31.

<sup>18</sup> Wessels 614.

Although it has been mentioned above that Voet ascribed to the notion that specific performance as remedy was available in case of breach of contracts of sale, he also favoured the general view that contractual obligations could be discharged through the payment of damages, if the defaulting party so preferred. In his *Commentarius ad Pandectas*,<sup>19</sup> he makes this clear in the following words:

“A seller cannot be absolutely forced into delivery of a thing sold, but is freed by making good the damages. This is firstly because an obligation to deliver is an obligation to do something; but in all obligations to do a thing the rule is that he who does not fulfil the act can discharge his duty by the monetary making good of damages. Secondly it is because no road or method is disclosed in the laws by which he could be stringently constrained to make delivery. Thirdly and lastly it is because in a number of laws the duty of making good of damages is found to be laid upon a seller who refuses in his shamelessness to deliver the thing sold.”

Although Voet uses only the example of the delivery of a thing sold, the reasons advanced in the passage for why the payment of damages would adequately replace specific performance as suitable remedy is somewhat troublesome. For instance, Voet refers to “the rule” that a person who neglects to perform may discharge his duty to perform by “monetary making good of damages”, and also that there is no “road or method” in a number of “laws” by which actual delivery of performance could be compelled. It is unclear to which “rule” and “laws” Voet is referring. In fact, contemporaries such as Groenewegen in his *De Legibus*,<sup>20</sup> Huber in *Hedendaegse Rechtsgeleertheit*,<sup>21</sup> Van der Keessel in *Theses Selectae*,<sup>22</sup> Van der Linden in *Koopmans Handboek*<sup>23</sup> and Van Leeuwen in *Censura Forensis*<sup>24</sup> differ from Voet’s, but also Grotius’s point of view that the remedy of specific performance was only available to a party in very selected instances in Roman-Dutch law, and could thus not be perceived as a primary remedy for breach of contract. Voet’s misconception was to some extent adopted by South African law, most notably in the case of *Cohen v Shires, Mchattie and King*,<sup>25</sup> in which Kotzé CJ considered Voet’s point of view that *nemo potest precise cogi ad factum*.<sup>26</sup> Gross<sup>27</sup> has

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<sup>19</sup> Voet 19 1 14. See also Lambiris 36 and Gross 1934 *SALJ* 351.

<sup>20</sup> Groenewegen 42 1 13 1.

<sup>21</sup> Huber 2 2 9-10.

<sup>22</sup> Van der Keessel 3 3 41.

<sup>23</sup> Van der Linden 1 14 7.

<sup>24</sup> Van Leeuwen 1 4 19 10.

<sup>25</sup> 1881-1884 (1) SAR TS 41.

<sup>26</sup> *Cohen v Shires, Mchattie and King* 1881-1884 (1) SAR TS 41 at 45. Kotzé CJ also referred to Grotius’ (3 15 6) opinion that a purchaser in a transaction of sale has a choice to demand either damages or special delivery of the thing in question. The Court then proceeded to state that Grotius is followed in his opinion by Groenewegen, Schorer, Van Leeuwen, Schorer and Van der Linden by merely acknowledging the option of specific performance in Roman-Dutch law. I do not agree with the Court that the latter authors followed Grotius’s opinion. Whereas Grotius opined that a contractant always had the option of electing a remedy, I

stated, however, that the court in this case had read Voet's point of view as absolute and unconditional, but what Voet had actually meant was that damages was the only remedy available if the performance in question had become impossible. Gross is of the opinion that what Voet had in fact meant, was that in cases where performance became impossible, the remedy of specific performance was not advisable, and that at any rate, he (Voet) preferred the *nemo potest*-doctrine. In order to receive clarity on the position of specific performance in Roman-Dutch law, and if the views of Voet and Grotius were indeed considered contrary to Dutch practice at the time,<sup>28</sup> one must consequently consider the contradicting points of view.

### **5.3. The availability and suitability of the remedy of specific performance in Roman-Dutch law: a different point of view**

Willem de Groot, the younger brother of Hugo, mentioned in 1655 that the province of Holland had a system known as "gijzeling" by which a contractual debtor could be compelled to specifically perform an act agreed upon.<sup>29</sup> What makes De Groot's statement very relevant to this discussion is the fact that he clearly refers to contracts which may have been *sui generis* in nature, and actions that may have sprung from these contracts. In discussing the types of contract which existed at the time, he makes specific mention of "de contracten die alleen met het confent beftaen zijn of oude die de Roomfche Rechtsgeleerden<sup>30</sup> mede bekent zijn geweest, of *nieuwe, die het hedendaeghfche gebruyck heft ingevoert*." He classifies among the "oude bekende contracten", in other words the contracts familiar to Dutch legal practice at the time, the contract of sale<sup>31</sup> as well as the lease agreement<sup>32</sup> (among others).<sup>33</sup> Among the "nieuwe contracten", meaning contracts that have come into existence because of the dynamic nature of legal practice in Holland at the time, De Groot resorts the contract of promissory,<sup>34</sup> assurance<sup>35</sup> and "Admiraelschap".<sup>36</sup> De Groot goes on to mention the different

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do believe that the latter-mentioned group of authors opined that specific performance was considered a *primary* remedy, even though the contractant in question still had the option of election. My point of view is supported by the following passage of Groenewegen, from *De Legibus* 42 1 13 1: "A person who is under an obligation to perform certain acts is not discharged from his obligation by paying damages." This matter is discussed in a more detailed manner in the text above.

<sup>27</sup> Gross 1934 *SALJ* 351.

<sup>28</sup> Du Plessis 1988 *THRHR* 357.

<sup>29</sup> His viewpoints were eventually set out in De Groot (1667) 2 8 25.

<sup>30</sup> De Groot 2 4 28 mentions specifically the well-known contracts of Roman law such as *depositum*, *commodatum* and *mutuum*. For a discussion of what these contracts entailed, see chapter 2 of this thesis.

<sup>31</sup> "Koop ende verkoop".

<sup>32</sup> "Huyl ende verhuylring".

<sup>33</sup> De Groot 2 4 30.

<sup>34</sup> "Wiffel".

<sup>35</sup> "Affeurantie".

actions that would result from breach of the contracts in question.<sup>37</sup> The point to be made here is that Dutch legal practice at the time catered specifically for a dynamic and ever-changing system of contract law, and remedies or “acties” had to develop with the types of contract in order to ensure that the most suitable remedy was found for the specific type of contract being breached.

### 5.3.1. The procedure known as “*gijzeling*”

The Provincial Court of the province of Holland distinguished between three forms of execution of judgments:<sup>38</sup> firstly, a person could be condemned in terms of a real action to give up and keep out of the possession of immovable property.<sup>39</sup> Secondly, in personal actions for the payment of a fixed sum of money, the court could order the goods of the judgment debtor to be sold in order to pay the debt.<sup>40</sup> Thirdly, and most importantly for the purposes of this chapter, in cases where a person was condemned to perform a specific act, the execution of such judgment was levied by way of “*gijzeling*.”<sup>41</sup> The latter procedure is discussed in more detail below.

In the 1580 Ordinance on the procedure in the Dutch lower courts, the procedure of “*gijzeling*” was described as follows:

“The judgment debtor shall be ordered to place himself in *gijzeling* in a certain inn under penalty of ten guilders...If he places himself in the inn, and having been there for 14 days is not as prudent to perform the act to the satisfaction of the court, he shall be apprehended and lodged in the gaol at a cost of 3 pennies per day. If, after having been lodged in the gaol for a month, the judgment debtor still does not satisfy the judgment, the judgment holder shall be entitled to request the court to tax the act and convert it into a money judgment.”<sup>42</sup>

What the general procedure of “*gijzeling*” entailed in practice, in other words, was that a debtor could be taken into civil custody until specific performance of the obligation in question had been achieved. The debtor was held in an inn or in the chateau of the Provincial Court, and if he persisted in his neglect to perform, he could be transferred to prison.<sup>43</sup> If, after a month of imprisonment, the debtor still did not comply with the obligation in question,

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<sup>36</sup> De Groot 2 4 31.

<sup>37</sup> De Groot 2 4 28-43.

<sup>38</sup> Van der Linden 3 6 3.

<sup>39</sup> Van der Linden 3 1 9; Steyn 11.

<sup>40</sup> Van Leeuwen 5 26 6; Steyn 13.

<sup>41</sup> De Groot 2 8 25.

<sup>42</sup> *Ordonnantie van de lustitie in den steden en ten platte lande van Holland*, 1580. Article 31.

<sup>43</sup> Du Plessis (1988) *THRHR* 359.



the relevant creditor's claim against the debtor could be taxed and an amount of money paid out to the creditor.<sup>44</sup> What is very important to note is that “*gijzeling*” could be ordered even when it was clear that the obligation in question was impossible to perform.<sup>45</sup> This is somewhat strange, as, according to Van der Merwe *et al*,<sup>46</sup> possibility of performance at the commencement of the contract was already a requirement of a valid contract in Roman and Roman-Dutch law. This fact was confirmed in *Gassner v Minister of Law & Order*.<sup>47</sup> In Justinianic law, the rule *impossibilium nulla obligatio est* was prescribed by the Digest.<sup>48</sup> It is, however, also important to distinguish between subjective or relative impossibility, and objective or absolute impossibility of performance. The former entails that, although a third party may be able to perform the act in question, the specific debtor is unable to do so. The latter form of impossibility of performance entails that objectively speaking, no-one is able to perform the act in question. In the case of subjective impossibility of performance, a valid obligation is created, and non-performance of this obligation may result in breach of contract. Where the performance is impossible from an objective point of view at the time of the conclusion of the contract, no obligation arises, as was decided in the case of *Van der Westhuizen v James*,<sup>49</sup> and confirmed in *Blou Bul Boorkontrakteurs v McLachlan*.<sup>50</sup> In *Benson v SA Mutual Life Assurance Society*,<sup>51</sup> Hefer JA stated in fact that “the Court will not decree specific performance where performance has become impossible.”<sup>52</sup> The procedure of “*gijzeling*” was very similar to the one prescribed in the Twelve Tables,<sup>53</sup> by which a judgment debtor could be given thirty days in which to pay a debt to satisfy a judgment, failing in which case the judgment creditor had the right to forcibly seize the debtor and bring the latter before court.<sup>54</sup> The specific form which an order of “*gijzeling*” took, depended not only on the circumstances of the case in question, but also on the type of contract being breached and the effect that the remedy of “*gijzeling*” would have on the breaching party. Performance through “*gijzeling*” could be effected in one of two, possibly three ways. In the first instance, a judgment debtor could be compelled to render an account or to perform any

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<sup>44</sup> Van der Keessel 3 3 41. See also Du Plessis (1988) *THRHR* 359.

<sup>45</sup> Groenewegen 3 3 41, 3 15 6; Van Leeuwen 4 2 13; 4 18 1; Huber 3 2 9; Du Plessis (1988) *THRHR* 357.

<sup>46</sup> Van der Merwe *et al* 186.

<sup>47</sup> 1995 (1) SA 322 (C).

<sup>48</sup> More specifically *D* 50 17 185.

<sup>49</sup> 1898 5 OR 90.

<sup>50</sup> 1991 (4) SA 283 (T). See in this regard also Van der Merwe *et al* 187-188 and Joubert 124-128.

<sup>51</sup> 1986 (1) SA 776 (A).

<sup>52</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783.

<sup>53</sup> *Tab* 3 4. See the discussion of this procedure in chapter 3 of this thesis.

<sup>54</sup> *Tab* 3 6.

other act.<sup>55</sup> In the second instance, if judgment was given against any *collegiae*, tutors, curators, receivers, agents or others condemned in some particular capacity, such judgment could have been for payment of a sum of money.<sup>56</sup> In the third instance, it was possible for the Provincial court to “condemn” a debtor to perform a certain act and pay a sum of money at the same time.<sup>57</sup> These three forms should be discussed in detail, as well as the viewpoints of certain Roman-Dutch writers on each form.

### **5.3.1.1. The process of “*gijzeling*” in which a person was condemned by a judgment of the Provincial Court to render an account or to perform an act**

As far as the modern South African perception of specific performance as contractual remedy is concerned, the process of “*gijzeling*” probably bears the closest resemblance to that perception. Through this process, the general rule applicable to Roman-Dutch practice at the time, that is, the rule that a debtor could be compelled by “*gijzeling*” to fulfil his obligation or promise, was exercised. Steyn<sup>58</sup> has stated that proceedings by way of “*gijzeling*” were frequently instituted in Holland, and that cases of “*gijzeling*” were “extremely” common. According to Steyn,<sup>59</sup> Hugenholtz<sup>60</sup> has described “*gijzeling*” as an “indirecte middel van reële executie” or “*zijdelingsche executie*”, therefore proclaiming that “*gijzeling*” was in fact a forerunner of the remedy of specific performance or “reële eksekusie”, which was the term used since the end of the nineteenth century. Steyn<sup>61</sup> is of the opinion, however, that “*gijzeling*” was never referred to as a form of real execution up to the beginning of the nineteenth century, and it is doubtful whether, before the beginning of the nineteenth century, the term “reële executie” was even known. It is a fact, however, that the word “*gijzeling*” as it was exercised in the sixteenth century is dissimilar from the term used by more contemporary Dutch lawyers, and it should be stated that the term used in this chapter applies to the process used in the sixteenth to early nineteenth centuries to effect specific performance of contractual duties. This implies that the process of “*gijzeling*” discussed here

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<sup>55</sup> De Groot 2 8 25 states that “in verbanden die in feyten ofte in yet te doen beftaen, wert op een geheel ander maniere de executie gedaen.” See in this regard also Steyn “Gijzeling. The historical development of the mode of proceeding in ‘gijzeling’ in the Provincial Court of Holland from 1531” (LL.D thesis 1939 Leiden) 29, Lambiris 40-41 and Du Plessis (1988) *THRHR* 359.

<sup>56</sup> Steyn 36.

<sup>57</sup> *Ibid.*

<sup>58</sup> Steyn 2.

<sup>59</sup> Steyn 4-5.

<sup>60</sup> Hugenholtz “Over Reële Executie” WPNR No. 3503, 3504, 3505.

<sup>61</sup> Steyn 5.

was applied in the execution of formal court judgments, and not, as in the case of the Roman law *legis actio*, merely by a creditor informally claiming performance from a debtor.<sup>62</sup>

There can be no doubt that it was common practice in Roman-Dutch law to compel a debtor to specifically perform his contractual obligations if such debtor had by his own will agreed to the performance in question. This is somewhat in contrast to what Voet and Grotius stated, as discussed above. It has already been mentioned that some of the latter's contemporaries had disagreed with them on the issue of the availability of specific performance as *primary remedy* in Roman-Dutch law (and not merely as an alternative to damages if specific performance had in fact been agreed on). In order to substantiate the fact that specific performance was in fact available as primary remedy in Roman-Dutch law, one must discuss the views of the abovementioned contemporaries in more detail.

Groenewegen was one of the staunchest advocates of the fact that a debtor could through the process of "*gijzeling*" be compelled to perform his (the debtor's) contractual duty. In his *Inleydinge*, published in 1644, Groenewegen stated the following:<sup>63</sup>

"Nowadays he cannot relieve himself this way (by paying a surrogate of damages instead of actually performing his contractual duty), but may be compelled by means of '*gijzeling*' to fulfil his promise."

It is also very important and relevant to this discussion to note, as Wessels exclaims, that Groenewegen had no doubt that specific performance could be ordered in case of breach of not only contracts *ad dandum*, but also contracts *ad faciendum*.<sup>64</sup> To put Groenewegen's view in context, it is obvious that the law of Holland with regards to specific performance (to which Groenewegen, among others, prescribed) was that if a debtor was able to perform the act in question, he was obliged to do so, even if such act involved services of a personal nature (it must be stated, though, that statutory provisions on "*gijzeling*" at the time were silent on the issue of the precise acts which a court should order to be specifically performed<sup>65</sup>). Furthermore, it is very relevant to this chapter, but also to the conclusion reached in chapter 3 of this thesis as to the availability and suitability of the remedy of specific performance in Roman law, that Groenewegen was of the opinion that his perception

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<sup>62</sup> Steyn 10.

<sup>63</sup> Groenewegen 3 3 41. See in this regard also Groenewegen *D* 42 1 13; Hallebeek and Merkel in Hallebeek and Dondorp (eds)(2010) 86; Dondorp "Decreeing specific performance: a (Roman-)Dutch legacy" 2010 (1) *Fundamina* 40; Lee 274; Wessels 613.

<sup>64</sup> Wessels 613. Groenewegen's point of view is endorsed by Schorer, Van der Keessel and Van der Linden, the latter albeit reluctantly. The viewpoints of these authors are discussed in more detail in the text.

<sup>65</sup> Dondorp 2010 *Fundamina* 45.

of the availability of the remedy of specific performance was in accordance with Roman law. In other words, the remedy of specific performance was, according to Groenewegen, an available and suitable one in Roman law, as well as Roman-Dutch law.<sup>66</sup>

Van Leeuwen shared Groenewegen's belief that specific performance could be ordered in cases of breach of contracts both *ad dandum* and *ad faciendum*. In his *Commentaries on the Roman-Dutch law*<sup>67</sup> he states the following:<sup>68</sup>

“But where (a promise has been made) to do something or cause it to be done, we will not be absolved by payment of the damage caused by non-performance, but may be compelled by means of imprisonment, to performance of the promise made.”

This is a distinct reference to the availability of the procedure of “*gijzeling*” in a situation where a person who had promised to perform a certain act, and subsequently neglected to do so, could be compelled by threat of imprisonment, or even actual imprisonment, to perform. The philosophy behind this seemingly harsh remedy is that a person, who had promised to perform a certain act, was bound not only by the obligation created by such promise, but by honourable considerations. Van Leeuwen has stated that “nothing is more proper among men than to observe what has been mutually agreed upon, and nothing is more serious than not complying with one's promises, our ancestors of old thought nothing of greater importance than to keep their word and perform what they had once promised. In this respect they have always been placed as an example above other nations as a people whose word could be trusted.”<sup>69</sup> This statement is confirmation of the principle of *pacta sunt servanda*, and raises a very valuable argument in favour of specific performance as primary contractual remedy in Roman-Dutch law. It is also indicative of the fact that granting specific performance as primary remedy for breach of contract was without a doubt common practice in Roman-Dutch law, contrary to Voet and Grotius' points of view. Having stated this, it must be remembered that Van Leeuwen's writings were to a large extent based on those of Grotius, which means that, as explained above, it may just be that Voet and Grotius' viewpoints (on the availability of specific performance as primary remedy and the choice a debtor had to

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<sup>66</sup> Groenewegen stated that “het welck ook enige regts-geleerden niet sonder rede seggen met de Roomse regte over een te komen.” He did not adopt this opinion lightly, but based it on the works of Corasius (*Miscellanea* 2 3), Busius (*D* 42 1 13 1) and Bronchorst (*Enantiophanon* 4 41). All these authors denied that a debtor could discharge his obligations through a mere payment of damages. See in this regard also Hallebeek and Merkel in Hallebeek and Dondorp (eds) 86.

<sup>67</sup> Van Leeuwen 4 2 13 as translated by Kotzé (1923) 29.

<sup>68</sup> *Ibid.*

<sup>69</sup> Van Leeuwen 4 3 1 as translated by Kotzé 31.

rather pay damages instead of specifically performing the obligation in question) were either misinterpreted or only partially interpreted, but definitely not in line with reigning Roman-Dutch practice. Furthermore, Van Leeuwen discusses the types of contract familiar to Roman-Dutch law, which include *mutuum*,<sup>70</sup> *commodatum*,<sup>71</sup> *depositum*<sup>72</sup> and *pignus*,<sup>73</sup> but also *do ut des*,<sup>74</sup> *do ut facias*,<sup>75</sup> *facio ut des*<sup>76</sup> and *facio ut facias*.<sup>77</sup> The relevance of his mentioning these types of contract lies therein that all these types of contract were familiar to Roman law, and were actually based entirely on the types of contract that originated in Roman law. The conclusion may thus be drawn that the remedy of specific performance has strong roots in Roman law, regardless of the type of contract being breached, and that these Roman law roots extended to a significant degree to Roman-Dutch law. Put differently, the remedy of specific performance originated in a primitive and crude way as primary remedy for breach of contract (regardless of the type of contract in question, or whether the contract in question involved services of a personal nature) in Roman law, and was developed to a significant extent during Roman-Dutch law to what we perceive as specific performance in South African law today. As far as the type of contract in question is concerned, and the influence that this might have on the most suitable remedy for breach of such type of contract, Van Leeuwen, commenting on the contract of service, stated that “a master may not dismiss his servant before the proper time, without lawful cause, except on payment of his full wages. And, on the other hand, servants are obliged to serve their master or mistress faithfully to the last.”<sup>78</sup> Interestingly enough, it was common practice, according to Van Leeuwen, to impose a restraint of trade on a servant who dishonoured his contract of service with his master. He states that “...no one may...engage or hire such servant or artisan before his time is up, or his work completed, under penalty of compensation for any damage which the first hirer may have sustained.”<sup>79</sup> Although restraint of trade is discussed in detail in chapter 8 of this thesis, it must be stated at this point that the purpose of imposing a restraint of trade clause in Roman-Dutch law, as well as modern South African law and in foreign jurisdictions, was and still is to discourage a party to a contract to dishonour such contract,

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<sup>70</sup> Loan for consumption. See detailed discussion of this type of contract in chapter 3 of this thesis.

<sup>71</sup> Loan for use. See detailed discussion of this type of contract in chapter 3 of this thesis.

<sup>72</sup> Deposit. See detailed discussion of this type of contract in chapter 3 of this thesis.

<sup>73</sup> Pledge. See detailed discussion of this type of contract in chapter 3 of this thesis.

<sup>74</sup> Giving in return of giving.

<sup>75</sup> Giving in return of doing.

<sup>76</sup> Doing in return of giving.

<sup>77</sup> Doing in return of doing.

<sup>78</sup> Van Leeuwen 4 12 2, as translated by Kotzé 174.

<sup>79</sup> *Ibid.*

because by doing so, the party would have no employment for the remainder of his current contract, as other potential employers would be barred by such contract to hire his services. What Van Leeuwen implies is that should a servant have committed breach of his contract of service, it would not have been unfair in Roman-Dutch law to impose a measure as harsh as restraining that servant's right of trade in order to compel said servant to serve out the remainder of the contract in question. Although it has been stated in chapter 2 that the relationship between a professional athlete and his "employer" is not one of "master and servant", but rather of two parties negotiating, contracting and functioning on equal terms, the purpose of and philosophy behind restraint of trade has always been to compel a party to honour his contract in its entirety. The issue as to the constitutionality of restraint of trade clauses, as well as the difference between clauses that restrain a player's right of trade during the existence of the contract in question and those that restrain a player's right of trade after the contract has ended, is discussed in chapter 8 hereof. It would suffice to state at this stage that restraint of trade as a manner of enforcing contractual duties is well-founded in Roman-Dutch law. In summarising it can be stated that Van Leeuwen's view, in accordance with that of Groenewegen, was that parties who were capable of performing the obligations in question, could not pay damages instead.

Groenewegen and Van Leeuwen's views on the availability of specific performance as primary remedy for breach of contract are supported by Van der Keessel. The latter's *Praelectiones*<sup>80</sup> and *Theses Selectae* are based once again on Grotius' *Inleydinge tot de Hollandsche Rechts-Geleertheyt*, on which Groenewegen's work was also based. Van der Keessel actually went so far as to state that the procedure of "gijzeling" as a means of establishing specific performance of a contractual obligation was in concordance with the *ius commune*.<sup>81</sup> He specifically commented that, in accordance with the pure spirit<sup>82</sup> of Roman law, the carrier of an obligation "to do" could by all means be compelled to specifically perform such obligation. This also accorded with the general practice of the *Hooge Raad* of Holland, according to Van der Keessel.<sup>83</sup> Furthermore, Van der Keessel stated very specifically that this practice was not derived from the specific nature of the contract of sale,

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<sup>80</sup> *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*.

<sup>81</sup> Van der Keessel *Th* 512, as translated by Van Warmelo (1966) 127 and 129. See in this regard also Wessels 614-615, Gross 350, Steyn 30 and Lee 269.

<sup>82</sup> "Suiwer gees" according to Van Warmelo's translation, but in Latin *sed dirimendam esse ex vera mente iuris civilis*.

<sup>83</sup> Van der Keessel *Th* 512, as translated by Van Warmelo 129.

but from the general nature of each obligation demanding of a party thereto to perform.<sup>84</sup> This implies that specific performance was a primary remedy in Roman-Dutch law regardless of the type of contract in breach. This view is supported by Huber. Commenting on the contract of sale, the latter in his *Hedendaegse Rechtshelertheyt* exclaimed that such contract came into existence at the moment when the parties had struck a bargain with each other.<sup>85</sup> From this point onwards, the seller was under obligation to deliver the property to the buyer, and could not free himself from such obligation by offering to pay damages. This is despite the fact that the laws of the time stated that the buyer could demand his damages from the seller. This law was not intended to prevent the buyer from insisting on actual delivery of the property itself.<sup>86</sup> Based on the views of the other Roman-Dutch writers discussed in this chapter, one must accept that Huber's view on the availability of specific performance extended beyond the contract of sale to other types of contract. In fact, Huber states that a person who had bound himself by a mere promise to another person, was bound to fulfil that promise.<sup>87</sup> Whether such promise was made in regard to either corporeal or incorporeal, or in regard to either movable or immovable property, or even in regard to either acts or things, it was binding, and if the promised object was of a certain and definite kind, it could be claimed in exactly the way and form it had been promised. If this did not occur, the performance could be got from the debtor by execution.<sup>88</sup> Very importantly, Huber mentions that because of the inconvenience caused to a plaintiff in a matter in which breach of contract had been

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<sup>84</sup> Van der Keessel *Th* 512, as translated by Van Warmelo 129. For the sake of clarity, the original Latin text reads as follows:

*Animadvertitis quaestionem hanc iure Hollandico decidi vix posse ex licis illis a Groenewegio in medium allatis, sed dirimendam esse ex vera mente iuris civilis; et ex illa quidem, uti docui at t. D de V.O., existimo etiam iure Hollandico facti promissorem ad factum praestandum omnino damnari et compelli posse, quod haud parum confirmatur ex decisione illa Senatus Supremi; quae cum fundamentum habere videatur, non in peculiari nature emptionis, sed in generali natura omnis obligationis, quae necessitate imponit praestandi id quod promissum est, non exceptionem trader sed generalem regulam ad casum specialem incidentem applicare videatur.*

Steyn's translation of the abovementioned text in English reads as follows: "It is properly concluded from a correct interpretation of the civil law that a person who has promised to perform an act may be condemned and compelled to perform such act, and it appears to have been so decided by the *Hooge Raad*."

<sup>85</sup> Huber 3 2 9-10, as translated by Gane 400-401. See also Du Plessis (1988) *THRHR* 358.

<sup>86</sup> *Ibid.* The choice of remedy has, according to Kotzé CJ in *Cohen v Shires, McHattie and King* (1881-1884) 1 SAR TS 41 at 45, always rested with the disadvantaged party, and not with the party in breach. This was confirmed in *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350, *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 378 and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 at 782. In the *Haynes*-case, De Villiers AJA at 378 stated the following: "It is correct...that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him."

<sup>87</sup> Huber 3 21 43, as translated by Gane 506.

<sup>88</sup> Huber 3 21 77, as translated by Gane 511.

committed, damages were often granted as surrogate for the performance in question, but also mentions very clearly that “it does not follow from this that the promisor of an act cannot be compelled to fulfil it, if the promisee wishes to insist on that (specific performance of the obligation in question), and the matter is still *res integra*, since there is certainly no reason why it should be more permissible to break things in deeds than in rights.”<sup>89</sup> This is a definite statement by Huber that specific performance as primary remedy in Roman-Dutch law applied to breach of all types of agreement, including those for the performance of services. In order to confirm the availability of specific performance as primary remedy in Roman-Dutch law where a person was ordered by a court to render an account or perform an act, Van der Linden<sup>90</sup> states the following:

“He who contracts to give any thing, is bound to deliver it at a proper time and place.”

Commenting on an obligation to perform a certain act, Van der Linden states the following:

“The consequences of an obligation by which one binds himself to do any thing, consists in this, that he must do the act stipulated for, and on failure, is liable in damages and interest, to the person in whose behalf he has bound himself.”<sup>91</sup>

Although Van der Linden provides for the option of damages in case of non-performance of the obligation, thereby seemingly aligning himself with Voet and Grotius’ point of view, he nevertheless admits that compelling the debtor to specifically perform the act in question is the general opinion of the time and also the one most accepted in practice at the time.<sup>92</sup>

Having evaluated the opinions of some of the most prominent Roman-Dutch writers, there can be no doubt whatsoever that specific performance of contractual obligations was considered a primary remedy in Roman-Dutch law, especially as far as the rendering of an account or performance of an act was concerned. Although Voet, Grotius and Van der Linden (to a lesser extent) seemed to have preferred the practice where the debtor had the option of paying damages as surrogate for specific performance, such was not the general practice in Roman-Dutch law. Throughout the abovementioned discussion, it was clear that the Roman-Dutch writers in question distinguished constantly between *ad dandum* and *ad faciendum* performances, and whether it would be acceptable to order specific performance of both these groups of obligations. The answer to this question must be affirmative, based on the views of

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<sup>89</sup> Huber 3 21 79, as translated by Gane 512.

<sup>90</sup> Van der Linden 1 14 7, as translated by Henry (1828) 197. See also Steyn 30.

<sup>91</sup> *Ibid.*

<sup>92</sup> Van der Linden 1 14 7, as translated by Henry 197-198. See also Steyn 31.



the writers as to the acceptable practices at the time. Steyn<sup>93</sup> raises an interesting question in his thesis, though: could the delivery of property be considered an act, and consequently, could a judgment condemning a person to deliver property be considered a judgment for the performance of an act? In cases where a debtor had failed to deliver movable property, “gijzeling” was the prescribed procedure to compel the debtor in question to deliver the said movable property.<sup>94</sup> In this sense, ordering the delivery of movable property can be considered an order to perform an act. According to Steyn, Article 275 of the *Ordonnantie ende Instructie van den Hooge Raedt van Appél in Holland van 31 Mei 1582* seemed to suggest that the delivery (or, as is the case in South Africa currently, registration) of immovable property was considered performance of an act. As far as the most suitable remedy for breach of a contract for the delivery of movable property and the registration of immovable property is concerned, there can be no doubt that specific performance was that remedy in Roman-Dutch law.

### **5.3.1.2. The process of “gijzeling” in cases where a judgment was given against any collegiae, tutors, curators, receivers, agents or other condemned in some particular capacity**

According to Steyn, article 36 of the *Reglement voor de Deurwaerders van de Hove in’t doen van Exploicten van 28 Maert 1680* stated the following:<sup>95</sup>

“In the case of all judgments by which a person is condemned to render an account, or to give evidence, or to perform any other personal act, or if the judgment is given against any tutors, curators, receivers, agents, or collegiae, the proceedings against the judgment debtor shall take place by way of ‘gijzeling’.”

Although a different category was recognized by which, or rather against whom, “gijzeling” could be ordered, the primary rule that it (and therefore also specific performance) was available as primary remedy in case of breach of contract remained without doubt. This was also true of the third instance in which “gijzeling” could be ordered, namely when a person was condemned by judgment of the Provincial Court to perform an act *and* to pay a sum of money at the same time.

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<sup>93</sup> Steyn 33.

<sup>94</sup> *Ibid.*

<sup>95</sup> *G.P.B.* 3 at 659, as translated by Steyn 36.

### **5.3.1.3. The process of “*gijzeling*” in cases where a Provincial Court ordered performance as well as the payment of a sum of money**

The process by which both an act and the payment of a sum of money was ordered, typically occurred when certain accounts had to be rendered and in cases of liquidation. The payment of the ordered sum of money was in no way meant to undermine the primary order to perform the act in question, and therefore makes no difference to the conclusion reached in paragraph 5.3.1.1. above that “*gijzeling*” and by implication specific performance, was available as primary remedy for breach of contract.

### **5.4. The procedure followed in the execution of judgments for the specific performance of an act in Roman-Dutch law**

The first step in the procedure by which a judgment for the performance of a specific act was executed, was the so-called “*sommatie*”.<sup>96</sup> The “*sommatie*” was served upon the execution debtor in question, and the latter was called upon to perform the obligation in question within twenty-four hours.<sup>97</sup> Once the twenty-four hour period had elapsed without the judgment having been satisfied, the “*renovatie*” was served together with the notice of “*gijzeling*”. This had to be served at least fourteen days before the debtor had to submit himself to the process of “*gijzeling*.”<sup>98</sup> The purpose of the fourteen-day period of notice was seemingly to provide the debtor the opportunity to render performance before sacrificing his freedom through the process of “*gijzeling*”. If, by the end of said fourteen-day period, the debtor still had not performed, the process of “*gijzeling*” as discussed above commenced. Willem de Groot<sup>99</sup> describes the process up until “*gijzeling*” as follows:

“After the ‘*sommatie*’ and the ‘*renovatie*’ have been issued, the process-server serves a notice upon the execution debtor to appear to place himself in ‘*gijzeling*’ in a certain inn under penalty of being fined 6 guilders, and there to remain until he has satisfied the judgment. This mode of procedure could safely be called “notice to appear at an inn”, but it is called “to proceed by way of ‘*gijzeling*’.”

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<sup>96</sup> Summons.

<sup>97</sup> Steyn 37.

<sup>98</sup> *Ibid.*

<sup>99</sup> De Groot 2 8 26.

As mentioned above, the debtor had to appear at an inn or the chateau of the Provincial Court. This was considered the place of detainment for debtors who were compelled to perform a certain act in terms of a contract.<sup>100</sup>

There is no doubt, then, that the process of “*gijzeling*” must be considered the means by which specific performance of contractual obligations of all kinds were enacted in Roman-Dutch law. Of similar importance is the fact that the philosophy of specific performance in Roman-Dutch law was derived directly from Roman law. What is even more important, is the influence the process of “*gijzeling*” has had on the perception of specific performance in South African law today. It is therefore of vital importance to trace the development of the remedy of specific performance since the process of “*gijzeling*” in Roman-Dutch law to how the remedy is dealt with in South Africa today. As the primary source of South African common law, it is logical that early South African court decisions would have followed the Roman-Dutch writers in reaching decisions on relevant topics (in this case, the availability of specific performance as primary remedy for breach of contract). As will be indicated below, this was not always the case, because of South African courts being influenced by English law and decisions during the time of Union.<sup>101</sup>

### **5.5. The development of the remedy of specific performance in Roman-Dutch law since “*gijzeling*”: The situation in the Netherlands after the Napoleonic invasion**

Although the procedure known as “*gijzeling*” had waned towards the end of the seventeenth century, returning to “*gijzeling*” as mode of execution was proposed in the *Ontwerp Kemper* of 1816,<sup>102</sup> after Napoleon’s invasion of Holland. Because of the latter invasion, the legislator in Holland at the time rather opted to adopt the French *Code Civil* and *Code de procedure civile* which had been applied in the Netherlands since 1811.<sup>103</sup> This resulted in coercive measures to enforce contractual obligations (such as “*gijzeling*”) failing almost in its entirety.<sup>104</sup> The 1838 Dutch Code of Civil Procedure made mention of only two ways in which performance of contractual obligations could be compelled: the first was the civil imprisonment of a depositee who refused to restore an object deposited out of necessity, and

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<sup>100</sup> Steyn 39, 41.

<sup>101</sup> 31 May 1910–30 May 1961. The previously mentioned South Africa Act of 1909 was signed into law by Edward VII on 20 September 1909 and came into operation on 31 May 1910. See in this regard Grütter and Van Zyl (1982) 49.

<sup>102</sup> *Ontwerp op de manier van procederen in civiele zaken* 1815, Article 410.

<sup>103</sup> Dondorp (2010) *Fundamina* 48.

<sup>104</sup> *Ibid.*

the second the eviction of a tenant who failed to vacate the premises after expiry of a lease.<sup>105</sup> According to reigning legal rules of the time, a plaintiff in a matter where breach of an obligation had occurred, could choose between specific performance of the obligation in question and an alternative of damages.<sup>106</sup> Although the courts did decree specific performance, creditors *as a rule* had to be content with damages if the defendant (although entirely capable of performing the obligation in question) refused to comply with the court's decree of specific performance.<sup>107</sup> This differed significantly from the practice in seventeenth century Holland, where the defendant could never subscribe to the plaintiff which remedy to seek (see discussion above). It does seem then that after the Napoleonic occupation of the Netherlands and subsequent implementation of the French Civil Code, specific performance as primary remedy for breach of contract waned in stature. Early South African courts, however, would inevitably refer to the writings of the most prominent Roman-Dutch authors in their decisions on specific performance as primary remedy for breach of contract, although their interpretations of this aspect would differ just as those of the Roman-Dutch writers upon whom their (early South African courts') decisions were based.

## 5.8. Conclusion

The purpose of this chapter is to investigate the development of the remedy of specific performance throughout Roman-Dutch law in order to eventually determine what influence this perception has had on current South African law on the subject. The reason why the development of the remedy in Roman-Dutch law must be traced is because the Roman-Dutch system of law is considered the common law of South Africa. The treatment of the remedy of specific performance in Roman-Dutch law will subsequently provide one with a strong indication of the suitability of the remedy for breach of contract, especially in relation to contracts of personal services, including athletes' contracts. One must keep in mind, however, that the athlete's contract is very much *sui generis*, and therefore it is not necessarily so that because specific performance may have been perceived as primary contractual remedy in Roman-Dutch law, it should be perceived as such in the case of breach of athletes' contracts. It has also been established in this chapter that not all Roman-Dutch writers agreed on the exact status of specific performance as contractual remedy in Roman-Dutch law. One of the reasons for these divergent points of view was that authors such as Grotius and Voet believed

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<sup>105</sup> Dondorp (2010) *Fundamina* 48.

<sup>106</sup> *Idem* 49.

<sup>107</sup> *Idem* 48.

that it was in accordance with Roman law that contractual obligations could always be discharged by payment of a monetary surrogate for damages.<sup>108</sup> This notion has, however, been established as a false one in of this thesis. It is confirmed that the remedy of specific performance was a familiar one in Roman law, and that Grotius's and Voet's points of view were consequently erroneous. The second reason why writers such as Grotius and Voet believed that specific performance should not have been perceived as primary contractual remedy<sup>109</sup> was because such remedy was often difficult to enforce. This reason was also not a valid one, as it has been indicated in this chapter that a Court in fact never had to personally see to it that an order made by such court was indeed honoured.<sup>110</sup> The origin of the debate with regard to the availability of specific performance as primary remedy for breach of contract in Roman-Dutch law lay in the twelfth century, according to Wessels.<sup>111</sup> Grotius' and Voet's points of view were based on jurists such as Donellus who believed that no one could be compelled to commit a certain act and that especially an *obligatio faciendi* could always be discharged by the payment of a monetary surrogate for performance. It has been established in this chapter that Grotius probably believed that a creditor who had been disadvantaged by breach of contract had a choice between electing actual performance of the obligation in question, and the monetary surrogate of said obligation. Nevertheless, it is certain that Grotius did not perceive specific performance as primary remedy for breach of contract. Although Voet acknowledges the availability of specific performance in Roman-Dutch law, he adopts a view similar to that of Grotius on the matter. This is evident from the relevant passages from his *Commentarius Ad Pandectas* quoted in this chapter. There is little doubt, however, that the points of view adopted by Grotius and Voet were erroneous views on what they may have believed was consistent with Roman law on the status of the remedy of specific performance. Furthermore, the two mentioned authors' views were inconsistent with prevailing Roman-Dutch practice at the time. Unfortunately, early South African decisions were influenced by these erroneous points of view, most notably that in *Cohen v Shires, Mchattie and King*.<sup>112</sup>

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<sup>108</sup> Lambiris 37.

<sup>109</sup> It must be stressed that Voet did not state that specific performance was not available as contractual remedy *at all*, merely that it was not the primary contractual remedy in Roman-Dutch law.

<sup>110</sup> This point is also made in chapter 5 of this thesis, as the practical difficulty of superintendence by the court of an order of specific performance by such court is one of the main reasons why specific performance is not a primary remedy in English law.

<sup>111</sup> Wessels 612; Gross *SALJ* 349.

<sup>112</sup> 1881-1884 (1) SAR TS 41.

The prevailing Roman-Dutch view (which was consistent with legal practice at the time) was that a debtor, who had committed breach of contract, could be compelled to perform through a procedure known as “*gijzeling*”. This procedure was alluded to by prominent Roman-Dutch writers like Willem de Groot, Groenewegen, Van der Linden, Van der Keessel, Van Leeuwen and Huber, among others. Willem de Groot also makes specific mention of the fact that the procedure of “*gijzeling*” as a way of ensuring specific performance of contractual obligations applied to all types of contract, including “*nieuwe, die het hedendaeghsche gebruyck het ingevoert*”.<sup>113</sup> This is indicative of the fact that Dutch legal practice at the time provided for a dynamic system of contract law, with the implication that contractual remedies had to evolve according to the new types of contract that originated, in order to secure that the most applicable remedy was found for breach of each type of contract. What makes this significant to the current thesis, is that the athlete’s contract, as explained in chapter 2 of this thesis, is the *sui generis* product of an ever-changing system of not only contract law, but also mercantile law in general. Such was the importance afforded to specific performance of contractual obligations that the procedure of “*gijzeling*” allowed for a contractual debtor to be held in civil custody until the achievement of specific performance of the obligation in question. The debtor’s right to freedom was, in other words, sacrificed in order to satisfy the creditor’s right to performance provided to him by a valid contract. What is more, was that if civil custody in an inn or the chateau of the Provincial Court did not effect performance from the debtor in question, the latter could be transferred to prison.<sup>114</sup> According to some of the most prominent Roman-Dutch writers, including Groenewegen,<sup>115</sup> Van Leeuwen<sup>116</sup> and Huber,<sup>117</sup> if a contractual debtor had undertaken to perform a contractual obligation and subsequently neglected to do so, he could be subjected to “*gijzeling*”, even if performance of the obligation in question had become impossible.<sup>118</sup> This goes against logic and also against the Roman and Roman-Dutch practice that specific performance could not be decreed by a court if the performance in question had become impossible. This fact has also been confirmed by South African decisions, most notably in *Benson v SA Mutual Life Assurance Society*<sup>119</sup> and by the High Court in *Gassner v Minister of Law and Order*.<sup>120</sup> These cases

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<sup>113</sup> De Groot 2 4 31.

<sup>114</sup> Du Plessis (1988) *THRHR* 359.

<sup>115</sup> Groenewegen 3 3 41, 3 15 6.

<sup>116</sup> Van Leeuwen 4 2 13, 4 18 1.

<sup>117</sup> Huber 3 2 9.

<sup>118</sup> Du Plessis (1988) *THRHR* 357.

<sup>119</sup> 1986 (1) SA 776 (A) at 783.

<sup>120</sup> 1995 (1) SA 322 (C).

were in fact only confirmation of the Justinianic rule *impossibilium nulla obligatio est* promulgated in the Digest.<sup>121</sup> It has, however, been discussed in this chapter that the position might differ if the contractual obligation in question is relatively impossible, as opposed to absolutely impossible. The procedure of “*gijzeling*” finds its origins in Roman law, and more specifically in the procedure prescribed in the Twelve Tables in terms of which a judgment debtor could be given thirty days in which to pay a debt to satisfy a judgment, failing in which case the judgment creditor possessed the right to seize the debtor in a forcible manner and bring the latter before a court.<sup>122</sup> The specific form which “*gijzeling*” took, however, depended entirely on the type of contract in breach as well as the effect the remedy would have on the breaching party. It has been established in this chapter that two, possibly three ways existed by which “*gijzeling*” could be effected. The first way in which “*gijzeling*” was effected, was if a person (or contracting party) was condemned by a judgment of the Provincial Court to render an account or to perform a specific act. This form of “*gijzeling*” bears the closest resemblance to the remedy of specific performance as it is known in South African law today. Groenewegen supported the view that a contractual debtor could be compelled by way of this form of “*gijzeling*” to perform not only contracts *ad dandum*, but also contracts *ad faciendum*.<sup>123</sup> He was of the opinion that if a debtor was able to perform a specific act, he (the debtor) was obliged to do so, even if such act involved services of a personal nature. Groenewegen based his views on the availability of the remedy of specific performance in Roman law. Van Leeuwen in his Commentaries on the Roman-Dutch law shared Groenewegen’s views on the matter. Van Leeuwen in fact added a moral aspect to the duty to perform a contractual obligation, by emphasising the moral importance and value of a promise made between two persons.<sup>124</sup> This moral aspect mentioned by Van Leeuwen is also confirmation of the applicability of the doctrine of *pacta sunt servanda*, which has been confirmed as the cornerstone of modern South African law of contract by Hefer JA in *Benson v SA Mutual Life Assurance Society*. The doctrine also serves as underlying philosophy behind the validity of the restraint of trade clause, which is discussed in detail in chapter 8 of this thesis. The binding nature of a promise to fulfil an obligation has also been alluded to by Huber.<sup>125</sup> The general opinion of some of the most prominent Roman-Dutch writers was that specific performance was available to a contractual creditor who had been disadvantaged by

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<sup>121</sup> D 50 17 185.

<sup>122</sup> Tab 3 6.

<sup>123</sup> Groenewegen 3 3 41; Groenewegen D 42 1 13.

<sup>124</sup> Van Leeuwen 4 3 1 as translated by Kotzé 31.

<sup>125</sup> Huber 3 21 43, as translated by Gane 506.

an act of breach of contract. Furthermore, specific performance was available as primary contractual remedy (regardless of the type of contract in question), provided the creditor did indeed apply to a court for specific performance and performance remained possible.

The second way in which the procedure of “*gijzeling*” was effected, was in cases where judgment was given against any *collegiae*, tutors, curators, receivers, agents or other condemned in some particular capacity. This category merely served as confirmation of the availability of the procedure of “*gijzeling*” as a means of ensuring specific performance of a contractual obligation, as did the third category in which “*gijzeling*” could be effected in order to ensure specific performance of a contractual obligation together with the payment of a sum of money. The physical nature of the procedure in which “*gijzeling*” was effected, was not dissimilar to the civil procedure currently adhered to in South Africa, in terms of which the procedure is commenced by issuing summons against the contractual debtor based on his breach of contract.<sup>126</sup> The procedure of “*gijzeling*” waned towards the end of the seventeenth century in Holland, and after the Napoleonic invasion and subsequent incorporation of the French Civil Code into the law of the Netherlands, coercive measures to enforce contractual obligations were no longer used. However, the perception of specific performance as primary contractual remedy was adopted by South African courts, as is evident from early South African decisions.

It is concluded that in Roman-Dutch law, the remedy of specific performance was perceived as a primary one available to a contractual creditor who elected this remedy in case of breach of contract, provided the performance in question remained possible.

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<sup>126</sup> The commencement of the civil procedure was known as “*sommatie*”.



## CHAPTER 6: THE REMEDY OF SPECIFIC PERFORMANCE IN ENGLISH LAW

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### 6.1. Introduction

It has been indicated in chapter 5 of this thesis that the remedy of specific performance was considered a primary one for breach of contract in Roman-Dutch law. Despite opposing views such as those promulgated by Voet and Grotius as to the primary availability of the remedy of specific performance in Roman-Dutch law, there is no doubt that the remedy had its origins in Roman law and was incorporated into Roman-Dutch law by popular legal practice at the time. Despite English influence, this is also the perception of the remedy in South African law today.

The purpose of this chapter is twofold: firstly, to establish the nature of the remedy of specific performance as applied in English law, and secondly to indicate how English influence skewed the Roman-Dutch perspective of specific performance as primary remedy in South African law to a point that the doctrine of *pacta sunt servanda* has come under threat. The reason why a discussion of the English perspective of specific performance necessitates a separate chapter in this thesis, is because of the fact that during the late nineteenth and early twentieth centuries, many legal practitioners practicing in South Africa had been trained in English law.<sup>127</sup> This led to an inevitable confusion between the notion of the remedy of specific performance as applied in Roman-Dutch law, and the notion of the same remedy applied in English law. The two jurisdictions' treatment of the remedy was fundamentally different.

In order to discuss the nature of the remedy of specific performance in English law effectively, it is essential to commence this chapter with an overview of the history of the English law relating to contracts in general. It is interesting to note that Blackstone's *Commentaries on the Laws of England* devotes a mere twenty eight pages to the law governing contracts.<sup>128</sup> The reason for this is probably the fact that the need for commercial governance by means of contract only became prominent after the Industrial Revolution in England. Because English law of contract was created almost in its entirety by the English

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<sup>127</sup> Lambiris 43.

<sup>128</sup> Guest (1964) 3.

courts, legislature has played but a very little role in the development of rules relating to the law of contract.<sup>129</sup> Furthermore, it is evident from a discussion of the origin of contractual principles of English law that the English law of contract, under which the English notion of specific performance resorts, does not share the same rich history of its Roman and Roman-Dutch counterparts. The reason for this is once again that over the past two hundred years, England has developed from a mainly agricultural into a mainly commercial and industrial nation.<sup>130</sup> The modernisation of commerce and society in general demanded a modern way of regulating business dealings in England and Europe in general, which in turn led to a modernised system of contractual rules and practices.

## 6.2. The nature of the remedy of specific performance in English law

Blackstone, commenting on the remedies available to a master whose servant has been “stolen” by another employer, makes no mention of the possibility of compelling such servant to work out his current contract with his current employer.<sup>131</sup> It must be assumed that if specific performance was not available as primary contractual remedy in the case of breach of contract of a personal nature such as one of employment, then it was not considered a primary remedy in general as far as English law was, and still is concerned.

Specific performance is defined in English law as “a decree of the court which compels the defendant personally to do what he promised to do.”<sup>132</sup> Put differently, it is an order “by which the court directs the defendant to perform the contract which he has made, and in accordance with its terms.”<sup>133</sup> In the English case of *Ryan v Mutual Tontine Westminster Chambers Association*,<sup>134</sup> the court stated the following:<sup>135</sup>

“This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy of an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules.”

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<sup>129</sup> Guest 3.

<sup>130</sup> *Ibid.*

<sup>131</sup> Blackstone 52. He merely makes mention of the fact that the wronged master could issue summons against the servant and the new master for damages suffered.

<sup>132</sup> Jones and Goodhart (1986) 1.

<sup>133</sup> Guest 513.

<sup>134</sup> [1893] 1 Ch. 116.

<sup>135</sup> At 126.

Within this definition lies the fundamental difference between the way in which specific performance as contractual remedy is perceived in English law as opposed to the way in which it was perceived in Roman and Roman-Dutch law: In the former, it is considered a supplementary (to damages) and discretionary remedy,<sup>136</sup> whereas in the latter it has always been perceived as primary contractual remedy. Jones and Goodhart state that the remedy in English law is “exceptional”, and furthermore that “no plaintiff...is entitled to specific performance as of right.”<sup>137</sup> However, the remedy of specific performance was not altogether unknown to common law.<sup>138</sup> On the contrary, it is believed that the remedy is at least as old as that of damages.<sup>139</sup> There are numerous examples from the sixteenth and seventeenth centuries of Chancery decrees compelling a contractant to honour his agreement. In the case of *Shapcott v Dowrish*,<sup>140</sup> for example, the court stated that “said agreement should be performed according to the tenor and true meaning thereof.”<sup>141</sup> What is even more interesting than the fact that specific performance was a familiar remedy in the common law, is the philosophy English law attached to the remedy. It is said that the remedy was simply granted because “it was in accordance with good conscience to do so.”<sup>142</sup> The question must inevitably be asked why specific performance had at some point in English legal history been negated to a mere secondary remedy. The answer seems to lie in the leading case of *Buxton v Lister and Cooper*.<sup>143</sup> *In casu*, an English court for the first time considered the suitability of the remedy of specific performance in view of the *type* of contract which had been breached. It was also the first time in which the Chancery considered the fact that while the granting of an order of specific performance was certainly in the court’s discretion (a prerequisite for granting specific performance that has been erroneously adopted from English law by the South African courts), a court would never grant such an order if the contract involved services of a personal nature.<sup>144</sup> The court differentiated specifically between personal contracts which relate to merchandise and vary according to different times and

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<sup>136</sup> Guest 513.

<sup>137</sup> Jones and Goodhart 1.

<sup>138</sup> *Idem* 3.

<sup>139</sup> Pollock and Maitland 595; Jones and Goodhart 4.

<sup>140</sup> [1619] Bacon’s Cases 167.

<sup>141</sup> [1619] Bacon’s Cases 167 at 169.

<sup>142</sup> Jones and Goodhart 4.

<sup>143</sup> [1746] 3 Atk. 383.

<sup>144</sup> *Buxton v Lister and Cooper* [1746] 3 Atk. 383 at 386. The court stated in fact that “a personal contract is quite different [from, for instance, a contract of sale of immovable property], because, when the defendants saw that the plaintiff would not insert these covenants, they had no occasion to wait the event of a Chancery suit, but might go to another market to supply themselves.”

circumstances, and contracts for the purchase of lands or things that relate to realities.<sup>145</sup> In deciding that it would be inequitable to enforce a contract of a personal nature against a specific contractual party, the court provided that “it [the order of specific performance] might drive on parties to the execution of the contract, to the ruin of one side.”<sup>146</sup> It is submitted, however, that by the time of the *Buxton*-decision, there was no general principle in English law that specific performance would never be granted if damages were an adequate remedy. The question must consequently be posed in what circumstances an English Court of Equity would (or would not) grant an order of specific performance of contractual obligations. In discussion these circumstances, it is vital to keep in mind that a constant inherent tension exists between Common law and Equity.

The first guideline as to when an English court would grant an order of specific performance, which has already been mentioned, is that the granting of such an order is entirely in the discretion of the court.<sup>147</sup> This means that the presiding court has a choice in the matter, which choice may not be exercised in an arbitrary or capricious manner.<sup>148</sup> The court must consider the general fairness (or “equity”) of the transaction in question and should refuse to grant specific performance if damages would be an adequate remedy.<sup>149</sup> It is important to note the use of the word “adequate” here. It does not state that an order of damages must be granted if it were perceived to be the “most suitable” remedy in the circumstances, but merely if it were perceived as an “adequate” remedy in the circumstances. This is a further negation of the importance of the remedy of specific performance in English law. The fundamental principle that underlies this philosophy is that Equity courts do not regard the mere provision of a promise by the defendant in a contractual matter as itself creating a situation where it would be inequitable or unfair that the promise should not be performed.<sup>150</sup> This seems in contrast to Jones and Goodhart’s point of view mentioned above that in early English law a court would enforce a contractual obligation merely because it was “in accordance with good conscience to do so.”<sup>151</sup> Nevertheless, the “adequacy” principle is one that carries much weight in English law. Damages would be considered “adequate” as contractual remedy if the claimant could readily make a substitute contract for a performance equivalent to that

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<sup>145</sup> Jones and Goodhart 4.

<sup>146</sup> *Buxton v Lister and Cooper* [1746] 3 Atk. 383 at 386.

<sup>147</sup> *Buxton v Lister and Cooper* [1746] 3 Atk. 383; Jones and Goodhart 6; Guest 514.

<sup>148</sup> Guest 514.

<sup>149</sup> *Ibid.*

<sup>150</sup> Spry (1997) 56.

<sup>151</sup> See Jones and Goodhart 4.

promised by the defendant.<sup>152</sup> This would entail that the claimant in the matter would be compensated “adequately” by an amount of damages based on the difference between the market price of the substitute and the price fixed in the contract.<sup>153</sup> The problem with the guideline of adequacy is that it is a mercurial principle.<sup>154</sup> By this is meant that it was inconsistent and subjective in nature. In earlier English decisions such as that of *Buxton* discussed above, it was stated that specific performance would be decreed if damages failed to provide the plaintiff a “complete” remedy.<sup>155</sup> In later decisions, however, it seemed that English courts would only decree specific performance if it was virtually impossible to assess the amount of damages.<sup>156</sup> The logical question that must be asked at this stage, is in what circumstances damages would be considered *inadequate* as remedy for breach of contract in English law.<sup>157</sup> The question as to the adequacy of damages is a factual one. The plaintiff must be placed into substantially the same position as if an agreement concerning personalty had been performed specifically.<sup>158</sup> In the case of *Duncuft v Albrecht*<sup>159</sup> it was decided that if no adequate market existed for obtaining shares or stock of a certain class or kind, awarding the plaintiff damages would be inadequate. If, however, the shares or stock was readily obtainable by the plaintiff at any market, an award of damages would be adequate. According to Guest, Courts of Chancery were accustomed to decree specific performance, and not damages, where the chattels sold possessed special beauty, rarity or interest.<sup>160</sup> This once again raises the primary question posed by this thesis: what is the most suitable remedy for breach of an athlete’s contract? On the one hand, the athletic services provided by a professional athlete are certainly of a “special rarity or interest” as exclaimed in *Holroyd v Marshall*. On the other hand, English law does not allow decrees of specific performance of contracts involving services which require personal skill, because it would be “improper” to force someone to serve another against the former’s will.<sup>161</sup> This is clearly contradictory. The

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<sup>152</sup> Beale (Ed) 1523.

<sup>153</sup> Beale (Ed) 1523.

<sup>154</sup> Spry 18.

<sup>155</sup> See also the case of *Adderley v Dixon* [1824] 1 Sim & St 607, in which the term “complete remedy” was used at 610.

<sup>156</sup> Jones and Goodhart 19. An example of such a case was *Hart v Herwig* [1873] 8 Ch App 860. In the case of *Cohen v Roche* [1927] 1 K.B. 169, the Court asked whether damages were likely to be an adequate remedy for breach of the *type* of contract before the Court.

<sup>157</sup> It must be noted that the discussion of damages in this chapter focuses on the remedy in English law. A complete discussion of the remedy as applied in South African law follows in chapter 7 of this thesis.

<sup>158</sup> Spry 61.

<sup>159</sup> [1841] 12 Sim. 189.

<sup>160</sup> Example of cases in which these factors proved persuasive to the Court in decreeing specific performance, was *Holroyd v Marshall* [1862] 10 H.L. Cas 191 (at 209) and *Falcke v Gray* [1859] 4 Drew. 651 (at 658).

<sup>161</sup> Guest 516.

inadequacy-argument relating to the contractual remedy of damages seems to be based to a large extent on the question as to the availability of the same or a similar performance as that in the contract. This is exactly where the argument fails as far as English law's perception that specific performance would never be decreed in case of a contract involving services of a personal nature (or personal skills) is concerned. The services provided by a professional athlete are of a highly personal, unique and specialised nature which can certainly not be obtained readily elsewhere (although *similar* services may be obtained). Therefore, the argument in English law that specific performance would never be decreed where personal services are involved, is inherently flawed as far as breach of an athlete's contract is concerned.

A second factor by which damages could be rendered inadequate remedy for breach of contract, is where there is a provision in said contract for a benefit to be conferred upon a person who is not a party to such contract.<sup>162</sup> The English doctrine of privity of contracts holds that only a party to the material agreement can sue on it, and such party will sometimes be able to recover merely nominal damages in respect of acts to be performed for the benefit of a third person.<sup>163</sup> In such a case, damages would be inadequate, unless they are of such an amount as to enable the plaintiff to confer the material benefit derived from the contract upon the third person in question. In such a case, the Court of Equity would likewise have no other option but to decree specific performance of the contractual obligation in question.<sup>164</sup>

Although it is clear that equity would sometimes demand that specific performance be decreed instead of damages in English law, the fact remains that the former is still considered in the English legal system as merely secondary to damages. In order to eventually illustrate clearly how the English perception of specific performance has influenced that of South African courts, one must refer to and discuss the established situations in which specific performance would never be granted in English law.

### **6.3. Factors against the decree of specific performance in English law**

The first factor, upon which a decree of specific performance would be refused in English law, is if there were to be a lack of mutuality on the contract between the parties.<sup>165</sup> This entails that, on the one hand, a court will not grant specific performance to one party if it

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<sup>162</sup> Spry 64.

<sup>163</sup> *Idem* 65.

<sup>164</sup> *Idem* 65.

<sup>165</sup> Guest 515.

could not do so at the suit of the other. On the other hand, the question should be asked whether it would be acceptable if one party, who has already performed his part of the agreement, could by doing so compel the party who has yet to perform to do so. The argument here is that by carrying out his part of the bargain, the former has already rendered the remedy mutual.<sup>166</sup> This is, according to Guest, the preferred view in English law.<sup>167</sup> However, the defence of lack of mutuality would only be successful in proceedings in which specific performance is prayed if the defendant is able to show that he would be protected insufficiently were he to be compelled to specifically perform his contractual obligations.<sup>168</sup> An example of an instance where the defendant would be protected insufficiently, is if it is probable that some of the *plaintiff's* obligations might not be enforced because of a disability of the latter or because the court would not be prepared to undertake specific difficulties in order to ensure enforcement.<sup>169</sup> Furthermore, a defendant would not be protected sufficiently (and therefore mutuality would be lacking) if the *plaintiff's* obligation would involve any act of illegality, as this would obviously mean that a court would not order mutual performance of said plaintiff's obligation.<sup>170</sup> What is most relevant, though is that English law states that a defendant would also be protected to an insufficient degree if for any reason the plaintiff's corresponding obligation would involve "the maintenance of a special personal relationship, and hence be contrary to policy".<sup>171</sup> This implies clearly that if a plaintiff demands specific performance of a contractual obligation, the court, on the ground of lack of mutuality, would not grant such performance if it meant that the plaintiff would have to perform his obligation(s) in terms of the contract as well, and these obligation(s) involved the sustaining of a personal relationship. This fact gives rise to a second factor upon which specific performance would as a rule not be granted in English law: if the performance involves personal services. According to Guest, neither the performance of contracts of personal services nor of those involving the use of "personal skill" will ever be enforced in English law.<sup>172</sup> Classic examples would be if a singer were to be forced to sing,<sup>173</sup> or an apprentice to complete his apprenticeship.<sup>174</sup> Guest, however, states that "the cases in which it (the

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<sup>166</sup> *Hoggart v Scott* [1830] 1 Russ. & M 293.

<sup>167</sup> See Guest 515.

<sup>168</sup> Spry 83.

<sup>169</sup> *Idem* 84.

<sup>170</sup> *Idem* 84.

<sup>171</sup> *Idem* 84.

<sup>172</sup> Guest 515.

<sup>173</sup> As in the case of *Lumley v Wagner* discussed in chapter 2 of this thesis.

<sup>174</sup> As in the case of *De Francesco v Barnum* (1889) 45 Ch. D. 430. This is despite the large degree of power that a master could exercise over his apprentice, alluded to in the text above.

argument that specific performance would never be ordered in the case of contracts involving services of a personal nature) has been applied, all relate to contracts similar to those of master and servant.”<sup>175</sup> It is once again submitted that the contract between a professional (or for that matter *any*) athlete or coach and his employer-club, union or franchise is certainly *not* one of traditional master and servant. On the contrary, there is no doubt that the contract referred to is one between parties on equal footing in every sense of the word, and therefore English law’s argument that specific performance would never be granted in cases of contracts involving personal services or skill, does not relate to athletes’ contracts. This is true despite the fact that the playing of sport is generally considered “service of a personal nature”. The argument here is not to the contrary, it is merely that the personal services are not performed in terms of a “master-and-servant”-relationship, but a relationship between parties equal in law. At least two English courts have made decisions in support of the abovementioned argument, most importantly Lord Cowper in *Ball v Coggs*<sup>176</sup> and Lord Hardwicke in *East India Co v Vincent*.<sup>177</sup> Consequent English decisions have, however, inevitably followed a contrary path, seemingly because they had felt that compelling a person to perform services of a personal nature or involving personal skill would cause “undue hardship” to such person. In the case of *Gould v Kemp*<sup>178</sup> the court decided that “any circumstance of hardship in the defendant’s situation will incline the court not to interfere, but to leave the party to his legal remedy in damages.”<sup>179</sup> *In casu*, the court weighed the unfairness that would be caused to the plaintiff if specific performance were not granted, against the hardship suffered by the defendant if such equitable remedy were indeed granted, and came to the conclusion that the latter outweighed the former in the case at hand. The tendency in English law, as a result of numerous cases similar to *Gould*, is seemingly that hardship suffered by the defendant would *always* outweigh the unfairness suffered by the plaintiff, and only in exceptional circumstances would the unfairness suffered by the plaintiff be considered legally significant. It is this tendency in English law that has caused much confusion as to the proper application of the remedy of specific performance in South African law, especially in cases involving contracts of a personal nature or involving personal skills.

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<sup>175</sup> Guest 516.

<sup>176</sup> (1710) 1 Bro Parl Cas 140.

<sup>177</sup> (1740) 2 Atk 83.

<sup>178</sup> (1834) 2 My & K 304.

<sup>179</sup> *Gould v Kemp* (1834) 2 My & K 304 at 308.



A third situation in which specific performance would never be granted in English law, is when an order of specific performance would require the court to supervise the granting of its order.<sup>180</sup> In the case of *Wolverhampton and Walsall Ry. v London and Northwestern Ry.*,<sup>181</sup> the court decided that if it enforced a contract, it would “require a series of orders, and a general superintendence, which could not conveniently be undertaken by any Court of Justice.”<sup>182</sup> This was reiterated by the court in *Ryan v Mutual Tontine Westminster Chambers Association*,<sup>183</sup> who exclaimed that specific performance would only be granted if the contract could be performed without supervision and on the specific terms agreed upon. As far as this third situation in English law is concerned, Jansen JA in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*<sup>184</sup> stated that such limitation did not apply to South African law.<sup>185</sup> This was confirmed in the *Santos*-case,<sup>186</sup> in which Foxcroft J made the all-important statement that the limitation (that a court would not grant specific performance in a case in which it would be expected of that court to supervise performance by the defendant) has even fallen into disfavour in England. Treitel<sup>187</sup> has stated, in fact, that the “difficulty” of supervision of a court order by the court who has decreed that order, is “much exaggerated.” This is understandable, as the applicant for a decree of specific performance carries the risk that if such decree were granted, the defendant might not perform satisfactorily. It is not the duty of the court to exercise supervision of any order of specific performance. The applicant alone would be prejudiced if the defendant does not perform satisfactorily after being compelled to do so by a court. The reasoning is, however, that that (the defendant not performing adequately) was, as stated above, a risk the applicant was willing to take when he applied for the order. A fourth, less significant circumstance in which an English court would not order specific performance, relates to the doctrine that “equity will not assist a volunteer”.

Having discussed the three situations (and made mention of one less significant one) in English law in which specific performance would never be granted, it is clear that it is only in exceptional circumstances of equity that the remedy would be granted in English law. It is

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<sup>180</sup> This was also a considerable factor for not granting specific performance against the athlete in the South African cases of *Troskie en 'n Ander v Van der Walt* 1994 (3) SA 545 (O) and *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C).

<sup>181</sup> (1873) L.R. 16 Eq. 433.

<sup>182</sup> *Wolverhampton and Walsall Ry. v London and Northwestern Ry.* (1873) L.R. 16 Eq. 433 at 439.

<sup>183</sup> (1893) 1 Ch. 116.

<sup>184</sup> 1981 (4) SA 1 (A).

<sup>185</sup> *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 5.

<sup>186</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C) at 80.

<sup>187</sup> Treitel (2011) 930.

unfortunate, as noted above, that the English position had for a significant period of time influenced South African law to the extent that the remedy was very nearly negated to a secondary one in South African law towards the end of the twentieth century. This is discussed in the next chapter.

#### 6.4. Conclusion

Although it was established in the previous chapter of this thesis that specific performance was considered the primary remedy for breach of contract in Roman-Dutch law and subsequently in South African law, this fact was skewed by the perception in English law that specific performance would only be granted in exceptional circumstances. This chapter has set out to indicate how English law perceives the remedy of specific performance in order to eventually show the fundamental difference between this perception of specific performance and that of Roman-Dutch law.

The earliest indication of the fact that specific performance of a contractual obligation was not considered a primary remedy for breach of contract in English law, is the absence of any mention of that or a similar remedy by Blackstone in his discussion of a servant who had been “stolen” by another master.<sup>188</sup> In fact, Blackstone states that in the scenario sketched above, the wronged master would but have a claim for damages against the guilty party- a further indication that not specific performance, but rather damages, was (and to this day still is) considered the primary remedy for breach of contract in English law. It must be stated, though that specific performance as an equitable remedy has always been well-known in English law. It has been defined in that system as “a decree of the court which compels the defendant personally to do what he promised to do,”<sup>189</sup> or an order “by which the Courts directs the defendant to perform the contract which he has made and in accordance with its terms.”<sup>190</sup> In *Ryan v Mutual Tontine Westminster Chambers Association*<sup>191</sup> it was confirmed that while damages must be considered the “ordinary” remedy for breach of contract, specific performance could be decreed if the former remedy was inadequate as such. The fundamental difference between the remedy as it is applied in English law and how it is applied in South African law, is that in the former, “no plaintiff...is entitled to specific performance as of

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<sup>188</sup> Blackstone 52.

<sup>189</sup> Jones and Goodhart 1.

<sup>190</sup> Guest 513.

<sup>191</sup> [1893] 1 Ch. 116.

right.”<sup>192</sup> Although examples have been provided in the chapter of instances where Courts of Chancery did in fact decree specific performance of contractual obligations, the important question of why specific performance would only be granted in exceptional circumstances in English law was addressed. The reason why this question had to be addressed, is because of the English influence on South African law relating especially to the adequacy and appropriateness of the remedy of specific performance for breach of contract.

It has been established as a matter of importance that English courts do differentiate between personal contracts involving merchandise and contracts for the purchase of land.<sup>193</sup> Furthermore, it is an important principle in English law that the granting of an order of specific performance is entirely in the discretion of the relevant court.<sup>194</sup> However, in exercising its discretion, the court will not grant specific performance if damages were to be an adequate remedy in the circumstances. Adequacy of damages would mean that a claimant could easily enter into a substitute contract for performance equivalent to that promised by the defendant, while the latter simply “pays his way out of the contract.” The problem with the adequacy-guideline is that it is, according to Spry, a mercurial principle, meaning that it was (and remains) inconsistent and subjective in nature.<sup>195</sup> Furthermore, the guideline is based on the argument that if the same or similar articles or services could be found in the open market, it would be inequitable to compel the defendant to perform in terms of the promise he himself had made previously. This is exactly where, as indicated in this chapter, the English perception of specific performance as mere secondary remedy fails as far as the athlete’s contract is concerned, as the latter involves services of such a personalised, unique and special nature as to make these services virtually impossible to acquire on the “open market”.

The obvious question which arose in this chapter is why English law perceives specific performance as a mere secondary remedy for breach of contract. The importance of this question lies therein that it must be compared to the South African perception of the remedy, in order to determine eventually whether specific performance *should* be the primary for breach of *especially* the athlete’s contract. Certain factors exist in English law which serve as guidelines for when specific performance would never be granted in that system. The first one identified in this chapter is a lack of mutuality between the parties. An English court

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<sup>192</sup> According to Jones and Goodhart 1.

<sup>193</sup> Jones and Goodhart 4.

<sup>194</sup> *Buxton v Lister and Cooper* [1746] 3 Atk. 383; Jones and Goodhart 6; Guest 514.

<sup>195</sup> Spry 18.

would as a rule not grant specific performance of a contractual obligation if the defendant is able to show that he would be protected insufficiently were he to be compelled to perform the obligation in question, or if the plaintiff's obligation involved any act of illegality. The principle of mutuality bears a resemblance to Roman law's principle of reciprocity,<sup>196</sup> in terms of which the question is raised whether one contracting party can withhold his performance until the other contracting party has performed. The second factor upon which specific performance would not be granted in English law is if the obligation in question involved services of a very personal nature. This factor is especially relevant to this chapter and this thesis in general, as it rules out any possibility that an English court would order an athlete to comply with a contract to which that athlete no longer wishes to be bound for whatever reason. The final factor considered in English law for not granting an order of specific performance, is when such an order would require the court to supervise the granting of such order. Whether there in fact exists such a duty upon a court were such court to grant an order of specific performance, is highly doubtful. Although English decisions, most notably the one in *Wolverhampton and Walsall Ry. v London and Northwestern Ry.*<sup>197</sup> placed a duty on a court who has granted a remedy of specific performance to superintend the proper performance of such order, this duty is an unreasonable one. In fact, the duty to superintendence has, according to Foxcroft J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another*,<sup>198</sup> even fallen into disfavour in England. The argument has been made in this chapter that the applicant for the remedy of specific performance must reconcile himself with the strong possibility that a defendant who has been compelled to do something he doesn't want to do, would do so with "diminished enthusiasm."<sup>199</sup> However, if this is the case (that, for instance, an athlete would not perform optimally if he were compelled to do so), the question remains as to whether specific performance is the most appropriate and also effective remedy for breach of the athlete's contract. The argument that an athlete (either professional or amateur) is his own product, and such an athlete would put only himself at a disadvantage were he to perform with diminished enthusiasm on the field of play. Despite the arguments made above and earlier in this chapter against it, specific performance remains a secondary remedy in English law which will only be granted if equity demands it. This fact

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<sup>196</sup> Commonly referred to as the *exceptio non adimpleti contractus*.

<sup>197</sup> (1873) L.R. 16 Eq. 433.

<sup>198</sup> 2003 (5) SA 73 (C) at 80.

<sup>199</sup> This is the expression used by Desai J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C).

has led to a lot of confusion in South African case law, especially since 1910. This confusion is discussed in the following chapter.

## CHAPTER 7: THE REMEDY OF SPECIFIC PERFORMANCE IN SOUTH AFRICAN LAW

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### 7.1. Introduction

Having established the nature and perception of the remedy of specific performance in Roman law, Roman-Dutch law and English law, it is imperative to discuss the influence these perceptions have had on current South African courts' treatment of the remedy. This will enable one to determine whether such treatment is substantiated by and aligned with comparative jurisdictions, especially as far as the athlete's contract is concerned. Specific decisions by South African courts regarding specific performance will be discussed, and care will be taken to indicate the influence of the abovementioned legal systems on each decision. Finally, this chapter will discuss the all-important influence the South African Constitution has had, and will continue to have, on the perception of the remedy of specific performance.<sup>1</sup>

### 7.2. The influence of the Roman-Dutch perception of specific performance on South African law

When South Africa was colonised by the Dutch in 1652, it was inevitable that the laws of Holland at the time would be implemented and applied in the governing of the Cape. After colonisation by Britain in 1806, the Bigge and Colebrooke report of 1826 recommended that Roman-Dutch law should be replaced by English law in the Cape.<sup>2</sup> However, in the case of *Louisa and Protector of Slaves v Van den Berg*<sup>3</sup> neither the court nor counsel made any reference to English law on the matter at hand, but instead relied entirely on the writings of Voet, Grotius and Groenewegen.<sup>4</sup> This led to the Roman-Dutch system of law being adopted as common law at the Cape and eventually the whole of South Africa, and entailed that the writings of the prominent Roman-Dutch authors on the topic of specific performance as primary remedy for breach of (all types of) contract would prevail in any case concerning such topic.

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<sup>1</sup> The Constitution of the Republic of South Africa 1996.

<sup>2</sup> Christie and Bradfield (2011) 8.

<sup>3</sup> 1830 (1) M 471.

<sup>4</sup> Christie and Bradfield (2011) 8.

One of the earliest South African<sup>5</sup> decisions on the matter at hand was made in the case of *Twentyman v Hewitt*,<sup>6</sup> in which the court decreed that an antenuptial contract had to be drawn up between the parties in question, failing in which case the husband would be imprisoned for disobedience. It is submitted that the penalty the court added for failure to comply with its order was aimed at ensuring performance of the order in question. In *Norden v Rennie*<sup>7</sup> the court confirmed the creditor's right to specific performance in case of breach of contract, but decided that the defendant in that specific case had the option of paying damages *in lieu* of specific performance. Gross states however, that the issue of the most appropriate remedy in the circumstances was not specifically argued in this case.<sup>8</sup> The case in which the availability of the remedy of specific performance was dealt with in detail for the first time by a South African court, was that of *Cohen v Shires, Mchattie and King*,<sup>9</sup> mentioned above. *In casu*, deciding on the availability of the remedy of specific performance in order to ensure performance of an agreement of purchase and sale, the court stated that the defendants had erred in arguing that the remedy of specific performance did not exist in South African law.<sup>10</sup> Interestingly enough, the defendants had depended on Voet 19 1 14 to substantiate their argument. It has already been established in this thesis, though, that Voet's opinion on the availability of specific performance in Roman-Dutch law did not correspond with reigning legal practice at the time. Gross<sup>11</sup> has also stated that Voet in the passage mentioned was in fact referring to cases in which it was impossible for the vendor in question to perform.<sup>12</sup> Further on in the same passage, Voet actually said that an order of specific performance was *not advisable* in a case in which performance had become impossible, but that he in any event preferred the rule in Roman law.<sup>13</sup> Kotzé CJ confirmed this by stating the following:<sup>14</sup>

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<sup>5</sup> By "South African" decisions is meant decisions of the courts which functioned as such within either of the British colonies, namely the Cape and Natal, or either of the Boer Republics, namely the Transvaal (also referred to as the "Zuid-Afrikaansche Republiek" and the Orange Free State. As stated above, it was not until 31 May 1910 that these four governments became a union and was henceforth known as the Union of South Africa.

<sup>6</sup> 1833 (1) *Menz* 156.

<sup>7</sup> 1879 *Buch* 155.

<sup>8</sup> Gross (1934) *SALJ* 352.

<sup>9</sup> 1881-1884 (1) SAR TS 41. What is meant by discussion "in detail" is that it was the first case in which the court actually alluded to the Roman-Dutch writers, and compared Voet's point of view to those of Groenewegen, Van der Linden and Van der Keessel.

<sup>10</sup> *Cohen v Shires, Mchattie and King* 1881-1884 (1) SAR TS 41 at 45.

<sup>11</sup> Gross (1934) *SALJ* 351.

<sup>12</sup> See the discussion of the contractual element of possibility of performance above.

<sup>13</sup> The rule in Roman law was that specific performance could be considered a primary remedy. This rule is supported by Voet, although, as mentioned in the text of this chapter, he still believed that the debtor had a choice of remedy. See in this regard Gross (1934) *SALJ* 351.

“Grotius gives to the purchaser the election or choice to demand either damages, or else special delivery of the thing sued. In this he is followed by Groenewegen, Schorer, Van Leeuwen, Van der Keessal (sic), and Van der Linden. The Roman-Dutch law, therefore, clearly recognises the right to a specific performance of a contract; and Van der Keessel, Van Leeuwen and others also hold that such is the true rule of civil law. By the well-established practice of South Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence.”

Although the court never referred to specific performance as a primary contractual remedy pertinently, he did state pertinently that the *creditor* had the choice of remedy, and that if the creditor elected specific performance as remedy, the court should order it as such. Dondorp mentions that in early South African law there was no reason to assert that the creditor must be content with damages in case of non-compliance with contractual duties by the debtor.<sup>15</sup> Imprisonment was, according to Dondorp, still available as a measure to compel a debtor to specifically perform his contractual duties, because refusal to comply with a court order constituted contempt of court.<sup>16</sup> Kotzé CJ again had to decide on the suitability of the remedy of specific performance for breach of contract ten years after the *Cohen* decision discussed above, in the case of *Thompson v Pullinger*.<sup>17</sup> Confirming his decision in *Cohen* that a purchaser is entitled to demand and receive specific performance of a contract of sale and purchase, the court stated clearly that under Roman-Dutch law, Pothier’s rule of *nemo potest precise cogi ad factum* could not be observed.<sup>18</sup> Kotzé CJ once again mentioned Voet’s favouring of Pothier’s rule, but stated expressly that Voet’s opinion was “in conflict with the other great authorities, and with the practice now followed all over South Africa.”<sup>19</sup> This is a very important statement, as the court stated expressly that South African law at the time accepted the opinions of Groenewegen, Huber, Van der Keessel and Van der Linden, among others, that specific performance was available as primary remedy in case of breach of contract, contrary to Voet’s interpretation of what he believed to be the position in Roman law.<sup>20</sup> The court went further to exclaim that the right to specific performance of a plaintiff in cases in which the defendant is in a position to do so (in other words, where performance

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<sup>14</sup> *Cohen v Shires, Mchattie and King* 1881-1884 (1) SAR TS 41 at 45.

<sup>15</sup> Dondorp (2010) *Fundamina* 51.

<sup>16</sup> *Ibid.*

<sup>17</sup> 1894 (1) Off Rep 298.

<sup>18</sup> *Thompson v Pullinger* 1894 (1) Off Rep 298 at 301.

<sup>19</sup> *Ibid.*

<sup>20</sup> *In casu*, Kotzé CJ phrased it as follows: “Voet relies on especially on what he considers the correct principles of the *Ius Civile*, although other jurists, for instance Huber, Van Leeuwen and Van der Keessel, express their conviction that the compelling of the defendant to specifically perform the contract, where this is in his power, is more in accordance with the principle of Roman-Dutch law.”



remains possible) was “beyond all doubt”.<sup>21</sup> What is important to note for the purposes of this thesis, is that the court in *Thompson* alluded to the *type* of contract in question. In the case under discussion, the contract in question was for the sale and purchase of shares in a company, and the court decided that in such a case, as a rule, no specific performance would be decreed, “because the payment of compensation, calculated by the difference between the purchase price of the shares and that at which they can be obtained at the time when the defendant is placed *in mora*, is a full and satisfactory compensation.”<sup>22</sup> However, confirming the availability of specific performance as primary remedy for breach of *any type* of contract, Kotzé CJ stated the following:<sup>23</sup>

“Under our law the option to demand either specific performance or damages is left to the plaintiff. This is no more than fair, as it may well happen that a plaintiff may find it more advantageous to pay damages than to deliver the thing sold, and in this way may derive advantage from this breach of contract. I am speaking, of course, of the case where the defendant is in a position to carry out his contract. It appears, therefore, to follow that the onus of proof rests upon the defendant, and, where there is a doubt, the plaintiff is entitled to delivery of the shares bought by him.”

This point of view was confirmed by the Supreme Court of the Transvaal in *Silverton Estates Co. v Bellevue Syndicate*.<sup>24</sup> *In casu*, Innes CJ quoted Grotius 3 15 6 who stated that the purchaser in a contract of sale and purchase had the option of claiming specific delivery of the property in question.<sup>25</sup> The court then inevitably referred to Voet’s point of view that every breach of a contract of sale (or, as established above, any type of contract in fact) could be adequately discharged by the payment of damages, and that specific performance in such cases (breach of contract of sale and purchase) should not be decreed by the courts.<sup>26</sup> However, as in the previous South African decisions discussed above, the court had to state

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<sup>21</sup> *Thompson v Pullinger* 1894 (1) Off Rep 298 at 301.

<sup>22</sup> *Ibid.* The reasoning behind this statement is simple: if a product is widely available on the open market, and can be easily obtained without any trouble to the purchaser, it would be trivial to order a seller of that product to provide the purchaser thereof with the specific product the latter had purchased (for instance: a loaf of bread, a carton of milk, etcetera). In such a case, it would be more logical to grant the purchaser damages, so that the exact same product could be purchased by the purchaser without any additional trouble on his behalf. The same reasoning does, however, not apply in the case of, for argument’s sake, an athlete’s contract, because the skills possessed by an athlete, as already discussed in chapter 2 of this thesis, are *unique to that individual*. Although another athlete might possess skills of a similar nature and standard, they will never be the ones that were unique to the former athlete. The point is that it would be virtually impossible to link a monetary value to the unique skills of an athlete. Lubbe in *Smits et al* (2008) 101 agrees with this.

<sup>23</sup> *Thompson v Pullinger* 1894 (1) Off Rep 298 at 302.

<sup>24</sup> 1904 TS 462.

<sup>25</sup> *Silverton Estates Co. v Bellevue Syndicate* 1904 TS 462 at 466.

<sup>26</sup> *Idem* 467.

that Voet's view was not in line with "modern practice" meaning the practice at the time of "Groenewegen, Neostadius and Grotius".<sup>27</sup> The court proceeded to state that "as a fact, the weight of Roman-Dutch authority is not in favour of Voet." The court in the current decision followed the Roman-Dutch practice relating to the availability of specific performance as primary remedy for breach of contract advocated by Groenewegen, Van der Linden, Huber and Van der Keessel (among others), and stated specifically that this practice was "settled law in the Transvaal".<sup>28</sup>

It does seem from the discussion of the cases decided before South Africa became a Union that the Roman-Dutch practice supported by the abovementioned authors was adopted by the courts of the Cape, Transvaal and Natal.<sup>29</sup> Although the courts mentioned Voet's and Grotius' view almost without exception, it is stated repeatedly that the latter's points of view were contrary to Roman-Dutch practice of the time. It is also clear that early decisions of South African courts supported the Roman-Dutch view that specific performance was the primary remedy for breach of all types of contract, regardless of whether the obligations entailed in the contracts were *ad dandum* or *ad faciendum*.<sup>30</sup>

Unfortunately, South African decisions directly after Union<sup>31</sup> buckled under strong English influence. Exactly how the English perception of the remedy of specific performance was (erroneously) incorporated into South African case law should consequently be discussed.

### **7.3. The influence of the English perception of specific performance on South African law**

It was inevitable that decisions by South African courts would follow English doctrine, especially after the country became a union functioning under the laws of Great Britain on 31 May 1910. Furthermore, the fact already mentioned that many South African lawyers had been trained in English law, contributed to the (distorted) application of the remedy of specific performance in South African law. The first case that dealt with the most appropriate remedy in case of breach of contract after unionisation was that of *Fick v Woolcott and*

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<sup>27</sup> *Idem* 467.

<sup>28</sup> *Idem* 467.

<sup>29</sup> The Natal High Court confirmed this stance in the case of *Spettigue v Bocher* 1869 Morcom's Rep 80.

<sup>30</sup> It will be discussed further on in this chapter how it came about that the question was at one point asked whether specific performance, while accepted as primary remedy for breach of contract, was the most suitable remedy for breach of a contract of personal services such as the employment contract and ultimately the athlete's contract after all.

<sup>31</sup> 31 May 1910.

*Ohlsson's Cape Breweries Ltd.*<sup>32</sup> In this case, the plaintiff sought an order compelling the first respondent to transfer certain licenses to the former in terms of a written agreement between the parties.<sup>33</sup> Significantly, the initial claim was for specific performance as well as damages in the sum of £250, but the additional claim for damages was later withdrawn. The court had to decide whether to grant a decree of specific performance to compel the first defendant to transfer the necessary licences to the plaintiff in accordance with the written contract between the parties.<sup>34</sup> An issue arose which regarded the fact that the defendant could not deliver the performance exactly as the contract demanded. In answer to this, Lord de Villiers CJ decided that whilst the first respondent may not have been able to perform his obligation in terms of the contract literally and exactly, he had to perform it as best he could.<sup>35</sup> Lord de Villiers CJ was consequently of the opinion that an order of specific performance for the transfer of the licences in question had to be granted.<sup>36</sup> Innes J, in a separate judgment, agreed with Lord de Villiers CJ, and stated the following:

“Now, Woolcott undertook at the expiration of the lease – and it has admittedly come to an end – to deliver and transfer the licenses to Fick. As already pointed out, that is an obligation he cannot discharge (in the manner prescribed by the contract-author’s emphasis). But it amounts in effect to an agreement to apply to the proper authority for a transfer in favour of his landlord, and to do all things necessary to place the application in due form before the Licensing Court. And that contract is one of which I think specific performance should be decreed.”

*In casu*, the court did not deem it necessary to evaluate the suitability of the remedy of specific performance for breach of the contract at hand by looking at the Roman-Dutch authors. The court merely accepted that the remedy was an available one to a party who wished to claim for it, and a primary remedy at that. This can be gathered from the fact that the court never criticised, or even mentioned, the plaintiff’s decision to withdraw his additional claim of damages. It is submitted that the failure of the court to refer to the Roman-Dutch writers on the availability and suitability of specific performance, was due to the fact that they considered the position as trite. Although Innes J in *Farmers’ Co-operative Society (Reg.) v Berry*<sup>37</sup> came to exactly the same conclusion as did the court in the *Fick*-case discussed above, his decision is relevant for other reasons. Stating that although it was

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<sup>32</sup> 1911 AD 214.

<sup>33</sup> *Fick v Woolcott and Ohlsson's Cape Breweries Ltd* 1911 AD 214 at 223.

<sup>34</sup> *Idem* 225.

<sup>35</sup> *Idem* 229.

<sup>36</sup> *Idem* 229.

<sup>37</sup> 1912 AD 343.

decided in *Thompson v Pullinger* that the right to specific performance where the performance is possible was beyond all doubt, Innes J mentioned that courts “will exercise discretion in determining whether or not decrees of specific performance should be made.” The court then went further to explain that a court would, for instance, not grant a decree of specific performance where it is impossible for the defendant to perform.<sup>38</sup> What is troubling though, is that Innes J mentioned further that “there are many cases in which justice between the parties can be fully and conveniently done by an award of damages”.<sup>39</sup> This statement influenced several South African decisions over the next six decades, up until the case of *Benson* (discussed below) in which Hefer JA exclaimed that while the court indeed had a discretion to decree specific performance, it would go as “far as possible” to give effect to the election of the plaintiff. The plaintiff’s right to elect specific performance, was described by Hefer JA as “the cornerstone of our law relating to specific performance”.<sup>40</sup> Decisions subsequent to the one in *Berry* were influenced by Innes J’s comment (stated above) to the extent that some courts believed that specific performance of especially services should never be granted.<sup>41</sup> These beliefs were no doubt influenced by English law, because although Innes J in *Berry* stated that specific performance was the only appropriate remedy in cases where it was possible for the defendant to carry out his undertaking, he used as authority for this statement Storey’s *Equity Jurisprudence*.<sup>42</sup> Although this authority corresponded with the Roman-Dutch (and South African) position, this was merely chance. There is no reason why Innes J should not have referred to the Roman-Dutch writers’ opinions on the availability of the remedy of specific performance to a plaintiff and the court’s responsibility to grant that remedy if performance remained possible. It is submitted that the reference to Storey influenced and confused later courts in having to decide on the same and similar matters. Nevertheless, although the court in *Berry*’s case based its decision on the suitability of specific performance on the wrong authority, the decision still conformed to the general rule

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<sup>38</sup> This statement by Innes J was unnecessary. It has been established in the text of this chapter above that it went without saying in Roman-Dutch law that specific performance of an obligation which had become impossible would never be granted.

<sup>39</sup> *Farmers’ Co-Operative Society (Reg.) v Berry* 1912 AD 343 at 350.

<sup>40</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782.

<sup>41</sup> Dondorp (2010) *Fundamina* 41 states that “(South African) judgments (of the early twentieth century) expressly referred to English authorities in support of the view that specific performance should not be ordered to enforce contracts of employment, nor in cases where damages would be an adequate remedy, or where specific performance would be unjust.”

<sup>42</sup> Innes J specifically quoted section 717 (a) of the mentioned work, which reads as follows: *It is against conscience that a party should have a right of election whether to perform his contract or only pay damages for the breach of it.*

that specific performance was a primary contractual remedy available to a plaintiff if he so preferred.

One of the most important cases on the remedy of specific performance in South Africa was that of *Haynes v Kingwilliamstown Municipality*.<sup>43</sup> English influence has nowhere been as evident on the suitability of the remedy of specific performance as in this case. The facts are mentioned shortly, because of their significance to the court's remarks on the remedy of specific performance. The Municipality of Kingwilliamstown had appropriated, impounded and diverted water from the Buffalo River at a point on the river just above the appellant's property.<sup>44</sup> The purpose of this appropriation was to provide the inhabitants of Kingwilliamstown and the village of Izeli with an adequate amount of water.<sup>45</sup> The compensation payable to the appellant's predecessor in title included "the release for all time of a total minimum flow of water at the rate of two hundred and fifty (250,000) gallons per day of twenty-four hours from its impounding dam into the Buffalo River below the wall of the dam, or the payment of an amount of £500."<sup>46</sup> The obligation created in terms of a contract between the titleholder of the specific farm and the Kingwilliamstown enforcing the abovementioned stipulation, was honoured by the respondent up until a certain point, when the latter was forced to commit a temporary breach of its obligation because of an "unprecedented" drought, which affected the catchment area of the Buffalo River above the Maden Dam.<sup>47</sup> The appellant claimed specific performance of the obligation in question, which was the release of a minimum of two hundred and fifty thousand gallons of water per day to the appellant by the respondent. The court *a quo* had previously rejected the respondent's contention that it was excused from its obligation because of impossibility of performance brought on by *vis major*.<sup>48</sup> He also found that the undertaking by the respondent to release the two hundred and fifty gallons of water a day was not conditional on there being sufficient water in the dam for the needs of the inhabitants of Kingwilliamstown.<sup>49</sup> However, in reaching his decision, Gardner JP stated that the equitable principles of English law were "in harmony" with the principles of "our" law. He subsequently referred to Wessels on the

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<sup>43</sup> 1951 (2) SA 371 (A).

<sup>44</sup> *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 375.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Idem* 376.

<sup>48</sup> *Haynes v Kingwilliamstown Municipality* 1950 (3) SA 841 (E) 848.

<sup>49</sup> *Ibid.*

subject.<sup>50</sup> The court subsequently decided that in the matter at hand, granting specific performance would “bear hardly” on the Municipal Council.<sup>51</sup> De Villiers AJA on appeal noted that it was common cause between the parties that no material harm had been caused to the appellant by the respondent’s breach of contract.<sup>52</sup> This was significant, as it would make a claim for damages obsolete. The only appropriate remedy in this instance, it is submitted, would have been specific performance. This much was accepted by the court. However, the court then made mention of the discretion it possessed to refuse to decree specific performance, regardless of the type of contract in question. It even went so far as to state grounds upon which specific performance would not be granted. These grounds were, firstly, in cases where damages would adequately compensate the plaintiff, secondly, where it would be difficult for the court to enforce the decree, thirdly, where the thing claimed can readily be bought anywhere, and fourthly, where specific performance entailed the rendering of services of a personal nature.<sup>53</sup> A further ground was added by the court, namely “where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice or would be inequitable under all circumstances.”<sup>54</sup> These grounds were not in accordance with the Roman-Dutch view on specific performance as primary remedy in breach of contract. They created the notion that specific performance would only be granted in unique cases, and that damages was in fact the primary remedy available to a plaintiff in case of breach of contract. It is submitted that the grounds upon which specific performance would be denied by a court were incorporated into South African law erroneously from English sources such as Fry<sup>55</sup> and Storey,<sup>56</sup> and differed fundamentally from the Roman-Dutch concept of specific performance and when it should be granted. In the case under discussion, specific performance was refused by the court based ultimately on the hardship it would have caused the respondent had the remedy indeed been granted. While it is agreed that this would indeed have been the case in the present matter, the court erred in denying the Roman-Dutch rule that specific performance would always be granted in cases where the claimant applied for the remedy and the performance remained possible. The court should have refused to decree specific performance based on the fact that performance had become impossible because of the

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<sup>50</sup> *Idem* 849.

<sup>51</sup> *Idem* 849.

<sup>52</sup> *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 377.

<sup>53</sup> *Idem* 378.

<sup>54</sup> *Idem* 379. See also Beck’s criticism of De Villiers AJA’s decision at Beck (1987) *CILSA* 197-198.

<sup>55</sup> See *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 379.

<sup>56</sup> *Ibid.*

unprecedented drought. Instead the court based its decision on English legal principles and demoted the remedy of specific performance to an equitable remedy – exactly as it was (and still is) perceived in English law.

The decision in *Haynes* caused a lot of confusion concerning the question as to when specific performance would be the most appropriate remedy for breach of contract in subsequent decisions dealing with that question. It would be reasonable to state that, although courts have criticised the decision in *Haynes* primarily for its dependence on English legal principles, the confusion created by that decision is still felt today.<sup>57</sup> *Haynes*' legacy was evident as early as the decision in *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd*.<sup>58</sup> *In casu*, the court decided to refuse an order of specific performance of a contract between a landlord and tenant, because “it would be a difficult matter for the court to supervise and see that its order is carried out, and as the question whether there has been specific performance of the court’s order was difficult to determine, it would be difficult to enforce it.”<sup>59</sup> The court referred explicitly to the grounds provided by De Villiers AJA in *Haynes* upon which an order of specific performance would not be decreed. It has already been determined above that these grounds were imported directly from English law, and were unfamiliar to Roman-Dutch law. Furthermore, it has never been considered the duty of the court to see to it that his order was carried out satisfactorily. Foxcroft J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another*<sup>60</sup> decided that if the appellant chose to take the risk of the respondent not performing optimally or satisfactorily, and this did indeed occur, several other remedies were available to said appellant.

Something ought to be mentioned about the discretion courts possessed (and seemingly still do) to refuse an order of specific performance. Because of the fact that it was mentioned for the first time by a unified South African court in *Berry*,<sup>61</sup> and in that case Innes J seemingly depended on English law to determine the suitability of specific performance as primary

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<sup>57</sup> According to Beck (1987) *CILSA* 198, the *Haynes*-decision had at the time of that article been referred to some twenty times in the preceding thirty-five years.

<sup>58</sup> 1953 (1) SA 246 (W).

<sup>59</sup> *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W) 249.

<sup>60</sup> 2003 (5) SA 73 (C) at 85.

<sup>61</sup> Innes J in fact mentioned the discretion of a court to refuse an order of specific performance in the Supreme Court of Transvaal’s decision in *Shakinovsky v Lawson and Smulowitz* 1904 TS 326, in which he exclaimed that “a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the court either to grant such an order or not.” The *Berry*-case was, however, the first decision after unionisation in which this discretion was mentioned.

contractual remedy, it is essential to determine whether this discretion is in fact a relic of English law. Dondorp has little doubt that this was indeed the case. He states that common-law rules had “crept in insidiously and as it were almost by accident, so that grounds for refusing specific performance listed by some academic writers in the early part of the twentieth century were virtually the same as those applied by English courts.”<sup>62</sup> Hefer JA in *Benson* stated that “it came about that English cases came to be followed somewhat indiscriminately without noticeable regard to the fundamentally different approach which the courts in England adopt when it comes to the exercise of the discretion to order performance.”<sup>63</sup> The difference between the judicial discretion to decree specific performance in Roman-Dutch law and the judicial discretion to decree that remedy in English law, is that in the former, the claimant has the right to claim the remedy, subject to the discretion of the court to refuse it, whilst in the latter, the claimant has no right to the remedy of specific performance, except if the court deems it fit to grant this remedy in accordance with considerations of Equity.<sup>64</sup> This has been stated in the previous chapter in the discussion of the *Berry*-case. Beck<sup>65</sup> states that the judicial discretion of South African courts in relation to the remedy of specific performance is a legacy from the Equity jurisdiction of English law where this question is approached from a remedial point of view with the remedy being granted on a discretionary basis. This statement is supported by both Lubbe<sup>66</sup> and Dondorp.<sup>67</sup> Interestingly enough, Lubbe states that the denial of specific performance would leave an innocent party or plaintiff in a case of breach of contract with only a claim for damages. The problem with this is, according to Lubbe, that the “claim for damages would require from the plaintiff not only proof of the extent of the loss but would also bring into play the rules regarding remoteness and mitigation which attempt to draw a balance between the interests of the parties.”<sup>68</sup> This fact is especially true of the athlete’s contract, as it is virtually impossible to determine the value of a professional athlete’s services.<sup>69</sup> The discretion of the court in

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<sup>62</sup> Dondorp (2010) *Fundamina* 40-41.

<sup>63</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 785. This “fundamental difference” was alluded to by Gross (1934) *SALJ* 355, who states that although the practical result might be the same in the two systems (Roman-Dutch and English), “the difference between them is fundamental”.

<sup>64</sup> Gross (1934) *SALJ* 355.

<sup>65</sup> Beck “The coming of age of specific performance” 1987 *CILSA* 197-198.

<sup>66</sup> Lubbe in Smits *et al* (Eds) (2008) 100.

<sup>67</sup> Dondorp (2010) *Fundamina* 42.

<sup>68</sup> Lubbe in Smits *et al* (Eds) (2008) 101. The difficulty of proving the extent of damages suffered was alluded to by Tindall JA in *Johannesburg Stock Exchange v Northern Transvaal (Messina) Copper Exploration Co.* 1945 AD 529 at 540. *In casu*, the Court stated that “relief by way of damages...would to a great extent be ineffectual as compensation for the breach of contract, because of the difficulty of proving damages.”

<sup>69</sup> It may be argued that it is unnecessary to determine the value of a professional athlete’s services, as it



cases of specific performance would prove confusing to South African courts during the entire twentieth century as well as in the twenty-first century. There is no doubt that this confusion can be attributed to the influence of English notions on Equity. It should, however be mentioned that the author does not deny that judicial discretion to decree specific performance is entirely unfamiliar to Roman-Dutch law.<sup>70</sup> The point which is being made is that English influence resulted in South African courts treating the remedy of specific performance as something that should best be decreed with the utmost caution (as demanded by Equity), as opposed to (South African) courts perceiving the remedy as one which ought to be decreed as primary remedy in every matter of breach of contract in which performance remained possible and the claimant applied for this remedy.

However much the matter of judicial discretion caused uncertainty among South African courts in the first part of the twentieth century, the availability of the remedy of specific performance as primary remedy for breach of contract was never denied explicitly.<sup>71</sup> In *Woods v Walters*,<sup>72</sup> Innes CJ (as he was by that time) referred to the process of “*gijzeling*” in Roman-Dutch law by which a debtor could be compelled by imprisonment to render performance in terms of a contract. This is something that Innes CJ should have done in the *Berry*-case. Although confirming the plaintiff’s right to specific performance, the court made it very clear that this right was subject to its “discretion to say whether in *any particular case* specific performance is the proper and appropriate remedy.”<sup>73</sup> This statement is not in line with Roman-Dutch practice. In the latter, as explained above, the court could use its discretion to deny a decree of specific performance in matters in which performance had

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would be more practical to determine the monetary value of the remainder of an athlete’s contract at the moment of breach of contract by such athlete. However, the “value of a contract” is at most a very vague concept, as it refers to the maximum amount a player can receive over a fixed period if all requirements of the contract are met by the athlete over the fixed period. An athlete, in other words, will only receive the monetary “value” of his contract when he, for argument’s sake, has played in all his team’s matches during the specific fixed period, that his team has won all these matches (which means that he would have received winning bonuses for all matches played by him for his team), had never once been replaced or injured during the period, had at all times maintained optimal levels of fitness and had attended promotional activities. It goes without saying that this is an impossible task, and therefore the argument that the “value” of a contract should have any influence in the determination of the extent of damages at breach of contract. Acknowledgment is hereby given to Professor Rian Cloete, head of the Department of Procedural law at the University of Pretoria, for his insights on the meaning of the “value” of a contract.

<sup>70</sup> In this instance it is agreed with Hefer JA in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781 that “it is settled law that the grant or refusal of such an order (of specific performance) is entirely a matter for the discretion of the Court in which the claim is made.”

<sup>71</sup> Chapter 5 of this thesis discusses in depth the influence of English law on South African court decisions throughout the twentieth century.

<sup>72</sup> 1921 AD 303.

<sup>73</sup> *Woods v Walters* 1921 AD 303 at 310. See in this regard also Gross (1934) SALJ 355.

become impossible, where the plaintiff preferred to claim damages, or where the property claimed could be easily obtained elsewhere without too much trouble for the plaintiff in question. Innes CJ's statement seems to imply that the court now had the discretion to deny specific performance in any particular case in which the court felt that specific performance would be unsuitable, based on any reason the court could fathom. This has never been in accordance with Roman-Dutch law, as eventually decided in *Benson*,<sup>74</sup> and it is submitted that the extent to which a court's discretion could be applied in matters of specific performance as advocated by Innes CJ in the cases discussed above, undermined the Roman-Dutch status of specific performance as primary remedy for breach of contract.

Until the Appellate Division's decision in *Schierhout v Minister of Justice*,<sup>75</sup> that division of the Union of South Africa had never had to decide on whether the remedy of specific performance was the most suitable remedy for breach of a contract of *personal services*. Unfortunately, Innes CJ once again ignored the Roman-Dutch view on this issue, and chose to refer to English law. Whereas the result of the same court's reference to English law in *Thompson v Pullinger* was the same as it would have been had the court referred to the correct (Roman-Dutch) sources, in *Schierhout* the court's reference to English law led directly to a wrong decision. Deciding on whether it would be appropriate to decree specific performance against an employee who had committed breach of contract, Innes CJ stated that the courts (insinuating South African courts) "will not decree specific performance against the employee" because, according to him (the court), it was "a well-established rule of English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages."<sup>76</sup> Referring to Macdonell's *Master and Servant*, Innes CJ went further to state that although Equity courts had "at one time" issued decrees of specific performance (for any type of contract", the practice (of decreeing specific performance "had long been abandoned".<sup>77</sup> The reason for this abandonment of the remedy of specific performance in English law, especially as far as contracts of personal services were concerned, was supposedly twofold: firstly, it was inadvisable to compel a person to employ another whom he did not trust in a position which imported a close relationship, and secondly was the absence of mutuality, "for no Court could by its order compel a servant to perform

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<sup>74</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 784-785.

<sup>75</sup> 1926 AD 99.

<sup>76</sup> *Schierhout v Minister of Justice* 1926 AD 99 at 107.

<sup>77</sup> *Ibid.*

his work faithfully and diligently.”<sup>78</sup> Within this statement resonates Desai J’s decision seventy six years later in *Santos Professional Football Club (Pty) Ltd v Igesund and Another*,<sup>79</sup> in which the court stated that a person compelled to perform personal services would do so with diminished enthusiasm and commitment.<sup>80</sup> The court in *Santos* in fact referred to Innes CJ’s decision in *Schierhout* in vague terms, stating that “the Courts have previously held that the reasons militating against an award for specific performance of a contract of employment were so compelling that they were generally regarded as a rule of law, that specific performance of such contracts would never be granted.”<sup>81</sup> Innes CJ’s decision on the matter in *Schierhout* did not concord with Roman-Dutch law. It has been established in this chapter that the procedure known as “*gijzeling*” was used in Roman-Dutch law to secure specific performance in the form of rendering an account or performing a specific act. It has also been established that “performing a specific act” included performance of obligations both *ad dandum* and *ad faciendum*, under which services of a personal nature resorted. Innes CJ erroneous dependence on English law was confirmed by Van Dijkhorst J in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*,<sup>82</sup> in which he stated the following:

“As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. There is, in my view, no reason why this general rule should not also be applicable to contracts of employment.”<sup>83</sup>

It is submitted, though that Innes CJ’s main error at the time of judgment in *Schierhout* was his neglect to refer to Roman-Dutch principles concerning a subject on which sufficient Roman-Dutch authority existed, and opting instead to consult English law on said subject. It is submitted further that English law and its influence on the South African perception of specific performance should for once and all be eradicated, in order to ascertain objectively whether the remedy of specific performance is the *most appropriate* remedy for breach of the *athlete’s contract* specifically.

The decision in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd*<sup>84</sup> was the first in a series of decisions during the 1980’s, culminating in the *Benson*-decision

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<sup>78</sup> *Ibid.*

<sup>79</sup> 2002 (5) SA 697 (C).

<sup>80</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C) 700.

<sup>81</sup> *Idem* 701.

<sup>82</sup> 1982 (4) SA 151 (T).

<sup>83</sup> *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another* 1982 (4) SA 151 (T) 156.

discussed below, in which the courts rejected the English influence mentioned above, and provided the remedy of specific performance with its rightful status in South African law: that of primary contractual remedy available to a plaintiff seeking this remedy, provided that the performance claimed remained possible. In the abovementioned case, the court confirmed the “general rule” (no doubt referring to the Roman-Dutch rule) that a party to a contract which had previously been rescinded by the other party in a wrongful manner, could hold such other party to the contract “if he (the wronged party) so elects”. The court then went further to state that there was no reason why that “general rule” should not be applicable to contracts of employment as well.<sup>85</sup> This is doubly significant to this chapter and this thesis, as it states unequivocally that specific performance is not only a *primary remedy* in South African law, but also a primary remedy for breach of contracts of personal services, such as employment contracts, and ultimately also athletes’ contracts. Coetzee J soon followed suit in the case of *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others*.<sup>86</sup> In this case the court stated specifically that the remedy of specific performance was one to which a party was entitled to “as of right”. The court stated further that the remedy (of specific performance) could not be withheld “arbitrarily and capriciously”.<sup>87</sup> In confirming the status of specific performance as primary remedy for breach of contract, Coetzee J referred with distinction to the High Court’s decision in *Industrial and Mercantile Corporation v Anastassiou Brothers*,<sup>88</sup> in which it was stated that the court should “avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform and which, when he was called upon to perform by summons, and he chose to defy the claim of the plaintiff.”<sup>89</sup> Coetzee J also specifically criticised the ground mentioned in *Haynes* above that specific performance would not be granted if it were difficult for the court to supervise the proper performance of the judgment in question.<sup>90</sup> The case of *Benson v SA Mutual Life Assurance Society*<sup>91</sup> should finally have

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<sup>84</sup> 1982 (4) SA 151 (T).

<sup>85</sup> *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another* 1982 (4) SA 151 (T) 156.

<sup>86</sup> 1984 (3) SA 861 (W).

<sup>87</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 879.

<sup>88</sup> 1973 (2) SA 601 (W).

<sup>89</sup> *Industrial and Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W) 609; *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 880.

<sup>90</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction*

laid to rest the uncertainty brought about by the *Haynes*-decision as to a claimant's right to specific performance as primary contractual remedy. Hefer JA confirmed that a plaintiff in a contractual matter had the right to elect whether to demand specific performance or to sue for damages, and that "the Courts will as far as possible give effect to his selection...subject only to the qualification that the court has a discretion to grant or to refuse an order of specific performance".<sup>92</sup> The court then went further to confirm that "this right" (to specific performance) was the "cornerstone" of our law relating to specific performance.<sup>93</sup> Although the court's discretion was described by Hefer JA as one familiar to Roman-Dutch law, he stated that the purpose of such discretion was merely to prevent injustice.<sup>94</sup> Referring to three of the grounds advanced by De Villiers AJA in *Haynes* and discussed above, Hefer JA criticised these grounds severely. Mentioning the ground that specific performance would not be granted where an award of damages would adequately compensate the plaintiff, Hefer called this ground "a complete negation of the plaintiff's right to select his remedy."<sup>95</sup> The second ground mentioned by Hefer JA, namely that specific performance would not be granted if the goods in question could readily be bought anywhere, was described by him as "equally foreign to our law and inconsistent with a plaintiff's right to performance."<sup>96</sup> The third ground alluded to by the court in *Benson*, was one which was advanced in the case of *Thompson v Pullinger* discussed above, and which proclaimed that if contracts for the sale of shares which were dealt with on the market daily were breached, the court would not decree specific performance for the delivery of such shares, even if it was in terms of a valid contract.<sup>97</sup> Hefer JA also rejected this ground based on the fact that it was derived from English law. In making mention of the erroneous implementation of the English notion of specific performance, Hefer JA stated that there was neither need nor reason for this process to continue".<sup>98</sup> It is therefore submitted that Hefer JA's decision in *Benson* restored the status of specific performance to that of primary remedy in case of breach of contract, which is the status it possessed in Roman and Roman-Dutch law.

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*(City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 880-881.

<sup>91</sup> 1986 (1) SA 776 (A).

<sup>92</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782. The scope of the court's discretion is discussed in the text above.

<sup>93</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782.

<sup>94</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783.

<sup>95</sup> *Idem* 784.

<sup>96</sup> *Idem* 784.

<sup>97</sup> *Idem* 784.

<sup>98</sup> *Idem* 785.

## 7.4. The remedy of specific performance and the Constitution of the Republic of South Africa

Although specific performance was confirmed as primary contractual remedy in the *Benson*-case discussed above, the question always remained whether the position would still be the same after South Africa adopted a new Constitution in 1996. The question was asked pertinently by Desai J in *Santos Professional Football Club v Igesund and Another*<sup>99</sup> whether compelling a party to a contract to perform his duties in terms of that contract, might not impede on that party's dignity. The right to dignity is afforded in terms of section 10 of the Constitution, which reads as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

It is a fair question to ask whether compelling a person to commit an act against such person's will would not impede on that person's right to inherent dignity. The question is even more significant when the act in question involves services of a personal nature, such as the playing of sport. As far as the latter is concerned, Desai J in *Santos* also mentioned as one of the reasons not to compel specific performance a “disapproval of forced labour”.<sup>100</sup> This is a clear reference to section 13 of the Constitution, which provides to every individual the right not to be subjected to forced labour.<sup>101</sup> A final Constitutional right relevant to the matter under discussion is the right to freedom of trade, occupation and profession afforded all citizens of the Republic of South Africa by section 22 of the Constitution.<sup>102</sup> It is consequently possible that compelling a person to perform an act or duty such person no longer wishes to perform, will impede on that person's Constitutional rights mentioned above. On the other hand, the common law doctrine of *pacta sunt servanda* would demand from a person who has entered into a contract freely and willingly, to honour such contract. Do the Constitutional values of freedom, equality and dignity negate the doctrine of *pacta sunt servanda* to a secondary consideration in matters involving breach of contract? One must look to post-Constitutional South African case law in order to solve this seeming predicament.

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<sup>99</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C) at 701.

<sup>100</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C) at 701.

<sup>101</sup> Section 13 of the Constitution of the Republic of South Africa, 1996 reads as follows: “No one may be subjected to slavery, servitude or forced labour.”

<sup>102</sup> Section 22 of the Constitution of the Republic of South Africa, 1996 reads as follows: “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

The abovementioned question was first raised in the post-Constitutional dispensation in the case of *Brisley v Drotsky*.<sup>103</sup> *In casu*, the well-known *Shifren*-principle,<sup>104</sup> which stated that the verbal amendment of a written contract was not allowed, came under discussion. The principle was considered “hard law”, and it was argued that it should be revised in a post-Constitutional legal dispensation. Commenting not only on the *Shifren*-principle, but on the common law doctrine of *pacta sunt servanda* and its place in post-Constitutional South Africa, Cameron JA in a separate judgment stated the following:<sup>105</sup>

“On the contrary, the Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons...is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”

This statement was a clear confirmation of the post-Constitutional validity of the *pacta sunt servanda* doctrine.<sup>106</sup> Furthermore, it implied that if a person had entered into a contract freely and willingly, the Constitutional value of dignity would actually demand of that person to honour his contract. Consequently, it would be considered Constitutional to compel a party to a contract who no longer wishes to be bound to that contract, to honour his contractual obligations. This view was supported by Brand JA in *Afrox Healthcare Bpk v Strydom*,<sup>107</sup> in which the court stated that “the Constitutional value of freedom of contract comprises what is expressed by the doctrine *pacta sunt servanda*”,<sup>108</sup> as well as in *Napier v Barkhuizen*.<sup>109</sup> The right to specific performance of a contract involving personal services in the post-

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<sup>103</sup> 2002 (4) SA 1 (SCA).

<sup>104</sup> In the case of *SA Sentrale Graanmaatskappy v Shifren en Andere* 1964 (4) SA 760, the Court had to decide whether a so-called “non-variation” clause, effectively stating that the contract in question could not be amended verbally, was valid. Steyn JP stated at 766 that it could not be derived from the fact that the parties were permitted to revoke their agreement verbally, that they possessed the same freedom with regard to verbally *amending* their agreement where they have explicitly decided in the contract between them that no amendment to that contract would be valid unless in writing.

<sup>105</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

<sup>106</sup> Lewis “Fairness in South African Contract Law” 2003 *SALJ* 330 at 335 states that “it must not be forgotten that the maxim *pacta sunt servanda* is still a cornerstone of our law of contract”.

<sup>107</sup> 2002 (6) SA 21 (SCA).

<sup>108</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 38. The Afrikaans text read as follows: “Die grondwetlike waarde van kontrakteersvryheid omvat, op sy beurt, weer die beginsel wat in die stelreël *pacta sunt servanda* uitdrukking vind.” See in this regard also Brand JA “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution” 2009 *SALJ* 71, as well as Bhana and Pieterse “Towards a reconciliation of contract law and Constitutional values: *Brisley* and *Afrox* revisited” 2005 *SALJ* 865.

<sup>109</sup> 2006 (4) SA 1 (SCA). In discussing the case, Bhana referred to the Appeal Court’s caution in pointing out that the Constitutional values of dignity, equality and the advancement of human rights and freedoms did not provide a “general all-embracing touchstone for invalidating a contractual term.” See Bhana “The law of contract and the Constitution: *Napier v Barkhuizen*” 2007 *SALJ* 269.

Constitutional dispensation was confirmed in *Santos*<sup>110</sup> as well as in *Nationwide Airlines (Pty) Ltd v Roediger and Another*.<sup>111</sup> It can be concluded, then, that the status of the remedy of specific performance as primary contractual remedy (also in cases of contracts of services of a personal nature) has been confirmed by the Appeal Court, as well as subsequent High Court decisions in the post-Constitutional South African dispensation. This means that the current South African view of the remedy of specific performance corresponds with the view which originated in Roman law and was established in Roman-Dutch law, despite some English influence, especially during the early part of the twentieth century.

The decision in *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd*<sup>112</sup> was the first in a series of decisions during the 1980's, culminating in the *Benson*-decision discussed below, in which the courts rejected the English influence mentioned above, and provided the remedy of specific performance with its rightful status in South African law: that of primary contractual remedy available to a plaintiff seeking this remedy, provided that the performance claimed remained possible. In the abovementioned case, the court confirmed the "general rule" (no doubt referring to the Roman-Dutch rule) that a party to a contract which had previously been rescinded by the other party in a wrongful manner, could hold such other party to the contract "if he (the wronged party) so elects". The court then went further to state that there was no reason why that "general rule" should not be applicable to contracts of employment as well.<sup>113</sup> This is doubly significant to this chapter and this thesis, as it states unequivocally that specific performance is not only a *primary remedy* in South African law, but also a primary remedy for breach of contracts of personal services, such as employment contracts, and ultimately also athletes' contracts. Coetzee J soon followed suit in the case of *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others*.<sup>114</sup> In this case the court stated specifically that the remedy of specific performance was one to which a party was entitled to "as of right". The court stated further that the remedy (of specific performance) could not be withheld "arbitrarily and capriciously".<sup>115</sup> In confirming the status of specific performance as primary remedy for

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<sup>110</sup> More specifically in the decision of the Full Bench of the Cape High Court.

<sup>111</sup> 2008 (1) SA 293 (W).

<sup>112</sup> 1982 (4) SA 151 (T).

<sup>113</sup> *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another* 1982 (4) SA 151 (T) 156.

<sup>114</sup> 1984 (3) SA 861 (W).

<sup>115</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 879.



breach of contract, Coetzee J referred with distinction to the High Court's decision in *Industrial and Mercantile Corporation v Anastassiou Brothers*,<sup>116</sup> in which it was stated that the court should "avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform and which, when he was called upon to perform by summons, and he chose to defy the claim of the plaintiff."<sup>117</sup> Coetzee J also specifically criticised the ground mentioned in *Haynes* above that specific performance would not be granted if it were difficult for the court to supervise the proper performance of the judgment in question.<sup>118</sup> The case of *Benson v SA Mutual Life Assurance Society*<sup>119</sup> should finally have laid to rest the uncertainty brought about by the *Haynes*-decision as to a claimant's right to specific performance as primary contractual remedy. Hefer JA confirmed that a plaintiff in a contractual matter had the right to elect whether to demand specific performance or to sue for damages, and that "the Courts will as far as possible give effect to his selection...subject only to the qualification that the Court has a discretion to grant or to refuse an order of specific performance".<sup>120</sup> The court then went further to confirm that "this right" (to specific performance) was the "cornerstone" of our law relating to specific performance.<sup>121</sup> Although the court's discretion was described by Hefer JA as one familiar to Roman-Dutch law, he stated that the purpose of such discretion was merely to prevent injustice.<sup>122</sup> Referring to three of the grounds advanced by De Villiers AJA in *Haynes* and discussed above, Hefer JA criticised these grounds severely. Mentioning the ground that specific performance would not be granted where an award of damages would adequately compensate the plaintiff, Hefer called this ground "a complete negation of the plaintiff's right to select his remedy."<sup>123</sup> The second ground mentioned by Hefer JA, namely that specific performance would not be granted if the goods in question could readily be bought anywhere, was described by him as "equally foreign to our law and inconsistent with a plaintiff's right to performance."<sup>124</sup> The

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<sup>116</sup> 1973 (2) SA 601 (W).

<sup>117</sup> *Industrial and Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W) 609; *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*; *LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 880.

<sup>118</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*; *LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) 880-881.

<sup>119</sup> 1986 (1) SA 776 (A).

<sup>120</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782. The scope of the Court's discretion is discussed in the text above.

<sup>121</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782.

<sup>122</sup> *Idem* 783.

<sup>123</sup> *Idem* 784.

<sup>124</sup> *Idem* 784.

third ground alluded to by the court in *Benson*, was one which was advanced in the case of *Thompson v Pullinger* discussed above, and which proclaimed that if contracts for the sale of shares which were dealt with on the market daily were breached, the court would not decree specific performance for the delivery of such shares, even if it was in terms of a valid contract.<sup>125</sup> Hefer JA also rejected this ground based on the fact that it was derived from English law. In making mention of the erroneous implementation of the English notion of specific performance, Hefer JA stated that there was neither need nor reason for this process to continue”.<sup>126</sup> It is therefore submitted that Hefer JA’s decision in *Benson* restored the status of specific performance to that of primary remedy in case of breach of contract, which is the status it possessed in Roman and Roman-Dutch law.

## 7.5. Conclusion

The decision in *Cohen v Shires, Mchattie and King* has been mentioned above as one of the first South African cases in which specific performance was acknowledged as contractual remedy in South Africa. It has also been stated above, however, that in the mentioned case Voet’s point of view on the availability and status of specific performance, which was contrary to Roman-Dutch practice at the time, was largely depended upon. The rule that the creditor had the option of selecting the remedy he thought most suitable to him, was established in the *Cohen*-decision. In the case of *Thompson v Pullinger*, the court confirmed the availability of specific performance as primary remedy for breach of contract, and also stated that Voet’s point of view discussed above was “in conflict with the other great authorities, and with the practice now followed in South Africa.”<sup>127</sup> Unfortunately, subsequent decisions, most significantly that of Innes J in *Farmers’ Co-operative Society v Berry*, depended on English law to determine whether specific performance was available as primary contractual remedy in South Africa. This decision, along with several others, are discussed in detail, in order to illustrate the significant influence of English law on the South African perception of the remedy of specific performance.

The fact that many South African lawyers were trained in England during the early part of the twentieth century<sup>128</sup> inevitably led to the fact that South African courts made liberal use of English sources in order to reach decisions on the suitability of specific performance as

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<sup>125</sup> *Idem* 784.

<sup>126</sup> *Idem* 785.

<sup>127</sup> *Thompson v Pullinger* 1894 (1) Off Rep 298 at 301.

<sup>128</sup> Especially since 1910, when South Africa officially became a Union of four provinces under English rule.

remedy for breach of contract. The problem was (and still is) that the Roman-Dutch and English perceptions of specific performance were (and still are) fundamentally different. English influence led to a situation in which South African courts adopted the notion that specific performance would never be granted except in exceptional circumstances.

Despite the arguments made above and earlier in this chapter against it, specific performance remains a secondary remedy in English law which will only be granted if equity demands it. This fact has led to a lot of confusion in South African case law, especially since 1910. This confusion was fuelled without a doubt by Innes J's mention of the English practice that a court will have a discretion when deciding on specific performance as remedy for breach of contract in the case of *Farmers' Co-Operative Society (Reg.) v Berry*.<sup>129</sup> The mention of this discretion, as well as the dependence of Courts on English rather than Roman-Dutch sources soon after unionisation, confused South African courts to such an extent that when the case of *Haynes v Kingwilliamstown Municipality*<sup>130</sup> was decided in 1951, the remedy of specific performance had been all but negated to a secondary remedy in South African law that would seldom be granted. In fact, Gardner JP in *Haynes* stated unequivocally that the equitable principles of English law were "in harmony" with the principles of "our" law as far as specific performance was concerned.<sup>131</sup> This was a fundamental error, and although Hefer JA in *Benson v SA Mutual Life Assurance Society* refuted the abovementioned statement by Gardner JP, subsequent courts were still uncertain as to the propriety of specific performance as contractual remedy in law. The relevance of this uncertainty is nowhere clearer than in the court *a quo*'s decision in *Santos*, and therefore, while it is submitted without any doubt that despite English influence, the remedy of specific performance is a primary one in South African law, it is not certain yet whether it is the *most suitable* remedy for breach of the *athlete's contract*. It is therefore essential to investigate other legal systems' treatment of the athlete's contract and the way in which they handle contractual disputes as far as these contracts are concerned, as will be done in the next chapter.

English influence was criticised in South African cases such as *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd*<sup>132</sup> and in the *Benson*-decision discussed above. Although especially the latter decision should have clarified the position as to the status of specific performance in South African law, decisions such as that of the court *a quo* in *Santos*

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<sup>129</sup> 1912 AD 343. See Innes J's remark at 350.

<sup>130</sup> 1951 (2) SA 371 (A).

<sup>131</sup> *Haynes v Kingwilliamstown Municipality* 1950 (3) SA 841 (E) 849.

<sup>132</sup> 1982 (4) SA 151 (T).

*Professional Football Club (Pty) Ltd v Igesund and Another* is indicative of the fact that the influence of cases like *Berry* and *Haynes* (and their erroneous dependence on English law) has not been eroded entirely. However, the position of specific performance as primary remedy for breach of contract in South Africa and the underlying doctrine of *pacta sunt servanda* have been confirmed as cornerstones of the South African law of contract in a post-constitutional legal dispensation in cases such as *Brisley v Drotsky*,<sup>133</sup> *Afrox Healthcare Bpk v Strydom*<sup>134</sup> and *Napier v Barkhuizen*.<sup>135</sup> The fact that specific performance is also available as primary remedy for breach of contracts which involve personal services, was confirmed in the Full Bench decision in *Santos*,<sup>136</sup> as well as in *Nationwide Airlines (Pty) Ltd v Roediger and Another*.<sup>137</sup>

It is concluded that in Roman-Dutch law, the remedy of specific performance was perceived as a primary one available to a contractual creditor who elected this remedy in case of breach of contract, provided the performance in question remained possible. This perception has been adopted by South African law despite English influence which by its nature negate the remedy to a mere equitable one. Furthermore, it does seem that the current Constitutional dispensation in South African law has confirmed the philosophy of *pacta sunt servanda*, which means that despite uncertainty, the remedy of specific performance currently is still a primary one as it was in Roman-Dutch law. It is submitted that this is also true as far as athletes' contracts are concerned.

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<sup>133</sup> 2002 (4) SA 1 (SCA).

<sup>134</sup> 2002 (6) SA 21 (SCA).

<sup>135</sup> 2006 (4) SA 1 (SCA).

<sup>136</sup> 2003 (5) SA 73 (C).

<sup>137</sup> 2008 (1) SA 293 (W).

## CHAPTER 8: COMPARISON BETWEEN THE TREATMENT OF ATHLETES' CONTRACTS IN SOUTH AFRICA AND ABROAD

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### 8.1. Introduction

Having established the nature of the athlete's contract and constructed a working definition for this type of contract for the first time in law literature, it is of vital importance to investigate and discuss the treatment of this type of contract by other jurisdictions. Chapter 3 of this thesis discussed South African courts' treatment of this type of contract, especially as far as the most suitable remedy for breach thereof is concerned. Unfortunately, the Appeal Court of South Africa has not had the opportunity to decide on whether the remedy of specific performance would be the most suitable for breach of the *athlete's contract*. There have been but a few decisions by the Provincial and Local Divisions of the High Court of South Africa regarding this issue, and they have been contradictory at best. Because professional sport in South Africa is relatively young (a fact already alluded to in chapter 3) it is imperative to look at the treatment of contractual disputes by countries that have rich histories as far as professional sport and the contracts regulating it is concerned. In doing so, this chapter, and ultimately this thesis, will aim to provide the courts with a clear indication of the most suitable remedy for breach of athletes' contracts not only in South Africa, but globally.<sup>1</sup>

Because of the vast amount of international case law available for the abovementioned purpose, this chapter will be structured according to the treatment of athletes' contract in different countries. Case law will obviously be preferred in determining a specific country's treatment of the athlete's contract and breach thereof, but numerous secondary sources exist which will contribute significantly to solving this issue. In order to put the different jurisdictions' treatment of the athlete's contract in context, an overview will be provided in each country's case of the organisation of at least the main sporting codes of that specific country, in other words the sporting bodies that exist within those countries which govern the sport in question. The jurisdictions discussed in this chapter have been selected according to

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<sup>1</sup> The reason why it is important to establish the most suitable and efficient remedy for breach of contract globally, is because of the global nature of sport as a business. Common ground on the subject is essential.

the contribution each can make towards determining the ultimate aim of this thesis: to determine whether specific performance is the most suitable remedy for breach of the athlete's contract.

## **8.2. The treatment of athletes' contracts in other jurisdictions with focus on specific performance as remedy for breach of these contracts**

### **8.2.1. Jurisdictions within the United States of America<sup>2</sup>**

The significance of a discussion of case law within jurisdictions of the US lies in that country's vast history of not only professional sport, but also litigation relating thereto. According to Champion,<sup>3</sup> the "Standard Player's Contract" in US sport is an employment contract that specifies the player in question's rights. The contract states specifically that the player in question possesses unique skills and that the activities of the player are controlled by the team. It is possible for players to negotiate "Specialty Clauses", which would relate to matters like signing bonuses, option clauses, no-cut clauses and other bonuses relating to incentives.<sup>4</sup> The inclusion of these "Specialty Clauses" will depend largely on the player's bargaining power. It must be kept in mind that one of the main features of the athlete's contract is the fact that the parties thereto have equal bargaining power as far as the contract between them is concerned.<sup>5</sup> An important part of the athlete's contract, according to Champion, includes the clauses that deal with termination of the agreement, assignment and remedies.<sup>6</sup> He mentions specifically that the possible remedies available to the parties are damages, restitution, and specific performance. When one considers US courts' treatment of the athlete's contract discussed below, it is very clear that of these remedies mentioned by

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<sup>2</sup> Hereinafter referred to in the text as the "USA".

<sup>3</sup> Champion (2005) 7.

<sup>4</sup> *Ibid.*

<sup>5</sup> Champion at 8 refers to the athlete's bargaining power as "juice". It is defined as the "ability to write your own ticket based on unique skills and rampant popularity." The more "juice" a player possesses, the greater his power to negotiate or modify his contract. An interesting example of the tremendous bargaining power possessed by some professional athletes, is that of football player Jim Kelly. During the 1980's, Kelly, who had played quarterback for the United States Football League's Houston Gamblers, negotiated that two special clauses had to be added to his contract with the latter: the first stating that he would receive a new sports car every month, and the second that his salary would automatically increase if a higher paid quarterback were to enter the league. The latter is known as an "escalator clause". Another example is that of Major League Baseball player Dave Parker, who, because of his rising stardom, could actually negotiate bonuses based on crowd attendance to matches in which he played. This was an indication of the fact that the athletic skills possessed by a single baseball player could ensure larger crowd attendance. This is at least what the club and the player believed and contracted on. For a discussion of the case itself, see Snyder "The Cobra's contract: Revisiting Dave Parker's 1979 contract with the Pittsburgh Pirates" 2012 *Alb. Govt. L. Rev.* 188.

<sup>6</sup> Champion 7.

Champion, specific performance (and of course negative injunction) seems to be the preferred remedy for breach of an athlete's contract in particular. The assignment clause, which is fairly standard in professional athletes' contracts in the USA, may prove problematic in certain instances. According to this clause, a club is allowed to sell, exchange or assign the contract in question to any other club, and the athlete must serve out the contract with his new "employer" according to the terms of the existing contract. In this case, it is not the *services* of the athlete being sold, but the *contract* itself. If specific performance is perceived as the primary remedy for breach of the athlete's contract by the athlete, the question should be asked whether the same remedy may be used by the athlete in order to compel his club to allow him to serve out his contract with the present club, if, of course, the athlete can show that there was some form of breach on the *club's* part. The matter of breach of contract by the employer is, however, discussed in detail in chapter 11 of this thesis. Suffice to state at this stage that when assigning an athlete to another club, the current club must act within its rights.

An important aspect which must not be forgotten, is that the athlete's contract will only be enforceable if both the club and the athlete perceive the signing of it to be the "final act in the creation of a binding agreement".<sup>7</sup> This is a reference to the contractual requirement of consensus. According to Champion, there are three main stages or occurrences that give rise to the reaching of consensus between a club and a professional athlete.<sup>8</sup> The first is the offer. The club usually prepares the offer and draws up the employment contract. When this contract is signed by the player, it is indicative of the fact that the athlete has accepted the contract. However, if the signing of the contract by the athlete is not accompanied by consideration and the athlete withdraws from the contract before actual acceptance, the athlete's signature would merely serve as authentication of a revocable offer. The validity of the offer is determined solely by the parties' intent.<sup>9</sup> The second occurrence in the process of reaching consensus between the relevant parties is timely acceptance of the offer. This is indicated by any action that expresses the athlete's intention and willingness to be bound by the exact terms of the offer.<sup>10</sup> The third occurrence in creating a binding athlete's contract is that of interpretation. In a contract as specialised as that governing the complex relationship between a club and a professional athlete, the possibility of misinterpretation of words,

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<sup>7</sup> Champion 14.

<sup>8</sup> *Idem* 17.

<sup>9</sup> *Idem* 17.

<sup>10</sup> *Idem* 17.

phrases and even entire clauses is prevalent. Champion suggests that good practice would demand that the contract be drafted in consideration of the context of professional sport. Previous contracts between the exact same two contracting parties may also be used in interpreting the context of the wording of the athlete's contract.<sup>11</sup>

An important aspect which must be addressed before discussing the organisation of sport in the US, is the important role labour unions play in the developing the standard player's contract discussed above. This aspect includes contractual restraints on professional athletes through collective labour agreements. Nafziger<sup>12</sup> states that in North America, team and player restraints as well as formal relationships between them are largely found in labour agreements.<sup>13</sup> It goes without saying that if labour unions were to be involved in negotiating and influencing the contents of the "Standard Player's Contract" in North American, and specifically US professional sport, then such involvement will have a significant effect on said Contract. Nafziger and Ross argue that this may have the effect on a tacit restraint of trade on a professional athlete entering into the Contract.<sup>14</sup> It would suffice to state for the purposes of a discussion of the Standard Player's Contract that labour law, in the "person" of unions, does play a significant role in moulding the contents of said contract.

In order to effectively provide the context in which sport in the federal system<sup>15</sup> of law in the USA is organised, it is necessary to briefly explain the organisation of especially the four main sporting codes in the United States.<sup>16</sup> It is important to note that each state within the USA is regulated according to its own set of laws, and has its own Athletics Commission. However, because of the fact that sport is played on a national basis, and that different states

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<sup>11</sup> Champion 18; *Pasquel v Owen* 186 F.2d 263 (8<sup>th</sup> Cir. 1950). The interpretation of contracts in general is in itself a complex and specialised field of law. For an expert analysis of this field, see Cornelius "Principles of the Interpretation of Contracts" (2007).

<sup>12</sup> Nafziger "A comparison of the European and North American models of sports organisation" 2008 *International Sports Law Journal* 100.

<sup>13</sup> Nafziger 2007 *International Sports Law Journal* 100 at 103. See also Nafziger and Ross (Eds) 2011: 99.

<sup>14</sup> Nafziger and Ross (Eds) 2011: 97. Other intrinsic restraints are listed as the draft system of available-player recruitment in different sporting codes, salary caps, luxury and payroll taxes and revenue sharing.

<sup>15</sup> The fifty states which collectively form the United States of America each has its own legal system and rules. This is important to keep in mind, as different states may also follow different approaches in their treatment of the athlete's contract. However, McCutcheon "Negative enforcement of employment contracts in the sports industries" 1997 *Legal Studies* 65 at 75 states that sport within the US is organised on a "trans-jurisdictional" basis.

<sup>16</sup> The four main spectator sports in the USA are American football, baseball, ice hockey and basketball. Although the law governing these codes is obviously the same, other considerations such as practical organisation of leagues within the codes differ.



look towards each other for legal precedent, the current discussion focuses on the USA in general and not on different states as such. As was the case in England during the Industrial Revolution alluded to in chapter 6 above, the law evolved to a great degree in the USA during a relatively short period of time as a result of growing industry.<sup>17</sup> The evolution of law had a direct influence on the evolution of sport, especially as a profession. There is little doubt that sport benefited from the advancement of industrial technologies as well.<sup>18</sup> In the USA, the sport of baseball was the first code to be organised in leagues in which professional teams competed against each other.<sup>19</sup> The National League,<sup>20</sup> which is still in existence, was founded in 1876, followed by the emergence of the National Football League<sup>21</sup> in 1919, 1920 or 1921, and the National Hockey League<sup>22</sup> in 1918. The National Basketball Association<sup>23</sup> has its origins in the Basketball Association of America,<sup>24</sup> which was founded only in 1946.<sup>25</sup> Shortly after the founding of the first professional baseball league (the National League mentioned above), the first reported case in the USA which commented not only on the nature of the athlete's contract, but also the most appropriate remedy for breach of such contract was decided. The Pennsylvania Circuit Court in the case of *Allegheny Base-ball Club v Bennett*<sup>26</sup> depended heavily on English law insofar as the most suitable remedy for breach of a contract involving personal services was concerned. *In casu*, interestingly enough, the contract in breach was not the actual one of "employment", but in fact a type of "pre-contractual agreement" in terms of which the professional athlete (one Charles Bennett) agreed to execute a formal contract to provide personal services as a baseball player to the complainant *in future*.<sup>27</sup> However, the importance of the decision lies in the fact that the court commented on the nature of the *eventual* contract (for the playing of professional sport) and the most suitable remedy for breach of *that* type of contract. The content of the athlete's contract was simple: the athlete was obliged to provide his services as a baseball player to the Allegheny Club for the 1883-season. In return, the latter would pay the athlete the amount of

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<sup>17</sup> Mitten *et al* (2009) 399.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> The National League is one of two subdivisions (the other being the American League) which constitute Major League Baseball (MLB) in the USA. MLB consists of thirty professional teams (twenty-nine from the USA and one – the Toronto Blue Jays – from Canada).

<sup>21</sup> The "NFL".

<sup>22</sup> The "NHL".

<sup>23</sup> "NBA".

<sup>24</sup> "BAA".

<sup>25</sup> Mitten *et al* 399-400.

<sup>26</sup> 14 F. 257 C.C. Pa. 1882.

<sup>27</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 257.

\$1,700 for the season.<sup>28</sup> The complainant argued that it (the complainant) was in the “business of playing baseball for profit” and that this demanded “expenditure of much time and large sums of money...to make preparations for the exhibition of such games.”<sup>29</sup> Furthermore, the complainant stated specifically that the respondent (the athlete) was a “skilful player of baseball” and that by subsequently signing a contract with another club,<sup>30</sup> the complainant would suffer damages in the amount of “not less than \$1000.”<sup>31</sup> Although the club stated that it would suffer the damages referred to, it requested the court to compel the athlete to sign the eventual contract in terms of which professional athletic services had to be rendered to the club, and also to restrain the athlete from performing these athletic services in favour of any other competing club.<sup>32</sup> Very importantly, in considering these remedies, the court made mention of the nature of the contract between a professional sports club and a professional athlete in such a club’s employment. The first and most logical assumption made by the court was that the contract in question was one of “personal services, where the services in question require a succession of acts whose performance cannot be accumulated by one transaction, but will be continuous and require the exercise of special knowledge, skill or judgment.”<sup>33</sup> This is a clear reference to the athlete’s contract as *sui generis* legal tool as defined in chapter 3 of this thesis. The services in question are not only personal (as in all contracts of employment) but require special knowledge, skill and judgment of an *athletic* or sporting nature. There is no doubt, then, that this early decision by the Pennsylvania Circuit Court classified the contract in question as a *sui generis* one, and not simply one of employment. To confirm the *sui generis* nature of the contract in question, an abstract in *Current Legal Thought*’s 1936-1937 edition, commenting on several similar cases, but in particular the one currently under discussion, could not have put it more simply: “Baseball’s employer-employee situation is *sui generis*.”<sup>34</sup> In deciding on the most appropriate remedy for breach of this type of contract, the court stated however that there was no precedent where a contract for personal services alone had been enforced actively.<sup>35</sup> In other words, while the court acknowledged the *sui generis* nature of the services in question as well as of the

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Idem* 257-258.

<sup>30</sup> The athlete had, after agreeing to sign the contract with Allegheny Club, signed a subsequent contract with the Detroit Baseball Club, a direct competitor of Allegheny.

<sup>31</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 258.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 259.

<sup>34</sup> *Current Legal Thought* 832 1937-1937 832, abstracted from 46 Yale Law Journal 1386, June 1937. Author unknown.

<sup>35</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 260.

contract regulating those services, it was decided that equity would demand that specific performance<sup>36</sup> of the contract in question would *not* be granted,<sup>37</sup> as the complainant already had at its disposal a remedy in law (damages). What the court in *Allegheny* failed to take into account, though, was that in the case of a professional athlete contracting with a club, there was indeed mutuality, as the two parties had negotiated and contracted on equal footing. Secondly, it was argued in chapter 5 that there rests no duty of superintendence of a court order on the court who had decreed such an order, as the risk of the order not being performed adequately is carried by the party who had requested that order in the first place. It is submitted that in the *Allegheny* case, the court followed English doctrine blindly, without considering the true nature of the contract in question and the effect that such consideration should have had on deciding the most suitable remedy in the circumstances.

The nature of the athlete's contract as perceived by courts within the various US jurisdictions was discussed in detail for the first time in the all-important case of *Philadelphia Ball Club v Lajoie*.<sup>38</sup> *In casu*, a professional baseball player violated his agreement with the club that employed him by arranging to play for a rival club.<sup>39</sup> Although the trial court had "with great industry and painstaking care collected and reviewed the English and US decisions"<sup>40</sup> on the question at hand, the Supreme Court of Pennsylvania in the person of Potter J for the first time in the history of professional sport in the USA investigated the true nature of the athlete's contract, and came to a conclusion directly contrary to the decision in *Allegheny* discussed above.

In the *Lajoie*-case,<sup>41</sup> the court stated that the athlete in question had for several years been in the service of the plaintiff club, and had been re-engaged by said club from season to season

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<sup>36</sup> Although this chapter is aimed at discovering different jurisdictions' treatment of the athlete's contract in particular, it is relevant to note that certain guidelines were provided by the court in *Allegheny* as to the perception of the remedy of specific performance in US law. Firstly, it was decided by the court that specific performance would never be granted if it is not clear that the minds of the parties have come together, in other words, that *consensus* existed between them. This relates very closely to the requirement that the agreement between the parties be mutual, its terms certain, its enforcement practicable, and the complainant without an action at law. English influence is notable here, especially as far as the requirement of "mutuality" and the practical challenge of superintendence by the court of its order is concerned.

<sup>37</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 259-260.

<sup>38</sup> 202 Pa. 210, 51 A (1902).

<sup>39</sup> *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902) at 215.

<sup>40</sup> According to the Supreme Court of Pennsylvania on appeal. See *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902) at 215.

<sup>41</sup> This discussion refers specifically to the Supreme Court's decision.

with an ever-increasing salary.<sup>42</sup> The athlete had become thoroughly familiar with the action and methods of the other players in the club, and furthermore his own “work” was described by the court as “peculiarly meritorious as an integral part of the team work which is so essential.”<sup>43</sup> Additionally to these features already mentioned by the court, the latter also stated that the athlete’s services were of peculiar and special value to the plaintiff, and not *easily* replaceable (as opposed to entirely irreplaceable). Lastly, the court stated that because the athlete was “well-known” and had a “great reputation among the patrons of the sport”, he was a “most attractive drawing card for the public.”<sup>44</sup> In somewhat dramatic fashion, the court concluded its praise of the athlete in question by stating that he (the athlete) was “not the sun in the baseball firmament, but...certainly a bright particular star.”<sup>45</sup> The point that the court was so gallantly attempting to make, was that the services performed by the athlete in question were of a *sui generis* athletic nature. Because of the nature of these services and the attractive way in which the athlete performed them, the latter had become invaluable to his employer-club, not least so because of the tremendous amount of income he generated for the club. Rogers<sup>46</sup> correctly describes the athlete in question (Napoleon Lajoie) as “arguably the first superstar of the Twentieth Century.” It is once again submitted as in chapter 3 that the performance of athletic services by a person with unique and special skills to do so, is the main difference between an athlete’s contract and a contract of employment. Although Whitehill<sup>47</sup> states that as a general rule, personal service contracts will not be specifically enforced,<sup>48</sup> in his discussion of *Lajoie* he establishes the necessary prerequisites for obtaining *negative injunction* against a breaching athlete.<sup>49</sup> These are that the athlete in question should

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<sup>42</sup> *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902) at 217.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Rogers “Napoleon Lajoie, breach of contract and the great Baseball war” 2002 *S.M.U. L. Rev.* 325.

<sup>47</sup> Whitehill “Enforceability of professional sports contracts- What’s the harm in it?” 1981-1982 *SW L.J.* 803.

<sup>48</sup> The “policy considerations” provided by Whitehill as to why a Court in the various US jurisdictions would not grant specific performance, are firstly the difficulty of ensuring proper compliance with a Court order, secondly the undesirability of forcing two parties to work together after friction develops between them, and thirdly public sentiment against involuntary servitude. In the same paragraph, Whitehill states however that US and English courts (like the one in *Lumley v Wagner* discussed above) have not had any objection to granting negative injunction against a party while the contract is still in force. The question must then be asked why a court would deny someone the opportunity to work somewhere else, but not be willing to compel someone to work for his current employer. Surely the former intrudes to a greater degree on a person’s right of trade. See in this regard also Uberstine and Grad “The enforceability of sports contracts: a practitioner’s playbook” 1987 *Loy. Ent. L.J.* 1.

<sup>49</sup> It must be noted that these prerequisites are not for the remedy of specific performance, but for that of a negative injunction. Whereas the former would compel the respondent in a private law suit to comply with his contract, the latter would simply restrain the respondent to perform the same contractual duties for any employer other than the applicant. It is submitted that whereas the two remedies are certainly different in

possess a “sufficiently unique ability, an adequate remedy at law, and irreparable harm to the plaintiff.”<sup>50</sup> Very importantly, if the first of these prerequisites is complied with, in other words once an athlete has been shown to be “sufficiently unique”, the remedy of damages will always be inadequate in case of breach of contract by the athlete.<sup>51</sup> Furthermore, Whitehill opines that inadequacy of the remedy of damages is always equated with irreparable harm to the aggrieved club.<sup>52</sup> In other words, once an athlete has been found “sufficiently unique” in his sporting code, damages would be an inadequate remedy for breach of contract committed by such athlete against his club, and the latter would inevitably suffer irreparable harm as a result of the athlete’s breach of contract. The position adopted in *Lajoie* as far as the treatment of the athlete’s contract is concerned, was that such contract was *sui generis*, as it regulated services of a *sui generis* nature. Despite the fact that the Pennsylvania Supreme Court acknowledged English law’s perception that personal services contracts would never be specifically enforced, it found that the athlete’s contract is so unique as to qualify as something very different from a mere “personal services contract”, and therefore demanded a remedy other than damages for breach of said contract. In the preceding case of *Columbus Base Ball Club v Reiley*,<sup>53</sup> the Court of Common Pleas of Ohio decided in fact that “a court of equity will not enforce a contract of personal services... unless the services contracted for were peculiar, unique, and extraordinary in nature, and the person sought to be enjoined is shown to be a person of exceptional skill and ability, so that his place could not reasonably be filled...”<sup>54</sup> In the case of *Lajoie*, negative injunction was perceived as the most appropriate remedy for breach of the athlete’s contract in question. Although this was a step in the right direction, it is submitted that negative injunction is far more restrictive than would the remedy of specific performance be in a case where an athlete commits breach of contract with his club. The reason for this submission is the fact that in case of specific performance, the athlete is still provided the opportunity to ply his trade, albeit at a club he no longer wishes to be a member of. In the case of negative injunction, however, the athlete is barred from plying his trade at any competing club. Although the outcome will be the same (the athlete will be compelled to ply his trade at his current club even though the current club

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nature, they will eventually have the same effect: if, for instance, an athlete is prohibited from plying his trade anywhere else, he would have no other option than to remain at the club with which he has entered into a contract.

<sup>50</sup> Whitehill 1981-1982 *SW L.J.* 806.

<sup>51</sup> Whitehill 1981-1982 *SW L.J.* 806; Uberstine and Grad 1987 *Loy. Ent. L.J.* 11.

<sup>52</sup> Whitehill 1981-1982 *SW L.J.* 806.

<sup>53</sup> 11 Ohio Dec. 272 (1891).

<sup>54</sup> *Columbus Base Ball Club v Reiley* 11 Ohio Dec. 272 (1891) at 1.

might no longer be interested in his services), it is submitted that there is a strong possibility that negative injunction would be considered unconstitutional in South African law, as it would possibly infringe on a person's constitutional right to freedom of trade, occupation and profession awarded in section 22 of the Constitution of the Republic of South Africa. That having been stated, the negative injunction is at least a remedy that is familiar to South African law: the prohibitive interdict. Brennan states that although specific performance has traditionally been considered an extraordinary remedy for breach of contract, the "trend" in the various US jurisdictions is to make specific performance more readily available as an alternative remedy for breach of contract.<sup>55</sup>

It is clear that the three early US decisions discussed above acknowledged the athlete's contract as a *sui generis* legal tool. The reason for this statement is that each of the decisions discussed above recognised the fact that a professional athlete, contrary to a "regular" employer, possesses skills of an athletic nature which ensure that great amounts of money are spent by the broad public to witness said skills on display. The obvious question which must be posed consequently is what makes an athlete so unique as to be classified as *sui generis*. Although much has been said on this question in chapter 3 of this thesis, it is important to focus on the stance of especially courts within the various jurisdictions of the US on what makes an athlete, and consequently the contract governing the services performed by such an athlete, unique. If, as decided in *Lajoie*, it would be difficult to replace the specific athlete, such athlete would probably be considered unique in an athletic sense.<sup>56</sup> Whitehill adds hereto that the factor to be considered is the relative value of the athlete to his team, and not simply his past record or reputation as a professional athlete.<sup>57</sup> This was not difficult to determine in *Lajoie*, but it should be kept in mind that not all athletes are considered as stellar as *Lajoie* in the discussed case. In *Central New York Basketball, Inc. v Barnett*,<sup>58</sup> for instance, the Court of Common Pleas of Ohio decided that a particular basketball player was "sufficiently unique" despite the fact that he had only been a professional athlete for one year and had not been selected for national honours.<sup>59</sup> The mere fact that the athlete in question was considered good enough at the time to play in the NBA was sufficient reason for such

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<sup>55</sup> Brennan "Injunction against professional athletes breaching their contracts" 1967-1968 *Brook. L. Rev.* 61.

<sup>56</sup> In fact, Brennan 1967-1968 *Brook. L. Rev.* 61 at 64 states that the athlete's services in this case were so unique as to make it impossible to replace him.

<sup>57</sup> Whitehill 1981-1982 *SW L.J.* 808.

<sup>58</sup> 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961).

<sup>59</sup> *Central New York Basketball, Inc. v Barnett* 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961) at 514.

athlete to be qualified as one possessing “excellence and extraordinary abilities.”<sup>60</sup> Importantly, the fact that both teams (the current team he was playing for as well as the team he wanted to defect to) were offering the athlete a substantial raise in salary, was also indicative to the court in question of the fact that the athlete possessed “special value”.<sup>61</sup> This is an interesting indicator which perhaps has not been stressed enough in this thesis so far, especially in favour of the argument that a professional athlete performs services of an entirely *sui generis* nature: the mere fact that rival clubs are prepared to pay huge amounts of money for the services of an individual athlete,<sup>62</sup> is proof enough that the athlete possesses skills of such a unique nature that thousands of spectators would pay significant amounts of money to watch the athlete in question *exhibit* these athletic skills. Mitten *et al* state that athletes with great skills are “essential” to the game’s attractiveness to consumers as well as economic success.<sup>63</sup> The business of sport, therefore, thrives on the special athletic talents of players, their celebrity status and their resulting marketability.<sup>64</sup> At least two US courts have subsequently confirmed the decisions in both *Lajoie* and *Barnett* as far as the “difficult-to-replace”- requirement<sup>65</sup> for granting either specific performance of an athlete’s contract or negative injunction against the athlete is concerned. Interestingly enough, Whitehill states that both these decisions have been criticised for abandoning the standards and limits set in *Lajoie*. However, when one studies the two cases, it is clear that they are in fact consistent with what was decided on the meaning of “unique services” in *Lajoie*. The first of the two mentioned cases was *Winnipeg Rugby Football Club v Freeman*,<sup>66</sup> in which two rugby football players attempted to repudiate their contracts to play in the Canadian Football League by signing contracts with the Cleveland Browns, which participated in the NFL.<sup>67</sup> The court granted negative injunction against both players, preventing them from committing breach of their respective contracts. The court’s decision was based on the “uniqueness”-

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<sup>60</sup> *Central New York Basketball, Inc. v Barnett* 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961) at 514; Whitehill 1981-1982 SW L.J. 808.

<sup>61</sup> *Central New York Basketball, Inc. v Barnett* 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961) at 514.

<sup>62</sup> According to statistics provided by the ESPN Magazine of June 24, 2013, the highest paid professional athlete in the world at the time of printing was Manny Pacquiao. The boxer had, in the preceding year, earned a salary of fifty two million American dollar. The combined salaries per annum of the top ten highest paid athletes in the world at the time of printing was in excess of \$347 000 000.

<sup>63</sup> Mitten *et al* 402.

<sup>64</sup> *Ibid.*

<sup>65</sup> This requirement entails that a club, province or union need not prove that the athlete who wants to commit breach of contract by opting to play for a different club, province or union is irreplaceable, but merely that the athlete in question would not be *easily* replaceable.

<sup>66</sup> 140 F.Supp. 364 (N.D. Ohio 1955).

<sup>67</sup> *Winnipeg Rugby Football Club v Freeman* 140 F.Supp. 365 (N.D. Ohio 1955) at 366; Whitehill 1981-1982 SW L.J. 809.

requirement used in *Lajoie*, although it was argued that the two players in question both possessed little more than “ordinary” talent by NFL standards. The court found, however, that by Canadian Football League standards, the two players both possessed exceptional athletic abilities.<sup>68</sup> Brennan<sup>69</sup> describes these abilities as “peculiar to the Winnipeg Club”, implying that the exceptionality of their athletic skills were perceived in context. It must be gathered, then, from the court’s decision in *Freeman* that the “uniqueness” requirement should be perceived as relating to the value the *current employer-club, union or province* attaches to the athlete in question. The uniqueness- requirement was developed even more in the case of *Dallas Cowboys Football Club Inc. v Harris*.<sup>70</sup> *In casu*, the court actually went so far as to decide that a player who possessed only average ability at the relevant sporting code complied with the “uniqueness”-requirement, and such player was, based on that requirement, prevented from repudiating his current contract.<sup>71</sup> The court argued that the athlete in question was in fact the most skilled player in his position available to the plaintiff at the time, and therefore once again the player’s uniqueness was said to be measured relative to his value to his *specific* club, and not to his general status as professional athlete.

As far as the requirement of uniqueness is concerned, US courts seem to be in agreement that an athlete will be considered unique if such athlete cannot easily be replaced by his professional employer-club.<sup>72</sup> According to Uberstine and Grad,<sup>73</sup> this entails that “no two athletes are identical in terms of what they can provide to a team,” and therefore in the case of breach of an athlete’s contract, “money damages may be unobtainable due to difficulty in precisely quantifying the value of the athlete’s services.”<sup>74</sup> Damages as a remedy for breach of the athlete’s contract was in fact described by the court in *Boston Professional Hockey Association v Cheevers*<sup>75</sup> as being “speculative, uncertain, and as a practical matter, impossible to ascertain.” Once the “uniqueness test” or requirement discussed above has been passed, US courts seem to be of the opinion that the loss of the athlete in question will inevitably cause irreparable harm to such a player’s employer-club.<sup>76</sup> The “irreparable harm”-

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<sup>68</sup> *Ibid.*

<sup>69</sup> Brennan 1967-1968 *Brook. L. Rev.* 61 at 67.

<sup>70</sup> 348 S.W. 2d 37 (Tex. Ci. App.-Dallas 1961); Whitehill 1981-1982 *SW L.J.* 809.

<sup>71</sup> *Dallas Cowboys Football Club Inc. v Harris* 348 S.W. 2d 37 (Tex. Ci. App.-Dallas 1961) at 45; Whitehill 1981-1982 *SW L.J.* 809-810; Brennan 1967-1968 *Brook. L. Rev.* 61 at 68-69.

<sup>72</sup> Whitehill 1981-1982 *SW L.J.* 810.

<sup>73</sup> Uberstine and Grad 1987 *Loy. Ent. L.J.* 11.

<sup>74</sup> *Ibid.*

<sup>75</sup> 472 F.2d 127. (1<sup>st</sup> Cir. 1972).

<sup>76</sup> Whitehill 1981-1982 *SW L.J.* 810; Uberstine and Grad 1987 *Loy. Ent. L.J.* 11-12.



requirement entails that the plaintiff (in this instance, the employer-club) has no adequate remedy at law for breach of contract by the employee-athlete.<sup>77</sup> In other words, the “remedy at law” or damages is considered inadequate for breach of the athlete’s contract. The point has been made, however, that in many instances, the services of the breaching athlete may be easily replaceable to the degree that the employer-club would not suffer irreparable harm and damages would be sufficient and ascertainable. It is submitted that this will rarely be the case in professional sport, as the fact that the athlete in question is a professional, already suggests that such athlete is sufficiently unique in the way he plies his trade. This submission has in fact been confirmed in the *Barnett*-case discussed above.<sup>78</sup>

The position in the various jurisdictions within the US as it relates to athletes’ contracts is clear: the contract is considered a *sui generis* legal tool regulating *sui generis* relationships. The athlete is perceived as an individual who possesses unique athletic skills which make them almost indispensable to the clubs that employ them. The loss of such an athlete through repudiation of his contract would inevitably cause “irreparable harm” to the employer-club in question.<sup>79</sup> Courts in the various US jurisdictions have adopted the abovementioned legal position despite the fact that the English rule (that performance of a contract of personal services would never be granted) has been accepted specifically by US courts. This is a clear indication that US courts perceive the athlete’s contract as something very different from a mere contract of personal services, and that while damages may be the most appropriate remedy for breach of the latter, specific performance (even indirectly by way of a negative injunction) would be the most suitable remedy for breach of the former.

The fact that US courts are willing to order equitable relief for breach of athletes’ contracts in the form of either negative injunction or specific performance, has not solved the problem of professional athletes repudiating their contracts on a regular basis in the US.<sup>80</sup> The reason for this is the fact, that most athlete’s contracts make provision for a so-called “transfer-fee”, which is paid to the aggrieved party by the club with which the athlete in question has signed

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<sup>77</sup> *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902) at 210; *Uberstine and Grad* 1987 *Loy. Ent. L.J.* 12.

<sup>78</sup> *Central New York Basketball, Inc. v Barnett* 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961) at 517.

<sup>79</sup> This was confirmed in both *Nassau Sports v Hampson* 355 F. Supp. 733 (D. Minn. 1972) at 736 and *Washington Capitols Basketball Club, Inc. v Barry* F. Supp. 1193 (N.D. Cal. 1969) at 1197. See also *Uberstine and Grad* 1987 *Loy. Ent. L.J.* 12.

<sup>80</sup> This is the case in South Africa as well. The problem of athletes repudiating their contracts is so serious in the US that Kaplan “Professional Athletic Contracts and the injunctive dilemma” 1974-1975 *J. Marshall J. Prac. & Proc.* 437 has stated that “the athlete who breaches his contract and plays for another club presents a major threat” to the foundation upon which professional sport is built: the standard player contract.

a new contract, thereby repudiating his contract with the former. The problem with this transfer-fee is twofold: firstly, as with the remedy of damages, it is almost impossible to determine the appropriate amount to be paid for the services of a professional athlete, and secondly, richer clubs, unions or provinces will always be able to easily pay the transfer-fee to poorer ones. This renders the value of a contract obsolete, as the practice has been established that an athlete could always be “bought out” of his current contract.<sup>81</sup>

The solution to the abovementioned problem lies in the old saying “prevention is better than cure.” In other words, the drafter of an athlete’s contract has a tremendous responsibility to ensure not only mutuality within the contract, but also fairness from both contracting parties’ points of view. Because of the fact that the four main spectator sports in the USA have been professional for a very long time, the standard of athletes’ contracts regulating these codes is high.<sup>82</sup> It would be relevant to the purposes of this chapter and thesis to determine the manner in which potential problems relating to athletes’ contracts (as discussed) are prevented and dealt with within these contracts themselves, particularly in a US context.

In determining the treatment of athletes’ contracts by courts of the USA in the preceding pages, one thing is clear: the athlete’s contract is based on the premise that each professional athlete is unique in his own right. In the USA, the contract governing these unique athletes in the four main spectator sports in the USA is known as a Standard Player’s Contract.<sup>83</sup> As mentioned above, it is a contract which has been shaped through court cases and collective bargaining processes.<sup>84</sup> The purpose of this athlete’s contract is to define the rights and responsibilities of participants in professional sport, but also to specify an athlete’s rights, and most importantly to confirm the fact that an athlete who competes at a professional level, possesses unique athletic skills.<sup>85</sup> These unique skills include not only the inherent talent of the player to be a professional athlete, but also the physical skills required to perform the services of actually participating in the sporting code involved. In the case of *Tillman v New*

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<sup>81</sup> From a South African legal perspective, the practice of athletes being “bought out” of contracts which they had entered into freely and willingly, poses a serious threat to the doctrine of *pacta sunt servanda*. The obvious question that emerges is: “What is the use of a contract if one can easily be bought out of it at any time?”

<sup>82</sup> According to Champion 14, the Standard Players Contract regulating the sporting codes in the USA is close to “bullet-proof” as it stands currently.

<sup>83</sup> Often referred to as merely “SPK”.

<sup>84</sup> Champion 20.

<sup>85</sup> *Ibid.*

*Orleans Saints*,<sup>86</sup> for instance, the athlete had signed a contract in which he warranted that he would remain sufficiently skilled in all types of football team play, and that he would, throughout the playing season, remain in excellent physical form. During pre-season training, however, the athlete suffered torn knee ligaments, which obviously rendered him unable to comply with the abovementioned warranty. The athlete's contract was terminated by the club because of the fact that he no longer possessed the necessary skills to perform the services required of him in the contract. This was not because of a lack of inherent talent on the athlete's behalf, but merely because of a temporary loss of ability to perform the required athletic services. Because of this loss of ability, the athlete's contract was terminated, and the court in question found the termination to be lawful and reasonable. Although modern day athlete's contracts should surely make provision for the protection of the athlete in question in case of injury while performing his services, the decision in *Tillman* demonstrated once again the *sui generis* nature of the athlete's contract. If an athlete's contract with his club could be terminated because of a temporary inability to perform the athletic services in question, then surely it would not be considered unreasonable to compel an athlete who no longer wishes to be bound by his contract, to serve out that contract. As stated above, US courts seem have no hesitation in doing just that.

Having established the treatment of athlete's contracts by US courts, with specific focus on the most appropriate or suitable remedy in case of breach of such contracts, it is important to look at the way in which courts in Europe treat these contracts. This is a challenging undertaking, as there are obviously different jurisdictions within the European Union with different legal systems and different points of view on the athlete's contract and the enforcement thereof.

### 8.2.2. The European Union<sup>87</sup>

According to Gardiner *et al*,<sup>88</sup> one of the most important aspects of modern sports law from a global perspective is the intersection of sport with the European Union.<sup>89</sup> This intersection is

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<sup>86</sup> 265 So. 2d 284 (La. Ct. App. 4<sup>th</sup> Cir. 1972).

<sup>87</sup> The European Union consists of twenty-eight member states, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom of Great Britain. The capital of the Union is Brussels. It has developed a single market through a standardised system of laws that apply in all member states, and has as its main aim the free movement of citizens, goods, services and capital throughout member states. The European Union was founded by the Treaty of Rome in 1957, and was then known as the European Economic Community (EEC).

personified by the decision of the European Court of Justice in *Union Royale Belges des Sociétés de Football ASBL v Bosman*,<sup>90</sup> which is discussed in detail below. Because of the decision in *Bosman* and the considerable impact that the EU has had on sport, the institutions of the EU have started to give more detailed attention and appreciation of the nature of sport and the extent to which sport can be regulated by legal (and more specifically, judicial) intervention.<sup>91</sup> The interaction between sport and the EU has undergone three phases of development, with a possible fourth being entered into currently.<sup>92</sup> The first phase involved relative indifference, in which the interaction between the EU and sport was characterised by limited interest in EU intervention in sport.<sup>93</sup> The second phase was characterised by litigation and conflict, in which the autonomy of sport was severely tested by the application of EU law in “a robust and direct fashion.”<sup>94</sup> The third phase involved negotiation and relative co-operation between the regulators of sport in Europe and the institutions of the EU. Finally, Gardiner *et al* state that a distinctive fourth phase, which is characterised by the existence of a co-regulatory relationship between the EU and sports regulators, has been entered into.<sup>95</sup> This fourth phase has been brought on specifically by the EU’s new competence in sport granted by virtue of Article 165 (1) of the Treaty for Functioning of the European Union, which reads as follows:

“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”

It is relevant to note that the abovementioned article acknowledges specifically the “specific nature” of sport, which is a definite allusion to the *sui generis* nature of sport as a business. Although the EU currently seems to recognise the need for legal regulation of professional sport, this was not always the case. Quite to the contrary, when the EU was incepted by the Treaty of Rome in 1957,<sup>96</sup> it was not granted any competence as far as sport was concerned.<sup>97</sup> This remained the case until 1974, when the Court of Justice had to decide whether a rule

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<sup>88</sup> Gardiner *et al* (2012) 146.

<sup>89</sup> Hereinafter referred to as EU.

<sup>90</sup> [1995] ECR I-4 1 9 2.

<sup>91</sup> Gardiner *et al* 146.

<sup>92</sup> Gardiner *et al* 146; Parrish “The Birth of European Union Sports Law” 2003 *Ent. L.* 20.

<sup>93</sup> Gardiner *et al* 146.

<sup>94</sup> *Ibid.*

<sup>95</sup> Gardiner *et al* 146.

<sup>96</sup> The EU was then known as the European Economic Community.

<sup>97</sup> Gardiner *et al* 147.

promulgated by the International Cycling Union<sup>98</sup> stating that pacemakers and stayers competing as a team in the world cycling championship had to be of the same nationality.<sup>99</sup> The plaintiffs in the case argued that they had agreed with the cyclists, their associations and their sponsors to act as pacemakers and stayers, and that the abovementioned rule was incompatible with the European Economic Community<sup>100</sup> Treaty in that it prevented them from offering their services to a team of another Member State of the EEC. Four significant questions were posed in this case: the first question was on what basis (if any) sport fell within the terms of the abovementioned Treaty. Secondly, the question was asked if there were any circumstances in which the Treaty would not apply. The third question was whether Community law applied to a non-public regulatory body such as the UCI, and lastly the court had to decide whether Community law would apply in the case of a sporting event taking place outside of the EEC, but still had an impact within it.<sup>101</sup> Importantly, the court found that sport indeed fell within the ambit of the Treaty mentioned.<sup>102</sup> More importantly though, and also relevant to the question as to the treatment of sport and the contracts that regulate it by the European Union, was the fact that the parties to the matter placed particular emphasis on the fact that the relationship in question (that between pacemaker and stayer) was one of employment or the provision of services. However, the court made it very clear that the rules of a sports federation had to comply with the general rules of Community law.<sup>103</sup> In doing so, the court acknowledged for the first time in its existence the importance of sport and the regulation thereof within the European Union.

The position as established in the abovementioned case was confirmed soon thereafter in the case of *Donà v Mantero*.<sup>104</sup> *In casu*, the Court of Justice confirmed that Community law applied to sport in as much as the latter constituted an economic activity (in other words, Community law applied to professional sport). Once again, the court acknowledged the character of professional sport as something unique. As mentioned above, though, it was the *Bosman*-case that actually first dealt with the way in which professional athletes and the contracts that regulate them are treated within the European Union. In order to better illustrate this treatment, the *Bosman*-case must be discussed in detail.

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<sup>98</sup> UCI.

<sup>99</sup> This was in the case of *Walrave & Koch v Union Cycliste Internationale* [1974] ECR 1405.

<sup>100</sup> EEC.

<sup>101</sup> *Gardiner et al* 148.

<sup>102</sup> *Walrave & Koch v Union Cycliste Internationale* [1974] ECR 1405 at 1413.

<sup>103</sup> By "Community Law" is meant the law of the European Community.

<sup>104</sup> [1976] ECR 1333.

Bosman was a professional football player at the Belgian club RC Liège. His contract with said club was due to end on 30 June 1990. In April of that year the club offered the athlete an extension of one year on his current contract, but with a significant reduction in his basic wage. Bosman declined the offer and the club made him available for a transfer. An important aspect of the contract was the fact that it made provision for a transfer fee for the services of Bosman, which transfer fee was calculated by a certain formula. Although no club was interested in obtaining Bosman's services, he eventually entered into an agreement with French club Dunkerque. In terms of his agreement with the latter club, he was basically transferred by his former club (RC Liège) to Dunkerque for a period of one year, with an option to the latter club to make the transfer permanent upon payment of a set fee. Both contracts in question – that between Bosman and Dunkerque (the athlete's contract) and that between RC Liège for the payment of the transfer fee for Bosman – were dependant on the furnishing of a clearance certificate by the *Union Royale Belges des Sociétés de Football ASBL*.<sup>105</sup> Because of the fact, however, that there was uncertainty over whether the Dunkerque club could pay the transfer fee to RC Liège, the clearance certificate mentioned above was withheld, with the effect that both contracts in question elapsed. RC Liège had at the elapse of the two contracts, however, already secured Bosman's suspension in accordance with existing rules. The result was that Bosman could no longer play for them or for Dunkerque for a period of at least a year.

Bosman consequently brought proceedings against both RC Liège and the URBFSA, and an interim order was granted by the *Tribunal de Première Instance* in Liège. This order entailed that Bosman could play football for a series of clubs in the lower divisions of France and Belgium pending the determination of the main proceedings brought by him. Bosman's claim involved firstly damages against his former club (RC Liège) as well as a ruling to declare the transfer system of football players unlawful. The URBFSA subsequently intervened, and sought a declaration from the court in question to the effect that the transfer system of the Union of European Football Associations<sup>106</sup> was in fact lawful. The question which effectively had to be answered by the *Tribunal de Première Instance* was whether a club could refuse a player, whose contract with said club had already elapsed, the opportunity to be transferred to another club.<sup>107</sup> The court in question found that the transfer system of

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<sup>105</sup> Hereafter referred to in the text as URBFSA.

<sup>106</sup> UEFA.

<sup>107</sup> Put differently, the question that was asked was whether a restraint of trade of a player whose contract has already elapsed was lawful. The contractual restraint of trade is discussed in detail in chapter 8 of this

UEFA was indeed unlawful. The matter was then referred to the Court of Justice.<sup>108</sup> Advocate General Lenz decided, firstly, that the activity of professional or even semi-professional football was an economic one for the purposes of the Treaty of Rome, irrespective of profitability.<sup>109</sup> Secondly, the court decided that the payment of a fee on a player changing clubs affected the opportunity for players to find employment in a negative sense.<sup>110</sup> Thirdly, the court acknowledged specifically the “complex entwinement” of the sporting and economic aspects of football in particular. Importantly, the court also referred to possible economic restrictions to be justified by sporting necessity.<sup>111</sup> This is a clear reference to the fact that many problems relating to professional athletes repudiating their contracts are brought about by the fact that there is no limit to what potential clubs would pay for the services of a sought-after athlete.<sup>112</sup> In the fourth place, the Court of Justice stated that the regulations of sports federations could not effectively override the rights awarded citizens of the EU by the Treaty of Rome. The reason for this was that if the mentioned regulations were considered superior to basic right afforded in the Treaty, it would compromise the abolition of barriers to free movement of professional athletes.<sup>113</sup> Fifthly, the court dismissed any arguments pertaining to the right to freedom of association provided by Article 11 of the European Convention on Human Rights, and finally the court confirmed the decisions in *Donà* and *Walrave* discussed above that the matter at hand (and more specifically – the movement of athletes between member states of the EU) formed part of European Community law and therefore the Court of Justice had jurisdiction in hearing the matter. Ultimately, the court reached the decision that the transfer rules of UEFA which allowed an employer-club to claim a transfer fee for an athlete whose contract with that employer-club has elapsed, were unlawful.<sup>114</sup>

As mentioned above, the *Bosman*-decision by the Court of Justice presented the first indication of how sport and the athletes that partake in it are perceived by European Courts.

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<sup>108</sup> Gardiner *et al* 152.

<sup>109</sup> *Union Royale Belges des Sociétés de Football ASBL v Bosman* [1995] ECR I-4 1 9 2 at paragraph 126.

<sup>110</sup> *Idem* 75.

<sup>111</sup> *Idem* 76.

<sup>112</sup> It is submitted that the court was referring to the possibility of so-called “salary caps” in future. This means that athletes could only receive salaries up to a certain maximum amount as regulated by the sporting body in question. The advantage of a “salary cap” is that athletes would think twice about repudiating their contracts, as they may earn the same or similar salaries at the current club which employs them.

<sup>113</sup> *Union Royale Belges des Sociétés de Football ASBL v Bosman* [1995] ECR I-4 1 9 2 at paragraph 81-87. The “free movement” mentioned by the Court referred to free movement of athletes, but also other European citizens, between member-countries of the EU.

<sup>114</sup> *Union Royale Belges des Sociétés de Football ASBL v Bosman* [1995] ECR I-4 1 9 2 at paragraph 145.

The first relevant issue addressed in the *Bosman*-case was the fact that the court had to decide on whether a sports-related matter such as the one in question could be heard by the Court of Justice. Although it was decided that the matter did indeed fall within the ambit of Community law, the mere fact that uncertainty existed in the first place acknowledges the fact that courts within the EU perceive sport as a *sui generis* activity regulated by *sui generis* legal tools and played by *sui generis* athletes. Although the case did not involve the question as to the most appropriate remedy in case of breach of the athlete's contract, it laid the foundation for future courts to decide on the most appropriate remedy for breach of an athlete's contract based on the *nature* of such contract. Having stated that, the decision in *Bosman* did have an indirect effect on the question as to whether specific performance would have been a suitable remedy in the circumstances: the court's refusal to enforce the transfer regulations, is a clear indication that it did not perceive specific performance as suitable remedy for breach of contract at all.

The effect of the *Bosman*-decision was rapid and clear within the European Union and its treatment of athletes' contracts.<sup>115</sup> In the well-known case of *Deutscher Handballbund eV v Kolpak*,<sup>116</sup> the Court of Justice had to decide on the issue of whether a professional handball club could limit the amount of "foreign" players on its books. The athlete in this case was a Slovakian national, and therefore a member of the European Community. The question before the court was whether a Slovak national had the right to non-discrimination on the ground of nationality with regards to his athlete's contract. The court decided that the rule of limiting the amount of "foreign" players eligible to play for a specific club was contrary to the terms of the Association Agreement between the two countries in question. In other words, *Kolpak* was allowed to enter into an athlete's contract with the *Deutscher Handballbund eV* not as a "foreigner", but as a European national.<sup>117</sup> The relevance of the decision of the Court of Justice in *Kolpak* lies in the fact that another *sui generis* characteristic of the athlete's contract is identified: in order to develop local sporting talent within a country and to strengthen the national side of a particular country (regardless of the sporting code), it is essential to ensure that the local talent mentioned above is provided with

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<sup>115</sup> For confirmation of this statement, see Duffy "Football may be ill, but don't blame *Bosman*" 2003 *Sports L.J.* 295.

<sup>116</sup> [2003] ECR I-4 1 3 5.

<sup>117</sup> See Gardiner *et al* 172. It is important to note that the decision of the Court of Justice in *Kolpak* did not have the effect of declaring the rule in question unlawful. Clubs, provinces and unions are still allowed to limit the amount of foreign players playing for them on a professional basis. The purpose of the *Kolpak*-rule is to ensure that local talent is developed and provided with sufficient opportunity to compete at national level.



sufficient opportunity of developing their skills at national level. If clubs were to be prohibited to enforce the *Kolpak*-rule, it would have the effect of a domestic competition possibly being of a higher standard because of the opportunity to contract with many of the best foreign-based players in the sporting code concerned. However, the lack of sufficient local representation at club or provincial level would inevitably lead to a weakening of the national side in question, as the foreign-based players would more often than not be unavailable for selection to the latter.<sup>118</sup> This is a situation, it is submitted, which is absolutely unique to the profession of sport.<sup>119</sup>

As far as the EU's treatment of contractual remedies for breach of athletes' contracts is concerned, the Court of Justice has had to decide specifically on the need to compensate the employer-club for the training and development of athletes in its (the club's) employment. In other words, if a club, union or province has invested a significant amount of capital in the training and development of a player, surely such club, union or province will have a claim in recompense if the player in question decides to relocate to a new employer? According to Article 20 of the *Fédération Internationale de Football Association*<sup>120</sup> *Regulations for the Status and the Transfer of Players* of 2010, it is possible for a club to be compensated financially for the training and development of players while in such a club's employment *after* the contract in question has elapsed. According to Gardiner *et al*,<sup>121</sup> such compensation is paid "in recognition of the financial outlay undertaken by the club(s) in developing the player." This matter was considered in the case of *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United*.<sup>122</sup> *In casu*, the athlete in question had signed a so-called *joueur espoir*-contract<sup>123</sup> with the Lyonnais-club in France. Before the expiration of this

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<sup>118</sup> The problem (from a national perspective) of athletes being unavailable for national duty because of club commitments, is becoming ever a greater one. South African football has not escaped this problem, as reported in the *South African Sport and Health Monthly Magazine* of August 2013 at page 87.

<sup>119</sup> Gardiner *et al* 173-174 set out the argument for and against the need to develop "home-grown" athletes. This argument is, however, not relevant to the purpose of this chapter. What is relevant, though, is the fact that a rule such as the one addressed in *Kolpak* is indicative of the uniqueness of the athlete's contract that courts of law are confronted with regularly.

<sup>120</sup> Commonly referred to as FIFA.

<sup>121</sup> Gardiner *et al* 174.

<sup>122</sup> Case number C-325/08.

<sup>123</sup> A *joueur espoir*-contract was one provided for by Title III, Chapter IV of the *Fédération Française de Football-Charter*, in terms of which athletes between the ages of sixteen and twenty-two years of age were employed as trainees by a professional football club under a fixed-term contract. The contract obliged the trainee (*joueur espoir*) to sign his first professional contract with the club which had trained him, if such club required him to do so. However, the Charter mentioned above provided no scheme for compensating the club if a trainee at the expiration of his *joueur espoir*-contract refused to sign a professional contract with that club. Obviously, the club in this situation would not have the normal contractual remedies available, as

contract, the club offered him a professional athlete's contract of one year.<sup>124</sup> The athlete refused to sign the athlete's contract, however, and subsequently entered into a contract with Newcastle United Football Club.<sup>125</sup> The Lyonnais-club claimed damages against the athlete in the amount of €53 357.16, which they stated was the remuneration the athlete would have received over one year if he had signed the contract with them.<sup>126</sup> The *Conseil de prud'hommes*<sup>127</sup> in Lyon decided that the athlete had terminated his *joueur espoir*-contract unilaterally, and ordered him and Newcastle Football Club to pay the Lyonnais-club damages in the amount of €22 867.35.<sup>128</sup> Interestingly enough, this decision was overturned by the *Cour d'appel* in Lyon, who stated that the obligation which rested upon a trainee to enter into a professional athlete's contract with the club that trained him, included a prohibition on entering into a similar type of contract with any club situated outside the EU.<sup>129</sup> This was confirmed by the *Cour de cassation*, who stated that the effect of the *joueur espoir*-contract was to "hinder or discourage young players from signing such a contract (referring to an athlete's contract with another club)". It is submitted that, although not stated pertinently, the purpose of the *joueur espoir*-contract was to compel an athlete who has been trained and developed by a certain club, to remain at that club. It is submitted further that the payment of damages for breach of the relationship in question, would be an inadequate remedy for the reason alluded to *ad nauseum* in this thesis that the calculation of a suitable amount of damages is virtually impossible. This is confirmed by the amount of damages claimed in the case under discussion by the Lyonnais-club. The amount was based on the compensation the athlete would have received had he remained at the club. There is no doubt that the Lyonnais club considered this amount of compensation to be the *value* of the athlete in question.<sup>130</sup> However, if the athlete will not be in the employment of the club, it means that the club will not have to compensate the athlete to that amount at all. The inevitable question is how the

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the *joueur espoir*-contract would have elapsed. However, in such a case, the club in question would have an action for damages against the trainee under Article L. 122-3-8 of the French *Code du Travail* for breach of the contractual obligation in question.

<sup>124</sup> *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United C-325/08* at paragraph 8.

<sup>125</sup> *Idem* 9.

<sup>126</sup> *Idem* 10.

<sup>127</sup> This is the Employment Tribunal in France, similar to South Africa's Labour Court.

<sup>128</sup> *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United C-325/08* at paragraph 11.

<sup>129</sup> *Idem* 12.

<sup>130</sup> In the case, the Court stated the following as far as the determination of the amount in question was concerned: "It is apparent...that a scheme such as the one at issue in the main proceedings was characterised by the payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club." See *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United C-325/08* paragraph 46.

club could claim damages for that particular amount, if the athlete's actions actually meant that they would *not* have to compensate him at all. A more sensible approach to determining the amount of damages suffered by the club would have been to attempt to calculate the *actual expenses* the club had acquired over a number of years (the duration of the *joueur espois*-contract) for training and developing the player in question. Nevertheless, it is once again submitted that this would be a near-impossible and utterly-futile exercise. As the court of Justice upon hearing the *Lyonnais*-case stated: "the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period"<sup>131</sup> If it were to become general practice for trainees under *joueur espois*-type contracts to dishonour their initial commitments to the trainer-clubs in question, it would discourage said clubs from providing training at all. This would be extremely detrimental to the sport in question, because, according to the Court of Justice, "the recruitment and training of young players are of considerable importance for the social and educational functioning of sport."<sup>132</sup> As far as the *sui generis* nature of sport is concerned, the Court of Justice stated the following:<sup>133</sup>

"In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken...of the specific characteristics of sport in general, and football in particular, and of their social and educational function."

The "said objective" of the system referred to by the court above is to adequately compensate a club which has trained and developed a young athlete and gone to great lengths (both physically and financially) to do so. It is submitted, as discussed above, that the mere payment of damages to the club in question would not be adequate compensation for the training and development of a young athlete. Although the court in the *Lyonnais*-case decided that monetary compensation for training and developing young athletes would be sufficient for the clubs doing that training and development,<sup>134</sup> there is no doubt that the clubs in question would prefer to retain the actual services of the athlete in question. Otherwise, they would not have recruited the athlete in the first place.

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<sup>131</sup> *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United C-325/08* at paragraph 43.

<sup>132</sup> *Idem* 44.

<sup>133</sup> *Idem* 40.

<sup>134</sup> As alluded to by the court in *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United C-325/08* at paragraph 44.

From the abovementioned discussion, one thing is certain: as far as EU courts are concerned, sport is a *sui generis* profession regulated by *sui generis* contracts. The groundbreaking decision in *Bosman* has cemented this notion within the EU particularly. However, as far as the treatment of these contracts is concerned, there is some uncertainty, especially as far as the most appropriate remedy for breach of the athlete's contract is concerned. The reason for this is the fact that within the EU, there are different jurisdictions with different approaches to contractual remedies. The purpose of this discussion on the treatment of athletes' contracts by courts in the EU is not to determine the point of view of each member state on the most appropriate or suitable remedy in the case of breach of such contracts, but to determine the collective opinion within the EU on the *nature* of such contracts. Once it has been established that athletes' contracts are unique, and not merely apparitions of another type of contract, determining the most suitable remedy for breach of such contract is simpler. However, as the case of *Lyonnais-club* discussed above illustrates, the Court of Justice is not averse to granting an award of damages to a party against whom breach of contract has been committed, despite acknowledging the fact that athletes should be held bound to their contracts. It is submitted that the threat of having to pay a significant amount of damages would not discourage athletes recruited by rich clubs, provinces or unions to repudiate their contracts with their employer-clubs, as the rich clubs will always be more than willing to pay the damages in question in order to obtain the services of the athlete in question. The reason for this is the fact that the services of a professional athlete is worth much more to an employer club as a sum of money, however large.

### 8.2.3. The United Kingdom<sup>135</sup>

Because of the fact that English law's perception of the contractual remedy of specific performance and its influence on South African law as far as that remedy is concerned has already been discussed in thesis, the purpose of the current discussion is to establish the perception of jurisdictions within the UK as to the *nature* of the athlete's contract. Obviously, in discussing the treatment of the athlete's contract within the UK, the most appropriate remedy for breach of this type of contract will inevitably be touched upon. However, since it has already been established that specific performance is seen in especially English law as a mere equitable and secondary remedy for breach of contract, the main focus of this particular

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<sup>135</sup> The United Kingdom of Great Britain and Northern Ireland is a constitutional monarchy consisting of four countries, namely England, Scotland, Wales and Northern Ireland. Hereinafter referred to in the text as the UK.

discussion will be on the question of whether courts in the UK consider the athlete's contract as significantly different from any other type of contract (especially the contract of service), to the extent that they would be willing to grant orders of specific performance for breach of this type of contract because it is *sui generis* (as is the case with the courts in the USA discussed above).

According to Anderson,<sup>136</sup> there are four points of note as far as the treatment of athletes' contracts in the UK is concerned. The first point is the fact that a single athlete is at any time involved in a series or "web" of contractual and quasi-contractual binds of an employment or quasi-employment nature.<sup>137</sup> The second point involves the fact that minors can enter into "employment" contracts with clubs, and the question as to whether this occurrence should be indicative of the nature of the contract entered into by said minor. The third (and most important for the purposes of this discussion) point involves an investigation of the treatment of an athlete's contract by courts upon breach of said contract. Finally, Anderson acknowledges the "contentious issue" of athletes terminating their contracts prematurely.<sup>138</sup> As far as the latter two points are concerned, English courts have, while acknowledging the *sui generis* nature of athletes' contracts, followed the English legal perception of specific performance as mere secondary or equitable remedy for breach of any type of contract rather closely. In the case of *Mortimer v Beckett*,<sup>139</sup> for instance, the court refused to grant an injunction attempting to restrain a boxer from boxing for another manager. The reason for the court's refusal was that if the injunction were to be granted, it would force the boxer to employ a particular manager, which would have been tantamount to granting specific performance of a contract for personal services<sup>140</sup> (which was obviously not acceptable in English law). Similarly, in the case of *White v Bristol Rugby*,<sup>141</sup> the High Court decided that although the professional relationship between a rugby player and his club had not broken down irretrievably, specific performance would not be available to the employer-club and the club would have to confine itself to taking an action in damages for breach of contract against the player in question. The reason for this decision by the court is in perfect accordance with English law as discussed in chapter 5: it would be impossible and largely futile to attempt to

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<sup>136</sup> Anderson (2010) 257.

<sup>137</sup> *Ibid.* The fact that professional athletes may at any one point in time find themselves to be parties to more than one fixed-term contract with different "employers", has been identified as a *sui generis*-characteristic of the athlete's contract in chapter 2 of this thesis.

<sup>138</sup> *Ibid.*

<sup>139</sup> [1920] 1 Ch 571.

<sup>140</sup> [1920] 1 Ch 571 at 581.

<sup>141</sup> [2002] IRLR 204.

supervise or compel the performance of such contract. Furthermore, the court argued that an absence of the high degree of fiduciary trust characteristic of a sports contract should serve as a determining factor against the granting of any form of injunctive relief compelling an athlete to work for a particular employer. The latter reason relates closely to the one already alluded to numerous times in this thesis that English courts (and for a while, South African courts as well) will never grant specific performance of a contract of highly personal services.

The *locus classicus* as far as the treatment of an athlete's contract by English courts is concerned, is the case of *Walker v Crystal Palace Football Club*.<sup>142</sup> This case has already been discussed in some detail in chapter 3 of this thesis, in determining the nature of the athlete's contract in general. For the purposes of this chapter, though, less emphasis is placed on the nature of the athlete's contract, and more on the way in which this type of contract is treated by UK courts. In mentioned case, the court had to decide on whether the contract between a professional football club and a professional athlete was one of service in accordance with the English Workmen's Compensation Act.<sup>143</sup> More specifically, the court had to decide whether a professional football player qualified as an ordinary "workman" for the purposes of section 13 of the abovementioned Act. The three judges unanimously agreed that the professional athlete was an ordinary workman in a contractual relationship of service with the club. Cozens-Hardy M.R. stated that the contract was one of manual labour,<sup>144</sup> with which both Fletcher-Moulton L.J.<sup>145</sup> and Farwell L.J.<sup>146</sup> agreed. Cozens-Hardy M.R. continued to state that the athlete was an ordinary workman because he was bound to the express terms of his contract to obey all general directions of the club and in any match situation the particular instructions of the captain of the team.<sup>147</sup> Very importantly, the court in the person of Cozens-Hardy M.R. stated the following:<sup>148</sup>

"In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody."

Within the abovementioned statement lies the problem with the decision in *Walker*. The court reasons that although the nature of the activity in question (the playing of football) involves

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<sup>142</sup> [1910] 1 K.B. 87.

<sup>143</sup> *Walker v Crystal Palace Football Club* [1910] 1 K.B. 87 at 90.

<sup>144</sup> *Walker v Crystal Palace Football Club* [1910] 1 K.B. 87 at 92.

<sup>145</sup> *Idem* 93.

<sup>146</sup> *Idem* 94.

<sup>147</sup> *Idem* 92.

<sup>148</sup> *Idem* 92.

the player “exercising his own judgment uncontrolled by anybody” the player is still bound to obey general instructions of the club or the captain on the field. The court failed to take into account the fact that the player possesses athletic skills of a unique nature, and *therefore* may exercise his own judgment as far as the *way* in which he plays the sport is concerned. The court simply decided that because the athlete in question was under a contract in terms of which he was obliged to render services for remuneration whilst under control of his employer, he (the player) was inevitably a normal “workman”. What the court failed to take into account, it is submitted, was the unique nature of the services in question. Not only were they services of a highly personal nature, they involved the possession of unique athletic skills by the athlete in question. The court erred in deciding that the contract in question was merely one of service based on the fact that the athlete in question stood under the authority of the team captain. Nevertheless, this was the precedent that was set in this early decision relating to the athlete’s contract in the UK. Interestingly enough, a clear distinction is made between athletes participating as part of a team and those who participate as individuals. The latter are perceived not as “employees”, but rather as professional individuals who negotiate their own entry into sporting matches and the compensation received therefrom.<sup>149</sup> It is submitted, though that while relevant labour legislation applies to the former and not the latter, the *nature of the services* in question should be the indicative factor when determining the treatment of the contract governing the relationship in question. Whether an athlete is a participant in a professional team sport or an individual competing in a professional tournament, the unique sporting services rendered by such athlete demands that the athlete be treated not as a mere employee or independent contractor, but as a professional athlete or sportsman. This, it is submitted, should have a significant influence on a court when deciding the most appropriate remedy for breach of the contract in question. In British law, however, this does not seem to be the case. In the case of *Warren v Mendy*,<sup>150</sup> for instance, the court did in fact acknowledge the unique nature of sport as a profession. The court stated specifically that “their (professional athletes’) trade is a very specialised one, requiring dedication, extensive training and expertise and a professional life is comparatively short”.<sup>151</sup> However, despite these unique features, Gardiner *et al*, referring to professional English football players, state that they (professional footballers) as employees “are not immune from the

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<sup>149</sup> Gardiner *et al* 395. Chapter 2 of this thesis contains a detailed discussion of the difference between an athlete under a fixed-term contract and one merely participating as a professional individual in a once-off tournament.

<sup>150</sup> [1989] 3 All ER 103.

<sup>151</sup> *Warren v Mendy* [1989] 3 All ER 103 at 115.

general principle of English contract of employment law which holds an employee potentially and personally liable in damages for their employer's loss flowing naturally and foreseeably from breach of the employment contract."<sup>152</sup> There is no doubt that, except for the *Walker*-decision referred to above, English courts acknowledge the fact that professional sport is a *sui generis* commercial activity. However, they do not perceive this activity as significantly different from other activities of a personal nature, and therefore feel that the contract governing the relationship between a professional club and athlete is simply one of personal service. Consequently, the most appropriate remedy for breach of such contract in English law is always damages, unless an equitable reason exists for granting specific performance of the athlete's contract in question. This does not mean that clubs will not attempt to retain the services of a professional athlete in their "employ". Various examples from case law (not necessarily English, but still relevant) exist where clubs in fact went out of their ways in order to ensure that a specific player's contract is not terminated based on repudiation of the contract by such player.<sup>153</sup> The reason for this is simple: professional athletes are "expensively acquired commodities, at best held to relatively short term contracts, and thus because it is a costly exercise to purchase and hold on to players, it is unsurprising that clubs are most reluctant to end contractual relations prematurely."<sup>154</sup> Because of the fact that specific performance is not available to a club in case of breach of contract by an employee-athlete of such club, other practices have been initiated in especially English and European football in order to ensure that athletes do not repudiate their contracts. Firstly, if a football player is unhappy at his present club, such a player can be sent out on loan to another club.<sup>155</sup> Secondly, the terms of the contract in question can be renegotiated to reflect the player's good form and/or improvement.<sup>156</sup> Finally, the parties can simply agree that the athlete will

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<sup>152</sup> Anderson 307.

<sup>153</sup> It should be kept in mind that repudiation of a contract by a professional athlete refers not only to the signing of another contract while still in the current employer's employment, but to any conduct contrary to the athlete's contract itself by the athlete in question. In the case of *Mutu v Chelsea Football Club* CAS 2008/A/1644, the athlete in question's contract was summarily terminated by the club after the athlete had tested positive for the use of cocaine. This conduct was seen as repudiation of the contract by the athlete. The conduct was accepted as such by the club and based on such acceptance the contract was terminated. The club consequently claimed damages against the player for breach of contract.

<sup>154</sup> Anderson 305.

<sup>155</sup> *Idem* 308-309.

<sup>156</sup> *Idem* 309. This practice is especially adequate where the player has made a name for himself while in the employment of his current club, and feels that he has become undervalued at said club.



be released from his contract at the next available window, and that he may enter into a pre-contract with any interested club to play for the latter in future.<sup>157</sup>

If one accepts English doctrine that damages is the primary remedy (or only remedy in law) available in case of breach of an athlete's contract, one must ask the difficult question as to how these damages are calculated. It has been submitted in this thesis that the calculation of damages for breach of contract committed by a professional athlete is virtually impossible. However, in practice, attempts have been made to calculate the worth of a football player's services who no longer wishes to be bound by his current contract. Article 17(1) of FIFA's regulations makes an attempt to calculate compensation payable to a club where breach of contract has been committed against such club by a professional football player.<sup>158</sup> This compensation is calculated with respect to "a number of objective sports-specific criteria"<sup>159</sup> including the remuneration and other benefits due to the player under the existing contract up to a maximum of five years, fees and expenses paid or incurred by the former club over the term of the contract, and whether the contractual breach fell within the protected period.<sup>160</sup> This method of calculation has led to serious problems- both practically and legally. These problems were more or less summarised in the case of *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA*.<sup>161</sup> Although this case was not decided by an English court, it is a clear indication of the problems that English courts encounter because of their reluctance to order specific performance of athletes' contracts, and therefore relevant to the current discussion. In this case, the twenty-four-year old athlete had signed a contract with the

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<sup>157</sup> Anderson 310. Interestingly enough, article 13 of FIFA's regulations states that a contract between a professional football player and a club may only be terminated upon expiry of the term of said contract, or by mutual agreement. This article is described by Anderson as based on the "absolutist, and somewhat utopian, *pacta sunt servanda* position." In other words, the doctrine of *pacta sunt servanda* is perceived in English law as an unreachable ideal, and does not in that system reflect the reality of contract law.

<sup>158</sup> Article 17(1) of FIFA's Regulations reads as follows: "In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specific city of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period."

<sup>159</sup> According to Anderson 311.

<sup>160</sup> The "protected period" mentioned here refers to a period of three entire seasons or three years following the entry into force of a contract where such a contract is concluded prior to the player's twenty-eighth birthday or two years/seasons where such a contract is concluded after the player's twenty-eighth birthday. This is obviously in consideration of the limited nature of a professional athlete's career.

<sup>161</sup> CAS 2008/A/1519-1520.

Shakhtar Donetsk-club in June 2004. The contract was a fixed-term one of five years commencing on 1 July 2004 and ending on 1 July 2009.<sup>162</sup> According to the contract in question, the athlete could be transferred to another club only with the consent of the current club and payment of compensation to the latter.<sup>163</sup> If the club were to receive a transfer offer from another club for the athlete in question in the amount of €25 million or above, the current club would agree to release the athlete immediately.<sup>164</sup> On the second of July 2007, on completion of the “protected period”, the player terminated his contract unilaterally and subsequently signed a new contract with the Real Zaragoza-club on 19 July of that year.<sup>165</sup> The Shakhtar Donetsk-club reacted in three ways: firstly, they wrote to the athlete reminding him that he could not, in terms of his contract, transfer to any other club without the prior agreement of his current club while he was still under contract with the latter. Secondly, they wrote to the Real Zaragoza-club informing them that they were jointly and severally liable for the payment of the compensation for the athlete in question according to article 17(2) of FIFA’s regulations.<sup>166</sup> Finally, they initiated legal proceedings with FIFA’s Dispute Resolution Chamber.<sup>167</sup> The latter found unequivocally that the athlete had repudiated his contract and that the Real Zaragoza-club would be held jointly and severally liable for payment of damages to the Shakhtar-Donetsk-club. The DRC then proceeded to calculate these damages to the amount of €6.8 million, based on the remuneration-related, residual value of the athlete’s contract with his current club, the fees and expenses paid by the club for the initial acquisition of the athlete, and a specific amount for aggravated damages caused by the “bad faith” showed by the athlete because he had accepted an increase in salary shortly before repudiating his current contract.<sup>168</sup> The Shakhtar-Donetsk-club was not satisfied with the amount of damages awarded by the DRC, and argued that it had not taken proper account of the objective criteria of article 17(1) of FIFA’s regulations mentioned above. They subsequently appealed to the Court of Arbitration for Sport.<sup>169</sup> Before the CAS, the athlete

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<sup>162</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA* CAS 2008/A/1519-1520 at 3.

<sup>163</sup> *Idem* 4.

<sup>164</sup> *Idem* 4.

<sup>165</sup> *Idem* 4.

<sup>166</sup> Article 17(2) of FIFA’s regulations reads as follows: “Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.”

<sup>167</sup> DRC.

<sup>168</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA* CAS 2008/A/1519-1520 at 8-9.

<sup>169</sup> CAS.

admitted to unilateral and premature repudiation of his contract without just cause or sporting just cause.<sup>170</sup> However, he relied heavily on the previous decision of that body in *Wigan Athletic FC v Heart of Midlothian; Heart of Midlothian v Webster and Wigan Athletic FC, and Webster v Heart of Midlothian*.<sup>171</sup> In this case, the court awarded compensation to the wronged club based on the residual remuneration value in the remainder of the contract. Based on this decision, the athlete in the case under discussion claimed that there was no “economic, moral, regulatory or legal justification for a club to be able to claim the so-called ‘market-value’ of an athlete as a lost profit.” The athlete in the current case under discussion also argued that the compensation should take into account the fact that he had moved after the “protected period” had lapsed, and therefore that the damages should be limited to the residual, remuneration-related monies left on the contract.<sup>172</sup> On the other hand, the club argued that the compensation ought to be based on all the losses associated with the commercial value of the contract rather than just its basic employment value.<sup>173</sup> The CAS found in favour of the Shakhtar-Donetsk-club, and ordered that they be paid the amount of just under €12 million in compensation, plus interest at 5% per annum from July 2007.<sup>174</sup>

The evaluation of the effectiveness of the contractual award of damages for breach of the athlete’s contract is cardinal to the purpose of this thesis. It would be sensible to do this evaluation at this stage, as the case of *Matuzalem* discussed above has accurately displayed the practical difficulty in calculating an award of damages in case of breach of an athlete’s contract. The first fact that should be mentioned is that in the case under discussion, the damages awarded to the club in question were calculated in accordance with FIFA’s Regulations. These are the exact same Regulations that state (in article 13 thereof) that a contract between a professional athlete and his club may only be terminated upon expiry of the term of the contract or by mutual agreement.<sup>175</sup> The logical conclusion one must draw from this is that, because specific performance is seen in European and English sports law as “utopian” (to quote Anderson) as well as unrealistic, damages must be available as a type of

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<sup>170</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA CAS 2008/A/1519-1520* at 12-13.

<sup>171</sup> CAS 2007/A/1298, 1299 and 1300. *In casu*, a professional football player terminated his contract one year before the conclusion of that contract. The club claimed compensation for what they believed the player’s “market value” at the time of breach was.

<sup>172</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA CAS 2008/A/1519-1520* at 13-14.

<sup>173</sup> *Idem* 12-13.

<sup>174</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA CAS 2008/A/1519-1520* at 45.

<sup>175</sup> See fn 156.

“backup” remedy or practical solution. Although the remedy is a primary one in English law, the fact that the athlete’s contract is *sui generis* should persuade a forum such as the Court of Arbitration for Sport to think outside the box and determine whether damages, as calculated in the *Matuzalem*-case, is really the most suitable remedy for breach of the *type* of contract in question. The court asked this exact same question in *Matuzalem*, and the reason why the court asked this question was because of the difficulty (and, it is submitted, inadequacy) of calculating an award of damages. Referring to *Bosman*, the court stated specifically that the purpose of article 17 of FIFA’s Regulations is to create “contractual stability” between professional athletes and clubs.<sup>176</sup> This was especially necessary in view of the reconstruction of the said Regulations after the *Bosman*-decision. In effect, the compensation or damages due for breach of contract by an athlete effectively replaced the pre-*Bosman* transfer fees due after the expiry of a contract. To state that the contractual remedy of damages is supposed to replace the former transfer fees payable after a contract has expired, is a gross misapprehension. Damages is a contractual remedy awarded because of breach of contract, whereas the pre-*Bosman* transfer fee was more of a token of appreciation to the club for what they had invested (in monetary terms) in the player while such player was still under contract with the club. In the latter case, no breach of contract was committed at all. The fact is that the contractual remedy of damages has proved to be ineffective to its purpose: to prevent professional athletes from dishonouring their athlete’s contracts on an alarming basis. The reason for the remedy’s ineffectiveness is the fact that clubs, provinces and unions are prepared to pay enormous amounts of money for the services of professional athletes. If they had to pay a minimal “buy-out fee” in order to attain the services of an athlete they desperately wanted, no amount of damages would be too great, especially if the acquiring club is a rich one and the “wronged” club not so much. Ironically, the court in *Matuzalem* stated unequivocally that the purpose of article 17 is “basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player.”<sup>177</sup> The court went even further to state that “because contractual stability is crucial for the well functioning (*sic*) of international football...the principle *pacta sunt servanda* shall apply to all stakeholders, ‘small’ and ‘big’ clubs, unknown and top players, employees and employers, notwithstanding

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<sup>176</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA CAS 2008/A/1519-1520* at 23.

<sup>177</sup> *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA CAS 2008/A/1519-1520* at 23.

their importance, role or power.” The irony lies therein that in order to ensure that athletes do not repudiate their contracts, FIFA’s Regulations actually provide these athletes with a near-perfect way of getting out of their contracts: the payment of money, either by themselves, the clubs that want to attain their services, or both. One must ask the question how the doctrine of *pacta sunt servanda* could apply if, within any given system, one is not allowed by law to hold a person (who has entered into a contract freely, willingly and while of sound mind) to that contract. *That* would in fact be, with due respect to Anderson, a utopian and unrealistic goal. Although the *Matuzalem*-case refers to the sport of football, the practical and legal problems identified therein are significant to all codes of professional sport. It is submitted that these problems, especially the one of professional athletes unilaterally repudiating their contracts prematurely, will continue to exist as long as courts, especially those within the UK, refuse to acknowledge that although damages is the remedy in law as far as breach of contract is concerned, the *sui generis* nature of the athlete’s contract demands that such contract be specifically enforced by courts. Suffice to state, after the discussion of the treatment of athletes’ contracts within the UK above, that this is definitely not the state of affairs within that jurisdiction currently.

#### **8.2.4. Australia**<sup>178</sup>

A study of Australian courts’ treatment of the athlete’s contract is relevant to this chapter for two main reasons: the first is the fact that the United Kingdom’s common law system forms the basis of Australian jurisprudence. The second reason is that Australia possesses some of the finest athletes in many sporting codes,<sup>179</sup> and it would be beneficial to the purpose of this chapter to discuss the regulation and treatment of these athletes by the Australian courts. More specifically, it is cardinal to investigate whether Australian courts perceive the athlete’s contract as significantly unique so as to enforce such contract in case of breach thereof (despite the fact that the remedy of specific performance is perceived, as in English law, as but a remedy in equity). It should be stated clearly that Australian jurisprudence contains numerous cases dealing specifically with the restraint of trade clause and the acceptability thereof in the case of professional athletes’ contracts. These cases (dealing with restraint of

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<sup>178</sup> The Commonwealth of Australia was founded on 1 January 1901 and consists of six states: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

<sup>179</sup> There are several professional sport leagues in Australia, the most important of which are the Australian Football League which governs Australian rules football, the National Rugby League which governs rugby league, Super Rugby, which governs rugby union, the so-called A league and W league which govern European football, the ANZ Championship that governs netball, the National Basketball League, the Women’s Basketball League and the Australian Baseball League.

trade) will be discussed in detail in chapter 8 of this thesis. The focus in this chapter will be on how the courts in Australia perceive the athlete's contract, and consequently whether they would be willing to enforce the contract in case of breach thereof.

The first relevant factor to be mentioned is that, as in all other jurisdictions discussed in this thesis, Australian law seems to perceive the athlete's contract as merely one of employment.<sup>180</sup> Mulheron<sup>181</sup> states that according to the law of the different jurisdictions within the federal system of Australia, a contract of personal services was traditionally not perceived as *sui generis*, "in which equity would ordinarily intervene and order either specific performance or an injunction which would have the effect of compelling the plaintiff and defendant to sustain the contractual relationship." By implication, then, if a contract *were sui generis*, equity would demand that such a contract ought to be enforced in case of breach thereof.

Although Australian courts do consider the athlete's contract as one involving "personal services" as discussed previously in this thesis, the case of *Buckenara v Hawthorn Football Club*<sup>182</sup> provides a very clear example of how courts in Australia perceive the athlete's contract in itself. In this case, a professional football player had entered into a contract for a term of three years ranging from 1982 to 1984. The contract contained an option in favour of the Hawthorn Football Club, in terms of which they (the club) could retain the athlete's services for a period of another two years after the expiration of his contract. The athlete, however, wanted to return to his home state of Perth to play for an opposing football side. Whereas the athlete claimed that the exercising of the option by the club constituted an unfair restraint of trade upon him, the club in return requested the Supreme Court of Victoria to grant specific performance of the services in question along with an injunction which would prevent the athlete from participating for another club in the same league. The court found, firstly, that the restraint of trade in question was not unreasonable in the circumstances. Secondly, and more significantly, the court found that it would be difficult to find a particular

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<sup>180</sup> Healey (2009) 59.

<sup>181</sup> Mulheron "New forays of equitable remedies into commercial 'personal service' contracts" 1999-2000 *Newcastle L. Rev.* 32. The reasons for this "attitude" is provided by Mulheron as follows:

- (i) the courts couldn't supervise the performance of a contract of personal services;
- (ii) to compel the continued relationship of hostile parties is not for the benefit of either party; and
- (iii) such relationships generally require the performance of obligations of mutual trust and confidence, the absence of which is generally exhibited by the very presence of the parties before the courts.

See in this regard also *Powell v London Borough of Brent* [1988] ICR 176 at 193.

<sup>182</sup> [1988] VR 39.

clause to be in (unreasonable) restraint of trade during the period of service required by the contract to be rendered. In other words, a court will have no objection to enforce a restraint of trade while the contract is still in existence. The court in the current case went even further to state that it would restrain the breach of a negative covenant, even where the positive covenant is of such a nature as to be incapable of being the subject of an order of specific performance. This statement is important because, firstly, the court acknowledges the seriousness of the contract in question. Although not stated specifically, there is no doubt that the court also considered the nature of the services in question. Because of the fact alluded to earlier in this chapter, that the athletic skills of a gifted athlete are difficult to obtain and to retain, the court in the current case went so far as to decide that even though the personal services in question may not be ordered to be specifically performed, the court can *restrain* an athlete from repudiating his contract. This, it is submitted, is not much different from an order of specific performance of the athletic services in question, as confirmed by Mulheron.<sup>183</sup> The reason why the court in *Buckenara* was prepared to impose an injunction on the athlete, is because it had to protect the “legitimate interests” of the football club in question (but also football clubs in general) to ensure that highly-skilled players represent them (the clubs) and not their competitors.<sup>184</sup> There is no other way to interpret this reason as confirming the *sui generis* nature of not only the services delivered by a professional athlete, but also that of the contract governing such services. This is despite the fact, mentioned above, that Australian law is based on the UK’s system of common law. The decision in *Buckenara* seemed to acknowledge that professional athletes are assets to their clubs, and the clubs must be protected against the unlawful loss of these assets. This was confirmed by the same Court in *Hawthorn Football Club Ltd v Harding*.<sup>185</sup> The facts are similar to those in *Buckenara*, but it is relevant to note that the court made specific mention of the fact that the parties to the contract in question had declared an intention to be bound by said contract.<sup>186</sup> Even more relevantly, the court stated specifically that it will, as far as possible, attempt to give effect to the parties’ intention. The court decided that while it would not grant an injunction to encourage a party in breach to perform their obligations under a contract of

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<sup>183</sup> Mulheron 1999-2000 *Newcastle L. Rev.* 32 at 33.

<sup>184</sup> Chadwick “Restraint of Trade in Australian Sport- Was the AFL’S hand forced on Ben Cousins?” 2010 *Bond University Electronic Sports Law Journal* at 8.

<sup>185</sup> [1988] VR 49.

<sup>186</sup> This is reminiscent of the fact mentioned by Foxcroft J in *Santos Professional Football Club v Igesund and Another* 2003 5 SA 73 (C) that if the parties had specifically agreed on the availability of the remedy of specific performance in case of breach of the contract between them, the Court should honour this agreement and give effect to the remedy applied for.

personal services (in other words a positive injunction), it could grant an injunction to restrain a breach of a negative covenant in order to tempt a party to keep their side of the contract.

The rationale of the Supreme Court of Victoria in the abovementioned decisions seems to be that although it will not go directly against Australian jurisprudence (which is derived from English law) and order specific performance of a contract of personal services (of which it perceives the athlete's contract to resort under), it has no objection to granting an order of negative injunction. Such an order would effectively entail that if an athlete repudiates his contract with his current employer-club, he (the athlete) will be barred from entering into a contract with any other club for the remaining term of his current contract. The argument has been made above that an order of negative injunction is in many ways more intrusive on a player's right to freedom of trade than an order of specific performance. This is indeed true: whereas the latter offers the athlete the opportunity to continue to ply his trade (albeit at a club which he no longer wishes to play for), the former implies that if the athlete discontinues playing for his current club (which he obviously wants to do) he will be barred from plying his trade at all. Nevertheless, the two decisions discussed above are at least indicative of the fact that Australian courts do recognise the *sui generis* nature of the athlete's contract. It is doubtful, however, that their willingness to order negative injunction against a breaching athlete will sufficiently solve the problem of professional athletes repudiating their contracts on a recurring basis. If a professional athlete realises that it would only be to his detriment if he were to repudiate his athlete's contract, such an athlete will certainly want to ensure that the relationship between himself and his employer-club is kept professional and healthy, at least from his side.<sup>187</sup>

The question as to how Australian courts perceive professional athletes was more or less confirmed in the case of *Whitehead v Carlton Football Club Ltd.*<sup>188</sup> In this case, the professional athlete was injured while performing his services to the club during the term of his contract with said club. He received medical treatment for the injury from the club doctor in the form of local anaesthetic and cortisone, which (so the athlete argued) worsened his injury. He subsequently claimed damages from the club based on their negligence in treating his injury. The relevance of this case lies in the club's defence: they claimed that the athlete in question was prohibited from claiming damages in terms of common law proceedings, as

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<sup>187</sup> It must be noted, though, that athletes are not always the sole cause of termination of the professional relationship. Breach of contract committed by the employer is discussed in chapter 9 of this thesis.

<sup>188</sup> [2005] VSC 257.



he was an employee of the club, and therefore should first have satisfied the requirements of Australia's Accident Compensation Act and in particular sections 16<sup>189</sup> and 135 A<sup>190</sup> thereof. The athlete, however, claimed that he was *not* a worker but a professional athlete, and that therefore the Accident Compensation Act did not apply to him and his common law action for negligence should be upheld. The court had to decide, effectively, whether the athlete was merely an employee for the purposes of the mentioned Act, or a *sui generis* professional athlete. The Supreme Court of Victoria stated that section 16 mentioned above created three conditions: the first was that the employee in question had to be engaged by an employer to participate as a contestant in a sporting activity. This condition was satisfied by the fact that the athlete in question was party to a "playing contract" with the club in question at the time of his injury. The second condition was that the athlete had to be injured while performing one of three specific actions mentioned in section 16: participating in a sporting contest or athletic activity, training or preparing to so participate, or travelling between his place of residence and the place where the athlete was actually participating in the athletic activity concerned. This condition was satisfied in that the athlete was indeed injured while participating in the sporting activity concerned. The third and final condition which had to be met in accordance with section 16 was that the athlete was not entitled to remuneration other than for the activities specified in his contract. The court found that, because the athlete in question had satisfied the conditions imposed by section 16 of the Accident Compensation

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<sup>189</sup> Section 16 of the Accident Compensation Act makes specific provision for claims by "sporting contestants". Section 16(1) of the Act reads as follows:

...Where a person is engaged by an employer to participate as a contestant in a sporting or athletic activity, neither the employer or self-insurer nor the Authority or authorised insurer is liable to pay compensation for an injury received by the person if-

- (a) the injury is received while the person is-
  - (i) participating as a contestant in a sporting or athletic activity;
  - (ii) engaged in training or preparation with a view to so participating; or
  - (iii) travelling between a place of residence and the place at which the person is so participating or so engaged.

<sup>190</sup> Section 135A of the Accident Compensation Act regulates the procedure to be followed when instituting an action for damages against an employer. The relevant subsection reads as follows:

- (2) A worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment-
  - (a) if employment of the nature was a significant contributing factor, and the injury is a serious injury and arose on or after 1 December 1992; or
  - (b) if the injury is a serious injury and arose before that date but the incapacity arising from the injury did not become known until that date or a later date.

Act, he qualified as an “employee” for the purposes of that Act. It can safely be assumed that this is how Australian courts in general perceive professional athletes: as employees or “workers” of the clubs that employ them. The fact that the Accident Compensation Act makes specific provision for employees who act as “sporting contestants”, is however an indication that the courts in Australia will at least approach the contracts of professional athlete with the belief that they are in fact unique in nature.

The most recent Australian decision relating to the treatment of athletes’ contracts by the courts is that of *Bulldogs Rugby League Club Ltd and Another v Williams and Others*.<sup>191</sup> The defendant-athlete in this case had entered into a five-year standard National Rugby League contract with the first plaintiff (the Bulldogs Rugby League Club).<sup>192</sup> Included in the contract was a clause which specifically prohibited the athlete from playing with any other club or person without the prior consent of the club. Less than a year into the contract, the athlete commenced negotiations with another club, the Club Toulonnais SA in France.<sup>193</sup> There was never any doubt that the athlete had repudiated his contract with the Bulldogs club. The question relevant to the current discussion was whether the court would grant injunctive relief to the club, which would effectively deny the athlete the right to play for the Toulonnais SA Club.

The court based its decision entirely on English doctrine. Firstly, the court quoted the King’s Bench decision of *Warner Brothers Pictures Inc v Nelson*,<sup>194</sup> in which it was decided that “a decree of specific performance, either in the primary or secondary sense, is not available to enforce a contract of personal service.”<sup>195</sup> However, the court also looked at another English case, namely that of *Lumley v Wagner*,<sup>196</sup> and came to the conclusion that while it could not compel a party to perform services of a personal nature, it could restrain that party from performing similar services for any other employer. The purpose of such a negative injunction was, and still is, to put pressure on the breaching party to actually perform his contractual duties by denying him the opportunity to ply his trade anywhere else.<sup>197</sup> This

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<sup>191</sup> [2008] NSWSC 822.

<sup>192</sup> *Bulldogs Rugby League Club Ltd and Another v Williams and Others* [2008] NSWSC 822 at paragraph 12.

<sup>193</sup> *Bulldogs Rugby League Club Ltd and Another v Williams and Others* [2008] NSWSC 822 at paragraph 17. It is important to note that the Club Toulonnais in France was not considered direct opposition to the Bulldogs Club. On the contrary, the two clubs participated in different sporting codes- the Bulldogs in rugby league and Toulonnais SA in rugby union.

<sup>194</sup> [1937] 1 K.B. 209.

<sup>195</sup> *Bulldogs Rugby League Club Ltd and Another v Williams and Others* [2008] NSWSC 822 at paragraph 51.

<sup>196</sup> [1852] 42 ER 687.

<sup>197</sup> In *Lumley v Wagner* [1852] 42 ER 687 at 693, the Court stated that it had the power to “compel her to

purpose was presented in *Lumley* and discussed above, and it is once again submitted that this remedy is in many ways more detrimental to the athlete than that of specific performance. The position of Australian courts is clear, however, as far as their treatment of athletes' contracts is concerned. These contracts are considered contracts of personal service (as in English law) and while Australian courts would be willing to grant injunctive relief to a club against an athlete, thereby barring said athlete to compete for any other team against the applicant-club, they would never go so far as to decree specific performance of personal services such as the playing of sport. Although Australian courts recognise and acknowledge the *sui generis* nature of sport as a profession and the contracts governing it to a certain extent, it is submitted, once again, that if they were to accept the athlete's contract as an entirely *sui generis* legal tool, their perception of the most appropriate (and equitable) remedy for breach of the athlete's contract might be different. This is, however, as in English law, not the case currently.

### 8.2.5. New Zealand

It is inevitable that the treatment of athletes' contracts by New Zealand courts will resemble that of Australian courts rather closely. The reason for this is that the two countries' legal systems stem from the same original system: that of English Common law.<sup>198</sup> However, because of the "fundamental part" that sport plays in the culture and identity of New Zealand,<sup>199</sup> it is important that that country's treatment of the athlete's contract be inspected. Sport and Recreation New Zealand is a Crown entity with the goal of encouraging more children and adults in New Zealand to participate in sport, and to get more New Zealand winners on the world stage.<sup>200</sup> This is an indication that the profession of sport plays a vital role in not only the entertainment sector, but also the economic sector of New Zealand.

The first relevant issue to be discussed as far as the regulation of sport in New Zealand is concerned, is the question alluded to in chapter 3 of this thesis (as far as the South African position is concerned) as to whether professional athletes in New Zealand should be considered employees or independent contractors in the eyes of the law. The reason why this distinction might prove important, is that the classification may have important implications

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abstain from the commission of an act which she has bound herself not to do and thus possibly cause her to fulfil her engagement."

<sup>198</sup> New Zealand is in fact a constitutional monarchy with Elizabeth II as Queen and head of state.

<sup>199</sup> Toomey and Fife (2012) 27.

<sup>200</sup> Toomey and Fife 27. The five main spectator sports in New Zealand are rugby, netball, yachting, cricket and rowing.

for the employment relationship as well as for tax liability.<sup>201</sup> Furthermore, as is the case in South Africa, employees and their contracts are governed by labour legislation in New Zealand,<sup>202</sup> whereas the contractual relationships entered into by independent contractors are not. The leading case in New Zealand for determining which types of contractual relationship would be construed as ones of employment is *Bryson v Three Foot Six Ltd.*<sup>203</sup> Although this case had nothing to do with sport as such, it went quite a way in determining whether an athlete in a particular context is an employee or an independent contractor. The respondent in the abovementioned matter (Three Foot Six Limited) was established in 1999 to administer the production of the “Lord of the Rings” film trilogy in 1999. The plaintiff (Bryson) joined the former some time later to work on the production of the said films as model maker and later on model technician. The contract he had entered into with the respondent was described as a “crew deal memo”.<sup>204</sup> This agreement stated specifically that Bryson was an independent contractor and not an employee.<sup>205</sup> However, when his (Bryson’s) services became redundant on 30 September 2001, he brought personal grievance proceedings before New Zealand’s Employment Relations Authority under the Employment Relations Act of 2000.<sup>206</sup> The company obviously argued that such proceedings were not allowed because of the fact that Bryson was not an employee of theirs, but merely an independent contractor. The New Zealand Court of Appeal stated that in order to determine the nature of the agreement between the parties, it was essential to determine how the relationship operated in practice.<sup>207</sup> The fundamental test for determining whether the person in question was an employee or an independent contractor, according to the court, was that of determining whether said person was working for his own account or not.<sup>208</sup> Furthermore, the “control test” formulated in common law was described in the current case as being of particular importance to “sports people”. The reason for this is, according to Toomey and Fife, “the unusual nature of professional sports contracts.”<sup>209</sup> In answer to the question in the case under discussion of whether Bryson was an employee of the company in question or not, the court decided that, based on the common law “control test” mentioned above, he was in fact not an employee of

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<sup>201</sup> As far as the issue of tax liability is concerned, see Blackshaw I “The Professional Athlete” 2006 1, discussed in chapter 2 of this thesis.

<sup>202</sup> More specifically, the Employment Relations Act of 2000.

<sup>203</sup> [2005] 3 NZLR 721.

<sup>204</sup> [2005] 3 NZLR 721 at paragraph [2].

<sup>205</sup> *Ibid.*

<sup>206</sup> *Idem* paragraph [3].

<sup>207</sup> *Idem* paragraph [32].

<sup>208</sup> *Idem* paragraph [32].

<sup>209</sup> Toomey and Fife 110.

the company.<sup>210</sup> This decision had a significant influence on the perception of the nature of the contractual relationship between a professional athlete and an employer-club. For example, in *Kirk v ACC*<sup>211</sup> a professional football player was injured while playing football for the New Zealand national team. He claimed compensation under the Accident Compensation Scheme.<sup>212</sup> The court had to decide whether the athlete in question was an employee of the New Zealand Football Association when playing for the national team. Using the various common law tests, the court concluded that the athlete was indeed an employee, for the reason that the athlete “was under the control of the club and was obliged to play for the particular team and to the best of his ability, and to carry out all training and instructions of club officials.”<sup>213</sup> This is a clear indication that New Zealand courts perceive the athlete’s contract as simply one of employment, possessing a few minor *sui generis* characteristics. However, in the subsequent case of *Waikato Rugby Union v NZRFU*,<sup>214</sup> the unique nature of the relationship between a professional athlete and his “employer” became abundantly clear. All professional rugby union players in New Zealand at the time were employed by a single company called New Zealand Rugby Promotions. This company was responsible for the payment of players’ salaries, deducting income tax, paying ACC employer premiums and surcharge costs, managing leave, and conducting performance reviews and disciplinary proceedings.<sup>215</sup> The athletes in question’s services were then “loaned” to the various provincial teams competing in New Zealand. The question which arose in the current case was whether a relationship of employment existed between the provincial team in question and a player seconded to such team while under the employment of New Zealand Rugby Promotions. The court decided that the so-called ‘Contractor’s Agreement for Provincial Rugby’ signed by the players representing provincial teams in New Zealand constituted a contract of employment.<sup>216</sup> Without any intention to do so, however, the court had in its decision referred to one of the most significant *sui generis* characteristics of the athlete’s contract: the fact that an athlete may at any time be employed by more than one employer for performing the exact same services. This has been established in chapter 3 of this thesis.

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<sup>210</sup> [2005] 3 NZLR 721 at paragraph [118].

<sup>211</sup> [1995] NZAR 1 (HC).

<sup>212</sup> Commonly referred to as the ACC.

<sup>213</sup> *Kirk v ACC* [1995] NZAR 1 at 6.

<sup>214</sup> [2002] 1 ERNZ 752.

<sup>215</sup> *Waikato Rugby Union v NZRFU* [2002] 1 ERNZ 752 at paragraph [18].

<sup>216</sup> *Idem* paragraph [53].

As far as the general treatment of athlete's contracts by New Zealand courts is concerned, there is no doubt that this type of contract is seen as merely one of employment, subject to the same legislation and general rules governing employment contracts in general. Although, as in Australia, the courts of New Zealand do acknowledge the fact that athlete's contracts are unique in nature, they seem to feel that they are not significantly so as to be seen as entirely different from the general contract of employment. Based on this perception, it is submitted that courts in New Zealand would not grant specific performance of any contractual obligation of a personal sporting nature.

### 8.3. Conclusion

The main purpose of any comparative legal study is to ascertain whether the law as applied in foreign jurisdictions can in any way contribute to the law applied in South Africa. This is especially necessary in the current study, as professional sport is still somewhat of a novelty in South Africa, despite the fact that football in the country has been professional for several years. The purpose of this chapter is consequently to investigate the treatment of professional athletes' contracts in countries with rich histories of professional sport and the regulation thereof. More specifically, the question which this chapter aims to address is whether specific performance is perceived as suitable remedy for breach of an athlete's contract in other jurisdictions. This question is posed with the knowledge that in South Africa, courts currently seem not to have any reservations about granting said remedy, even in cases of breach of contracts of personal sporting services.<sup>217</sup>

Courts in the federal legal system of the United States of America have been confronted with numerous questions as to how to effectively solve the problem of professional athletes repudiating their contracts with the clubs that employ them. The evolution of law in the USA as a result of industrialisation led to the advancement of industrial technologies, and sport was one industry in the USA that benefited immensely from such evolution. This is evident from the fact that the laws and contracts governing the four main spectator sports<sup>218</sup> in the USA are all based on exactly the same legal premises. The problem of professional athletes repudiating their contracts prematurely was first dealt with by an American court in *Allegheny Base-ball Club v Bennett*.<sup>219</sup> Based on the unique skills possessed by the

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<sup>217</sup> While South African courts have granted specific performance as remedy for breach of athletes' contract in the past, it is once again stressed that there has been no Appeal Court decision on the matter.

<sup>218</sup> American Football, baseball, ice hockey and basketball.

<sup>219</sup> 14 F. 257 C.C. Pa. 1882.

professional baseball player in question, the employer-club requested the court to compel the player in question to honour the contract they had with him, and also to restrain the player from playing baseball with any competing club.<sup>220</sup> Importantly, the court made specific mention of the fact that the contract in question was one of “personal services” which required “special knowledge, skills or judgment” from the player in question.<sup>221</sup> This was a clear indication that US courts at an early stage realised and acknowledged that the contract governing the professional relationship between an athlete and a club was unique. However, the court in *Allegheny* found no precedent upon which specific performance of a contract of personal services could be enforced. The court found merely that the plaintiff in the matter possessed a remedy in law, and that remedy was damages.<sup>222</sup> Therefore, although this early US decision preceded similar cases in future, it followed the English approach of not ordering specific performance of a contract of personal services. It has been submitted in this chapter that the court should have considered the fact that the parties in *Allegheny* had contracted on equal footing, and that it (the court) had no duty in supervising whether its order (of specific performance) was honoured. The *sui generis* nature of the contract in question should have been the deciding factor in determining the most appropriate remedy in the circumstances, and not general English doctrine relating to personal services-contracts in general.

The nature of the athlete’s contract was considered effectively for the first time by a USA court in the case of *Philadelphia Ball Club v Lajoie*.<sup>223</sup> The importance of this decision lies in the fact that the court focused on the nature of the contract in question in order to determine the most appropriate remedy for breach thereof, and not on general doctrine relating to all contracts of personal services. The court in *Lajoie* stated that the athlete’s services were of “peculiar and special value to the plaintiff” and not “easily replaceable”.<sup>224</sup> Furthermore, the athlete in question was considered a “most attractive drawing card for the public”<sup>225</sup> because of the athletic skills he possessed to play baseball. Based on this fact, the court ordered negative injunction against the professional baseball player. This decision was subsequently not so much a confirmation of specific performance as the most appropriate remedy in the circumstances, but a confirmation that damages as remedy would be insufficient if the athlete in question were found to be “sufficiently unique” to his employer-club. This had actually

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<sup>220</sup> *Allegheny Base-ball Club v Bennett* 14 F. 257 C.C. Pa. 1882 at 258.

<sup>221</sup> *Idem* 259.

<sup>222</sup> *Idem* 259-260.

<sup>223</sup> 202 Pa. 210, 51 A (1902).

<sup>224</sup> *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902) at 217.

<sup>225</sup> *Ibid.*

already been decided in the preceding case of *Columbus Base Ball Club v Reiley*,<sup>226</sup> in which the court found that “a court of equity will not enforce a contract of personal services... unless the services contracted for were peculiar, unique and extraordinary in nature, and the person sought to be enjoined is shown to be a person of exceptional skill and ability, so that his place could not reasonably be filled.”<sup>227</sup> The significant contribution of especially *Lajoie*, but also a number of subsequent decisions by US courts, is that professional athletes who are classified as “sufficiently unique” or “difficult to replace” to the clubs that employ them, will most probably be barred from plying their trade in competition with their current employers by courts in the USA. The “uniqueness”-criterion is, according to the US decisions discussed in this chapter, one that is subjectively determined by the employer club in question. In other words, the athlete in question need only be unique to the club that employs him in order to satisfy the “uniqueness” criterion. If such athlete would be difficult to replace by the employer-club in question, a US court will most probably be willing to grant negative injunction against such athlete, should the latter repudiate his contract. A further significant contribution by US courts and their treatment of the athlete’s contract to this chapter, is that the remedy of damages has been described as “speculative, uncertain, and as a practical matter, impossible to ascertain.”<sup>228</sup> In summarising US courts’ treatment of the athlete’s contract, one can safely state that the contract is perceived by these courts as a *sui generis* legal tool. This statement is qualified by the fact that the US decisions discussed in this chapter have made mention of the unique athletic skills possessed by such athletes which make them valuable commodities to their clubs, and also grant them equal bargaining power when negotiating their athletes’ contracts. Upon breach of such contract by an athlete, US courts would probably order negative injunction against the athlete, as damages has correctly been described as an inadequate remedy for breach of the athlete’s contract.<sup>229</sup> Although there is no clear decision *against* specific performance as contractual remedy by US courts, it is doubtful (based on the discussed authority) whether a US court will grant said remedy for breach of the athlete’s contract.

Determining the treatment of athletes’ contracts by courts in the European Union will always be a challenging task, as one must keep in mind that there are different countries within the Union with possible different perspectives on especially contractual remedies. However, the

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<sup>226</sup> 11 Ohio Dec. 272 (1891).

<sup>227</sup> *Columbus Base Ball Club v Reiley* 11 Ohio Dec. 272 (1891) at 1.

<sup>228</sup> In *Boston Professional Hockey Association v Cheevers* 472 F.2d 127 (1<sup>st</sup> Cir. 1972).

<sup>229</sup> The merits of the remedy of negative injunction are discussed in chapter 7 of this thesis.



intersection of sport with the functions of the European Union is indeed an important aspect of modern sports law in general, and relevant to the question as to the treatment of athletes' contracts in all sport-playing nations. One case in particular has shaped the perception of the profession of sport and the contracts governing it to a great extent within the EU: that of *Union Royale Belges des Sociétés de Football ASBL v Bosman*.<sup>230</sup> The significance of this decision lies therein that it has moved the European Union to provide more detailed attention to and appreciation of the nature of sport and the extent to which sport can be regulated by legal intervention.<sup>231</sup> Most importantly, the EU's competence in matters relating to sport within that Union is provided for by Article 165(1) of the Treaty for Functioning of the European Union, which acknowledges the "specific nature" of sport and its regulation. This, it has been submitted, is a clear acknowledgment by the EU of the *sui generis* nature of sport as a business. Despite this acknowledgment, however, decisions by the European Court of Justice on the most appropriate remedy for breach of athletes' contracts have stuck to the notion that said contracts are merely ones of employment or service, albeit of a personal nature. Consequently, these decisions have followed English doctrine as far as the most appropriate remedy for breach of a contract of personal services is concerned. When ordering damages, however, FIFA's *Regulations for the Status and Transfer of (Football) Players* provide guidelines as to calculating an adequate amount of damages available to a club which has invested significant amounts of capital in a player, only for the latter to repudiate his contract with said club. These guidelines, it has been submitted, are vague and ineffective at most. This has been illustrated in the current chapter by a discussion of the case of *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United*.<sup>232</sup> Ironically, the court in this case mentioned the importance of professional athletes honouring their contracts. The problem with the remedy of contractual damages is twofold: firstly, it is almost impossible (as illustrated in the Lyonnais-case) to calculate an adequate and reasonable amount of damages, and secondly, awarding damages will not solve the problem of player-poaching by rich clubs and subsequent repudiation of athletes' contracts within the EU.

The courts of the United Kingdom follow a similar approach to the treatment of athletes' contracts as those in the EU discussed above. Whereas heed should be paid to such treatment by South African courts in similar matters, one should consider English authority on the subject with great caution. The reason for this is that English law has always perceived

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<sup>230</sup> [1995] ECR I-4 1 9 2.

<sup>231</sup> According to Gardiner *et al* 146.

<sup>232</sup> Case number C-325/08.

specific performance as a mere remedy in equity, and that English courts will never grant specific performance of a contractual duty if the plaintiff in question possesses a remedy in law (which is damages). This is especially true in case of breach of contracts of personal services. In the case of *Walker v Crystal Palace Football Club*,<sup>233</sup> the court made it abundantly clear that a professional athlete is no different from an ordinary “workman”. It has been submitted that the court in *Walker* failed to take into account the unique athletic skills possessed by the “workman” in question. However, it is doubtful whether it would have made any difference to the court’s decision had he indeed perceived the contract in question as sufficiently *sui generis* in nature. In the case of *Warren v Mendy*,<sup>234</sup> an English court did in fact acknowledge the *sui generis* nature of the athlete’s contract. However, as Gardiner *et al* commented, such acknowledgment will probably never move an English court to reconsider the suitability of an award of damages for breach of an athlete’s contract. Once again, the adequacy (or rather lack thereof) of an award of damages for breach of an athlete’s contract was discussed, and the problems surrounding such an order in particular. The case of *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA*,<sup>235</sup> although not an English one, provided a thorough indication of the inadequacy of damages as contractual remedy in case of the athlete’s contract. Ironically once again, the Court of Arbitration for Sport stated specifically that the purpose of an award of damages was to ensure that neither athletes nor clubs committed repudiation of existing contracts. The irony lies in the fact that article 17 of FIFA’s Regulations actually creates a loophole for athletes to repudiate their contracts by providing them (and their potential “new” clubs) the opportunity to be “bought” out of their contracts. English courts will, however, always award damages to a “wronged” club in case of breach of contract by an employee-player of that club, despite the sporting code in question. It is once again submitted that it is highly doubtful that this approach will solve the problem of athletes dishonouring their contractual obligations. It is suggested, furthermore, that a forum such as the Court of Arbitration for Sport should rather create new precedents as far as the most appropriate remedy for breach of athletes’ contracts are concerned, than blindly follow English doctrine in this regard.

Unsurprisingly, a study of the treatment of athletes’ contracts by Australian and New Zealand courts indicated that the doctrine of these courts is thoroughly founded in English Common

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<sup>233</sup> [1910] 1 K.B. 87.

<sup>234</sup> [1989] 3 All ER 103.

<sup>235</sup> CAS 2008/A/1519-1520.

law. Although an Australian court in *Buckenara v Hawthorn Football Club*<sup>236</sup> decided that it would restrain an athlete from repudiating his contract (thereby protecting the “legitimate interests” of the football club in question), it would not go directly against Australian jurisprudence by ordering specific performance of a contract of personal services. At most, Australian courts will be willing to order negative injunction against a professional athlete in breach of his contract. This was confirmed in the Australian case of *Bulldogs Rugby League Club Ltd and Another v Williams and Others*.<sup>237</sup> *In casu*, the court referred to two significant English decisions, namely *Warner Brothers Pictures Inc v Nelson*<sup>238</sup> and *Lumley v Wagner*,<sup>239</sup> and decided that a decree of specific performance was not available to a plaintiff in case of breach of a contract of personal services. However, Australian and New Zealand courts will order negative injunction against a professional athlete in order to restrain such athlete to repudiate his contract *during* the term thereof. The logical question is why it should be necessary for a court to prohibit a party from committing breach of contract while such contract is still in existence – surely it is implied by the contract itself.

The discussion of the treatment of the athlete’s contract in various foreign jurisdictions, especially as far as the most applicable remedy for breach of this type of contract is concerned, has made it clear that South African courts currently seem not to be in alignment with said foreign jurisdictions as far as the most appropriate remedy for breach of the athlete’s contract is concerned. This can be ascribed to the different systems of common law that underlie said jurisdictions.

The problem with which South African courts will be faced in future, however, is that sport as a profession, in particular the three main spectator codes in South Africa,<sup>240</sup> will continue to become more and more globalised. This may lead to a situation where professional athletes domiciled in South Africa will be held bound to their athletes’ contracts upon breach thereof, whereas athletes in competing jurisdictions such as the USA, Europe, the UK, Australia and New Zealand would only have to pay a “buy-out fee” to be released from their athletes’ contracts. Furthermore, a situation may occur where a South African athlete contracted by a foreign club would be able to repudiate his contract with that club and simply pay damages, whereas if that very same athlete were to be under contract with a South African club (and

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<sup>236</sup> [1988] VR 39.

<sup>237</sup> [2008] NSWSC 822.

<sup>238</sup> [1937] 1 K.B. 209.

<sup>239</sup> 42 E.R. 687 (1910).

<sup>240</sup> Football, cricket and rugby.

repudiated that contract) he would be compelled to honour his contract (which is the exact same type of contract as the “foreign” one) for the remaining term thereof. The most important question to be posed is whether South African courts should continue to follow the Roman-Dutch notion that all contracts, including athletes’ contracts, can be specifically enforced, or whether South African courts should consider foreign authority, which is almost unanimous in its perception that specific performance must not be decreed in the case of contracts of a personal nature, such as athletes’ contracts. It has been argued in this chapter and elsewhere in this thesis that the remedy of damages is an ineffective one, and that it will not solve the ultimate problem posed by this thesis: to prevent or at least limit the “poaching” of professional athletes from their employer-clubs by richer clubs within the same sporting code (or even different sporting codes), causing the athletes in question to repudiate their contracts with alarming consistency.

The conclusions reached in this chapter cannot be denied, however, and therefore it is essential to evaluate each contractual remedy properly, in order to ascertain whether South African courts should indeed reconsider their current treatment of the athlete’s contract.

## CHAPTER 9: COMPARISON BETWEEN SPECIFIC PERFORMANCE AND OTHER REMEDIES FOR BREACH OF CONTRACT

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### 9.1. Introduction

South African courts' treatment of the athlete's contract is unique. It was established in the previous chapter of this thesis that the most relevant foreign jurisdictions (as far as sports law is concerned) will not grant specific performance of a contract involving personal services. Although these jurisdictions, without exception, acknowledge the *sui generis* nature of the professional relationship between an athlete and club, union or province that employs him, ordering the specific performance of contractual obligations by the athlete seems to be a bridge too far for these courts. At most, courts in the United States and Australia have been willing to grant injunctive relief to a club against whom repudiation of a contract has been committed.

The reason for the reluctance of courts in foreign jurisdictions to grant the remedy of specific performance is founded in the systems of common law present in said jurisdictions. The jurisdictions discussed in the previous chapters all follow English common law, in which of course the remedy of specific performance is a mere secondary one and will very seldom be granted in case of contracts regulating services of a personal nature (such as the playing of sport). In contrast, it has been established in this thesis that there is no doubt that specific performance is the primary contractual remedy in South African law. More importantly, courts in South Africa currently seem to be willing to grant specific performance even in cases involving contracts of personal service. Although there has not been an Appeal Court decision on the most appropriate remedy for breach of an athlete's contract by an athlete in South Africa, current authority suggests that a professional athlete plying his trade in South Africa will be held bound to his contract by a court should he repudiate said contract.

The problem with South African courts' treatment of the athlete's contract (especially as far as the most appropriate remedy for breach thereof is concerned) not being in alignment with relevant foreign courts' treatment of the same contract, is that sport is a global profession, and courts' treatment of the contract governing that profession should be similar. If not, no legal certainty will be created among especially South African athletes who are to an

increasing extent plying their trade overseas. The purpose of this chapter is to investigate the alternative remedies available to a club, union or province whose contract with a specific athlete has been repudiated by the latter. The focus will be on the contractual remedies available to a party to an athlete's contract in South Africa, but it is necessary to investigate whether a remedy such as negative injunction (which is similar to the prohibitive interdict in South African law) would perhaps not be a suitable (and possibly less infringing) alternative to specific performance in case of breach of athletes' contracts. The remedy of contractual damages, the interdict as a way of enforcing a contractual obligation, and the penalty clause, which serves the same purpose, will be discussed in this chapter along with the unfamiliar remedy (as far as South African law is concerned) of injunction.

## 9.2. Contractual remedies for breach of contract in South Africa

### 9.2.1. Damages

In order to determine whether an award of damages would be feasible and practical as remedy for breach of an athlete's contract in South African law, the true nature of this remedy must be examined. Much has been written on the inappropriateness of this remedy for breach of said type of contract. This perception has been confirmed by foreign case law discussed in especially the previous chapter. Ironically, in the case law referred to, damages were perceived as the most appropriate remedy for breach of an athlete's contract despite it being quite clear that it is almost impossible to calculate the amount of damages in any particular case accurately.

Whereas the existence of the remedy of specific performance in Roman law has been debated and discussed in chapter 4 of this thesis, availability of damages as remedy for breach of contract in that system of law is undisputed. This is so despite the fact that Roman law had neither a general concept of, nor general liability for, this remedy.<sup>1</sup> Damages, especially the recovery thereof, existed in classical Roman law in the forms of the formulary procedure as well as the *condemnatio pecunaria*.<sup>2</sup> The *iudex* had the responsibility to evaluate the extent of the liability in accordance with the *formula* of the action in question.<sup>3</sup> According to the

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<sup>1</sup> Kaser (1984) 182. This is the English translation of Kaser's *Das römische Privatrecht* by Rolf Dannenbring. See also Erasmus "Aspects of the History of the South African Law of Damages" 1975 *THRHR* 104 and Lotz "n Kursoriese historiese terugblik op skadevergoeding met spesifieke verwysing na suiwer vermoënskade in die Suid- Afrikaanse Reg" 2007 *Fundamina* 75.

<sup>2</sup> Erasmus 1975 *THRHR* 105.

<sup>3</sup> I 4 6 31. According to Justinian, "*praeterea quasdam actiones arbitrarie, id est ex arbitrio iudicis pendentes, appellamus, in quibus nisi arbitri iudicis is, cum quo agitur, actori satisficiat, veluti rem restituat vel exhibeat*

*condemnatio pecunaria*, every judgment by a *iudex* for a performance had to be for a definite sum of money.<sup>4</sup> According to Justinian, the *iudex* could determine, according to the principles of equity (as well as the circumstances of each particular case) the “satisfaction that the plaintiff ought to receive.”<sup>5</sup> The reasoning behind this was that historically, performance actually entailed “redemption from liability”, according to Kaser.<sup>6</sup> What this basically meant was that the debtor was relieved from the harshness of personal execution. By fixing a specific amount of money to the contractual debt, any person who could raise this sum could discharge the debtor’s contractual duties.<sup>7</sup>

One of the main problems experienced with attaching a monetary amount to a contractual duty, has been identified in previous chapters as the difficulty of calculating said amount. In Roman law, the specific amount of money awarded for damages in any particular case had to be determined by judicial estimation,<sup>8</sup> as explained above. If the action for damages was for a *certum*, the objective value of the object of the contract had to be ascertained. If, however, the action was for an *incertum*, the creditor was awarded the *quod* interest. This basically meant that the *iudex* considered factors such as the actual loss suffered by the creditor as well as the value of the thing in question.<sup>9</sup> Put somewhat differently, in the case of an action for *certa pecunia*, a fixed sum of money was mentioned in the relevant *condemnatio*, and the *iudex*’s discretion was limited to either condemning in the liquidated amount or absolving. In other actions for money, the *condemnatio* left the estimation of the amount due either to the discretion of the *iudex* or stated that the latter’s judgment was not to exceed a certain amount.<sup>10</sup> Whereas Justinian was in favour of the calculation of interest, he stated that such interest was never to exceed double the ordinary value of the original performance.<sup>11</sup>

The *iudex* was instructed in a number of formulae to evaluate the amount of the judgment in accordance with the norm *quanti ea res est*.<sup>12</sup> This standard was based on the objective valuation of the market value of property or goods at any particular time. Interestingly

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*vel solvat vel ex noxali causa servum dedat, condemnari debeat.*” See also Lotz 2007 *Fundamina* 76.

<sup>4</sup> Gaius I 4 48; I 4 6 31; Kaser 183, Lotz 2007 *Fundamina* 77.

<sup>5</sup> I 4 6 31. The Latin text reads as follows: “*In his enim actionibus et ceteris similibus permittitur iudici ex bono et aequo secundum cuiusque rei, de qua actum est, naturam aestimare, quemadmodum actori satisfieri oporteat.*”

<sup>6</sup> Kaser 183.

<sup>7</sup> *Ibid.*

<sup>8</sup> Kaser 183; Erasmus 1975 *THRHR* 105. Judicial estimation was known as *litis aestimatio*.

<sup>9</sup> Kaser 184, Lotz 2007 *Fundamina* 77.

<sup>10</sup> Erasmus 1975 *THRHR* 106, Lotz 2007 *Fundamina* 77-78.

<sup>11</sup> C 7 47 1. See also Kaser 184 on Justinian’s point of view.

<sup>12</sup> Erasmus 1975 *THRHR* 106.

enough, if summons was issued demanding something other than money (for example the transfer of ownership in property), then the objective value of the property in question at the time of *litis contestatio* had to be assessed.<sup>13</sup> If, however, the action in question was for a deposit, loan or pledge, the value of the thing in question at the time of judgment had to be assessed.

It is clear that the remedy of damages in classical law did not make sufficient provision for breach of contracts involving services of a personal nature. It is logical that damages could be assessed with relative ease if an amount or value could be attached to the thing in question. The challenge of this thesis lies, however, in determining a suitable amount of damages in case of services of a personal nature. Erasmus states that classical jurists were mostly silent on the clear limits of compensatory damages.<sup>14</sup> In the few texts that touch upon these limits, the authors were more concerned about the question as to the existence of liability to pay damages, than with the extent of said liability, in other words the amount of damages.<sup>15</sup> Erasmus makes specific mention of the fact that in Justinianic law, the formulary procedure of determining damages was replaced by a system of pleading. Furthermore, the *condemnatio pecunaria* was abolished and the *iudex* became entitled to order specific performance of contractual obligations.<sup>16</sup> The mere fact that specific performance was available as contractual remedy in Justinianic law, adds to the relevance of the question as to the suitability of damages as remedy for breach of an athlete's contract.

Because of the abolishment of the *cognitio*-procedure as well as the *condemnatio pecunaria* in post-classical Roman law, the development of the remedy of damages was focused on the term *interesse* by the glossators and the pandectists.<sup>17</sup> *Interesse* can be defined as follows:<sup>18</sup>

*Interesse est damnum emergens et lucrum cessans ex quo aliquid fieri cesset.*

In order to determine *interesse*, three broad divisions of the term were made and realised. The first division was that of *interesse commune*,<sup>19</sup> the second that of *interesse singulare*<sup>20</sup> and the

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<sup>13</sup> Erasmus 1975 *THRHR* 106.

<sup>14</sup> *Idem* 110.

<sup>15</sup> Erasmus 1975 *THRHR* 106, Lotz 2007 *Fundamina* 79.

<sup>16</sup> Erasmus 1975 *THRHR* 109, Lotz 2007 *Fundamina* 78.

<sup>17</sup> Erasmus 1975 *THRHR* 111-112; Lotz 2007 *Fundamina* 80.

<sup>18</sup> This definition was for centuries to remain the foundation of all further attempts to at definition, according to Erasmus 1975 *THRHR* 112. It was originally provided by Accurius *Possible est ad C 7 47*.

<sup>19</sup> The objective or market value of the *res* in question.

<sup>20</sup> This represented the subjective or personal *affectio* or *utilitas* of the plaintiff in question.



the third that of *interesse conventum*.<sup>21</sup> This division was, however, rejected on practical considerations during the sixteenth century, and this rejection was the inevitable predecessor of the so-called “Differenztheorie”<sup>22</sup> which was introduced by canon law, as opposed to Roman law.<sup>23</sup> The purpose of this theory was to find a generalised, singular method of determining an amount of damages without having to investigate the nature of the act in question as well as the circumstances surrounding said action on an *ad hoc* basis.<sup>24</sup> According to the “Differenztheorie”, the plaintiff’s actual material position is compared to the hypothetical material position he *would* have been in, had it not been for the damaging act.<sup>25</sup> This creates a particularly interesting scenario as far as breach of an athlete’s contract is concerned. If the “Differenztheorie” were to be applied to the mentioned scenario, it would entail that an “employer” in a professional relationship with a professional athlete would have to be placed in the financial (or material) position it would have been had it not been for the repudiation committed by the professional athlete. Once again, one is faced with the problem of determining both the actual financial position of the “employer” as well as the hypothetical position he would have been in had it not been for the athlete’s repudiation. There are numerous examples of professional athletes who had started their professional careers in somewhat mediocre fashion, only to emerge as *bona fide* “superstars” in later years.<sup>26</sup> It is close to impossible to determine a hypothetical material position in which a plaintiff in an action may have found itself had it not been for the doomed repudiation by the defendant in question, *especially* in case of breach of an athlete’s contract. Although Von Jhering refined the “Differenztheorie” by distinguishing between positive<sup>27</sup> and negative<sup>28</sup> interest, this distinction does little to address the problem discussed above.

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<sup>21</sup> This was similar to the agreed *pretium*.

<sup>22</sup> More familiar to South African law as “sommeskadeleer”. See also Van der Merwe *et al* (2012) 416.

<sup>23</sup> Lotz 2007 *Fundamina* 81.

<sup>24</sup> *Ibid.*

<sup>25</sup> Erasmus 1975 *THRHR* 114-115; Lotz 2007 *Fundamina* 81.

<sup>26</sup> It is generally accepted that Michael Jordan, for instance, was solely responsible for reviving the fortunes of the Chicago Bulls in the mid-1980’s. The original Yankee Stadium in New York was known unofficially as the “House that Ruth built”, due to the exceptional talents of former baseball player Babe Ruth and the subsequent crowds drawn merely because of these talents.

<sup>27</sup> Also known as *Erfüllungsinteresse*. This refers to the hypothetical material position the plaintiff would have been in had it not been for breach of contract. See also Van der Merwe *et al* (2012) 416.

<sup>28</sup> Also known as *Vertrauensinteresse*. This refers to the hypothetical material position the plaintiff would have been in had it not been for the conclusion of the contract. For a discussion of the difference between positive and negative interest, see Hutchinson “Back to Basics: Reliance damages for breach of contract revisited” 2002 *SALJ* 51 and Van der Merwe *et al* 416.

Roman-Dutch writers of the seventeenth and eighteenth centuries did very little to develop the concept of and practical difficulties in determining damages.<sup>29</sup> Voet, however, did lay down three general rules as far as damages are concerned. The first of these rules was that account had to be taken of advantage lost and damages sustained in a particular matter.<sup>30</sup> Secondly, damages must not be too remote,<sup>31</sup> and thirdly, the plaintiff's affections and feelings were not to be taken into account when determining the amount of damages, as the standard of calculation of damages was a commercial one.<sup>32</sup> Voet was of the opinion that the obligation to compensate a plaintiff for causing damage to the latter arose out of a disturbance of "commutative justice", which caused inequalities which had to be rectified by the effector of such inequalities in the form of money, *if he couldn't do so in kind*.<sup>33</sup> He defines *interesse* as follows:<sup>34</sup>

"The deprivation of a benefit and the suffering of a loss through such fraud or negligence on the part of an opponent as he is held liable to make good, and is assessed in fairness by the duty of the judge."

Interestingly enough, the word "fairness" as far as it relates to the duty of the judge to award damages, is again mentioned, as it was in the Roman law definition of damages. It must then be assumed that the requirement of fairness as relates to the award of damages is the golden thread which runs through the determination of an amount of damages in case of breach of contract. It is submitted, though, that the requirement of fairness is inherently flawed in case of having to determine an amount of damages in case of breach of an athlete's contract. The reason for this is simple and has been mentioned often in this and the previous chapter: it is impossible to determine a "fair" or "equitable" amount of damages, either according to positive or negative interest, due to an "employer" in a case where a professional athlete was to repudiate his contract with such employer. Put differently, if it were to be expected of a club, province or union (which is entitled to the services of an athlete by contract) to accept

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<sup>29</sup> Lee (1953) 263; Mulligan "Damages for breach: Quantum, remoteness and causality" 1956-1958 *SALJ* 30, Lotz 2007 *Fundamina* 82-83.

<sup>30</sup> Voet 45 1 9, as translated by Gane (1955). See also Lee 263.

<sup>31</sup> Voet 45 1 9, as translated by Gane (1955). This rule was confirmed in *Kotze v Johnson* [1928] A.D. 313. See also Lee (1953) 263.

<sup>32</sup> Voet 45 1 9, as translated by Gane (1955). This rule was confirmed in *Jockie v Meyer* [1945] A.D. 354. See also Lee 263 and Wessels (1937) paragraph 3191. This rule of Voet is quite contrary to the early South African decision of *Triegaardt v Van der Vyver* (1910) 24 EDC 44, in which the Court found that in a breach of promise to marry-suit, the feelings of the plaintiff should be taken into account, as the breach of contract was not one in the ordinary sense of the word.

<sup>33</sup> Voet 9 2 11, as translated by Gane (1955).

<sup>34</sup> Voet 45 1 9, as translated by Gane (1955). The original definition reads as follows: "Utilitas amissa et damnum acceptum adversarii dolo vel culpa tali, quam praestare tenetur, quod officio iudicis ex aequitate aestimatur." Van Leeuwen 1 4 15 6 adopts a similar definition. See also Lotz 2007 *Fundamina* 83.

an amount of money as surrogate for those services, it will *always* be unfair or inequitable towards that club, province or union. The reason for this statement is the fact that no amount of damages can compensate an “employer” for the loss of the *sui generis* athletic abilities of the professional athlete in question. This is confirmed by the fact that Voet felt that in determining the quantum of damages, the *defendant* should receive the benefit of the doubt.<sup>35</sup>

With the common law position as far as damages is concerned in mind, it is essential to determine South African courts’ treatment of this (contractual) remedy, in order to determine their position as far as the remedy is concerned.

The current South African law relating to damages (in general, not only contractual) is not based on Roman or Roman-Dutch law only.<sup>36</sup> The remedy, especially as far as contractual damages are concerned, has been influenced rather significantly by English law.<sup>37</sup> The reason for this is provided by Lotz as the fact that the English law of evidence as well as the jury system were used in South African civil procedure during the years 1852 to 1927.<sup>38</sup> Lee goes even further in stating that the Roman-Dutch law of damages (and consequently South African law) is “substantially” the same as in English law.<sup>39</sup> According to Van der Merwe *et al*,<sup>40</sup> a plaintiff in South African law who wishes to claim damages, must essentially prove four things: firstly, that there was indeed breach of contract committed by the defendant, secondly, that damages were indeed suffered, thirdly, that there exists a factual causal connection between the breach of contract and the damages suffered, and fourthly, that the damages are a natural consequence of the breach of contract that occurred. The fourth and last requirement mentioned by Van der Merwe *et al* echoes the second requirement for an award of damages mentioned by Voet and discussed above. The *locus classicus* as far as the remedy of damages in South African law is concerned, is *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*.<sup>41</sup> *In casu*, the defendant company neglected to supply the plaintiff company with an amount of electricity that had been agreed upon.<sup>42</sup> The plaintiff subsequently claimed damages, as the defendant’s neglect caused the plaintiff’s

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<sup>35</sup> Voet 45 1 12. See also Lotz 2007 *Fundamina* 85.

<sup>36</sup> Hahlo and Kahn (1973) 578; Lee 263.

<sup>37</sup> Lee 263; Erasmus 1975 *THRHR* 278.

<sup>38</sup> See Lotz 2007 *Fundamina* 86 at fn 95.

<sup>39</sup> Lee 263.

<sup>40</sup> Van der Merwe *et al* 415.

<sup>41</sup> [1915] A.D. 1. This was not the first South African case which dealt with contractual damages as remedy for breach of contract. However, it is the most significant and relevant decision in the current context.

<sup>42</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 6.

business to stagnate.<sup>43</sup> Innes CJ decided that in an action for contractual damages, the sufferer should be placed in the position he would have been had the contract been properly performed.<sup>44</sup> There were, however, two qualifications to this rule as laid down by Innes CJ: firstly, it had to be effected as far as it was possible through the payment of an amount of money, and secondly, it had to be effected without undue hardship to the defaulting party.<sup>45</sup> The damages awarded in a case like the one under discussion are only those as flow naturally from the breach of contract in question, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom.<sup>46</sup> This accord with Voet's second rule mentioned above.<sup>47</sup> The significance of this decision by Innes CJ lies therein that damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance.<sup>48</sup> In any case involving damages as a result of breach of contract, a plaintiff must indicate that he has in fact suffered some damage. This goes without saying. According to Wessels JA in *Lavery and Co Ltd v Jungheinrich*,<sup>49</sup> the damages recoverable by a plaintiff are determined by the "actual pecuniary loss" which the breach entails.<sup>50</sup> This refers to the damages that would naturally and generally result from the breach of contract.<sup>51</sup> It is submitted that the challenge in any particular case lies not in proving that damages were suffered, but (as has been stated repeatedly) in determining the exact amount of damages. Lee<sup>52</sup> makes mention of this challenge, but also alludes to the case of *Sandler v Wholesale Coal Suppliers Ltd*,<sup>53</sup> in which it was stated that difficulty in determining damages "does not relieve the court of the duty of doing so upon the evidence placed before it." In *Klopper v Molako*,<sup>54</sup> Tindall J placed a significant duty upon the plaintiff in assisting the court to determine a suitable and fair amount of damages. *In casu*, the court stated that "when a plaintiff is in a position to lead evidence which will enable the court to

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<sup>43</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 7.

<sup>44</sup> *Idem* 22.

<sup>45</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22. See also Hutchinson 2002 SALJ 51.

<sup>46</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22.

<sup>47</sup> See Voet 45 1 9.

<sup>48</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22. See also Lee 264.

<sup>49</sup> 1931 AD 156.

<sup>50</sup> *Lavery and Co Ltd v Jungheinrich* 1931 AD 156 at 174.

<sup>51</sup> *Ibid.*

<sup>52</sup> Lee 265. Lee states that it is often "exceedingly difficult" to value the damage in terms of money.

<sup>53</sup> [1941] A.D. 138.

<sup>54</sup> 1930 T.P.D. 865.

assess the figure (or amount of damages) he should do so, and not leave the court to guess at the amount.<sup>55</sup>

The current leading case on South African courts' treatment of the remedy of damages is *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.<sup>56</sup> The relevant facts of this familiar decision were that the respondent had bought an amount of bricks from the appellant, which turned out to be defective and unsuitable for building purposes.<sup>57</sup> Due to the fact that the building under construction had to be torn down and rebuilt, the respondent suffered damages in the form of consequential loss.<sup>58</sup> The court in the person of Corbett JA confirmed the fundamental rule in *Victoria Falls* that the purpose of damages is to place the sufferer in the position he would have been in had it not been for the breach of contract. Furthermore, this had to be achieved by the payment of money and without undue hardship to the defaulting party.<sup>59</sup> The defaulting party's liability, according to Corbett JA, was limited to those damages that flowed naturally and generally from the kind of breach on question, as well as those damages, although caused by the breach of contract, were considered in law as being too remote to be recoverable.<sup>60</sup>

A more effective way of determining an amount of damages in case of breach of contract, is to do so contractually. In the case of *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*, the contract included a clause which read that "in the event of failure to supply electric power, the power company shall pay for interruptions, which entail a stoppage of any period, at the rate of 7 shillings per hour."<sup>61</sup> Although the formula for determining the amount of damages was a simple one, it was described by the court as "a simpler and more satisfactory measure of damages".<sup>62</sup> It also preceded Tindall J's plea for the plaintiff to assist the court in determining the amount of damages as mentioned in *Klopper v Maloko*. It is submitted for the purposes of this thesis that contractually pre-determining a formula, by which damages would be calculated in case of breach of contract, is the only sensible way of ensuring that the sufferer of damages is not treated unfairly in an award of such by a court. This statement must be substantiated in view of the specific

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<sup>55</sup> *Klopper v Maloko* 1930 T.P.D. 865.

<sup>56</sup> 1977 (3) SA 670 (A).

<sup>57</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 683.

<sup>58</sup> "Gevolgskade" in Afrikaans.

<sup>59</sup> *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 686.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22. This was in terms of clause 11 of the contract between the parties in question.

<sup>62</sup> *Ibid.*

practical complications involved in determining a fair and suitable amount of damages for breach of the athlete's contract in particular.

The practical problems involved in determining an amount of damages for breach of an athlete's contract in particular have been mentioned and discussed at length in both foreign and domestic case law, as well as in this thesis. However significant these problems may seem, it was established in the previous chapter that foreign courts will not grant specific performance of contractual obligations involving services of a personal nature. Although South African courts currently seem willing to do so, it has also been suggested above that because of the global nature of sport as a business, heed must be paid to bringing South African law (as far as the treatment of athletes' contracts are concerned) in alignment with the foreign jurisdictions mentioned.<sup>63</sup> In order to do so, a satisfactory formula must be adopted in terms of which contractual damages should be calculated in case of breach of an athlete's contract. Due to the *sui generis* nature of said contract, it would not be impossible for such a formula to apply to all professional sporting codes. It must be stated that the idea of a uniformed formula for the determination of a suitable amount for contractual damages is not novel. It was seen in the previous chapter, especially in cases like *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA*<sup>64</sup> that parties to athletes' contracts have attempted to lay down certain rules as to monetary compensation in case of breach of contract. However, these rules have at best aided in determining *transfer fees* payable to an employer-club should an athlete in their employ decide to relocate and change clubs. A distinction must be drawn between the amount that a professional athlete and/or the club to which such athlete wants to move to is willing to pay in order to buy the athlete out of his current contract, and the contractual remedy of monetary damages payable to an employer-club against whom breach of contract has been committed. In the case of the former, it can be argued that although breach of contract is committed by the athlete in question, the party against whom such breach is committed at least has an opportunity to negotiate a "buy-out" fee with the athlete and/or his potential new club. The amount of this "buy-out" fee will be determined by actual

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<sup>63</sup> It is submitted that if this does not happen, South African courts will continue to compel professional athletes in breach of their contracts to serve out those contracts, while globally, professional athletes plying the same trade as those in South Africa will be allowed to rescind from their contracts and merely paying contractual damages. This would hardly be fair towards professional athletes in South Africa, although a decent argument could be made for the fact that it would be more fair towards the "employers" in each individual case.

<sup>64</sup> CAS 2008/A/1519-1520.

monies invested in the athlete, as well as potential loss of income due to the athlete's departure. In the latter case, however, the plaintiff in an action for damages will be limited to damages actually suffered, if the common law position relating to contractual damages is followed. The 'buy-out' fee or "transfer fee" should ideally be determined contractually in the form of a penalty clause in the athlete's contract. The penalty clause as remedy for breach of an athlete's contract is discussed separately in this chapter. As far as the remedy of damages is concerned, there is but one requirement that must be satisfied: the "victim" of the breach must be placed in the position he would have been had it not been for breach of contract.<sup>65</sup> This refers solely to his (the "victim's) financial position. In the case of *SA Music Rights Organisation Ltd v Mphatsoe*,<sup>66</sup> the South African Labour Court decided that an employee could avoid giving notice (if a notice period had been determined in the contract of employment) if such an employee paid the employer a sum equivalent to the remuneration that would have been earned by said employee during said notice period.<sup>67</sup> However, according to the court in *Mphatsoe*, there was more to the question as to the most appropriate amount of damages than met the eye. The court stated that it might have been possible that at the time of the employee's repudiation of his contract of employment in the current case, his services may have become redundant to the employer. In such circumstances, it would have been a relief for the employer not to have the obligation of having to pay the employee for the notice period. In such an instance, there would be no pecuniary loss suffered by the employer, and a claim for contractual damages would be obsolete.<sup>68</sup> However (and herein lies the significance of the *Mphatsoe*-decision to the current discussion), the employee at the time of repudiating the contract may have possessed "rare and sought-after skills", which would have necessitated the engagement at a premium of a similarly-skilled temporary (or even permanent) employee.<sup>69</sup> The reference to "rare and sought-after skills" is all too familiar, especially as it relates particularly to the professional athlete and the skills he possesses. If, for instance, the plaintiff in an action for damages as a result of breach of an athlete's contract, is able to indicate to a court that ticket sales had gone down significantly since the departure of a specific athlete due to breach of contract, *and* that the decrease in ticket sales was most likely caused by such athlete's departure, *and* finally an amount could be attached to the decrease in ticket sales, such an amount could be added to the actual money spent on

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<sup>65</sup> Hutchinson 2002 SALJ 52.

<sup>66</sup> (2009) 30 ILJ 2482 (LC).

<sup>67</sup> *SA Music Rights Organisation Ltd v Mphatsoe* (2009) 30 ILJ 2482 (LC) 2489.

<sup>68</sup> *Idem* 2490.

<sup>69</sup> *Idem* 2490.

the athlete in question (in the form of salaries, attire, etcetera) in order to calculate a reasonable amount of damages. If, however, it is impossible or even unfeasible to determine such an amount of damages, then it is submitted that damages would in a case like the one mentioned above, not be the most suitable remedy for breach of an athlete's contract. The solution offered in *Victoria Falls*, that is, to contractually agree on a formula in terms of which damages should be calculated at breach of contract, does not seem to offer a practical solution to the problem of determining a suitable amount of damages in any particular case. There are too many eventualities to be taken into account when breach of contract occurs (such as actual damages suffered, possible future damages which must be calculated, as well as personal damages), and this is particularly true of breach of an athlete's contract. However, the idea of determining an amount (or at least a formula for calculating an amount) of damages contractually is a feasible one. It is submitted, however, that this idea would only be feasible if put in the form of a penalty clause for breach of contract, which is alluded to above and discussed in detail below.

Whereas the contractual remedy of damages has its origins in Roman law, was developed to a limited degree by the Roman-Dutch writers, influenced by English law to a significant degree and is still perceived by South African courts as a significant remedy for breach of contract, it has been indicated above that when it comes to breach of the athlete's contract in South African law, damages might not be the most suitable remedy. The reasons for this have been discussed *ad nauseum*, and include the fact that in South African law, a plaintiff does have the option of claiming specific performance of the contract in question. Still, the problem of South African courts' perception of the most suitable remedy for breach of the athlete's contract not being aligned with courts in foreign jurisdictions' perception remains. The solution to this problem lies in the finding of a remedy which can serve as common denominator between South African and foreign courts. The interdict is one such possible common denominator.

### **9.2.2. Interdict**

According to Justinian, interdicts were formulae by which the praetor ordered or forbade something to be done.<sup>70</sup> They were mainly used in disputes regarding possession or quasi-

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<sup>70</sup> / 4 15.



possession. In Roman law, interdicts were divided principally into three categories, namely prohibitory, restitutory, and exhibitory.<sup>71</sup> In terms of prohibitory interdicts, the praetor forbade a person to do something in particular. Examples of actions which could have been forbade by the praetor, were to use force against a person in lawful possession of something or against a person who carried a dead body to a spot where he had the right to carry it, to build on a sacred place, and to do anything in or on the banks of a public river which would impede navigation.<sup>72</sup> The second category of interdicts, namely restitutory interdicts, were those by which the praetor ordered something to be restored, such as the possession of land to a person who had been violently expelled from such land.<sup>73</sup> The final category, exhibitory interdicts, were those interdicts by which the praetor ordered to exhibit something or someone, for instance a person whose freedom was being contested, or a freedman to whom his patron wishes to notify the services due from him, or to exhibit to a father the children in his power.<sup>74</sup> Apart from the abovementioned principal division of interdicts in Roman law, there was also a secondary division. In terms of this secondary division, interdicts were issued in order to acquire, retain or recover possession.<sup>75</sup> To acquire possession, an interdict was awarded to the *bonorum possessor* of a particular thing which had the effect of compelling the current possessor to make restitution to the *bonorum possessor*.<sup>76</sup> Examples of persons who might have been in *mala fide* possession of a thing, were an heir who mistakenly thought himself heir of the thing in question, and a possessor who possessed an entire or part of a thing while knowing that it did not belong to him in a legal sense.<sup>77</sup> This type of interdict was only granted to a person who wished to gain possession of a certain thing *for the first time*.<sup>78</sup> This effectively entailed that the current interdict was not available to a person who had previously had possession of a thing and then lost it. There was, however, another type of interdict available in Roman law in terms of which an owner of land had recourse to enforce his right over the things belonging to the farmer of said land, which said farmer had pledged as security for his (the farmer's) rent of the land. This type of interdict was known as *interdictum Salvianum*.<sup>79</sup>

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<sup>71</sup> I 4 15 1.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> I 4 15 2.

<sup>76</sup> I 4 15 2. This type of interdict was known as *Quorum bonorum*.

<sup>77</sup> I 4 15 3.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

To retain possession of a thing, two interdicts existed in Roman law: the *uti possidetis* and the *utrubi*.<sup>80</sup> In terms of this type of interdicts, it was logically important to determine firstly who was in possession of the thing, and secondly who was legally supposed to be in possession.<sup>81</sup> The person in possession (whether such person was the owner of the thing or not) was at an obvious advantage, according to Justinian. The reason for this was that the plaintiff had to prove that he was in fact the *bona fide* owner of the thing in question. If he failed to do so, then the current possessor would still be in possession, and when the rights of the parties were doubtful, it was customary to decide *against* the plaintiff.<sup>82</sup> There were significant differences between the interdict *uti possidetis* and the interdict *utrubi*, mentioned above. The former applied to land and buildings. In terms of this type of interdict, the person in possession of the immovable at the time of the interdict would prevail, provided that he had not acquired possession by force or clandestinely, or as a concession.<sup>83</sup> The latter type of interdict applied to movables. In terms thereof, the person who had been in possession of the thing for the greater part of the preceding year would prevail, provided that person did not obtain possession by force or clandestinely, or as a concession.<sup>84</sup>

According to Justinian, at the time of his writings, there was very little difference between the *uti possidetis* and the *utrubi*. The possessor at the time of *litis contestatio* would be in the strongest position to retain possession of either the immovable or movables in question.

It is clear from the abovementioned discussion of the type of interdicts in Roman law that the focus was on the retention or obtaining of property, and not services. However, attention must be provided to what exactly “possession” entailed in Roman law, so as to determine whether the same principles which applied in Roman law would apply to the modern day interdict, also as far as retention of property is concerned. In Roman law, a person was considered to possess not only if he did so in his personal capacity, but also if someone else was in possession in the former’s name as a tenant of a farm or building.<sup>85</sup> Such a person may also have been in possession through a depository or borrower. Furthermore, it was also possible for possession to be retained through mere intention. This simply entailed that

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<sup>80</sup> I 4 15 4.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> I 4 15 5.

although a specific person may not have been in physical possession, nor anyone else in that person's name, an intention of returning to the property in future (as opposed to an intention of abandoning the property) was sufficient in order for that person to retain possession.<sup>86</sup>

In order to recover possession of property, an interdict could be given in case a person had been expelled by violence from the possession of land or a building in Roman law.<sup>87</sup> This was achieved by way of the interdict *unde vi*, in terms of which the person who had expelled the plaintiff is forced or compelled to return possession to the latter. This was the case even though the plaintiff may have himself obtained possession from the person who expelled him by force, clandestinely or as a concession.<sup>88</sup> According to Justinian, however, the imperial constitutions of the time provided that if any property had been seized through violence, the person who had used such violence to seize the property in question, could never receive ownership thereof.<sup>89</sup>

Justinian makes mention of a third division of interdicts as well. This third division categorised interdicts into either "simple" or "double".<sup>90</sup> "Simple" interdicts entailed the scenario where one person was a plaintiff and the other a defendant, as would have been the case in all that were restitutory or exhibitory (as explained above). The plaintiff would be the person who wished the thing in question to be restored or exhibited, while the defendant would obviously be the person against whom the claim was made.<sup>91</sup> In the case of "double" interdicts, the possession of each party was equal, and therefore both parties could act as plaintiff and defendant simultaneously. This was common in the case of prohibitory interdicts, discussed above.<sup>92</sup>

It is interesting to note that Justinian stated that if jurisdiction was extraordinary as in all action procedures, interdicts would be superfluous, as judgment would always be given without interdicts, exactly as if *utilis actio* had been given in pursuance of an interdict.<sup>93</sup>

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<sup>86</sup> / 4 15 5.

<sup>87</sup> / 4 15 6.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> / 4 15 7.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> / 4 15 8.

Although it is quite clear from the discussion of the interdict in Roman law that this remedy was a well-known one, it is also clear that the interdict was mainly used in order to obtain or retain possession of property. However, the principles governing this remedy were laid down quite clearly in Roman law. These principles form the basis of the Roman-Dutch perception of the “remedy” of interdict, which must be examined in order to ascertain whether a contractual interdict barring a professional athlete from repudiating his contract would be a suitable remedy or precaution for breach of contract.

According to Joubert,<sup>94</sup> an interdict is the normal remedy granted in respect of a restraint of trade clause. Although an entire chapter of this thesis is dedicated to a discussion of the restraint of trade clause,<sup>95</sup> it would be beneficial to allude to it as far as it relates to the interdict. In order to determine the scope of the remedy of interdict, a court must first interpret the clause creating the restraint of trade.<sup>96</sup> Importantly, Joubert states that “there is a presumption in favour of an interpretation which will restrict the freedom of the debtor as little as possible.”<sup>97</sup> In order for a court to grant an interdict enforcing a restraint of trade clause, such clause must be reasonable. Previously, a restraint of trade clause was perceived as *prima facie* unlawful in South African law. However, this view was no doubt influenced by English law, and the current position is that a restraint of trade clause is considered *prima facie* lawful in South African law.<sup>98</sup> Once again, it is hereby stressed that the nature of the restraint of trade clause is discussed in the next chapter. For the purposes of the current discussion, it would suffice to state that an interdict is a tool by which contractual obligations may be enforced. In the case of *De Smidt v Steytler*,<sup>99</sup> it was found that a party to a contract of sale was entitled to an interdict in order to prevent the other party from “defeating the object” of the contract in question. This is very relevant to the current discussion. If the object of the contract was, for argument’s sake, for a professional athlete to perform sporting services for a determined period and receive compensation for such performance, failure to do so (by either the employer-club<sup>100</sup> or the employee-athlete) would qualify the granting of an interdict against the breaching party. This interdict may take the form of an order to honour all contractual obligations, but it may also take the form of an order prohibiting either the club or

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<sup>94</sup> Joubert (1987) 145.

<sup>95</sup> Chapter 8.

<sup>96</sup> This was decided in *Pretoria Bill Posting Co v Hess* 1911 TPD 360. See also Joubert 146.

<sup>97</sup> Joubert 146.

<sup>98</sup> *Ibid.*

<sup>99</sup> (1851) 1 S 136. See also Joubert 51.

<sup>100</sup> Breach of contract permitted specifically by the employer is discussed in chapter 11 of this thesis.

the athlete from performing a specific act.<sup>101</sup> Another area of contract law in which the interdict finds application as remedy, is in the case of a condition in a contract.<sup>102</sup> In the case of a suspensive condition, the creditor may not claim his rights in terms of the contract before the suspensive condition has been fulfilled.<sup>103</sup> However, this does not mean that no binding agreement exists between the parties. Neither party can rescind from the contract before fulfilment of said condition, except by mutual agreement.<sup>104</sup> The conditional creditor has a legitimate expectation that performance will be made to him upon fulfilment of the suspensive condition. This expectation of the creditor is protected by law in the form of an interdict.<sup>105</sup>

From the abovementioned occurrences of an interdict as contractual remedy, it is clear that the purpose of such remedy is to ensure that effect is given to the obligations created in the contract. According to Joubert, “the basic right of the creditor is to performance as agreed”. This much has already been established in this thesis. Joubert however goes further in stating that “if the debtor acts in breach of an agreement to refrain from doing some act, then the creditor can apply to the court for an interdict to prohibit the debtor from performance of the act which is feared on reasonable grounds that he (the debtor) proposes to perform.<sup>106</sup> In current South African law, an interdict can be defined as a court order prohibiting a person from committing a specific act. In order to determine whether this would be a suitable and effective remedy in case of breach of contract (or to prevent potential breach of contract) in the case of athletes’ contracts, the context of the remedy as it would apply in case of the latter must be examined.

In the previous chapter, it was established that courts in the United States of America and Australia in particular have been willing to grant “injunctive relief” to a party against whom breach of contract has been committed by a professional athlete. The remedy known in Anglo-American law of contract as “negative injunction” is none other than what is known in

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<sup>101</sup> For instance, the athlete may be prohibited from negotiating a new contract with any other club while still under contract with his current club.

<sup>102</sup> Two types of conditions exist in the law of contract: resolutive and suspensive. The former is a condition which makes the contract in question subject to the fulfilment of some stated condition. Roman law did not recognise this type of condition. In the case of a suspensive condition, it is uncertain whether the contract in will ever be effected, because effect will only be given to such contract upon the occurrence of the uncertain event. See in this regard Joubert 172-173.

<sup>103</sup> Joubert 173.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Idem* 208.

South African law as a prohibitory interdict. For this reason, the US decision of *Lajoie*<sup>107</sup> is undoubtedly relevant to the current discussion, especially as far as it sets out the prerequisites for an order of negative injunction (or interdict) as remedy for breach of an athlete's contract.

As mentioned in the previous chapter, the prerequisites for granting an interdict preventing a professional athlete from committing breach of contract are that the athlete in question should possess a "sufficiently unique ability, an adequate remedy at law, and irreparable harm to the plaintiff."<sup>108</sup> It has also been mentioned that if the first of these prerequisites is complied with, in other words once an athlete has been shown to be "sufficiently unique", the remedy of damages will always be inadequate in case of breach of contract by the athlete.<sup>109</sup> Furthermore, Whitehill opines that inadequacy of the remedy of damages is always equated with irreparable harm to the aggrieved club.<sup>110</sup> In other words, once an athlete has been found "sufficiently unique" in his sporting code, damages would be an inadequate remedy for breach of contract committed by such athlete against his club, and the latter would inevitably suffer irreparable harm as a result of the athlete's breach of contract. Therefore, the remedy of an interdict is submitted a more viable one than damages in case of breach of an athlete's contract. It is once again submitted, however, that negative injunction is far more restrictive than would the remedy of specific performance be in a case where an athlete commits breach of contract with his club, simply because it usually prohibits an athlete from plying his trade in competition with his current employer at all. In theory, it is possible for an employer-club to obtain an interdict against an athlete in his service prohibiting the latter from practising, competing or even negotiating with a rival club. In such a scenario, if the athlete no longer wishes to be bound by his current contract, the interdict would also prevent such athlete from plying his trade anywhere else. The effect of this, as submitted previously, would be that the athlete would have no other choice than to comply with his current contract. This, it is submitted, has exactly the same effect as would an order of specific performance.

Although the remedy of negative injunction is familiar to South African law in the form of an interdict, it is doubtful whether this remedy is (in isolation) the most suitable for breach of an athlete's contract. The reason for this is because, firstly, the interdict is actually a remedy used to enforce a restraint of trade, and secondly, the purpose of the interdict is the same as

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<sup>107</sup> *Philadelphia Ball Club v Lajoie* 202 Pa. 210, 51 A (1902).

<sup>108</sup> Whitehill 1981-1982 SW L.J. 806.

<sup>109</sup> Whitehill 1981-1982 SW L.J. 806; Uberstine and Grad 1987 *Loy. Ent. L.J.* 11.

<sup>110</sup> Whitehill 1981-1982 SW L.J. 806.

that of the remedy of specific performance: to compel a party to a contract to honour said contract for fear of a severe reprimand.

Consequently, it must be examined whether the penalty clause might not be the common denominator as far as contractual remedies in South Africa and abroad are concerned. Although not a contractual remedy *per se*, the penalty clause might serve the purpose of stemming the alarming rate at which contracts are currently being repudiated by professional athletes nationally and abroad, in all sporting codes.

### 9.2.3. The penalty clause

The penalty clause<sup>111</sup> is a legal tool which was entirely familiar to both Roman and Roman-Dutch law. Pothier, in fact, considered contracts which contained penalty clauses as a distinct class of obligations altogether.<sup>112</sup> The morality of Roman law-times regarded the penalty clause as admissible and enforceable.<sup>113</sup> It was totally acceptable in Roman times for a creditor to demand from the debtor a penalty (usually in monetary form) as a result of the latter's breach of contractual commitments. This was achieved by way of a *stipulatio poenae*.<sup>114</sup> The penalty usually replaced the actual performance, but could also be agreed upon in the case of late performance.<sup>115</sup> Interestingly, it was possible in Roman law for the creditor to opt for either the penalty or damages in case of breach of contract.<sup>116</sup>

Whereas Roman-Dutch law accepted the basic principle that penalty clauses were indeed enforceable, they did not conform to the Roman law-restriction that the penalty could not exceed twice the value of the original performance.<sup>117</sup> A new type of penalty was introduced by the Roman-Dutch writers, namely the forfeiture of payments made by a buyer after the seller has cancelled the sale due to the buyer's *mora*.<sup>118</sup>

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<sup>111</sup> The definition of "penalty stipulation" is provided further on in the text, in the discussion of the Conventional Penalties Act 16 of 1962, which came into operation on 16 March 1962.

<sup>112</sup> Wessels paragraph 1637.

<sup>113</sup> / 3 15 7; D 2 15 16; C 7 47; Joubert 266.

<sup>114</sup> Van der Merwe *et al* 442.

<sup>115</sup> D 2 15 16; Joubert 266.

<sup>116</sup> D 19 1 28; Joubert 266.

<sup>117</sup> Voet 45 1 12; Van Leeuwen 1 4 15 2; Joubert 266.

<sup>118</sup> Voet 18 3 3; De Groot 3 14 32; Joubert 266.

According to Wessels,<sup>119</sup> a penalty clause gives rise to a secondary obligation, which comes into play when the primary obligation has not been fulfilled. An agreement containing a penalty clause therefore belongs to a class of contract that contains both primary and secondary obligations.<sup>120</sup> Joubert states that the penalty clause in a contract involves an agreement between parties to a contract whereby one of them will be bound to provide performance or be subject to forfeiture in case he commits breach of contract. This performance or forfeiture could replace the primary performance, or could be performed together with the latter.<sup>121</sup> Early South African decisions accepted that penalty clauses were enforceable and that the penalty amount did not have to be moderated by the court. Clauses for the forfeiture of amounts already paid by the buyer were enforced, as well as clauses for payment of amounts due and payable in terms of the contract.<sup>122</sup> In terms of penalty clauses providing for some performance by the debtor because of his breach of contract, South African courts considered the motive of the parties in agreeing upon the term. The reason for this is very relevant to the purpose of this chapter: to distinguish between penalty clauses and genuine pre-estimate of damages.<sup>123</sup> The court in *Pearl Assurance Co Ltd v Union Government*<sup>124</sup> decided that contractual clauses based on a genuine attempt to give a pre-estimate of damages were enforceable, but that the amount recoverable was limited to the amount in the clause (in other words, the amount agreed upon by the parties). Joubert states that this decision was made under influence of English law.<sup>125</sup> The court in the abovementioned case also found that if the clause in question was predominantly a penalty clause, it was unenforceable. However, it was not without purpose, as the plaintiff could not recover more than the amount fixed by the penalty clause in damages.<sup>126</sup> The decision in *Pearl Assurance Co Ltd* was criticised for a number of reasons: firstly, it was foreign to Roman-Dutch law; secondly, it was difficult to distinguish between penalty clauses and pre-estimates of damages, because the latter depended on the accuracy of the parties' predictions

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<sup>119</sup> Wessels paragraph 1637.

<sup>120</sup> *Ibid.*

<sup>121</sup> Joubert 266. It is important to distinguish between a penalty clause and "rouwkoop". The latter entitles a contractant to pay a sum of money in order to be allowed to withdraw from the contract. This, it is submitted, is very similar to the transfer fee payable by a club if such club wants to obtain the services of a professional athlete from another club with whom the athlete still finds himself in a contractual relationship with.

<sup>122</sup> Joubert 266. The earliest reported case is that of *Smuts v Neethling* (1844) 3 M 283.

<sup>123</sup> *Borradaile & Co v Muller* (1832) 1 M 555; *Steytler v Smuts* (1834) 1 M 40; Joubert 267, Van der Merwe *et al* 442-443.

<sup>124</sup> 1934 AD 560 (PC).

<sup>125</sup> Joubert 267.

<sup>126</sup> *Pearl Assurance Co Ltd v Union Government* 1934 AD 560 (PC) 1934 AD 560 (PC) at 571.



of what the damages might be in future; and thirdly because penalty clauses were in fact desirable.<sup>127</sup> Despite this critique of the distinction between penalty clauses and pre-estimates of damages, the Appellate Division in *Tobacco Manufacturers Committee v Jacob Green & Sons*<sup>128</sup> and *John Bell & Co Ltd v Esselen*<sup>129</sup> decided that penalties in the form of forfeiture clauses which fell within the boundaries of Voet's comments on the matter,<sup>130</sup> were not covered by the erroneous precedent set in *Pearl Assurance Co Ltd*, and that they were consequently enforceable.

The distinction between penalty clauses and pre-estimates of damages is, as stated above, very relevant to the purpose of this chapter: to determine whether other available remedies in South African law might be more suitable in case of breach of an athlete's contract. It has been suggested in this chapter that a formula by which an amount of damages is calculated contractually (in other words, before breach of contract actually occurs) might prove to be an effective method of solving the problem of repudiation by professional athletes. This indeed seems like a viable solution, but the question that must be answered is whether such a formula should provide for a calculation of damages upon breach of contract, or whether it (the formula) should be included in the contract in the guise of a penalty clause.<sup>131</sup> In order to provide an answer to this question, one must examine how South African law dealt with the problem of distinguishing between penalty clauses and pre-estimated damages.

Because of the fact that the Appellate Division of the High Court could not provide a satisfactory solution to the abovementioned problem, legislation was adopted in the form of

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<sup>127</sup> *Tobacco Manufacturers Committee v Jacob Green & Sons* 1953 (3) SA 480 (A), Joubert 267.

<sup>128</sup> 1953 (3) SA 480 (A).

<sup>129</sup> 1954 (1) SA 147 (A).

<sup>130</sup> Voet 18 3 3.

<sup>131</sup> An example of a "formula" suggested here is found in the South African Football Association's (SAFA) Regulations on the status and transfer of players. Section 9.5. of these Regulations deal with the transfer of contracted football players. When a player wishes to be transferred from his current club (the "transferor club") to a new club (the "transferee club") *while still under contract with the former*, the transferor club must deposit an amount equal to 5% of any transfer fee into SAFA's solidarity trust account. The purpose of this account is to remunerate clubs which have registered and trained football players, only for these players to later move to different clubs. Upon such a player's transfer to a new club, the transferor club will receive remuneration depending on how long and from what age it (the transferor club) had trained the player in question. A club which had registered the player aged 12 to 13 or 13 to 14, would receive an amount equal to 5% of the player's transfer fee. If the club in question had registered the player in question from age 13 to age 23, the remuneration to the club would be 10% of the eventual transfer fee. Although this formula is a simple one, it seems to be effective. However, it has *not* solved the problem of constant repudiation of professional contracts in football. Furthermore, the formula is hardly a contractual remedy in the simplest sense of the word: it is merely a goodwill-payment to the transferor club in question.

the Conventional Penalties Act.<sup>132</sup> The purpose of the Act is threefold: to abolish the distinction between penalty clauses and pre-estimates of damages, to make all clauses covered by the Act enforceable, and to make all these clauses subject to moderation.<sup>133</sup> In terms of section 1 of the Act, a “penalty stipulation” is defined as a stipulation “whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or to perform anything for the benefit of another person...either by way of penalty or as liquidated damages.”<sup>134</sup> Therefore, the penalty clause (in terms of the Act) refers to both an obligation to perform and to the loss of a right to reclaim something to which the forfeiting party would normally be entitled at the termination of the contract.<sup>135</sup> It is important to note that the clause referred to must, in terms of the Act, refer to some right to which the debtor in question is not entitled to as of right, for instance the right to claim a pre-fixed amount as damages.<sup>136</sup> Furthermore, if a forfeiture, such forfeiture should not follow as a matter of course.<sup>137</sup>

Breach of contract is obviously a primary condition for the penalty clause to become activated. A clause will not be a penalty clause if the claim for performance in case of breach of contract is activated by a clause independent of such breach.<sup>138</sup> It is clear then that the penalty clause is not always easy to identify. There are, however, examples of occurrences which resemble the penalty clause. For the sake of clarity, these examples must be mentioned.

The first occurrence that resembles a penalty clause is the so-called acceleration clause.<sup>139</sup> This term provides that, upon failure to pay a single instalment timeously, all instalments become payable immediately or at the election of the creditor.<sup>140</sup> Secondly, a penalty clause may take the form of one that makes the debtor responsible for collection charges.<sup>141</sup> Thirdly, because of the fact that a creditor instituting proceedings based on breach of contract would normally be awarded costs on a party-and-party scale, a penalty clause may be included in the

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<sup>132</sup> 15 of 1962. Hereinafter referred to in the text as “the Act”.

<sup>133</sup> Section 1 of the Act.

<sup>134</sup> “Liquidated damages” refers to damages that have already been established and calculated.

<sup>135</sup> Joubert 268.

<sup>136</sup> *Ibid.*

<sup>137</sup> This was decided in *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 (D).

<sup>138</sup> *De Pinto v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A).

<sup>139</sup> “Opeisbaarheidsklousule” in Afrikaans.

<sup>140</sup> Joubert 269.

<sup>141</sup> *Ibid.* “Collection charges” are costs that a creditor has to incur in order take legal steps to recover his debt.

contract which would award the creditor costs on an attorney-and-client scale.<sup>142</sup> A fourth example of the form that a penalty clause may take, is that of a clause making provision for the payment of arrears after cancellation of the contract. Such a clause will include provision for the cancellation of the contract in case of failure to pay any instalment on time, but also for the forfeiture of amounts already paid in terms of the contract and the payment of arrear instalments.<sup>143</sup> What these examples indicate, is that the penalty clause is a versatile tool in order to ensure compliance with contractual obligations. What is very important to mention, though, is that a penalty clause is intended as a *substitute* for damages.<sup>144</sup> The two remedies cannot be prayed for together. The obvious question that must be asked and discussed, is subsequently which, in the context of the broader question as to the most suitable remedy for breach of the athlete's contract, would be the most effective in solving the main problem posed by this thesis: incessant repudiation of athlete's contracts. In order to answer this question, heed must be paid to some of the South African cases relating to athletes' contract already discussed in detail in previous chapters. The focus, however, will be shifted significantly, by constantly asking the question whether the inclusion of a penalty clause in each of the cases under discussion would have prevented the repudiation of the contract in each case. The reason for this approach is consistent with the purpose of this chapter: to determine whether there is an alternative, sustainable contractual remedy for breach of contract other than the primary one of specific performance in South African law relating to athletes' contracts.

### **9.3. The most suitable alternative to specific performance from a legal-practical South African point of view<sup>145</sup>**

In *Highland Park Football Club Ltd v Viljoen and Another*,<sup>146</sup> an interdict was applied for by the applicant requesting the court to restrain the professional football player (the respondent in this case) in its service from playing professional football for any other club within the Republic of South Africa.<sup>147</sup> The interdict was to give effect to a restraint of trade-clause in the contract, which read as follows:

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<sup>142</sup> Joubert 269-270.

<sup>143</sup> *Idem* 270.

<sup>144</sup> According to Joubert 270.

<sup>145</sup> Only South African cases involving athletes' contracts which are relevant and can make a contribution to the questions posed in this chapter are discussed in this section.

<sup>146</sup> 1978 (3) SA 191 (W).

<sup>147</sup> *Highlands Park Football Club Ltd v Viljoen* 1978 (3) SA 191 (W) at 192.

“The player agrees, undertakes and binds himself that on the expiry of this agreement and unless and until he is formally transferred by the Club to another club, he will not for a period of three years after the date of expiry play professional football in the Republic of South Africa, save with the prior permission of the Club.”<sup>148</sup>

It is important to note that the applicant did not ask the court for an order of specific performance against the athlete (which would have had the effect of the athlete having to serve out his current contract), but merely for an interdict prohibiting the athlete from playing for any other football club in the Republic. This, it is submitted, is quite similar to the negative injunction that US and Australian courts have seemed willing to grant against professional athletes who had repudiated their contracts. The core of the *Highlands Park*-case is whether the restraint of trade-clause should be considered *prima facie* lawful or not. This question will be discussed in chapter 10 of this thesis. The relevance of the case to the current chapter lies therein that the court refused to grant an interdict against the athlete which would have effectively denied the latter the opportunity to ply his trade elsewhere. The court, however, based its decision in the fact that “we are not living in the era when slaves are bought and sold.”<sup>149</sup> It is the author’s opinion that the court erred in refusing to grant the interdict against the athlete, simply because of the lawfulness of the restraint of trade-clause to which such interdict would have given effect. The problem with the contract in *Highlands Park*, it is submitted, was that while it contained a restraint of trade-clause, it did *not* contain a penalty clause. If a penalty clause had been inserted, it would have indicated to the court exactly what the parties intended should breach of contract occur. It is true that, as explained above, the interdict is the remedy which gives effect to the restraint of trade, but it would have been (and is) more beneficial if the parties at the signing of the contract had decided on the *consequences* of not complying with the restraint of trade clause and breach of contract in general. In the more recent case of *Coetzee v Comitis*,<sup>150</sup> this suggestion was complied with to a degree. *In casu*, the professional athlete was party to a collective agreement including the South African Football Association’s Regulations for the Transfer of Players (alluded to earlier in this chapter) in terms of which a “transferor club” had to be compensated for the transfer of a football player in its employ.<sup>151</sup> This compensation served as “penalty” (although it does not fall squarely within the definition of a “penalty stipulation according to the

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<sup>148</sup> *Highlands Park Football Club Ltd v Viljoen* 1978 (3) SA 191 (W) at 193.

<sup>149</sup> *Idem* 200.

<sup>150</sup> 2001 (1) SA 1254 (C).

<sup>151</sup> It must be stated, however, that in the case under discussion the regulation barring a player from entering into a new contract after the elapse of his current contract before his current club has been remunerated, was declared unconstitutional.

Conventional Penalties Act) for the football player wanting to relocate to another club. For entirely different reasons than in *Highlands Park*, neither an interdict nor specific performance-order could be granted against the player in question.<sup>152</sup> The athlete's contract in the case of *Santos Professional Football Club (Pty) Ltd v Igesund and Another*<sup>153</sup> did make provision for a penalty clause. Interestingly enough, the penalty clause actually stated that if there were to be breach of contract (by either party), the other party would have the right to claim specific performance of the obligations in question.<sup>154</sup> Because the parties had provided contractually for the remedy of specific performance at breach of contract, and because such remedy was (and is) the primary one for breach of contract in South Africa, the Full Bench of the Cape High Court had no objection to giving effect to the penalty clause. It is submitted that had the remedy of specific performance not been specifically agreed upon contractually, the penalty clause would still have had power, but would have tacitly empower the court to grant an interdict against the professional coach, either compelling him to serve out the remainder of his current contract, or prohibiting him from coaching any other football club. The difference between the orders are that in the case of specific performance being granted against an athlete or coach, there is an argument to be made that such an order would infringe upon the athlete or coach's right not to be subjected to forced labour in terms of section 13 of the Constitution, whereas in the case of an interdict prohibiting the athlete or coach from plying his trade at any other club, such interdict would infringe upon the athlete or coach's right to freely choose his trade, occupation or profession in terms of section 22 of the Constitution.<sup>155</sup> This was the argument made by the professional athlete in *Botha v Blue Bulls Co (Pty) Ltd and Another*.<sup>156</sup> Interestingly (and relevantly), the athlete's argument was rejected by the Labour Court. The athlete spent a few more very successful years with his employer-union despite being committed to "forced labour" as he chose to call it.

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<sup>152</sup> The player in question did not commit breach of contract, as his contract had already elapsed.

<sup>153</sup> 2002 5 SA 697 (C); 2003 (5) SA 73 (C).

<sup>154</sup> *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C) at 76. The clause reads as follows:

"Should the head-coach commit any breach of this agreement and fail to remedy such breach within 14 (fourteen) days after registered post of notice by the club or its attorneys requiring the head-coach to do so, the club shall have the right to cancel the contract forthwith, or to take action against the head-coach for specific performance of his obligation under the agreement."

The second sub-paragraph made provision for the *mutatis mutandis*-working of the clause.

<sup>155</sup> The Constitution of the Republic of South Africa, 1996.

<sup>156</sup> (2009) 30 ILJ 544 (LC).

In the case of *Vrystaat Cheetahs (Edms) Bpk v Mapoe and Others*,<sup>157</sup> the court went so far as to order both specific performance of the contractual obligations in question *and* an interdict preventing the athlete in question from availing his services in any way to the second respondent<sup>158</sup> for a specified period of time. The reason for the interdict was because the first respondent (the athlete) had been practicing with the second respondent for some time before the matter came to court. The contract did not make specific provision for an interdict to be granted by the court, but the mere fact that the athlete had repudiated his contract, was sufficient reason for the court to order a prohibitive interdict against such athlete. It must be assumed that had the applicants not applied for specific performance, the court would still have been willing to grant an interdict barring the player from plying his trade with the second respondent. It is submitted, though, that such an order would have come very close to infringing on the athlete's constitutional right to freely choose his trade, occupation or profession awarded him in terms of section 22 of the Constitution.

#### **9.4. Conclusion**

Because of the fact that South African courts are currently seemingly in isolation in their willingness to order specific performance in case of breach of athletes' contracts, this chapter set out to establish whether there are other contractual remedies which may be more suitable (but also more in alignment with foreign case law) for breach of said type of contract. The importance of this chapter lies therein that sport, as mentioned in chapter 2 of this thesis, has become a global business, which means that the treatment of the athlete's contract should be uniformed regardless of the country in which a professional athlete may ply his trade.

The reason why South African courts do not have a problem with granting specific performance, even in case of breach of contract involving services of a personal nature, is because said remedy is the primary one in Roman-Dutch law. The jurisdictions discussed in chapter 8 of this thesis are all Anglo-American, which means that according to their common law, damages are the primary remedy for breach of contract, while specific performance is merely an equitable or secondary one.

The first remedy to be examined in this chapter has been that of damages. The true nature of this remedy had to be established in order to make an informed decision as to the suitability

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<sup>157</sup> Unreported case number 4587/2010 delivered by the High Court on 29 September 2010 at pages 108 and 109.

<sup>158</sup> *Sharks (Pty) Ltd.*

thereof for breach of *athletes' contracts*. Discussions of this remedy in chapter 6 indicated that the remedy of damages was impractical and inappropriate for breach of said type of contract. However, the jurisdictions discussed in that chapter and mentioned above seemingly opined that it was the only feasible remedy.

The remedy of damages was a familiar one in Roman law, despite the fact that Roman lawyers had neither a general concept of, nor general liability for it.<sup>159</sup> The remedy existed in classical Roman law in the forms of both formulary procedure as well as the *condemnatio pecunaria*,<sup>160</sup> according to which every judgment made by a *iudex* had to be for a definite sum of money.<sup>161</sup> The *iudex* also had the responsibility of evaluating the extent of the liability according to the *formula* of the action in question,<sup>162</sup> with regard for the principles of equity in each case. The principles of equity demanded that the debtor had to be relieved from the harshness of personal execution. Subsequently, any person could raise the sum of damages on behalf of the debtor to allow the latter to discharge his duties in terms of the contract.<sup>163</sup>

The main problem with attaching a monetary amount to a contractual (often physical) duty, was confirmed in this chapter as being the difficulty of determining or calculating an appropriate amount of damages. In Roman law, the specific amount of an award of damages was determined through *litis aestimatio*.<sup>164</sup> If the action was for a *certum*, the objective value of the object of the contract had to be ascertained. Contrarily, if the action was for an *incertum*, the creditor was awarded the *quod* interest. What this entailed, was that the *iudex*, in determining the amount of damages, considered factors such as the actual loss suffered by the creditor as well as the value of the thing in question.<sup>165</sup> It was in Roman law that the question as to interest was raised for the first time: although Justinian was in favour of the calculation of interest on a contractual debt, he felt that such interest should never exceed double the ordinary value of the original performance.<sup>166</sup> In certain formulae, the *iudex* was instructed to evaluate the amount of his judgment at the hand of the norm *quanti ea res est*, which was based on the objective valuation of the market value of property or goods at any

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<sup>159</sup> According to Kaser 182.

<sup>160</sup> Erasmus 1975 *THRHR* 105.

<sup>161</sup> Gaius / 4 48; / 4 6 31; Kaser 183, Lotz 2007 *Fundamina* 77.

<sup>162</sup> / 4 6 31.

<sup>163</sup> Kaser 183.

<sup>164</sup> Judicial estimation.

<sup>165</sup> Kaser 184, Lotz 2007 *Fundamina* 77.

<sup>166</sup> As a matter of interest, the interest *in duplum*-rule states that the amount of interest on a debt should never exceed the capital amount of such debt. This rule is still applied in South African law today.

particular time.<sup>167</sup> If demand was made for something other than money, then the value of that demand (usually property) at the time of *litis contestatio* had to be determined. If the action was for a deposit, loan or pledge, however, then the value of the thing in question had to be determined as on the date of judgment. Although the remedy of damages in Roman law did not make provision for contracts involving services of a personal nature, it could be said that the foundation of South African law of damages was laid in Roman law. The *condemnatio pecunaria* was abolished towards the commencement of Justinian's time of writing, and subsequently the development of the remedy was focused on the term *interesse* by the glossators as well as the *pandectists*. Initially, *interesse* was divided into three divisions, namely *interesse commune*,<sup>168</sup> *interesse singulare*,<sup>169</sup> and finally *interesse conventum*.<sup>170</sup> The rejection of this division led to the "Differenztheorie", whose purpose was to find a generalised, singular method of determining an amount of damages without having to investigate the nature of the act in question and the circumstances surrounding said action on an *ad hoc* basis.<sup>171</sup> Practically, in terms of the "Differenztheorie", the plaintiff's actual material position is compared to a hypothetical (material) position he would have been in had it not been for the breach of contract.<sup>172</sup> As far as breach of athletes' contracts is concerned, it has been submitted in this chapter that should the "Differenztheorie" be applied, it would entail that an employer-club would have to be placed in the material position it would have been in, had it not been for the athlete's breach. This, it has also been submitted, is virtually impossible, as there is no way to determine the financial position the employer-club would have been in had it not been for the athlete's repudiation. The athlete may have been mediocre while representing his current employer-club, only to develop to such an extent that he attracts huge crowds (and the ensuing revenue) at his new club. By the same argument, an athlete who was a "superstar" at his previous employer-club, could within a question of months become discouraged and mediocre. The unpredictability, as well as the riskiness of sport as a profession, it has been submitted, seem to be the Achilles-heel of damages as a truly suitable remedy for breach of an athlete's contract.

Having stated, this, it would be impossible to disregard damages as contractual remedy for breach of athletes' contract altogether. The reason for this is that the remedy is still a well-

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<sup>167</sup> Erasmus 1975 *THRHR* 105.

<sup>168</sup> The objective or market value of the *res* in question.

<sup>169</sup> This represented the subjective or personal *affectio* or *utilitas* of the plaintiff in question.

<sup>170</sup> This was similar to the agreed *pretium*.

<sup>171</sup> Lotz 2007 *Fundamina* 81.

<sup>172</sup> Erasmus 1975 *THRHR* 114-115; Lotz 2007 *Fundamina* 81.



known one in both Roman-Dutch and consequently South African law. Voet, as a matter of fact, laid down three general rules as far as damages were concerned. These rules were that each case had to be judged on its own merit,<sup>173</sup> that damages should not be too remote,<sup>174</sup> and finally that the calculation of damages was of a commercial nature, and therefore the plaintiff's affections and feelings had to be disregarded in any calculation of contractual damages.<sup>175</sup> Importantly, in Voet's definition of *interesse*, strong emphasis is placed on the fact that a court's determination of an amount of damages should comply with the requirement of fairness. It has been submitted in this chapter that this requirement seems to be the golden thread that runs through Roman law, Roman-Dutch law, as well as South African decisions, in so far as it relates to an award of damages. Unfortunately, it is near impossible to determine a "fair" amount of damages in case of breach of an athlete's contract. The reason for this is the fact that no amount of money can adequately remunerate a club, province or union which has lost the *sui generis* athletic abilities of a professional athlete, regardless of the extent of that amount. This statement is confirmed by Voet, who felt that in determining the amount of damages, the defendant should always receive the benefit of the doubt.<sup>176</sup> This is a clear indication that the club, province or union would always be at the shortest end of the stick when it comes to repudiation of a contract by a professional athlete.

A discussion of early South African decisions was of cardinal importance in this chapter in order to ascertain courts' perception of damages. In this discussion, it was clear that the South African law of damages was influenced by English law, but that the latter system was substantially similar to the Roman-Dutch system relating to damages.<sup>177</sup> The case of *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*<sup>178</sup> to this day serves as the *locus classicus* as far as damages are concerned in South African law. The relevance and importance of this case lie therein that Innes CJ decided that in an action for contractual damages, the sufferer (plaintiff) should be placed in the position he would have been had the contract been properly performed.<sup>179</sup> The court in this case did, however, lay down two qualifications: the order of damages had to be effected as far as it was payable in an amount

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<sup>173</sup> Voet 45 1 9, as translated by Gane (1955). See also Lee (1953) 263.

<sup>174</sup> Voet 45 1 9, as translated by Gane (1955). This rule was confirmed in *Kotze v Johnson* [1928] A.D. 313. See also Lee (1953) 263.

<sup>175</sup> Voet 45 1 9, as translated by Gane (1955). This rule was confirmed in *Jockie v Meyer* [1945] A.D. 354. See also Lee (1953) 263 and Wessels (1937) paragraph 3191.

<sup>176</sup> Voet 45 1 12. See also Lotz 2007 *Fundamina* 85.

<sup>177</sup> Lee 263.

<sup>178</sup> [1915] A.D. 1

<sup>179</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22.

of money, and it had to be effected without undue hardship to the defaulting party.<sup>180</sup> Furthermore, damages awarded should only be those that flow naturally from the breach of contract in question, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom.<sup>181</sup> Although the *Victoria Falls*-decision has been confirmed in several subsequent cases, the problem as to the determination of the quantum still exists (especially in contracts involving services). In *Sandler v Wholesale Coal Suppliers Ltd*,<sup>182</sup> the court stated that the difficulty in determining the quantum of damages does not relieve a court of the duty of doing so upon the evidence before it. Eleven years prior to the decision in *Sandler*, the Transvaal Provincial Division of the High Court in *Klopper v Molako*<sup>183</sup> placed a responsibility on the plaintiff in an action for damages, to lead evidence that would assist a court in determining the amount of damages, and “not leave the court to guess at the amount.”

It has been suggested in this chapter that the only way in which an amount of damages for breach of an athlete’s contract could be determined fairly, was through a formula agreed upon between the parties in the contract itself. Reference was made to the case of *FC Shakhtar Donetsk (Ukraine) v Matuzalem Fancelion da Silva (Brazil) and Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) and FIFA*,<sup>184</sup> in which such a formula was attempted. It has been submitted that such a formula could in fact merely assist in determining a suitable *transfer fee* in case an athlete wishes to move to another club while he is still under contract, and not to determine contractual damages.

The interdict was examined as a possible “common denominator” between foreign jurisdictions’ and South African courts’ treatment of the athlete’s contract. After all, interdicts were formulae by which the praetor ordered or forbade something to be done, according to Justinian.<sup>185</sup> However, in Roman times, interdicts were mainly used in disputes regarding possession or quasi-possession of property. Interdicts in Roman law were divided into three categories: prohibitory, in terms of which the praetor forbade a person to perform a certain act; restitutory, by which the praetor ordered something to be restored; and finally exhibitory, in terms of which the praetor ordered someone or something to be exhibited.

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<sup>180</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22. See also Hutchinson 2002 SALJ 51.

<sup>181</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* [1915] A.D. 1 at 22.

<sup>182</sup> [1941] A.D. 138.

<sup>183</sup> 1930 T.P.D. 865.

<sup>184</sup> CAS 2008/A/1519-1520.

<sup>185</sup> / 4 15.

Apart from this, there was also a secondary categorisation, in terms of which interdicts were divided into orders to acquire, retain or recover possession.<sup>186</sup> Once again, this classification in Roman law focused primarily on property. It was essential to illustrate the practical functions of these categories of interdict, in order to establish whether current South African law strokes with Roman law practice in this regard. It would be fair to state that, while South African law relating to interdicts as contractual remedy certainly finds its roots in Roman law, the current treatment of the remedy is simpler.<sup>187</sup> Joubert states that an interdict is the normal remedy granted in respect of a restraint of trade clause.<sup>188</sup> This is very relevant, as the restraint of trade clause is discussed in chapter 8 of this thesis as a possible solution to the main problem posed by this thesis: the repudiation of contracts by professional athletes. Because the restraint of trade and the interdict are so entwined, brief mention has been made to the former in this chapter already. In the case of *Pretoria Bill Posting Co v Hess*,<sup>189</sup> it was decided that in order to determine the scope of the remedy of interdict, the court had first to interpret the restraint of trade-clause in terms of which the interdict would be granted. Joubert states that there is a presumption (as far as the restraint of trade-clause is concerned) in favour of an interpretation which will restrict the freedom of the debtor as little as possible.<sup>190</sup> As in the case of damages, there seems once again to be an unofficial “protection” of the debtor against whom these remedies are granted. It is submitted that this might be one of the reasons that professional athletes, who in most cases have enough money to buy themselves out of contracts they no longer wish to honour, repudiate said contracts at an alarming rate. It is a fact that if an interdict is to be granted in order to give effect to a restraint of trade-clause, such clause must be reasonable. Previously, South African law, under influence of English law, perceived the restraint of trade-clause as *prima facie* unlawful. This position has changed, however, and currently the clause is seen as *prima facie* lawful.<sup>191</sup> This fact contributed immensely to the question as to whether the interdict would be a suitable remedy for breach of an athlete’s contract, or simply to enforce a restraint of trade. It was established in chapter 6 that courts in the United States of America and Australia, while unwilling to grant orders of specific performance for services of a personal nature, were indeed willing to grant negative injunction against professional athletes who had repudiated their contracts.

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<sup>186</sup> / 4 15 2.

<sup>187</sup> Justinian, for example, also mentions a third division of interdicts: “simple” and “double”, which is discussed in the text above.

<sup>188</sup> Joubert 145.

<sup>189</sup> 1911 T.P.D. 360.

<sup>190</sup> Joubert 146.

<sup>191</sup> *Ibid.*

Injunctive relief is nothing other than what is known in South African law as prohibitive interdict. For this reason, the case of *Philadelphia Ball Club v Lajoie*<sup>192</sup> has been referred to in this chapter, as far as it sets out the prerequisites for granting an interdict preventing a professional athlete from repudiating his contract. The main prerequisites as provided in the *Lajoie*-case are that the athlete should possess sufficiently unique athletic ability, that he should have an adequate remedy at law, and that the plaintiff was to suffer irreparable harm. The aim of injunctive relief is to prohibit an athlete who has committed breach of contract from plying his trade in competition with the aggrieved club. It has been submitted in this chapter that this would have exactly the same effect as would an order of specific performance against an athlete: it would compel such athlete to honour the contract into which he (the athlete) had entered into freely and willingly. However, doubt has been expressed in this chapter as to whether an interdict is the most suitable remedy for breach of an athlete's contract in South Africa. The reason for this has been stated as the fact that it is merely a remedy to give effect to a restraint of trade-clause, and it would have the same effect of an order of specific performance, which is the primary contractual remedy in South Africa.

The penalty clause was the final "remedy" to be discussed in this chapter, as a possible alternative to specific performance in South African law. Once again, the roots of the penalty clause were quite clear: it was a legal tool familiar to both Roman and Roman-Dutch law. In Roman law, it was possible for a creditor to elect either the penalty or damages in case of breach of contract.<sup>193</sup> In Roman-Dutch law, the forfeiture of payments made by a buyer after the seller had cancelled a sale due to the former's *mora* was introduced.<sup>194</sup> The effect of a penalty clause is, according to Wessels, that it gives rise to a secondary obligation when the primary obligation in terms of the contract has not been fulfilled.<sup>195</sup> The clause involves an agreement between contracting parties in terms of which one is bound to performance or subject to some kind of forfeiture, should he commit breach of contract. This forfeiture could replace the primary contractual performance, or be performed together with the latter.<sup>196</sup> Although early South African court decisions accepted the enforceability of penalty clauses, as well as the fact that the penalty amount need not be moderated by the court, the court in

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<sup>192</sup> 202 Pa. 210, 51 A (1902). The qualification for referring to a US-case is that we are dealing with sport as a global profession, and therefore what is true in the US is also true in South Africa.

<sup>193</sup> *D* 19 1 28, Joubert 266.

<sup>194</sup> Voet 18 3 3; De Groot 3 14 32, Joubert 266.

<sup>195</sup> Wessels paragraph 1637.

<sup>196</sup> *Ibid.*

*Pearl Assurance Co Ltd v Union Government*<sup>197</sup> decided that contractual clauses based on a genuine attempt to pre-estimate damages were enforceable, but that the amount recoverable was limited to the amount on which the parties had agreed on contractually. This decision was, however, influenced by English law,<sup>198</sup> and furthermore, it was criticised for the fact that it was extremely difficult to distinguish between penalty clauses and pre-estimates of damages, as the latter depended on the accuracy of the parties' predictions of what the damages may amount to in future. Unfortunately, subsequent decisions of the Appeal Court followed the *Pearl Assurance Co*-decision, which meant that the problems mentioned above and discussed in this chapter had to be rectified by legislation in the form of the Conventional Penalties Act.<sup>199</sup> This piece of legislation had a threefold-purpose: to abolish the (English law-influenced) distinction between penalty clauses and pre-estimates of damages, to make all clauses covered by the Act enforceable, and finally to make all these clauses subject to moderation. The penalty clause subsequently entails both an obligation to perform as well as to the loss of a right to reclaim something to which the forfeiting party would otherwise be entitled at the termination of the contract.<sup>200</sup> Examples have been provided in this chapter as to certain occurrences of penalty clause in contracts and the forms they may take. The purpose of these examples was to indicate that the penalty clause is a versatile tool in order to ensure compliance with contractual obligations.

By using practical examples from South African case law, this chapter finally set out to determine which of the discussed remedies (which should all be perceived as mere alternatives to that of specific performance as far as South African law is concerned) would be most suited to breach of an athlete's contract. The interdict was blatantly refused by the court in *Highlands Park*, whereas the collective agreement in terms of which a penalty clause was created in *Coetzee v Comitiss* was declared unconstitutional. The most significant contribution in terms of the discussion of South African case law relating to remedies in case of breach of athletes' contracts was found in *Santos* and *Mapoe*. In the former, the parties had the foresight to provide for a contractual remedy (in that case, specific performance) in case of breach of contract, which was eventually granted by the court. In the latter, the court granted both specific performance and a prohibitive interdict, indicating that both these

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<sup>197</sup> 1934 AD 560 (PC).

<sup>198</sup> Joubert 267.

<sup>199</sup> 15 of 1962.

<sup>200</sup> Joubert 268.

remedies are currently acceptable as remedies for breach of athletes' contracts in South Africa.

There are numerous ways of compensating a professional employer club, province or union that has suffered because of breach of contract by a professional athlete in its employ. Including a formula for determining an amount of damages in the contract has been mentioned in this chapter, as well as a meticulous penalty clause stating exactly what the debtor would forfeit in case he commits breach of contract. There are several ways to soften the negative impact of breach of contract by an athlete on an employer-club.

The purpose of this thesis, however, is *not* to identify a system or formula to evade or soften the negative effects of repudiation. The purpose of this thesis is to find a suitable remedy for breach of an athlete's contract. While it is the author's opinion that specific performance is currently the most appropriate remedy for such breach, this and the previous chapter have indicated that the remedy is not in alignment with other jurisdictions, as far as athletes' contracts are concerned. It is suggested that South African courts in future should strongly consider barring an athlete who has repudiated his contract from plying his trade with a competitor-club for the remainder of his current contract. In order to make this suggestion viable, it is suggested that the restraint of trade clause (which is given legal effect through interdict) will play an increasingly important role in stemming the global tide of repudiation of athletes' contracts.

## CHAPTER 10: THE RESTRAINT OF TRADE CLAUSE

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### 10.1. Introduction

A restraint of trade clause in a contract<sup>1</sup> is given effect through an interdict. This much has been established in the previous chapter of this thesis. Put differently, an interdict would be the normal remedy granted in respect of a restraint of trade clause in a contract.<sup>2</sup> When discussing the origin, purposes and especially suitability of the restraint of trade clause in athletes' contracts, it is important to note that the treatment of this clause as well as the enforceability thereof in Roman-Dutch and South African law differ quite significantly from that in English law. Two relevant South African decisions have confirmed this: the first being *Katz v Efthimiou*.<sup>3</sup> *In casu*, the court stated that the doctrine that clauses in restraint of trade are to be considered in conflict with public policy (as is the case in English law), is entirely foreign to the Roman and Roman-Dutch systems of law.<sup>4</sup> The second case confirming the fundamental difference between English law's treatment of the restraint of trade clause and that of Roman, Roman-Dutch and South African law, is that of *Roffey v Catterall, Edwards & Goudré*.<sup>5</sup> In this case, Didcott J stated that Roman-Dutch law (unlike English law) had no noticeable aversion to contracts in restraint of trade. The only qualification, however, is that the former system would not enforce agreements which were against public policy.<sup>6</sup> This

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<sup>1</sup> A contract in restraint of trade is defined by Van der Merwe *et al* (2012) 212 as "an agreement by which someone is restricted in his freedom to carry on his trade, profession, business or other economic activity."

<sup>2</sup> Joubert (1987) 145.

<sup>3</sup> 1948 (4) SA 603 (O); [1948] 4 All SA 370 (O). See in this regard also Visser "The principle *pacta servanda sunt* in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade" 1984 SALJ 641.

<sup>4</sup> *Katz v Efthimiou* 1948 (4) SA 603 (O) at 610. This viewpoint is confirmed in the discussion of the case further on in the text of this chapter.

<sup>5</sup> 1977 (4) SA 494 (N); [1977] 4 All SA 482 (N).

<sup>6</sup> *Roffey v Catterall, Edwards & Goudré* 1977 (4) SA 494 (N); Visser 1984 SALJ 641. Arthur Suzman QC stated the following: "It is submitted that it is no part of Roman-Dutch law that all restraints of trade are *per se* or even *prima facie* contrary to public policy. The truer view would seem to be that a person who has voluntarily submitted to a restraint is bound by his undertaking unless he can show that in all circumstances the particular restraint is contrary to public policy." See in this regard Kerr in Visser (Ed) (1989) at 186. It is important to perceive then the restraint of trade clause as being in perfect alignment with the *pacta sunt servanda*-doctrine, which has its origins in Roman law and which has been confirmed as the basis of South African law of contract, most notably in post-Constitutional decisions such as *Brisley v Drotsky* 2002 (4) SA 1 (SCA), *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

point of view was finally confirmed by a South African court in the landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.<sup>7</sup>

The practical problem created by this, is that although covenants in restraint of trade are enforceable in South African law, the same cannot be said of those covenants in Anglo-American legal systems. As was the case in the comparative chapter on the treatment in foreign jurisdictions of the remedy of specific performance as it relates to athletes' contracts, it is essential to determine whether the restraint of trade clause has any significant role to play in prevention of repudiation of athletes' contracts at all. In order to determine this, the clause as it originated in Roman and Roman-Dutch law will be compared once again to English courts' treatment thereof. The position as far as South African courts' treatment of the restraint of trade clause is concerned, will be established (especially as it relates to athletes' contracts), and finally suggestions will be made as to whether contracts in restraint of trade may contribute in specifically enforcing contractual obligations created freely and willingly in terms of professional athletes' contracts.

## **10.2. The origins and development of contracts in restraint of trade**

### **10.2.1. Roman law**

The theoretical origins of the restraint of trade-clause are firmly settled in the Roman law concept of *obligatio*. More specifically, the contract in restraint of trade is rooted in the notion that a debtor is bound to perform in favour of a creditor in terms of an *obligatio*, and such duty to perform was sanctioned by an *actio in personam* at the instance of the creditor against said debtor.<sup>8</sup> It has been stated in chapter 2 of this thesis that obligations in Roman law arose either from contracts or delicts, and that Roman law did not distinguish between the two. It was only in Justinian's time that obligations were divided into those that arose *ex contractu* and those that arose *ex delicto*.<sup>9</sup> The significance hereof is that from Justinian's time, the concept of a contract developed from merely lawful conduct giving rise to liability to something that corresponded more closely to the modern day concept of a contract.<sup>10</sup> This "modern day concept" of a contract depends on the fact that commerce would be completely flawed if each party to a contract could not be depended on to perform his part of the

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<sup>7</sup> 1984 4 SA 874 (A). The case is discussed in detail in the text.

<sup>8</sup> Gaius / 2 13; D 44 7 3; Visser 1984 SALJ 642.

<sup>9</sup> See / 3 13 2.

<sup>10</sup> Visser 1984 SALJ 642. A discussion of the types of contract known to Roman law is found in chapter 2 of this thesis.



contract.<sup>11</sup> This was especially true in Roman law, as the earliest occurrence of a consensual contract<sup>12</sup> was that of sale. The contract of sale in Roman law came into existence as soon as the parties reached consensus on the essentials of the contract. This excluded the necessity of any *external* act in order to create a valid contract,<sup>13</sup> and implied that each party had to take the other at his word. If one of the parties was consequently allowed to dishonour his contractual duties at his behest, there would be no need and (more importantly) no *use* for a contract at all. In order to avoid a situation where a contract would become worthless, Gaius<sup>14</sup> has stated that a party to a consensual contract in Roman law was liable *ex fide bona*. The term *fides* acquired a meaning of trust, faith or reliance.<sup>15</sup>

Consensual contracts as the origins of the maxim *pacta sunt servanda* were incorporated into the *ius civile* from the early classical period<sup>16</sup> of Roman law, with the consequence that *consensus* became the primary requirement of all contracts. It should be clarified that the maxim was never a rule in Roman law, but was incorporated through canonical influence and only became a rule in early Roman-Dutch law, as stated below. In Justinian's Digest,<sup>17</sup> it is in fact stated that there is no contract or obligation which does not in itself contain an agreement.<sup>18</sup> This is confirmed by the fact that obligatory agreements were enforceable by means of an *actio* at *ius civile*.<sup>19</sup> In addition to the mentioned obligatory agreements, there were however agreements that were not actionable at the *ius civile*: the so-called *pacta*.<sup>20</sup> What is very important to note, however, is the fact that *consensus* was once again a prominent requirement of the pact. The form it took in early Roman law was that of a formal redemption from liability for personal injury. In fact, proceedings for personal injury were barred by pact according to the law of the Twelve Tables.<sup>21</sup> An agreement not to issue summons as stipulated in the aforementioned became the basis of a pact. Stated differently,

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<sup>11</sup> Visser 1984 *SALJ* 643.

<sup>12</sup> A contract which came into existence merely because of a meeting of the minds of contracting parties.

<sup>13</sup> Visser 1984 *SALJ* 643.

<sup>14</sup> Gaius / 3 137.

<sup>15</sup> Visser 1984 *SALJ* 643.

<sup>16</sup> The second and third centuries AD.

<sup>17</sup> *D* 2 14 1 3.

<sup>18</sup> The original text reads as follows: "nullum contractum, nullam obligationem est quae non habet in se conventionem."

<sup>19</sup> Visser 1984 *SALJ* 644.

<sup>20</sup> *Pacta* is defined in *D* 2 14 1 2 as "*duorum pluriumve in idem placitum et consensus*." The English translation reads as follows: "[A pact] means the consent and agreement of two or more persons to the same effect."

<sup>21</sup> *Tab* 8 2.

the primary meaning attached to the term “pact” in the Roman Republic<sup>22</sup> was of an agreement between parties not to enter into civil legal proceedings against each other.<sup>23</sup> This meaning was adopted into a general rule by the praetors, so much so that a pact could actually give rise to a praetorian defence<sup>24</sup> to any action. Visser<sup>25</sup> states that essentially, a pact could thus destroy an obligation, but could not found an action.<sup>26</sup>

Following the significant weight attached to pacts by the praetors, the pact developed to the extent that it could also vary obligations. If the obligation (importantly) was *bona fide*, such obligation could be amended by an agreement known as the *pacta adiecta*.<sup>27</sup> If, however, the obligation or transaction in question was *contra bonos mores*, it could not be amended, as the law would attach no consequences to the obligation in question.<sup>28</sup> In summarising, pacts entered into freely and willingly were considered enforceable at *ius civile*, as long as they were not *contra bonos mores*. Regarding contracts in restraint of trade, the aforementioned qualification would prove troublesome for future lawyers. It would seem that English lawyers consider a restraint of trade *prima facie* unlawful, because of the fact that it infringes upon an individual contractant’s right to ply his trade where and when he wants to. On the other hand, though, it must be kept in mind that one of the qualifications for a pact to be enforceable in Roman law was that it had had to be entered into freely and willingly. Although *pacta sunt servanda* was not yet a legal rule in Roman law, this is exactly what that maxim is based upon. The question must be posed once again what the purpose or use of a contract containing a restraint of trade clause (and entered into freely and willingly by a person of sound mind) would be if such contract were to be considered *prima facie* unlawful. Surely this would negate the sanctity of the contractual obligation? In the context of professional sport, the question as to the morality (or lack thereof) of a contractual clause barring an athlete from plying his trade elsewhere for a predetermined period of time is even more problematic. Before this issue is addressed, it is important to make mention of the influence that canon law has played in the sanctity of not only the pact as such, but also the belief that

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<sup>22</sup> Which existed from 509 to 27 BC.

<sup>23</sup> Gaius / 4 116; D 2 14 17 1; Visser 1984 SALJ 644.

<sup>24</sup> The defence was known as the *exceptio pacti conventi*.

<sup>25</sup> Visser 1984 SALJ 644.

<sup>26</sup> Visser’s statement is a confirmation of D 2 14 7 4.

<sup>27</sup> Visser 1984 SALJ 644-645.

<sup>28</sup> D 22 1 5; C 2 3 6; Visser 1984 SALJ 645.

promises (and subsequently obligations) should be kept according to the rules of natural law.<sup>29</sup>

The general principles governing consensus as a contractual requirement were introduced by the canonists of the medieval period.<sup>30</sup> In a decision by the *consilium* of the church regarding a dispute between two bishops arguing the delimitation of their dioceses in AD 348, a heading appeared which read *pacta quantumcunque nuda servanda sunt*.<sup>31</sup> The mentioned decision was incorporated in his *decretales* by Pope Gregory IX in 1234.<sup>32</sup> The church fathers actually went so far in the fourth century AD as to base the sanctity of contract on the Biblical gospel according to Saint Matthew.<sup>33</sup> This was incorporated in the oldest compilation of canon law, the *Decretum* of Gratianus of 1140.<sup>34</sup>

The glossators, as well as the commentators, were *ad idem* on the fact that canon law recognised a bare pact as in fact *actionable*.<sup>35</sup> The foundation of this recognition is interestingly enough settled in equity. Jason de Mayno, described as the “last great commentator,”<sup>36</sup> wrote that a bare pact would always give rise to an action in terms of the common law. To this he added that such a pact would give rise to an action on the basis of equity, not only in a canon law court, but also in a secular one.<sup>37</sup> Although the actionability of a bare pact in canon law was criticised by secular lawyers, the point of view (of the canonists) was recognised generally throughout Europe.<sup>38</sup> There was however an important exception to the principle of sanctity of contracts as perceived by canon law: the doctrine of *rebus sic stantibus*.<sup>39</sup> This doctrine entailed that a person would only be bound by a contract (or bare pact) if the circumstances surrounding said agreement had not changed subsequent to the

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<sup>29</sup> It ought to be remembered that, especially during the monarchy (753-509 BC), the administration of law and justice was in the hands of the priesthood, and the legal precept was largely indistinguishable from the religious concept.

<sup>30</sup> Visser 1984 *SALJ* 646.

<sup>31</sup> “Pacts, however bare, should be observed”.

<sup>32</sup> *Decretales* of Gregory IX (*Liber Extra*) 1 35 1.

<sup>33</sup> Chapter 5 verses 33-37 of said gospel. The commentary of the church fathers in question was supported by the belief that God drew no distinction between an oath in the religious sense of the word and the spoken word. The result of this was that a lie, dishonesty, or the neglect to fulfil a promise would be punishable in the same way as would perjury.

<sup>34</sup> Feenstra & Ahsmann (1980) 13; Visser 1984 *SALJ* 646.

<sup>35</sup> Visser 1984 *SALJ* 646.

<sup>36</sup> See Visser 1984 *SALJ* 646.

<sup>37</sup> Gloss ad *D* 2 14 7 4. The original text reads as follows: “Ista sit communis opinio quod pactum nudum de iure canonico producat actionem...ubicunque proceditur de aequitate pactum nudum producit actionem...non solum in foro canonico sed et saeculari, in omnibus terris subiectis ecclesiae.”

<sup>38</sup> Visser 1984 *SALJ* 647.

<sup>39</sup> Which basically referred to a situation where circumstances remained unchanged. This exception is supplementary to logical exceptions to the sanctity of contracts like illegality or immorality of said contracts.

conclusion thereof.<sup>40</sup> This was perceived as an implied condition to every contract or pact, and was commonly known as the *clausula rebus sic stantibus*.<sup>41</sup> It is submitted that this exception rings true even in contemporary South African law regarding the restraint of trade clause in particular. An example would be where an athlete has entered into a fixed-term professional contract with a club, but after having entered into the contract, the club in question is expelled from the league due to consistent poor spectator behaviour. Provided that the club was expelled after the athlete had entered into the contract with the particular club, it would be inequitable to hold the athlete to the contract, as the circumstances surrounding his entering into it will have changed essentially.

It is clear then that the concept of sanctity of contract has its roots firmly in Roman law. Whilst canon law played a significant role in the confirmation of said concept, secular lawyers accepted the undeniable influence of the church. The appropriateness of the restraint of trade clause is settled in the concept of sanctity of a contract. Therefore, it is submitted that said clause, however it is perceived by different jurisdictions, is founded in Roman law. It is consequently important to discuss the perception of sanctity of a contract with specific reference to the contract in restraint of trade in Roman-Dutch law.

### 10.2.2. Roman-Dutch law

Relying on the Digest and a certain text by Cicero,<sup>42</sup> Grotius contended that all *pacta* were binding, based on the belief that *fides* formed the basis of justice.<sup>43</sup> Grotius's initial contentions were underlied by him being influenced by particularly the Spanish moralist theologians of the sixteenth century.<sup>44</sup> It would be fair to state that Grotius was influenced rather heavily (at least initially) by natural law in adopting the abovementioned opinion.<sup>45</sup> However, in later times Grotius stated that the principle that promises should be kept formed

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<sup>40</sup> Visser 1984 *SALJ* 647.

<sup>41</sup> *Ibid.*

<sup>42</sup> The specific text referred to here is *De Officiis* 1 7 23.

<sup>43</sup> *Gr* 2 11 1 1 and 3, as translated by Steyn.

<sup>44</sup> Visser "Die invloed op Hugo de Groot" 1983 *THRHR* 136; Visser 1984 *SALJ* 649.

<sup>45</sup> Grotius referred to natural law as "de aengeboren wet". Both Vinnius and Groenewegen supported Grotius' views on the sanctity of contract, and consequently the lawfulness of the restraint of trade clause. Vinnius confirmed that the canonists had agreed to the fact that an obligation was created (and an action granted) in terms of a *pactum nudum* (*Tractatus de Pactis* 7 6). Groenewegen affirmed that in his time, a *pactum nudum* gave rise to both an exception and an action (*De Legibus Abrogatis* 2 3 10, 13, 21 and 28).

the primary source of the entire positive law.<sup>46</sup> In his *Inleidinge*,<sup>47</sup> Grotius defined the concept “toezegging” as follows:<sup>48</sup>

“A willing deed by a person by which he promises something to another, with the intention of creating a reciprocal right in favour of said other.”

It is important to note from the abovementioned definition that Grotius makes it very clear that a person is free to bind himself by way of “toezegging”. This is none other than a confirmation of the Roman law concept that *pacta sunt servanda* by Grotius. What makes this confirmation even more relevant to the current discussion, is that Grotius also stated that there were certain limitations (imposed by the positive law of Holland) to the freedom of a person to bind himself to a contract.<sup>49</sup> These limitations correspond closely to those advocated in Roman law, and related not only to the form of the agreement, but also to the contents thereof.<sup>50</sup> As far as the latter was concerned, Grotius made it clear that contractual contents which were either illegal or immoral would not be enforceable.<sup>51</sup>

A further qualification made by Grotius which raises some concern, but is very relevant to this chapter and thesis in general, is that parties to a contract should not be held bound to an agreement to work if doing so would result in “intolerable hardship” to either of them.<sup>52</sup> In the discussion of the remedy of specific performance (which, it is submitted, likewise finds its origins in the doctrine that *pacta sunt servanda*) it was submitted that the consideration of “undue hardship” to a defendant in an action for specific performance, was derived from English law and should therefore not have played such a significant role in early South African court decisions as it did. Grotius’s reference thereto is therefore somewhat confusing. However, it should be noted that Grotius does not refer to “undue” hardship, but to “intolerable” hardship. There is a significant difference between these two concepts. Whereas

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<sup>46</sup> *Gr 2 11 4 1*. Grotius stated that even God is bound by His promises, and He would be acting against His nature if he were to breach those.

<sup>47</sup> This refers to Grotius’ *Inleidinge tot de Hollandsche Rechtsgeleerdheyt* of 1631.

<sup>48</sup> *Gr Inleidinge 3 1 10*. The Dutch reads as follows: “Een willighe daed eens mensches waer door hy aen een ander iet belooft, met meninghe dat den ander het zelve aennemen ende daer door op den belover eenig recht zal mogen verkrijgen.”

<sup>49</sup> *Gr Inleidinge 3 1 21*.

<sup>50</sup> Visser 1984 SALJ 650.

<sup>51</sup> *Gr Inleidinge 4 1 42-43*; Visser 1984 SALJ 650.

<sup>52</sup> *Gr 2 16 27 1*. The original text in which Grotius made this statement, reads as follows: “*Secundum erit indicium, si verba sequi non quidem per se et omnino illicitum sit, sed aequae rem aestimanti nimis grave atque intolerabile: sive absolute spectate conditione humanae naturae, sive absolute spectate conditione humanae naturae, sive comparando personarum et rem de qua agitur, cum ipso fine actus...*”

it would not be considered inequitable to expose a contractant to “undue” hardship by compelling him to honour his contractual obligations, it would certainly be inequitable, from a humane point of view, to expose said contractant to “intolerable” hardship. The latter qualification, it is submitted, is a much stricter and potentially harmful one than the former.<sup>53</sup>

Van Leeuwen, interestingly enough, stated that a bare pact did not give rise to any action. He claimed that the Roman-law maxim *ex nudo pacto non datur actio* had previously been incorporated into Dutch practice.<sup>54</sup> Van Leeuwen’s statement was, however, criticised by Voet, who stated that the former had confused *pacta nuda* with a *stipulatio* or *cautio*, which required the *causa debiti* to be expressed.<sup>55</sup> The consequence of Voet’s criticism led to later editions of Van Leeuwen’s *Censura Forensis* being rectified as far as the abovementioned argument was concerned. In the 1780 edition of Van Leeuwen’s work, Decker stated the following:<sup>56</sup>

“Our law is certain: all engagements made freely and willingly by capable persons must be performed subject to the doctrine of *ex nudo pacto non datur actio*...”

All doubt which may have existed regarding the enforceability of a contract entered into freely and willingly by a person of sound mind, was eradicated by the abovementioned concession in Van Leeuwen’s *Censura Forensis*.<sup>57</sup> As mentioned above, agreements or clauses therein that were immoral or had arisen from dishonest causes were not enforceable. Voet added hereto that agreements contrary to the law or good morals were invalid.<sup>58</sup> Van der Linden stated that agreements were invalid if they were based on a cause that infringed justice or equity, good faith, or good morals.<sup>59</sup> This would form the basis of the current South African view on the restraint of trade clause in particular. Visser summarises the Roman-Dutch point of view as far as restraint of trade-clauses are concerned as follows: firstly, the

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<sup>53</sup> *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) contains a thorough discussion of the meaning of “intolerable hardship.” A detailed discussion of this requirement, and of the case on general, is found in chapter 5 of this thesis.

<sup>54</sup> Van Leeuwen 1 4 2 2.

<sup>55</sup> Voet 2 14 9 2.

<sup>56</sup> Van Leeuwen 2 4 2 13. The Dutch text reads as follows: “*Naar onze regten zeker is, dat alle vrywillige en voorbedagte engagementen, uit redelyke oorzaake door daartoe bekwaame personen geschied zynde, gepraesteert moeten worden, zonder dat by ons eenige de minste attentie verdient de in het Roomsche Recht bekende stelling: ex nudo pacto non datur action...*”

<sup>57</sup> Particularly the 1780-edition.

<sup>58</sup> Voet 2 14 16 1.

<sup>59</sup> Van der Linden 1 14 2 and 6.

principle of sanctity of contract was an entrenched principle in the practice of the time, and secondly, the courts did not harbour an “inherent suspicion” of restrictive covenants.<sup>60</sup>

Before South African courts’ treatment of the restraint of trade clause is discussed, it is important to first investigate the way in which English courts have dealt with said clause. The importance hereof lies therein that, as stated previously, confusion may arise if the restraint of trade-clause is suggested as a suitable manner in which to stem the tide of repudiation of athletes’ contracts on a global scale. It is consequently important to establish whether the use of a restraint of trade clause would be effective at all outside the borders of South Africa.

### 10.2.3. English law

As mentioned earlier, the rule in English law is that restraints of trade are *prima facie* illegal and void. This much is indicated below in the discussion of early English decisions on the matter, such as *Dyer’s Case*<sup>61</sup> and *Mitchel v Reynolds*.<sup>62</sup> However, it is also true that if the restraint of trade is reasonable *inter partes* depending on the specific circumstances, and not against public policy, it is valid and enforceable.<sup>63</sup> The argument has been made in English law that restraints are void rather than illegal.<sup>64</sup> Sutherland disagrees with this argument, stating that it is doubtful whether unacceptable restraints are actually void.<sup>65</sup> His argument is found, however, in terminology, and is not relevant to the matter under discussion. What is relevant is English courts’ treatment of restraints of trade. The relevance lies in Sutherland’s statement that the doctrine (of restraint of trade) as applied in English law is not necessarily different from that in South Africa.<sup>66</sup> It is doubtful whether this is an accurate statement. The doctrine itself may be similar, but the application thereof, as will be discussed below, differs significantly in the two jurisdictions concerned.

In England, the restraint of trade-doctrine has been categorised under “public policy” matters since Elizabethan times.<sup>67</sup> The connection between early (as far as English law is concerned) expressions of public policy in cases involving restraints of trade, and more modern

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<sup>60</sup> Visser 1984 SALJ 653.

<sup>61</sup> 2 Hen. 5, f. 5, pl. 26 (1414).

<sup>62</sup> (1711), 1 P. Wms. 181, 193.

<sup>63</sup> Van der Merwe *et al* 214.

<sup>64</sup> See in particular the cases of *Price v Green* (1847) 16 M & W 346 at 353; *Hilton v Eckersley* (1855) 6 El & Bl 47 at 53, and Sutherland “The restraint of trade doctrine in England, Scotland and South Africa” (LL.D. thesis 1997 University of Edinburgh) 6.

<sup>65</sup> Sutherland 6.

<sup>66</sup> *Ibid.*

<sup>67</sup> Winfield (1946) 285; Sutherland 7.

principles of public policy, is that restraint of trade law in fact formed the foundation of modern day public policy.<sup>68</sup> Although the main principles of the modern common law doctrine of restraint of trade were settled in a number of major English cases towards the end of the nineteenth century, the “forces that moulded them”, according to Heydon,<sup>69</sup> are much older. Pollock has stated that the history of restraint of trade (in English law) shows a “singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in defence to the changed conditions of society and the requirements of modern commerce.”<sup>70</sup> By this he suggests that the doctrine of restraint of trade has evolved and adapted to modern day legal and commercial requirements. This is especially important, as a mere allusion to “public policy” suggests something which is ever-changing, not only in terms of time periods, but also in terms of jurisdictions.<sup>71</sup> This is confirmed by the fact that public policy was not initially a concept used consciously by English lawyers, and was not defined specifically in English law.<sup>72</sup> However, towards the later eighteenth century notions of public policy as they exist today began to develop, and in the nineteenth century a thoroughly modern concept of public policy was established in English law.<sup>73</sup> English courts did not initially emphasise the fact that public policy formed the basis of the restraint of trade doctrine. However, the fact that the restraint in question had to be reasonable was never doubted by these courts.<sup>74</sup> Some English authorities have, however, found it troublesome to relate the concept of reasonableness to that of public policy.<sup>75</sup> According to Winfield, the alliance between the doctrine of restraint of trade and the principle that contracts should not be against public policy is an “uneasy” one.<sup>76</sup> According to him, public policy can take three different forms. The first form entails those cases (regarding public policy) which the courts decide based simply on the broad principles of public policy.<sup>77</sup> The second form entails specific principles and rules of public policy upon which courts can base their decisions. This second form can be subdivided: on the one hand the applicable rules may become so independent that the only

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<sup>68</sup> Sutherland 7.

<sup>69</sup> Heydon (1971) 1.

<sup>70</sup> Pollock (1936) 391-392; Heydon 2.

<sup>71</sup> Sutherland at 9 states that “public policy is a concept that is flexible and difficult to pin down, even if the variability of it over time is ignored.” See in this regard also the cases of *Davies v Davies* (1887) 36 ChD 359 at 364 and *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] 1 All ER 215 at 219.

<sup>72</sup> Sutherland 7.

<sup>73</sup> *Ibid* 7.

<sup>74</sup> *Idem* 8.

<sup>75</sup> *Idem* 8.

<sup>76</sup> Winfield 96.

<sup>77</sup> Sutherland 8.



link between them and the broader notion of public policy would be of historical significance only. On the other hand, though, the notion of public policy may be subversive to the specific rules applicable.<sup>78</sup> Winfield has argued that the restraint of trade doctrine is an example of the latter, and Sutherland has agreed with this argument.<sup>79</sup>

It is agreed with the abovementioned statement by Sutherland that there seems to be uncertainty in English law as to the place of the restraint of trade doctrine within public policy notions in England. This is so despite the fact that English law realises that the doctrine of restraint of trade has developed out of public policy notions, and is still regarded as a specific expression thereof.<sup>80</sup> The problem presented by this chapter is the differing character of public policy in different jurisdictions of the law. The restraint of trade is not considered as a possible solution to the constant repudiation of athletes' contracts in South Africa only, but as a possible global solution to said problem. However, as with the contractual remedy of specific performance, it would be very difficult to explain to a professional English athlete plying his trade in South Africa that in the country in which he is domiciled, he could not be restrained from plying his trade elsewhere if he so wished, but that in South Africa, such a restraint may be enforced against him – based on public policy considerations. The problem is effectively that two sets of rules may apply to the same sporting code and the same professional athlete, depending on where he chooses to ply his trade. Once again, the validity of *pacta sunt servanda* becomes relevant. If the athlete (foreign or domestic) chooses freely to ply his trade in South Africa and enters into a contract containing a restraint of trade clause, then he should be held bound to such clause if he were later to decide to repudiate his contract. The opposite is of course also true if a South African-domiciled person were to ply his trade overseas, especially in an Anglo-American legal system. It would entail that a restraint of trade agreed upon by said South African athlete would be considered *prima facie* unlawful, even if the athlete is a domiciled South African.

In order to find possible common ground between South African courts' treatment of the restraint of trade contract and that of English courts, it is important to discuss the latter in detail, before moving on to a discussion of the former. According to Heydon, *Dyer's Case*<sup>81</sup> is usually said to be the earliest reported restraint of trade case. *In casu*, the defendant had entered a bond not to practice the trade of dyer in a certain town for six months. The

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<sup>78</sup> Sutherland 8.

<sup>79</sup> Sutherland 8; Winfield 96.

<sup>80</sup> Sutherland 9.

<sup>81</sup> 2 Hen. 5, f. 5, pl. 26 (1414).

defendant argued successfully that he had not committed breach of contract. The court stated in quite elaborate language that the “bond” entered into was in fact illegal.<sup>82</sup> The reason for this decision seems to be the “great hardship” involved.<sup>83</sup> In a later case –that of *Mitchel v Reynolds*<sup>84</sup> - Parker CJ agreed with the decision in *Dyer’s Case*. In *Mitchel*, the defendant had assigned a lease of a bakehouse to the plaintiff for a period of five years.<sup>85</sup> A bond was entered into by the defendant in terms of which he had to pay a penalty<sup>86</sup> to the plaintiff if he (the defendant) were to work as a baker for that term. The defendant argued that he was a baker by trade and that the bond was void in law.<sup>87</sup> The value of this decision lies in Parker CJ’s meticulous review of the law relating to restraints of trades. He decided that restraints included in contracts were either voluntary or involuntary.<sup>88</sup> The latter were divided into three kinds of restraints: the first comprised those which depended on grants or charters from the Crown, which were usually considered void. The second kind of restraint depended on customs, and was subject to a general rule that all customs that restrain liberty of trade must be clear and plain and not doubtful.<sup>89</sup> The third kind of involuntary restraint identified by Parker CJ comprised those stemming from a by-law. These restraints were only valid if supported by a reasonable custom to the same effect<sup>90</sup> or if “made to restrain trade, in order to the better government and regulation of it...in some cases, if they are for the benefit of the place, and to avoid public inconveniences, nuisances *et cetera*. Or for the advantage of the trade, and improvement of the commodity.”<sup>91</sup> As far as voluntary restraints were concerned, Parker CJ stated that the law governing them had a different basis. In such instances, *Magna Carta*<sup>92</sup> was irrelevant, because a man was free to voluntarily put himself out of his freehold, and may similarly limit his own liberty for a valid reason or consideration.<sup>93</sup> Importantly, the court provided the reasons why the law frowned upon voluntary restraints of trade: firstly, a contract in restraint of trade caused the covenantee to lose his livelihood and thereby brought suffering to his family. Secondly, it deprived the public of a useful worker. Thirdly, the

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<sup>82</sup> Heydon 8.

<sup>83</sup> *Idem* 9.

<sup>84</sup> (1711), 1 P. Wms. 181, 193.

<sup>85</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 181.

<sup>86</sup> The penalty was significant: £50.

<sup>87</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 181.

<sup>88</sup> *Idem* 183.

<sup>89</sup> *Idem* 183.

<sup>90</sup> As decided in the earlier case of *Colchester Corporation v Goodwin* (1667), Carter 68 at 114.

<sup>91</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 184; Heydon 13.

<sup>92</sup> *Magna Carta* is an Angevin charter which was the first to limit the powers of the King of England. It was issued in June 1215 and originally in Latin.

<sup>93</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 187; Heydon 15.

contracts in question could be abused to give covenantees unfair advantages (such as masters attempting to protect themselves from future competition from their apprentices). Lastly, restraints may often be excessive, inflicting hardship on the covenantor without conferring specific benefits on the covenantee.<sup>94</sup> While these reasons are indeed laudable, it is submitted that Parker CJ omitted one very important consideration: that the contract in restraint of trade was entered into freely and willingly. Surely by saying, for argument's sake, that a man who had voluntarily committed contractually to a restraint of trade could not be held bound to such clause, because it would be detrimental to the man's family, negated that man's freedom of contract. Having established above that the doctrine of restraint of trade was borne from the notion of public policy, it would be reasonable to submit that depriving a person of his freedom to enter into any contract he wished to, was contrary to any jurisdiction's notion of public policy. Likewise, if a person who had committed willingly to a restraint of trade clause in a contract were to be allowed to dishonour said contract, it would in fact negate that person's dignity. The reason for this is that the law would in fact imply that the person did not have the legal power, dignity, intelligence (call it what you may) to enter into a relevant legal act. Cameron JA's statement on the post-constitutional decision of *Brisley v Drotosky*<sup>95</sup> (already alluded to in chapter 4 of this thesis) confirms the author's argument above:

“On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons... is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”<sup>96</sup>

By the same argument, courts should be hesitant not to enforce a restraint of trade that has been agreed to by two contracting parties acting out of their own free will, and of while of sound mind. Nevertheless, the importance of *Mitchel* is found in the fact that it established “a place in law” for contracts in restraint of trade.<sup>97</sup>

Whereas *Dyer's Case* was the first reported English case on restraint of trade, the decision of the House of Lords in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*<sup>98</sup> is seen as the *locus classicus* as far as the contract in restraint of trade in English law is concerned. In *Nordenfelt*, a patentee and manufacturer of guns and ammunition for war purposes entered

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<sup>94</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 188-189; Heydon 15-16.

<sup>95</sup> 2002 (4) SA 1 (SCA).

<sup>96</sup> *Brisley v Drotosky* 2002 (4) SA 1 (SCA) 35.

<sup>97</sup> Christie “Contracts in restraint of trade” 1900 *Jurid. Rev.* 283 at 285.

<sup>98</sup> [1894] AC 535.

into an agreement (the verb used in the decision of the House of Lords is “covenanted”) with a company to which the former’s patents and business had been transferred. The covenant<sup>99</sup> stated that the patentee would not for a period of twenty-five years conduct the business of a manufacturer of guns or ammunition, except under the auspices of the company.<sup>100</sup> The court of Appeal held that the covenant through unrestricted as to space was not (with regard to the nature of the business and the limited number of customers<sup>101</sup>) wider than was necessary to protect the interests of the company, nor was it injurious to the public interests of the country (England). Therefore, the Court of Appeal decided that the restraint was valid, and enforced it by way of injunction.<sup>102</sup> The decision of the Court of Appeal came under close scrutiny from the House of Lords. The presiding Lords were *ad idem* on the legal question: whether the covenant entered into between the parties could be enforced against the appellant, or whether it was void as being in restraint of trade. In Lord Herschell’s (the Lord Chancellor) judgment, he made it clear that it was a long-established rule of common law in England that a general covenant in restraint of trade could not be enforced.<sup>103</sup> He mentioned that in “early times” (as far as English law was concerned), all agreements in restraint of trade, whether general or restricted in area, were considered “bad”.<sup>104</sup> Referring to the case of *Mitchel v Reynolds* discussed above, Lord Herschell stated furthermore that with time, a distinction had been drawn between covenants in general restraint of trade and those in partial restraint of trade.<sup>105</sup> This distinction had always been maintained, according to Lord Herschell.<sup>106</sup> The Lord Chancellor accepted the rule laid down by Parker CJ in *Mitchel v Reynolds*, and stated that such rule was merely to be applied to the current case at hand.<sup>107</sup> Consequently, the Lord

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<sup>99</sup> It is important to understand that the covenant is actually created *in* the agreement.

<sup>100</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 535. The specific restraint of trade clause read as follows: “The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun mounting or carriages, gun powder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys or iron or copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of reconstruction or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same.”

<sup>101</sup> The customers basically consisted of the English Government, as well as governments of other countries.

<sup>102</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 535.

<sup>103</sup> *Idem* 541.

<sup>104</sup> *Idem*. See also Christie 1900 *Jurid. Rev.* 286.

<sup>105</sup> *Idem* 541.

<sup>106</sup> *Idem* 542. See also Christie 1900 *Jurid. Rev.* 287-288.

<sup>107</sup> *Idem* 542. The rule referred to by Lord Herschell was basically that voluntary restraints, by agreement

Chancellor accepted the argument that if a restraint of trade were partial, based upon an adequate consideration, and reasonable, such restraint of trade would be valid.<sup>108</sup> An important statement made by Lord Herschell, which has been alluded to above, was that when dealing with a legal question such as the current one, “changed conditions of commerce and of means of communication” had to be taken into account.<sup>109</sup> It is submitted once again that when dealing with a contractual clause (such as the restraint of trade) whose validity is dependent on public policy, the dynamic nature of public policy must always be taken into account. In the same decision, Lord Watson confirmed that the general policy in English law was that all restraints upon “liberty of individual action” which were injurious to the interests of the State or community were invalid.<sup>110</sup> Likewise, he stated that a (English) Court would “rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade.”<sup>111</sup> Lord Watson conceded to the fact that it was, at the time of the *Nordenfelt*-decision, to the advantage of the public to allow a trader who had established a lucrative business, to dispose of said business to a successor. Such a transaction would not be possible if, upon considerations of public policy, the law demanded of the seller an “absolute and indefeasible right” to start a rival business the day after he had sold the business.<sup>112</sup> Consequently, a restraint of trade would be capable of being enforced by an English court if such restraint were reasonable and limited in respect of space.<sup>113</sup>

Lord Macnaghten probably summarised the decision by the House of Lords in the *Nordenfelt*-case most effectively. He stated that both the public and the individual had an

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between the relevant parties, were void if they amounted to a general restraint of trading by either party. On the other hand, a particular restraint of trade, if such restraint was agreed upon a good and adequate consideration, was considered “good”.

<sup>108</sup> *Idem* 544.

<sup>109</sup> *Idem* 547. Although the discussion

by Lord Herschell is described by him as “academic”, he provides a very practical example of the changing nature of commerce and communication (and consequently, it is submitted, public policy): “Newcastle-upon-Tyne is for all practical purposes to-day as near to London as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could than have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection of the covenantee.” It is submitted that, especially as far as the business of professional sport is concerned, Lord Herschell’s example is today more relevant than ever.

<sup>110</sup> *Idem* 552.

<sup>111</sup> *Idem* 552.

<sup>112</sup> *Idem* 552.

<sup>113</sup> *Idem* 552.

interest in each and every person's carrying on his trade freely.<sup>114</sup> He went on to decide that any interference with the freedom (or "liberty", as he calls it) of the individual to engage in trade, was contrary to public policy and consequently void. However, there were exceptions to this general rule: restraints of trade and interference with individual freedom were justified in cases of reasonable restriction to freedom and with consideration to the interests of the public.<sup>115</sup>

The *Nordenfelt*-decision put the English perception of a restraint of trade in perspective. Although English law considers any covenant in restraint of trade void, there are circumstances in which English courts would grant injunctive relief in terms of a restraint of trade clause. These circumstances would more often than not involve considerations of public policy and interest, and also those in which the covenant in question were only partial (in other words relating to a limited space and time).<sup>116</sup> Joubert puts it simply: "the modern approach (of English law) is to reconcile all the interests involved and to hold all reasonable restraints valid and all unreasonable restraints invalid."<sup>117</sup> The question must be asked whether this approach has proved beneficial in cases involving restraint of trade in athletes' contracts. The general rule of restraint of trade as far as athletes' contracts are concerned, is that the duty to honour the restraint applies while the contract subsists, but ceases to apply on its termination. The only exception to this rule is where the athlete possesses information that could be categorised as a trade secret.<sup>118</sup> A restraint of trade would be permitted if an employer had a legitimate interest to protect and the clause was reasonable in so far as the scope, duration and area of geographical operation were concerned.<sup>119</sup> According to Gardiner *et al*, the purpose of a restraint of trade is to protect a contracting party who is in a vulnerable position towards the other contracting party.<sup>120</sup> This often happens to young professional athletes, who at the beginning of their professional careers are not in as strong a bargaining position as their potential employers, even if they make use of agency.<sup>121</sup>

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<sup>114</sup> *Idem* 565.

<sup>115</sup> *Idem* 565.

<sup>116</sup> Christie 1900 Jurid. Rev. 289.

<sup>117</sup> Joubert 145.

<sup>118</sup> Gardiner *et al* (2012) 409.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> The argument has been made in this thesis, however, that it is in fact a characteristic of professional sport that the athlete possesses equal bargaining power to the potential employer club or union. It must be agreed with Gardiner *et al*, however, that in reality, this is not always the case. This is especially true if the athlete in question has not accumulated sufficient "juice", as US sports personalities call it, and explained in chapter 9 of this thesis.

Gardiner *et al* provide a relevant practical example of what would be considered a reasonable restraint in English football. In 2008, Kevin Keegan resigned as manager of the Newcastle United Football Club.<sup>122</sup> He successfully claimed constructive wrongful dismissal.<sup>123</sup> However, an issue arose, which had to be considered by the English Premier League Managers' Arbitration Tribunal, which involved a clause in Keegan's contract prohibiting him from working in any capacity for any other Premier League Club for a period of six months, after termination of his contract by Newcastle.<sup>124</sup> The tribunal found that the clause was reasonable and enforceable. The reason for the decision was the fact that the term in question was wide enough to cover constructive as well as actual dismissal, and furthermore that it was reasonable and consequently enforceable.<sup>125</sup> Keegan could still have worked outside the Premier League and in any country, or even at international level. Also, the restraint would only apply for six months. The reasoning behind the tribunal's decision was that Newcastle would potentially be harmed if Keegan were to convey his detailed knowledge of Newcastle's players and their contracts to rival Premiership clubs. Such knowledge would provide the latter clubs with an unfair advantage.<sup>126</sup> The doctrine of restraint of trade is particularly significant as far as the transfer rules of the Premier and Football Association Leagues are concerned. To evaluate these in detail would be to divert from the discussion at hand. However, the aim of these transfer rules are relevant, and that is to enable a professional athlete to leave his club freely at the end of his contract, but to recognise that the particular club is entitled to compensation from the new club the athlete joins, provided that this does not seriously hamper the athlete's freedom of movement.<sup>127</sup> The European Court of Justice's decision in *Union Royale Belges des Sociétés de Football ASBL v Bosman*<sup>128</sup> is relevant to the matter at hand. The case has been discussed in some detail in chapter 6 of this thesis. For the purposes of this chapter, it would suffice to point out that the court in *Bosman* ruled that the transfer rules of UEFA at the time were unlawful, in so far as they allowed for a club to demand compensation for the services of a football player who had previously been in their employment, despite the fact that such player was out of contract and that the club had no interest in the player's services any longer. It is submitted that had the *Bosman*-case been decided based on the transfer rules of the English Premier and Football

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<sup>122</sup> Hereinafter referred to as "Newcastle".

<sup>123</sup> Gardiner *et al* (2012) 409.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Idem* 411.

<sup>128</sup> [1995] ECR I-4192.

Association,<sup>129</sup> the decision would have been the same, as well as based on the same argument: that it was against public policy, and therefore unreasonable. This would be in alignment with the general English legal perception of the doctrine of restraint of trade, as discussed above.

In order to establish how the English perception of the restraint of trade compares to the South African one (and indeed, has influenced it), it is important to establish exactly what the latter entails. Also, it is important to establish how South African courts have dealt with the covenant as far as athletes' contracts in particular are concerned.

### 10.3. The development of the restraint of trade doctrine in South African law

In one of the earliest South African decisions regarding the restraint of trade doctrine, *Eastwood v Shepstone*,<sup>130</sup> Innes CJ stated that a contract at common law would be illegal and unenforceable if such contract went against good morals or public policy.<sup>131</sup> In his decision, the court depended largely on De Groot's<sup>132</sup> point of view as to public policy and good morals, as discussed above. This led to the conclusion that agreements in restraint of trade are *prima facie* valid and enforceable in South African law, unless they impose an unreasonable restriction on a person's freedom to trade.<sup>133</sup> This much was confirmed in the important decision of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*,<sup>134</sup> in which the court stated the following:

"It is a principle of our law that agreements against public policy cannot be enforced, and one could consequently say that an agreement which limits a person's freedom of trade is contrary to public policy and therefore not enforceable, if the circumstances of the relevant case are such that a Court is of the opinion that enforcing the agreement would harm public policy."<sup>135</sup>

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<sup>129</sup> In fact, according to Camatsos "European sports, the transfer system and competition law: Will they ever find a competitive balance?" 2005 *Sports Lawyers Journal* 155 at 157, the transfer system in football actually commenced in England in the late nineteenth century.

<sup>130</sup> 1902 TS 294.

<sup>131</sup> *Eastwood v Shepstone* 1902 TS 294 302. Innes CJ's exact words were as follows: "Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or irrationally exercised: but once it is clear that any arrangement is against public policy, the court (sic) would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result." See also Saner (2013) 1-1.

<sup>132</sup> More particularly, De Groot's *Inleidinge* 3 1 42.

<sup>133</sup> Saner 1-4. It is agreed with Saner that an imposition on a person's freedom of trade will result in the relevant clause being against public policy, and consequently illegal and unenforceable.

<sup>134</sup> 1984 (4) SA 874 (A).

<sup>135</sup> *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 897-898. The original Afrikaans reads as



The abovementioned case has, to a large extent, made all judgments by South African courts prior to its decision irrelevant.<sup>136</sup> However, it is essential to illustrate the development of the courts' approach to the doctrine. In *Katz v Efthimiou*,<sup>137</sup> the applicant was a baker and general dealer who had purchased from the respondent immovable property together with the latter's baker's and general dealer-business as a going concern.<sup>138</sup> The relevant clause in restraint of trade read as follows:

“The seller undertakes that at no time hereafter shall he be interested in, in any capacity, as director, shareholder, partner, manager, employee or in any way whatsoever, in any baker or general dealer's businesses within a radius of one hundred miles of Harrismith.”<sup>139</sup>

The purchase price was £8000, of which £3500 was allocated towards the goodwill of the two businesses by the applicant. It was averred that the advantages obtained by the applicant under the restraint of trade clause had influenced and induced him to enter into the contract.<sup>140</sup> The respondent claimed that such amount (of £3500) which was paid by the respondent had established a monopoly of the bakery business in Harrismith.<sup>141</sup>

The first question which the court had to attempt to answer was whether the restraints imposed by the abovementioned were severable. The court stated that the doctrine that contracts in restraint of trade were generally considered as being in conflict with public policy was “entirely foreign to the Roman and Roman-Dutch systems of law”.<sup>142</sup> Consequently, the applicant failed to satisfy the court that the restraint of trade in question was reasonable. The unreasonableness thereof was founded in the fact that the area covered by it was considered too vast.<sup>143</sup>

An important point that should be mentioned is that the court in *Katz* liberally referred to English case law despite being obviously inclined towards the Roman and Roman-Dutch

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follows: “*Dit is 'n beginsel van ons reg dat ooreenkomste wat teen die openbare belang is, nie afdwing kan word nie, en 'n mens sou dusk on sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort, teen die openbare belang, end us onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sal skaad.*” This approach was confirmed in *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A). See also Saner 1-5.

<sup>136</sup> Saner 2-1 states that decisions regarding restraint of trade prior to *Magna Alloys* are of academic interest only.

<sup>137</sup> 1948 (4) All SA 370 (O).

<sup>138</sup> *Katz v Efthimiou* 1948 (4) All SA 370 (O) 371.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Idem* 371-372.

<sup>141</sup> *Idem* 373.

<sup>142</sup> *Katz v Efthimiou* 1948 (4) All SA 370 (O) 374. See also Visser 1984 SALJ 641.

<sup>143</sup> *Katz v Efthimiou* 1948 (4) All SA 370 (O) 378.

concept of the restraint of trade doctrine.<sup>144</sup> Although this was not to have an effect on the ultimate outcome of the case, it is submitted that a discussion of decisions by the Chancery Division and King's Bench does not fall within the ambit of an analysis of South African courts' perception of the doctrine of restraint of trade. An important pre-*Magna Alloys* South African decision on the doctrine is that of *Roffey v Catterall, Edwards and Goudré (Pty) Ltd*,<sup>145</sup> alluded to briefly above. In the words of Didcott J, this case raised "fundamental questions about some of the legal principles which govern such stipulations (as the restraint of trade clause) in this country".<sup>146</sup> The respondent carried on business as an estate agency, and the appellant was a salesman in the former's employment. What was interesting about the contract and the covenant in restraint of trade itself was that the latter was preceded in the contract by a clause in terms of which the appellant specifically, freely and voluntarily submitted to the restraint that would follow.<sup>147</sup> From this clause it seemed that the purpose of the restraint and its precession was the fact that the appellant's income-earning opportunities would be "potentially considerable", and that, because of his appointment to the company, he would gain access to "the business contacts and clients of the company and to the properties available to the company for sale or business and which are vital to the company's business."<sup>148</sup> This submission by the appellant was followed by the actual covenant in restraint of trade, which effectively barred him from carrying on business as an estate agent or property sales broker, or associating directly or indirectly with any estate agency business within a radius of seven miles from the respondent's office during his association with the respondent as well as for a period of twelve months after such association had ceased.<sup>149</sup> The contract furthermore contained the appellant's acknowledgment that the mentioned restraint was fair, reasonable, and necessary for the protection of the respondent's business interests. The contract even contained sanctions in case of breach of the covenant in question.<sup>150</sup>

What is important (for the purposes of the current discussion) about the evidence lead before the trial court, was that the appellant at the time of commencing his association with the respondent had never worked as an estate agent before. The respondent had trained the appellant as an estate agent from scratch, taught him the "tricks of the trade" (in the words of

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<sup>144</sup> Examples were the Court's referral to *Gophir Diamon Company v Wood* (1902) 1 Ch. D. 952 (Ch. D), *Haynes v Doman* (1899) 2 Ch 236 (Ch. D) and *Attwood v Lamont* (1920) 3 KB.

<sup>145</sup> [1977] 4 All SA 482 (N).

<sup>146</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 483.

<sup>147</sup> *Idem* 484.

<sup>148</sup> *Idem* 484.

<sup>149</sup> *Idem* 484.

<sup>150</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 484.

Didcott J), which included techniques for the promotion and negotiation of sales and other transactions involving immovable property and shares in land-owning companies.<sup>151</sup> Furthermore, the respondent had instructed the appellant on various types of agreements used in the abovementioned context, the arrangement of finance for such purpose and similar topics “requiring an expertise which it (the respondent) had and he (the appellant at the time) lacked.”<sup>152</sup> The appellant eventually left the respondent’s service, and within one month after that began working in Pinetown for another estate agent, in contradiction to the restraint of trade discussed above.<sup>153</sup> The reasonableness of the restraint came under the spotlight once again.

The court made the significant statement that restraints on employees (in terms of an employment contract) had usually been distinguished from other restraints by English courts. This example was followed by South African courts.<sup>154</sup> The former had through the years been approached more critically and condemned more easily than the latter. The reason for this seemed to be the bargaining inequality of employees, according to the court.<sup>155</sup> As in the case of athletes’ contracts,<sup>156</sup> this tendency was described by the court as unrealistic in an era where economic development, industrial legislation, trade unionism and other phenomena have strengthened the bargaining power of employees significantly.<sup>157</sup> In the case under discussion, the court found that the two parties were in fact on equal footing during contractual negotiations, and therefore there could have been no additional pressure on the appellant when agreeing to the covenant in restraint of trade.<sup>158</sup> In analysing the relevant law, the court decided that English law’s antipathy to the restraint of trade was “ancient” and originated from the unpopularity of monopolies and other commercial practices during the Tudor<sup>159</sup> and Stuart<sup>160</sup> dynasties.<sup>161</sup> An exception to the English perception that all restraints

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<sup>151</sup> *Idem* 485.

<sup>152</sup> *Idem* 485.

<sup>153</sup> *Idem* 484.

<sup>154</sup> *Idem* 487.

<sup>155</sup> *Idem* 487.

<sup>156</sup> One of the indisputable *sui generis* characteristics of an athlete’s contract is that the parties possess equal bargaining power. This has been mentioned repeatedly in this thesis.

<sup>157</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 487.

<sup>158</sup> *Idem* 488.

<sup>159</sup> The Tudor dynasty commenced with the reign of Henry VII in 1485 and concluded at the death of Elizabeth I in 1603.

<sup>160</sup> The Stuart dynasty commenced with the reign of James I in 1603 and concluded at the death of Queen Anne in 1714.

<sup>161</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 490.

of trade were unlawful was if such restraint was reasonable *inter partes*.<sup>162</sup> In contrast to the English notion, Roman-Dutch law, according to Didcott J, had “no noticeable aversion” to covenants in restraint of trade.<sup>163</sup> The main difference between the two systems of law’s perception of the doctrine, was that the Roman-Dutch authorities did not view covenants in restraint of trade as offensive to public policy.<sup>164</sup> Although English influence can be detected in South African court decisions, the Roman-Dutch perception seems to have prevailed. Didcott J finally decided that “South African law prefers the sanctity of contracts”.<sup>165</sup> The principle (of sanctity of contracts, or *pacta sunt servanda*) was firmly entrenched in South African law, and weighed much heavier than freedom of trade in (at least pre-constitutional) South African jurisprudence. The court had no hesitation in deciding that the restraint of trade was reasonable beyond any doubt.

A few important points must be raised about the decision in *Roffey*. Firstly, it was obviously decided before the landmark case of *Magna Alloys*, discussed below. However, it is submitted that it contributed significantly to the latter decision in its summary of the law relating to restraints of trade. Secondly, it must be kept in mind that the decision was made by a provincial division of the High Court, and therefore only binding on courts of equal standing. The third, and most significant point which must be raised, is the fact that the decision was made in a pre-constitutional South African dispensation. It is arguable whether the court’s statement that the principle of sanctity of contracts outweighs freedom of trade still applies in post-constitutional South African law. It is submitted that there would have to be a proper weighing of individual rights in each individual case.

Much mention has been made of the case of *Magna Alloys and Research (Pty) Ltd v Ellis*<sup>166</sup> in this chapter. However, no critical analysis of the position of the restraint of trade doctrine in South Africa would be adequate without a detailed discussion of this decision. The respondent in the matter before the Appellate Division of the High Court had entered into a verbal agreement to sell certain of the appellant’s goods (mainly welding apparatus). The respondent would receive commission from the appellant for selling said apparatus.<sup>167</sup> However, a restraint of trade clause formed part of the agreement between the parties. In

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 490; *Katz v Efthimiou* 1948 (4) All SA 370 (O) 374.

<sup>165</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 493.

<sup>166</sup> 1984 (4) SA 874 (A).

<sup>167</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 874.

terms of this clause, the respondent undertook not to sell any materials (or solicit any customers or business) in competition with the appellant within a ten kilometre-radius from the latter's business, for a period of two years following the termination of the contract in question.<sup>168</sup> The respondent consequently entered into a contract of employment with a company in direct competition with the business of the appellant, within a period of two years after termination of the contract between the appellant and the respondent. This was in direct contrast to the restraint of trade clause mentioned above.

Rabie CJ in his judgment referred to the now familiar English case of *Nordenfelt*, discussed above, in confirming the English notion that a contract or clause containing a limitation to a person's freedom of trade was *prima facie* void.<sup>169</sup> Heydon was also mentioned by the court in confirming that the English perception of restraint of trade was founded in public policy.<sup>170</sup> The reference to English law by the court served to indicate that system's influence on early South African decisions. However, the court soon quoted *Katz v Efthimiou* in which it was decided that the doctrine that contracts in restraint of trade were generally considered against public policy, was foreign to both Roman and Roman-Dutch law.<sup>171</sup> The essence of this lies therein that should a person allege that a restraint of trade (or any limitation to such person's freedom of trade) is against public policy, the onus will be on such person to prove that the enforcement of the restraint would violate same. This is especially true since, once again, it must be kept in mind that the person in question had previously entered into the contract (and subsequently accepted the restraint) freely and willingly. This fact is mentioned specifically by Rabie CJ in *Magna Alloys*.<sup>172</sup> It is also the main difference between the English and South African perceptions of the doctrine of restraint of trade.<sup>173</sup> Rabie CJ mentioned the *Roffey-*

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<sup>168</sup> *Idem* 875.

<sup>169</sup> *Idem* 881.

<sup>170</sup> *Idem* 881.

<sup>171</sup> *Idem* 884. See the discussion of *Katz* in the text above.

<sup>172</sup> *Idem* 887. The court's specific words were as follows: "...wanneer 'n party by 'n ooreenkoms beweer dat hy nie gebonde is aan 'n beperking wat hy op hom laat lê het nie, hy die las sal dra om te bewys dat die afdwing van die beperking die openbare belang sal benadeel..." ("When a party to an agreement claims that he is not bound to a restriction applicable to him, he bears the onus of proving that enforcing said restriction would be against public policy...")

<sup>173</sup> The effect of the judgment in *Magna Alloys* has been summarised as follows in the case of *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N) at 243: "Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has

decision, also discussed above, in deciding that the requirement in English law (and used in several South African decisions prior to the current one) that a party who wished to enforce a restraint of trade must prove the reasonableness thereof, “was contrary to our (South African) law.”<sup>174</sup>

When considering the question as to the limitation of a person’s freedom of trade, Rabie CJ stated that there were two main considerations. The first consideration was that the mere fact that a contract was unreasonable or unjust towards one of the contractants, was not sufficient reason to attack the validity of such contract. Public policy- also according to Rabie CJ, but confirmed *ad nauseum* in this thesis- demanded that persons be held bound to their contracts.<sup>175</sup> The second consideration of the court was that it had for some time been accepted by South African courts that it is in line with public policy that each individual be allowed to freely stake his claim in the business world. Put differently, it has been accepted for many years prior to the *Magna Alloys*-decision that it is against public policy to unreasonably infringe upon a person’s freedom of trade or occupation.<sup>176</sup> What is also important, though, is that a court must judge each possible infringement on its own merits.<sup>177</sup> When considering the merits of each case, it is important for a court to consider the surrounding circumstance which would allow it (the court) to enforce the restraint in question completely, partially, or not at all. The greatest contribution to jurisprudence made by the *Magna Alloys*-decision is probably Rabie CJ’s summary of the South African legal viewpoint on the restraint of trade doctrine.<sup>178</sup> This summary proclaims that in South African common law, there is no rule that a contractual stipulation limiting a party’s freedom of trade is void or unenforceable. The approach adopted in several early South African decisions that any limitation to a party’s freedom of trade was *prima facie* void or unenforceable, was derived from English law. That system of law holds that every limitation to a person’s freedom of trade is *prima facie* unenforceable because it is against public policy. The consequence thereof is that a person who wishes to enforce such limitation, must prove that it is reasonable *inter partes*. Although this is contrary to the South African point of view, it is a principle of South African law that agreements contrary to public policy are not enforceable. It is,

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happened since then and, in particular, of the situation prevailing at the time enforcement is sought.”

<sup>174</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 888.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Idem* 889.

<sup>177</sup> *Idem* 889.

<sup>178</sup> Rabie CJ’s summary is found at *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 898. See also Saner 3-4.

however, up to the specific court to determine whether the particular infringement is contrary to public policy in the relevant circumstances. Something that is particularly clear, is that it is completely in line with public policy that agreements entered into freely and willingly must be honoured and its obligations performed specifically. This is confirmation of South African law's support of the *pacta sunt servanda*-principle of Roman law. It is also relevant to the determination of specific performance as suitable remedy for breach of athletes' contracts. If it is accepted that *pacta sunt servanda*, it must be concluded that a party should be held to a contract into which he had entered freely and willingly. However, it is vital to establish whether the approach laid down in *Magna Alloys* finds application in a post-constitutional South African dispensation. The primary indicator of whether the abovementioned approach would still apply is public policy and interest. Before one can establish whether a particular restraint of trade is against public policy, one must explain what the term "public policy" or "public interest" entails in current South African law.

It has been stated above that a restriction to a person's freedom to practise his trade, profession or calling which is obviously unreasonable will be contrary to public policy if such person were held bound to said restriction.<sup>179</sup> In the case of *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*,<sup>180</sup> the court decided that in the constitutional South African legal dispensation, "the fundamental dispute concerns the balance between the bargain, as it is phrased in the (specific) contract, and the demands of public policy that give content to the ideas of a constitutional community."<sup>181</sup> It must be derived from this statement that a restraint which is unenforceable for being unreasonable and against public interest, will automatically be unconstitutional.<sup>182</sup> The opposite, according to Saner, is also true.<sup>183</sup> Public policy (from a South African point of view) is something that is rooted in the Constitution, as well as the values enshrined by it.<sup>184</sup> Ncobo J in the case of *Barkhuizen v Napier*<sup>185</sup> explained it as follows:

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<sup>179</sup> See Saner 6-4. In *Sunshine Records (Pty) Ltd v Rudi Frohling and Others* 1987 (1) PH A13 (A), Grosskopf JA stated that :all persons should, in the interest of society, be permitted as far as possible to engage in commerce or the professions-or, expressing this differently, it is detrimental to society if an unreasonable fetter is place on a person's freedom to trade or to pursue a profession...In general, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade." See in this regard also Kerr in Visser (Ed) (1989) 194.

<sup>180</sup> 2009 3 SA 78 (C).

<sup>181</sup> *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) 85.

<sup>182</sup> Saner 6-4.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Brisley v Drotosky* 2002 4 SA 1 (SCA) 91; *Afrox Healthcare v Strydom* 2002 6 SA 21 (SCA) paragraph 18; Saner 6-6.

“Public policy represents the legal convictions for the community; it represents those values that are held most dear by society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, “is the cornerstone” of that democracy: “it enshrines the right of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom.

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined by the Constitution is contrary to public policy and is, therefore, unenforceable.”<sup>186</sup>

Although this explanation seems verbose, it is an invaluable parameter of what “public policy” entails in post-constitutional South Africa. However, it does little to simplify the practical question as to *when* a specific contractual stipulation, such as a restraint of trade, would be against public policy. The fact that a stipulation in a contract which is “inimical” to the values enshrined by the Constitution seems to be the prerequisite provided by Ngcobo J for such stipulation being against public policy. Yet, a court having to decide on the matter will still have to determine if a specific contractual stipulation is indeed inimical to the mentioned Constitutional values. If a professional athlete, whose professional career is very limited (a fact that has been established in chapter 3 of this thesis) is prohibited from improving his financial prosperity (and possibly that of his family) by holding him bound to a contract in terms of a restraint of trade, a decent argument may be made in favour of the fact that such restraint would unreasonably infringe on the athlete’s constitutional freedom of trade, occupation or profession.<sup>187</sup> Such restraint would not, according to what have been discussed above as far as public policy is concerned, infringe upon the latter policy. What makes the issue even more complex is that public policy is something that is dynamic and ever-changing. Consequently, it (public policy, but also the notion of reasonableness) differs from generation to generation, and obviously also from jurisdiction to jurisdiction. Saner

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<sup>185</sup> 2007 5 SA 323 (CC). Due to its significance as far as the restraint of trade doctrine is concerned, this case is discussed in more detail further on in the text.

<sup>186</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) paragraphs 28-29.

<sup>187</sup> As provided for by section 22 of the Constitution of the Republic of South Africa, 1996.



suggests that in order to determine whether an agreement is contrary to public policy, courts should look at the tendency of the proposed transaction, not its actually proved result.<sup>188</sup>

No case has provided more clarity on the question as to when a specific contractual term would be against public policy than the case of *Barkhuizen v Napier*,<sup>189</sup> alluded to above. No discussion on the restraint of trade doctrine would be complete without a detailed reference to said decision. The facts of the case are of minor importance. It is Ngcobo J's comments on the law relating to public policy and reasonableness that are of major importance to the current discussion. The court stated that any constitutional challenge to a contractual term will inevitably give rise to the question of whether the relevant contractual provision is contrary to public policy.<sup>190</sup> In the court's view, this question must be answered by determining whether the contractual term that is being challenged is contrary to public policy "as evidenced by the constitutional values, in particular those found in the Bill of Rights."<sup>191</sup> This point of view, it is submitted, is supportive of the *pacta sunt servanda* doctrine, but also allows for courts to judge (in a manner of speaking) whether a specific contractual terms may be against public policy.<sup>192</sup> In determining the fairness (or equity, as it is more commonly known in English law) of a clause in any given contract, Ngcobo J suggested that two question be posed: the first whether the clause itself is unreasonable, and the second, if it should be found that the clause is reasonable, whether it is in fact enforceable.<sup>193</sup> The first question involves two considerations: one the one hand, the fact that public policy demands that contractual parties should comply with their obligations in accordance with *pacta sunt servanda*. On the other hand, the specific right infringed upon must be considered.<sup>194</sup> The question as to the enforceability of the clause in question demands an inquiry into the surrounding circumstances that prevented compliance with the clause in question.<sup>195</sup> Impossibility of performance would be a legitimate reason not to enforce the restraint of trade clause, for instance.

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<sup>188</sup> Saner 6-7. This approach was followed in the post-constitutional decision of *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (9) BCLR 930 (SCA) as well as the pre-constitutional decision of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>189</sup> 2007 (7) BCLR 691 (CC).

<sup>190</sup> *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC).

<sup>191</sup> *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at paragraph 30. The term that was challenged in the case under discussion presumably infringed upon the contractant's right to access to a Court provided for in section 34 of the Constitution.

<sup>192</sup> *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at paragraph 30.

<sup>193</sup> *Idem* at paragraph 56.

<sup>194</sup> *Idem* at paragraph 57.

<sup>195</sup> *Idem* paragraph 58.

For relevance's sake, Ngcobo J's discussion regarding particularly fairness, public policy and reasonableness of contractual terms in general, must be applied specifically to the clause in restraint of trade. It has been established that such a clause is *prima facie* lawful in South African law, as it is in line with the maxim *pacta sunt servanda*, which maxim has also been declared as being in alignment with the South African Constitution.<sup>196</sup> If, therefore, a contractant has submitted to a restraint of trade within a contract freely and willingly, South African courts will enforce said restraint. However, the constitutional right of the contractant that is being infringed by the restraint must also be considered. In the case of an athlete's contract, it (the restraint) will likely infringe on the athlete's right to freedom of trade, profession or occupation. What must be considered, though, is the fact that the professional athlete possessed equal bargaining power to that of his employer when negotiating and entering into the contract. Consequently, an athlete (especially if such an athlete is established and sought-after) will have a difficult time persuading a court that he was unaware of the impact of the restraint of trade, or possibly induced into signing the contract against his will.

It is important to provide an example of how South African courts in particular have dealt with restraints of trade in professional athletes' contracts specifically. Although the cases which will be discussed have, without exception, been mentioned previously in this thesis, they have not been discussed in view of their contribution to the aim of this chapter: to determine the suitability and enforceability of a restraint of trade in a contract.

The case of *Highlands Park Football Club Ltd v Viljoen and Another*<sup>197</sup> was probably the first significant South African decision in which a court had to decide on the legality of a covenant in restraint of trade in an athlete's contract.<sup>198</sup> The applicant was a professional football club, by which the second respondent, a professional football player, was employed.<sup>199</sup> It is important to mention that the court acknowledged the fact that the applicant's assets consisted solely of the contractual rights it possessed in terms of the professional contracts it was party to with several players. More importantly, these rights

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<sup>196</sup> See particularly Cameron JA's decision in *Brisley v Drotsky* 2002 4 SA 1 (SCA).

<sup>197</sup> 1978 (3) SA 191 (W).

<sup>198</sup> This was indeed confirmed by the court at page 194.

<sup>199</sup> *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 192.

were commonly regarded as “cedable and saleable” amongst football clubs.<sup>200</sup> The relevant clause read as follows:

“The player agrees, undertakes and bonds himself that on the expiry of this agreement and unless and until he is formally transferred by the Club to another club, he will not for a period of three years after the date of such expiry play professional football in the Republic of South Africa, save with the prior written permission of the Club.”<sup>201</sup>

Eight days after the contract came to an end, the player signed a contract with the Dynamos Football Club, which played in direct competition with the appellant. This was seemingly in violation of the abovementioned restraint of trade. The main defence raised by the player was not, however, that he had violated the restraint of trade, but that the restraint had been invalid and unreasonable.<sup>202</sup> This argument was based entirely on the wrong precedent. Counsel for the respondents argued that all contracts in restraint of trade were unenforceable as they were *prima facie* void, unless the party seeking to enforce the restraint could show special circumstances justifying the imposition of said restraint.<sup>203</sup> The authority provided for this erroneous assumption consisted mainly of English cases like *Nordenfelt*, as well as decisions by the Transvaal Provincial Division of the High Court that followed the former.<sup>204</sup> The gist of these decisions has been discussed sufficiently in this chapter, and does not qualify any further discussion. Counsel for the appellant merely relied on *Roffey*, also discussed in detail above. The court found in favour of the respondents. Although I agree that this was the correct decision, it was, it is submitted respectfully, based on completely faulty reasons.

The primary flaw in Vermooten J’s decision was that he openly supported the English legal view that a restraint of trade was void and therefore unenforceable.<sup>205</sup> This notwithstanding the fact that only a year prior to the decision under discussion, Didcott J in *Roffey* made it abundantly clear that that notion was contrary to Roman-Dutch law. It is true that Vermooten J was not bound to the decision in *Roffey*, as the latter case was decided in a different provincial jurisdiction. The court should, however, have paid heed to *Roffey* as far as its meticulous setting-out of the common law relating to the restraint of trade doctrine was concerned. Vermooten J disagreed with the applicant’s argument that special circumstances

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<sup>200</sup> *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 192.

<sup>201</sup> *Idem* 193.

<sup>202</sup> *Idem* 194.

<sup>203</sup> *Idem* 194.

<sup>204</sup> See especially *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 194-198.

<sup>205</sup> *Idem* 199-200.

existed upon which to enforce the restraint of trade. These special circumstances included the Club's training and expertise invested in the professional football player. The court stated that these "attributes were precisely what the authorities... say the servant can take away with him without restriction after leaving his master's service."<sup>206</sup> The court, in my opinion, failed to take into account the fact that it was dealing here with a *sui generis* contract, and that the circumstances identified by the applicant did indeed require special consideration. However, since the court had based its decision on erroneous law and assumptions, this argument is of little value.

Having criticised the way in which the court in *Highlands Park* reached its decision, the submission is confirmed that the decision at least was correct. This is based on the requirement mentioned above that a restraint of trade should not infringe unreasonably upon a person's right to freedom of trade, occupation or profession, even in a pre-constitutional South African dispensation. The key to the abovementioned submission (that the restraint was unreasonable in the circumstances) is the fact that the restraint applied for three years *after* the expiration of the contract itself.<sup>207</sup> The club was no longer interested in the services of the player, but still attempted to deny him the opportunity to ply his trade elsewhere, by obtaining an interdict giving effect to the restraint of trade. Both the period –three years – and the effect of the clause were unreasonable in the circumstances. It is submitted that a restraint of trade after expiration of the contract, and which applies to a significant area and period of restraint, will more often than not be unreasonable. The flip-side of the coin is the undeniable fact that professional clubs, unions or franchises often do invest large amounts of money and expertise in professional players, only for the latter to leave their service as more accomplished and bankable sportsmen. The solution to this predicament must be sought for within the facts and circumstances of each individual case. In *Highlands Park*, the court failed in both applying the correct legal rules as well as acknowledging the *sui generis* nature of the contract in question in reaching its decision. The latter mistake was rectified at least to some degree in the case of *Coetzee v Comitis and Others*.<sup>208</sup> Although mention has also been made of this case in this thesis, its specific reference to restraint of trade as it relates to athletes' contract in South Africa makes it deserved of discussion in this chapter.

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<sup>206</sup> *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 201.

<sup>207</sup> Cornelius states that there are two categories of restraints of trade: firstly, restraints that apply during the operational period of the contract, and secondly, restraints that apply after expiry of the contract, and which survive the termination thereof. See Cornelius "Sanctity of contract and players' restraints in South African sport" 2003 *TSAR* 727 at 727.

<sup>208</sup> 2001 (1) SA 1254 (C).

The applicant, having recovered from injuries which prevented him from playing professional football for the sixth respondent<sup>209</sup> was informed by his coach (the first respondent) that there was no prospect of him playing for Ajax in future. The applicant consequently requested a clearance certificate to allow him to join another club.<sup>210</sup> The National Soccer League's<sup>211</sup> Regulations, however, made provision at the time for a transfer fee to be paid by any club interested in the services of the player in question, to the club to which said player was up until the expiration of his contract affiliated.<sup>212</sup> Should the latter be unsatisfied with any offer for the player made by the former, the player in question would consequently be barred from plying his trade elsewhere. This, it is submitted, constituted nothing other than a restraint of trade against the player in question. Consequently, the court in the person of Traverso J had to decide whether the restraint (and in effect, the Regulations in question) was reasonable and in accordance with public policy with specific consideration of the impact of the clause on the player, as well as the *sui generis* nature of the contract in question.

When one considers what has already been discussed in this chapter about the point of view of South African courts on the restraint of trade doctrine, it must be assumed that the Regulations in which the restraint of trade in *Comitis* was created, was considered *prima facie* lawful and thus enforceable. However, it has also been established in this chapter that a (South African) court would not enforce a restraint of trade if the latter was to infringe unreasonably on the respondent's right to freedom of trade, or if the restraint was against public policy.<sup>213</sup> What makes the question as to unreasonableness and public policy unique in the case under discussion was that the court was dealing with a *sui generis* athlete's contract, wherein the athlete involved already had a limited professional career.<sup>214</sup> The court decided (correctly, it is submitted) that a profession such as football (and sport in general) could only be regulated in a reasonable manner, in other words a manner that did not violate any individual constitutional rights.<sup>215</sup> In the case under discussion, the court decided that the transfer fee which was demanded by the sixth respondent bore no relation to the amount of

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<sup>209</sup> Ajax Cape Town.

<sup>210</sup> *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) 1258.

<sup>211</sup> "NSL".

<sup>212</sup> The applicable clause (clause 17.13 of the NSL Regulations) simply read as follows: "If a professional player concludes a contract with a new club, his former club shall be entitled to compensation".

<sup>213</sup> The question as to the constitutionality of restraint of trade clauses in South African law was discussed in the cases of *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (A) as well as *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA).

<sup>214</sup> This is one of the *sui generis* characteristics of the athlete's contract established in chapter 3 of this thesis.

<sup>215</sup> *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) 1269.

money that it had invested in the player during the period of the contract.<sup>216</sup> The court also found that prohibiting the player to ply his trade elsewhere while simultaneously refusing to provide him an opportunity to play for his current club, stripped the player of his human dignity “as enshrined in the Constitution.”<sup>217</sup> Cornelius agrees that while a player is under contract, he should be restrained from moving to another club without permission of his current club, but once the contract in question has expired, such player cannot be prevented from plying his trade elsewhere.<sup>218</sup> Furthermore, the argument that the player had entered into the contract out of his own free will, was not accepted by the court, who stated that “if entering into a contract which incorporates these rules is the only option open to a person who wants to pursue a career of professional football, it can hardly be said that he agreed to these terms out of his own free will.”<sup>219</sup> The regulations of the NSL were declared unconstitutional by Traverso J, in so far as they were unreasonable and against public policy.<sup>220</sup> Very little heed was paid to the *sui generis* nature of the athlete’s contract in question, but the fact was raised tacitly by admitting that the player was bound not only by the contract with his club, but also by the regulations of the governing body. This, it is submitted, is another *sui generis* characteristic of the athlete’s contract identified in chapter 3 of this thesis. As far as South African courts’ treatment of a restraint of trade in athletes’ contracts is concerned, it must be concluded from the decision in *Comitis* that said courts will enforce a restraint of trade, unless such restraint is unreasonable or against public policy.

What is important to note as far as the restraint of trade in general is concerned, is that its primary purpose is the protection of a legitimate business interest. In serving this purpose, it would be sufficient to argue that a particular restraint of trade is there to prevent even potential detriment. In the case of *Reddy v Siemens Telecommunications (Pty) Ltd*,<sup>221</sup> the appellant had been trained in the use of products and networks belonging to the respondent. Said training resulted in the appellant possessing current knowledge of the respondent’s “processes, methodologies and systems architecture”.<sup>222</sup> For this reason, the respondent attempted to enforce a restraint of trade against the appellant, who wished to continue his

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<sup>216</sup> *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) 1269.

<sup>217</sup> *Ibid.*

<sup>218</sup> Cornelius 2003 TSAR 731.

<sup>219</sup> *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C) 1273.

<sup>220</sup> *Idem* 1273-1274.

<sup>221</sup> 2007 2 SA 486 (SCA).

<sup>222</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) 492.

professional career in telecommunications at a competing organisation.<sup>223</sup> The court in the person of Malan AJA found that the respondent had a legitimate business interest to protect, failure in case which it (the respondent) would suffer “injury actually committed or reasonable apprehended”.<sup>224</sup> The fact that an employer may be harmed *potentially* if the restraint of trade should not be enforced against a repudiating employee, is consequently sufficient reason to enforce said restraint. This much was confirmed in *Automotive Tooling Systems (Pty) Ltd v Wilkins and Others*.<sup>225</sup>

As far as the requirement of the protection of legitimate interest, as well as that of potential harm to be suffered are concerned in the context of professional sport, it would be fair to state that good results could be classified as “legitimate interests” of any professional club. If an athlete’s repudiation of a contract contrary to a restraint of trade should result in the club in question’s results degrading, the legitimate interests of said club would be harmed, even if only potentially so. According to the case law discussed above, this would then be sufficient reason to enforce any restraint of trade against the athlete in question.

#### 10.4. Conclusion

The primary aim of this chapter is to determine whether restraint of trade clauses in athletes’ contracts could make a contribution towards stemming the tide of repudiation of said type of contract on a global scale. In order to establish this, the chapter set out by mentioning the fact that the Anglo-American notion of restraint of trade differs substantially from that of Roman-Dutch and South African law. The difference is settled in the fact that English law perceives a restraint of trade as being *prima facie* unlawful, whereas South African law (based on Roman-Dutch law) perceived a covenant in restraint of trade as being *prima facie* lawful and enforceable, unless it should be unreasonable towards the respondent or against public policy.

This has presented a problem, as sport is a global business, and repudiation of athletes’ contracts a global problem. If the remedies available in case of breach of athletes’ contracts were to differ from jurisdiction to jurisdiction, legal certainty would never be established. In order to determine the viability of the restraint of trade clause as a means of ensuring specific performance of a contract which had been entered into freely and willingly by a professional athlete, this chapter firstly set out to determine the origins of the doctrine of restraint of trade.

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<sup>223</sup> Ericsson.

<sup>224</sup> *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) at 507.

<sup>225</sup> 2007 2 SA 271 (SCA).

It was established that the origins of the contractual restraint of trade clause were settled firmly in the Roman law concept of *obligatio*. According to Gaius, the contract in restraint of trade was rooted in the notion that a debtor is bound to perform in favour of a creditor in terms of an obligation, while the duty to perform was even sanctioned by an *actio in personam* at the behest of the creditor.<sup>226</sup> Visser has stated correctly that commerce would be completely flawed if parties to a contract could not be depended on to perform their parts of a contract.<sup>227</sup> The earliest occurrence of a contract that came about through consensus between parties was that of sale. The relevance of this to the current chapter is that in the Roman law contract of sale, no external act was required to create a valid contract.<sup>228</sup> The implication was that parties to a contract of sale had to rely on each other's word for the contract to be successful. Gaius has stated that in order to prevent a situation where a contract would no longer serve any purpose, a party to a consensual contract in Roman law was liable *ex fide bona*.<sup>229</sup> Consequently, the term *fides* acquired a meaning of trust, faith or reliance.<sup>230</sup> The maxim *pacta sunt servanda* originated from consensual contracts in Roman law, and was incorporated into the *ius civile* from the early classical period. Obligatory agreements in Roman law were enforceable by means of an *actio* at *ius civile*. This, however, excluded the so-called *pacta*, although *consensus* was a requirement for a valid pact to exist. The basis of the pact was an agreement between parties not to issue summons against one another.<sup>231</sup> This became common practice to the extent that it was adopted into a general rule by the praetors; a pact could even give rise to a praetorian defence to any action.<sup>232</sup> Consequently, a pact could render an obligation void, but could not found an action.<sup>233</sup> *Pacta* developed to the extent that later on, it could also vary obligations. A *bona fide* obligation could be amended by an agreement known as the *pacta adiecta*.<sup>234</sup> On the other hand, if the obligation was *contra bonos mores*, the law would not attach any consequence to it, with the result that said obligation could not be amended.<sup>235</sup> It was consequently established in this chapter that pacts which were entered freely and willingly were considered enforceable at *ius civile*, as long as

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<sup>226</sup> Gaius / 2 13; D 44 7 3; Visser 1984 SALJ 642.

<sup>227</sup> Visser 1984 SALJ 643.

<sup>228</sup> *Ibid.*

<sup>229</sup> Gaius / 3 137.

<sup>230</sup> Visser 1984 SALJ 643.

<sup>231</sup> Gaius / 4 116; D 2 14 17 1; Visser 1984 SALJ 644.

<sup>232</sup> Visser 1984 SALJ 644.

<sup>233</sup> D 2 14 7 4; Visser 1984 SALJ 643.

<sup>234</sup> Visser 1984 SALJ 644-645.

<sup>235</sup> D 22 1 5; C 2 3 6; Visser 1984 SALJ 645.



they were not *contra bonos mores*. This is the cornerstone of the restraint of trade doctrine in South African law today.

The influence of canon law on the sanctity of a contract has been confirmed in this chapter. There is no doubt that the principles which governed consensus were introduced by the canonists of the medieval period.<sup>236</sup> The duty to keep one's promise was considered a religious one, so much so that the church father based the sanctity of contract on the Biblical gospel according to Saint Matthew. The religious angle lent to the doctrine of *pacta sunt servanda* would later be adopted by Roman-Dutch writers, most notably Hugo Grotius. What is very clear from the discussion above, though, is that the restraint of trade as it is known today, originated in Roman law.

Grotius contended that all *pacta* were binding, based on the belief that *fides* formed the basis of justice.<sup>237</sup> He was influenced rather heavily in his beliefs by natural law in forming his opinion regarding *pacta sunt servanda*. It was however established in this chapter that he later on stated that the principle that promises should be kept, formed the basis of the entire positive law.<sup>238</sup> Grotius made it very clear that a person could freely bind himself to a contract by way of “*toezegging*”, unless the contract in question was either illegal or immoral, in which case the contract would be unenforceable.<sup>239</sup> This is confirmation of the cornerstone of the restraint of trade doctrine and especially the perception thereof by modern day South African Courts: a contractual clause in restraint of trade is enforceable, as long as it is reasonable and not against public policy. A problematic aspect of Grotius's view on *pacta sunt servanda* discussed in this chapter is his statement that a contract would be unenforceable if holding the parties bound to said contract would result in “intolerable hardship” to either of them.<sup>240</sup> It has already been established in previous chapters of this thesis that the suffering of “undue hardship” by a contractual party was an insufficient reason for not enforcing the contract in question. The solution suggested in this chapter lay in the semantics: while it is agreed with Grotius that *intolerable* hardship to either contractual party would result in unenforceability of the contract, such would not be the case where mere *undue* hardship was to be suffered. Put differently: the suffering of undue hardship by a

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<sup>236</sup> Visser 1984 SALJ 646.

<sup>237</sup> Gr 11 1 1 and 3, as translated by Steyn.

<sup>238</sup> Gr 2 11 4 1.

<sup>239</sup> Gr *Inleidinge* 4 1 42-43; Visser 1984 SALJ 650.

<sup>240</sup> Gr 2 16 27 1.

contractual party as the result of a contract entered into freely and willingly by that same party, would not be inequitable.

Interestingly enough, another of the most well-known Roman-Dutch writers, Van Leeuwen, did not share Grotius's view that bare pacts could be enforced by actions. His view was, however, based on confusion between *pacta nuda* and a *stipulatio* or *caution*, and was criticised by Voet.<sup>241</sup> This criticism led to later editions of the *Censura Forensis* conceding that any contract entered into freely and willingly (even if such contract contained a clause that may infringe on a party's freedom, like a restraint of trade) was enforceable.<sup>242</sup> Voet qualified, however, that agreements contrary to the law or good morals were invalid.<sup>243</sup> This was supported by Van der Linden, who stated that agreements based on a cause that infringed justice or equity, good faith or good morals, were invalid.<sup>244</sup> The Roman-Dutch perception of the restraint of trade doctrine is summarised clearly by Visser: the principle of sanctity of contract was entrenched in Roman-Dutch practice, and Roman-Dutch Courts did not harbour an inherent suspicion of restrictive covenants such as restraints of trade.<sup>245</sup>

The influence of English law on South African courts' perception and treatment of restraints of trade is undeniable. For this reason this chapter included a discussion of the treatment of the restraint of trade in significant English cases. According to English jurisprudence, a contractual clause in restraint of trade is *prima facie* illegal and void, but could be valid and enforceable if it is reasonable *inter partes* and not against public policy.<sup>246</sup> This has led to a perception, advocated by Sutherland<sup>247</sup> among others, that the doctrine of restraint of trade as applied by English law is not necessarily different from that in South Africa. This perception has been challenged in the current chapter. What is clear though is that English law has struggled to align the restraint of trade doctrine with the principle that a contract or contractual clause should not be inconsistent with public policy.<sup>248</sup> This is strange, as English law has realised the fact that the doctrine of restraint of trade is in fact a specific expression of public policy.<sup>249</sup> The main problem with the differing notions as to not only the doctrine of restraint of trade, but also public policy in England and South Africa, has been discussed in

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<sup>241</sup> Voet 2 14 9 2.

<sup>242</sup> Van Leeuwen 2 4 2 13.

<sup>243</sup> Voet 2 14 16 1.

<sup>244</sup> Van der Linden 1 14 2 and 6.

<sup>245</sup> Visser 1984 *SALJ* 653.

<sup>246</sup> Van der Merwe *et al* 214.

<sup>247</sup> Sutherland 6.

<sup>248</sup> Winfield 96.

<sup>249</sup> Sutherland 9.

this chapter. If these two jurisdictions (and also others) have differing approaches to the validity or not of a clause in restraint of trade, it would be very difficult to suggest such a clause as a global solution to the constant repudiation of athletes' contracts. The reason for this is that sport is a global business, participated in by persons of all nationalities plying their trade in several countries.

Because of the fact that early English decisions on the validity of restraints of trade were later liberally referred to and applied by South African courts, the most significant of the former decisions have been discussed in this chapter. The so-called *Dyer's Case* is said to be the earliest reported English case on restraint of trade.<sup>250</sup> The restraint of trade was considered unlawful due to the "great hardship" which would be suffered by the defendant if it (the restraint of trade clause) were to be enforced.<sup>251</sup> The court in *Mitchel v Reynolds*<sup>252</sup> agreed with the decision in *Dyer's Case*, and provided a detailed setting out of the law relating to restraints of trade at the time. It was stated that restraints of trade were either voluntary or involuntary, and that the latter were divided into three kinds, namely those which relied on grants or charters from the Crown and were usually void, those which depended on customs and was subject to a general rule that all customs which restrained liberty of trade must be clear, plain and not doubtful, and finally those stemming from a by-law. The third kind was only valid if supported by a reasonable custom to the same effect.<sup>253</sup> Voluntary restraints were valid, as the court suggested that a man had the right to voluntarily put himself out of his freehold and limit his liberty for a valid reason.<sup>254</sup> Voluntary restraints of trade were, however, frowned upon by English courts for a few reasons. The first of these was that a restraint of trade caused the covenantee to lose his livelihood and brought suffering to his family. The second was that it deprived the public of a useful worker, and the third was that it could be used to give covenantees an unfair advantage. Lastly, English courts felt that restraints may often be excessive, inflicting hardship on the covenantor without referring any benefits on the covenantee.<sup>255</sup> It has been argued in this chapter that while the reasons named above were laudable, it failed to take into account the obvious: that the restraint of trade was agreed to freely and willingly by both parties, usually in the absence of any duress at all. It has also been submitted that refusing to enforce a contract in restraint of trade which had

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<sup>250</sup> 2 Hen. 5, f. 5, pl. 26 (1414).

<sup>251</sup> Heydon 9.

<sup>252</sup> (1711), 1 P. Wms. 181, 193.

<sup>253</sup> *Mitchel v Reynolds* (1711), 1 P. Wms. 181 at 183.

<sup>254</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 187; Heydon 15.

<sup>255</sup> *Mitchel v Reynolds* (1711) 1 P. Wms. 181 at 188-189; Heydon 15-16.

been entered into freely and willingly, would be against public policy, as it would infringe on the individual's right to dignity and freedom of contract.

The *locus classicus* of English law's view on the restraint of trade could be said to be the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*.<sup>256</sup> Decided by the House of Lords, considered the cases mentioned above and came to the conclusion that if a restraint of trade were only partial, based upon adequate consideration and reasonable, it would in fact be valid.<sup>257</sup> Furthermore, the Lord Chancellor decided that the dynamic nature of public policy were to be taken into account when deciding whether a clause in restraint of trade infringed thereupon.<sup>258</sup> Lord Macnaghten in the case under discussion summarised the House of Lords' decision most accurately. He decided that both the public and the individual had an interest in every person's carrying on his trade freely.<sup>259</sup> Any interference with a person's freedom to engage in trade was contrary to public policy, and therefore void. Such interference was justified, however, in cases of reasonable restriction to freedom and with consideration to public interest.<sup>260</sup> This is the cornerstone of English law's perception of the doctrine of restraint of trade. As far as this perception relating to the business of professional sport is concerned, it has been submitted in this chapter (with reference to the *Kevin Keegan* and *Bosman*-cases) that the nature of the contract in question should also be considered when determining the enforceability of the particular restraint of trade. It is a fact that when knowledge of the "tricks of the trade" unique to a club was to be bestowed upon a professional athlete, only for such athlete to reveal them to a competitor-club, the former club would suffer a disadvantage. This, it has been submitted, would also contradict public policy.

A discussion of each and every South African decision on the restraint of trade doctrine would be futile, as the landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*<sup>261</sup> has rendered all earlier decisions on the matter of academic importance only. Nonetheless, in order to trace the development of South African courts' treatment of the doctrine, the most relevant and significant South African cases have been discussed in this chapter. In one of the earliest of these, *Eastwood v Shepstone*,<sup>262</sup> Innes CJ decided that a contract at common law

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<sup>256</sup> [1894] AC 535.

<sup>257</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 544.

<sup>258</sup> *Idem* 552.

<sup>259</sup> *Idem* 565.

<sup>260</sup> *Idem* 565.

<sup>261</sup> 1984 (4) SA 874 (A).

<sup>262</sup> 1902 TS 294.

would be illegal and unenforceable if it encroached on good morals or public policy.<sup>263</sup> As a result of depending on De Groot's point of view on public policy and good morals,<sup>264</sup> Innes CJ came to the conclusion that agreements in restraint of trade were *prima facie* valid and enforceable, unless they imposed an unreasonable restriction on a person's freedom to trade. Although many relevant cases were decided between those of *Eastwood* and *Katz* in 1948, none of the said decisions would contribute significantly towards the aim of this chapter: to establish whether restraints of trade as a mechanism to enforce contractual obligations would stem the tide of repudiation of athletes' contracts globally. *Katz* did make a significant contribution to the discussions in this chapter, though. *In casu*, it was decided that the notion that contracts in restraint of trade were generally considered against public policy, was "entirely foreign to the Roman and Roman-Dutch systems of law."<sup>265</sup> The court did, rather problematically, refer to several examples from English law in reaching his decision. The case of *Roffey v Catterall, Edwards and Goudré*<sup>266</sup> raised some fundamental questions about some of the legal principles governing restraints of trade in South Africa. According to the court, the bargaining inequality of employees has led to South African courts distinguishing between restraints on employees and other restraints.<sup>267</sup> In the case under discussion, this could however not be used as an excuse, as the parties in question had bargained equally from the beginning. The court called English law's antipathy to restraints of trade "ancient", and stated that the Roman-Dutch authorities did not view covenants in restraint of trade as offensive to public policy.<sup>268</sup> The gist of Didcott J's decision was that South African law preferred the sanctity of contracts.<sup>269</sup>

The case of *Magna Alloys* set the tone for future decisions on contracts in restraint of trade by South African court. In considering the question as to the limitation of a person's freedom to trade, Rabie CJ suggested two considerations: firstly the fact that a contract was unreasonable or unjust towards one of the contractants was not sufficient reason to attack the validity thereof. Secondly, it was against public policy to infringe *unreasonably* upon a person's freedom of trade or occupation.<sup>270</sup> The true value of *Magna Alloys* lies in the court's

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<sup>263</sup> *Eastwood v Shepstone* 1902 TS 294 302.

<sup>264</sup> Found in his *Inleidinge* 3 1 42.

<sup>265</sup> *Katz v Efthimiou* 1948 All SA 370 (O) 374.

<sup>266</sup> [1977] 4 All SA 482 (N).

<sup>267</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 487.

<sup>268</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 490; *Katz v Efthimiou* 1948 (4) All SA 370 (O) 374.

<sup>269</sup> *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* [1977] 4 All SA 482 (N) 493.

<sup>270</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 889.

summary of the South African legal view of the restraint of trade doctrine. According to this summary, there is no rule that a contractual stipulation limiting a party's freedom of trade is void or unenforceable. The approach adopted in several early South African decisions that any limitation to a party's freedom of trade was *prima facie* void or unenforceable, was derived from English law. That system of law holds that every limitation to a person's freedom of trade is *prima facie* unenforceable because it is against public policy. The consequence thereof is that a person who wishes to enforce such limitation, must prove that it is reasonable *inter partes*. Although this is contrary to the South African point of view, it is a principle of South African law that agreements contrary to public policy are not enforceable. It is, however, up to the specific court to determine whether the particular infringement is contrary to public policy in the relevant circumstances. Something that is particularly clear, is that it is completely in line with public policy that agreements entered into freely and willingly must be honoured and its obligations performed specifically.<sup>271</sup>

Public policy in especially post-constitutional South Africa plays an important role in determining the enforceability of restraint of trade clauses in contracts. The case of *Barkhuizen v Napier*<sup>272</sup> has been discussed in this chapter in so far as it defined what is entailed by the term "public policy" and how said term is moulded by the Constitution. Ngcobo J went to great lengths to explain the meaning and contents of "public policy", and the contribution of the case to this chapter is that it established the parameters within which a restraint of trade would be enforceable by South African courts. Saner suggests that in order to determine whether a specific agreement is against public policy, courts should look at the tendency of the proposed transaction, and not its actually proved result.<sup>273</sup>

As far as South African courts' treatment of restraints of trade in athletes' contracts are concerned, two significant cases have been discussed in this chapter. The first is that of *Highlands Park Football Club Ltd v Viljoen and Another*.<sup>274</sup> The court in said case made almost no reference to the fact that the contract in question was *sui generis*. It merely decided the case based on the (erroneous) notion that restraints of trade were void and therefore unenforceable.<sup>275</sup> It totally disregarded the decision in *Roffey* just a year before that this notion was contrary to Roman-Dutch law. The court furthermore disagreed with the

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<sup>271</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 898.

<sup>272</sup> 2007 5 SA 323 (CC).

<sup>273</sup> Saner 6-7.

<sup>274</sup> 1978 (3) SA 191 (W).

<sup>275</sup> *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 199-200.

applicant's argument that it had invested training and expertise in the development of the player.<sup>276</sup> Although the decision, it has been submitted, was ultimately correct because of the unreasonableness of the restraint in question, the fact that it was reached on erroneous legal considerations renders the decision almost valueless. On the contrary, the case of *Coetzee v Comitis and Others*<sup>277</sup> has proved to be a landmark case as far as South African courts' treatment of restraints of trade in athletes' contracts are concerned. Although accepting that a restraint of trade in South African law was considered *prima facie* lawful, the court decided that the Regulations of the National Soccer League which prohibited a player from moving to another club before a compensation fee has been paid to his current club, were against public policy and unconstitutional. The importance of this case lies therein that the court perceived the contract in question as unique in the sense that the appellant's professional career was limited, and therefore to be barred from plying his trade (even when his current club no longer wished to employ him) elsewhere, infringed unreasonably on his freedom of trade, profession or occupation afforded him by section 22 of the Constitution of the Republic of South Africa.

To conclude, the South African position on restraints of trade is clear: it is *prima facie* lawful and enforceable, unless it infringes unreasonably on an individual's right to freedom of trade and is therefore against public policy. The consideration of public policy is an important one, and adopts a whole new meaning when perceived in the light of athletes' contracts. A restraint of trade that in normal circumstances would be reasonable, may be unreasonable in the case of an athlete's contract, merely because of the *sui generis* nature of the latter. One of the main reasons for this is the limited nature of a professional athlete's career. The aim of this chapter is to establish whether the restraint of trade has a role to play in stemming the tide of repudiation of athletes' contract both locally and abroad. It is submitted that it certainly does have a role to play, provided that the restraint in question conforms to the general perception of public policy. The requirement that a restraint of trade must be aligned with public policy is the only similarity between South African and English law's perception of the restraint of trade.

The entire question as to the enforceability or not of a restraint of trade clause in an athlete's contract rests upon the conviction that such a clause should not be detrimental to the athlete in question. Likewise, the primary question as to whether an athlete can be compelled to

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<sup>276</sup> *Highlands Park Football Club Ltd v Viljoen and Another* 1978 (3) SA 191 (W) 201.

<sup>277</sup> 2001 (1) SA 1254 (C).

perform his contractual obligations rests upon the assumption that it was the athlete who committed breach of contract. It must be remembered that employers are often the ones who commit breach of contract first. This type of breach of contract (by the employer club, union or franchise) must consequently be discussed.



## CHAPTER 11: BREACH OF CONTRACT COMMITTED BY THE EMPLOYER

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### 11.1. Introduction

The focus of this thesis has been on addressing the alarming rate of repudiation of athletes' contracts by professional athletes. However, it is of vital importance to admit to the fact that professional clubs, unions and franchises are often the instigators of causing contracts between themselves and professional athletes employed by them to be terminated prematurely. Often, the athlete receives the blame for terminating his employment before proper performance has been made, but his true reasons for doing so are seldom entertained. The purpose of this chapter is to indicate that employers are often to blame for employees' repudiation of professional athletes' contracts, and often repudiate these contracts themselves. This blame is assigned to employer clubs, unions or franchises due to their making circumstances and conditions of employment unbearable for the athletes. Therefore, the occurrence of both unfair as well as constructive dismissal of employees must be discussed in this chapter. Furthermore, issues such as discrimination and consequent inequality in treatment of athletes in the same work set-up will also be presented as possible reasons for repudiation of contracts by athletes, which can be attributed to unfair treatment by their employers.<sup>1</sup>

The main problem presented by this thesis, namely the global occurrence and alarming regularity of breach of athletes' contracts, will be significantly addressed if employers were to learn to treat professional athletes with the respect they deserve, especially since the latter are *sui generis* employees possessing skills of an athletic nature that make them valuable commodities. However, having stated this, it would be inaccurate to assume that most (or even many) athletes who repudiate their contracts do so solely because of ill-treatment by their employers. If the requirement of "ill-treatment" by an employer were to be elevated to a standard excuse to repudiate an athlete's contract, it is submitted that a situation would arise

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<sup>1</sup> In the case of *Vrystaat Cheetahs (Edms) Beperk v Mapoe and Others* 4587/2010 at 55-56, the first respondent claimed that the employer had discriminated against him by better remunerating one of his fellow-players with the same player-profile as him. What the first respondent did however allude to the fact that he probably did not negotiate his initial contract as well as did the fellow-player in question, but blamed this on the fact that he (first respondent) was in an unequal bargaining position when he first entered into a contract with the applicant.

where the “tail starts wagging the dog”, and the current problem (of repudiation of athletes contracts) would only increase. Furthermore, it would be extremely difficult to prove so-called “ill-treatment” from a legal point of view.<sup>2</sup>

This chapter will therefore consist of a discussion of the problem of both unfair and constructive dismissal of employees, but more specifically how these influence athletes’ contracts. Because the problem is a global one, academic sources as well as practical examples and case law from different jurisdictions will be discussed interchangeably, in order to establish the nature, meaning and implications of breach of contract committed by the employer in a professional sports-relationship. Finally, suggestions will be made as to whether minimising the occurrence of breach of contract committed by employers would contribute in a significant way to addressing the primary question posed by this thesis: whether specific performance is the most suitable remedy for breach of athletes’ contracts, either by athletes or their employers. In order to determine the most suitable remedy in case of breach of contract by an employer, all possibilities must be evaluated and discussed.

## 11.2. Constructive dismissal

According to section 186 of the South African Labour Relations Act<sup>3</sup> “dismissal” entails one of a number of things. Firstly, it occurs when an employer has terminated a contract with or without notice.<sup>4</sup> Secondly, when an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer did not do so or renewed the contract on less favourable terms.<sup>5</sup> Thirdly, an employer refuses to allow an employee to resume work after having taken maternity leave in terms of a valid law, collective agreement or contract of employment.<sup>6</sup> Fourthly, a dismissal will involve a situation where an employer has dismissed a number of employees for the same or similar reasons, has offered to reinstate some of these employees but refuse to re-employ the others.<sup>7</sup>

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<sup>2</sup> In 2012, for instance, the head coach of the Lions’ Rugby Union, John Mitchell, was suspended following a “list of grievances” against him by his players. He was consequently reinstated as head coach following an investigation of the allegations against him. See [www.rugbyworld.co.za](http://www.rugbyworld.co.za) (2012-06-29) accessed on 11 February 2014.

<sup>3</sup> Act 66 of 1995.

<sup>4</sup> Section 186 (1) (a); Fouché in Du Plessis *et al* (2012) 271; Van Jaarsveld *et al* (2006) 150; *Mills v Drake International SA (Pty) Ltd* 2004 ILJ 1519 (CCMA)

<sup>5</sup> Section 186 (1) (b); Fouché in Du Plessis *et al* 271; Van Jaarsveld *et al* 150; *Traube v Administrator of Transvaal* 1988 ILJ 563 (W); *SARPA v SA Rugby (Pty) Ltd* 2005 ILJ 176 (CCMA).

<sup>6</sup> Section 186 (1) (c); Fouché in Du Plessis *et al* 271; Van Jaarsveld *et al* 150; *Collins v Volkskas Bank* 1994 ILJ 1398 (IC).

<sup>7</sup> Section 186 (1) (d); Fouché in Du Plessis *et al* 272; Van Jaarsveld *et al* 150; *SARPA v SA Rugby*

Fifthly, an employee has terminated a contract of employment with or without notice because the employer made any continued employment intolerable for the employee (this is the so-called constructive dismissal).<sup>8</sup> Finally, “dismissal” would entail a situation in which an employee terminated a contract of employment because the new employer provided the employee with conditions of employment substantially less favourable than the previous employer, following a transfer in terms of section 197 or 197A of the Labour Relations Act.<sup>9</sup>

The focus of the current discussion is on the fifth situation mentioned above: that of so-called “constructive dismissal”. The court in *Jooste v Transnet Ltd t/a South African Airways*<sup>10</sup> stated that constructive dismissal was not a concept found in the Labour Relations Act or any South African statute. Neither was it a concept known to the South African common law. Fouché states however that this ground has always constituted an unfair labour practice in South Africa in terms of the decisions of the former Industrial Court.<sup>11</sup> This has been confirmed in a number of post-constitutional decisions by especially the Labour and Labour Appeal Courts, the most significant of which are discussed in this chapter below. Constructive dismissal basically entails that an employer makes the working circumstances of the employee intolerable to the extent that it not only becomes unreasonable towards the employee, but that the latter has no other option but to terminate his own employment.<sup>12</sup> Constructive dismissal often takes the form of the employer making unilateral amendments to the conditions of service of the employee, which was decided to be unlawful in the cases of *Dallyn v Woolworths (Pty) Ltd*<sup>13</sup> and *Fourie v Booyens t/a HB Makelaars*.<sup>14</sup> Examples of such action are a decreasing of the status of an employee,<sup>15</sup> unreasonable sales margins,<sup>16</sup> and decreasing the employee’s salary.<sup>17</sup> Sometimes promises are made to the employee and certain expectations are created, only to be frustrated at a later stage, causing the employee to become frustrated and consequently terminating his own employment. In the case of *Halgreen v Natal Building Society*,<sup>18</sup> the applicant, who had been in the employ of the

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(Pty) Ltd 2005 ILJ 176 (CCMA).

<sup>8</sup> Section 186 (1) (e); Fouché in Du Plessis *et al* 272; Van Jaarsveld *et al* 150.

<sup>9</sup> *Ibid.*

<sup>10</sup> [1995] 5 BLLR 1 (LAC).

<sup>11</sup> Fouché in Du Plessis *et al* 273.

<sup>12</sup> Van Jaarsveld *et al* 165.

<sup>13</sup> 1995 ILJ 696 (IC).

<sup>14</sup> [1995] 7 BLLR 55 (IC).

<sup>15</sup> *Riverview Manor (Pty) Ltd v CCMA* 2003 ILJ 2196 (LC); Van Jaarsveld *et al* 165.

<sup>16</sup> *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 ILJ 361 (LAC); Van Jaarsveld *et al* 165.

<sup>17</sup> Van Jaarsveld *et al* 165.

<sup>18</sup> (1986) 7 ILJ 769 (IC).

respondent for close to fifteen years, was approached by certain authorised officials of the latter to rewrite some of its insurance systems.<sup>19</sup> The applicant was given the assurance that on completion of said task, he would be promoted. On that basis, he accepted the mandate in question.<sup>20</sup> On completion of the task, the applicant sought to get clarity on when the promised promotion was to occur. After being poorly treated by officials of the respondent, the latter denied having ever made the applicant any promise of promotion.<sup>21</sup> As a result of the ill-treatment and broken promises, the applicant was compelled to resign his service.<sup>22</sup> The court decided that in cases of dismissal the general principle was that the employer bore the onus of proving that the employee's misconduct or poor performance justified the dismissal in question.<sup>23</sup> However, in the current case, the employer did not dismiss the employee- it was the employee who terminated the contract. In such a case, the court stated, the onus of proof rested on the employee to indicate that the conduct imputed by the employer necessitated the former to terminate the contract between them.<sup>24</sup> The court summarised the South African law relating to the subject carefully when he decided that where the conduct of an employer amounts to a fundamental breach of the contract of employment, then although the employer does not in fact dismiss the employee, the latter may accept the conduct of the employer as breach of contract, with the subsequent effect of dismissal by the employer.<sup>25</sup>

It is important to mention that constructive dismissal is an extraordinary and unique form of dismissal. Therefore, it is generally not accepted easily, and an employee will have to prove the extraordinary circumstances and facts upon which he bases his claim of constructive dismissal.<sup>26</sup> In other words, the onus of proof rests firmly on the shoulders of the employee to prove constructive dismissal. More specifically, such an employee would have to prove that any continuous occupation under the employer in question is intolerable, that such

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<sup>19</sup> *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) 770.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Idem* 771.

<sup>22</sup> *Idem* 771.

<sup>23</sup> *Idem* 775.

<sup>24</sup> *Idem* 775.

<sup>25</sup> *Idem* 775. In the case of *Smith v Cycle & Motor Trade Supply Co* 1922 TPD 324 at 325-326 the court held that "an employer who employs a servant for a particular work, and gives him a particular status, is not entitled without the sanction of the employee to alter the *character* of that contract (own emphasis). The contract remains intact until both parties agree to alter it; it cannot be altered at the instance of one of the parties. The employer cannot say to his employee "I am now going to alter the contract between us- which is that you shall act as manager of the local branch at Johannesburg- into another contract that you shall act as bookkeeper at the Johannesburg branch." This confirms that altering an employee's conditions of service unilaterally will most probably constitute constructive dismissal.

<sup>26</sup> *Van Jaarsveld et al* 166.

intolerability was caused by the employer in question, that no alternative exists but to resign, that the contract of service has indeed been terminated, and finally that despite his resignation, he (the employee) never had the intention of terminating his relationship.<sup>27</sup> According to Gardiner *et al*,<sup>28</sup> constructive dismissal, if proved as such, has the same legal consequences as an actual lawful dismissal. The consequence of this is that the employee will have the relevant contractual remedies for breach of contract. This is very significant to the purpose of this chapter and ultimately, thesis. With reference to an athlete's contract, constructive dismissal may include actions by the employer such as refusing to select a player on grounds other than merit.<sup>29</sup> As far as remedies are concerned, Myburgh J in *Jooste v Transnet Ltd t/a South African Airways*<sup>30</sup> made the important statement (alluded to above) that constructive dismissal was not part of South African common law.<sup>31</sup> He noted that if an employer repudiated a contract of employment, the employee could either accept such repudiation and claim damages, or hold the employer to the actual terms of the contract by way of specific performance.<sup>32</sup> The latter option would not be available to the employee should he choose to end the working relationship, though. As mentioned above, the destruction of the necessary mutual trust and confidence of a contractual relationship will include unlawful discrimination against the particular employee based on grounds of race, sex, sexual orientation or religious belief.<sup>33</sup> The notion that constructive dismissal may be replaced by the more familiar concepts of offer and acceptance of repudiation has been confirmed to some extent by English law. According to Harvey,<sup>34</sup> there are certain conditions that must be met by an employee if he wished to claim for constructive dismissal in English law. Firstly, there must be either actual or anticipatory breach of contract by the employer. Secondly, such breach must be sufficiently important to justify the employee's resignation. Thirdly, the employee must leave as a result of (or in response to the breach of the employer - in other words, the employer's repudiation). Finally, the employee must not delay too long in terminating the contract in response to the employer's breach of contract, for risk that he (the employee) might be perceived to have waived the original breach of contract by the

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<sup>27</sup> Van Jaarsveld *et al* 166.

<sup>28</sup> Gardiner *et al* (2011) 421.

<sup>29</sup> *Ibid.*

<sup>30</sup> [1995] 5 BLLR 1 (LAC).

<sup>31</sup> *Jooste v Transnet Ltd t/a South African Airways* [1995] 5 BLLR (LAC) 1.

<sup>32</sup> *Ibid.*

<sup>33</sup> Gardiner *et al* 422.

<sup>34</sup> Harvey *et al* (eds) (2009) paragraph 403.

employer.<sup>35</sup> There is little doubt, then, that an “offer” of repudiation made by an employer in the form of making continued employment of the employee intolerable, must be “accepted” by the latter as such, in order to constitute constructive dismissal.<sup>36</sup> Returning to the issue of constructive dismissal in athletes’ contracts, an interesting fact mentioned by Gardiner *et al*, is that so-called “locker-room” behaviour in sport is something that is obviously very unique to that business, and may include levels of banter and practical jokes that might not be tolerated in “more typical” forms of employment.<sup>37</sup> Constant picking on a specific athlete by team mates and/or management of the abovementioned nature could well just make any continuous employment relationship intolerable to the extent of impossibility. If proved as such, the employer-club that had allowed the behaviour of its employees to get out of control may be liable for the consequent constructive dismissal of the employee-athlete in question. However, in the South African decision of *Value Logistics Ltd v Basson and Others*,<sup>38</sup> the court found that the true test of constructive dismissal lies not merely in the employer’s blameworthiness for the intolerable working conditions, but that the employer had actually been found to have acted *unfairly*.<sup>39</sup> Consequently, a mere finding that there has been constructive dismissal does not give rise to an entitlement of relief.<sup>40</sup> Should the employee be successful in proving that he has been dismissed unfairly in terms of section 186 of the Labour Relations Act, the employer will bear the onus of proving that such dismissal was both substantially and procedurally fair.<sup>41</sup> The situations in which dismissal would be considered automatically unfair, have been mentioned and discussed above.

As far as constructive dismissal of an employee is concerned, the positions in both South African and English law seem clear: an employee, whose working conditions have been rendered intolerable by his employer’s actions, can terminate such working relationship. Such termination would be the result of an acceptance of the employer’s repudiation. A requirement for an action against the repudiating employer is that the latter’s action must have been unfair in the circumstances. As far as the athlete’s contract is concerned, the *sui generis* nature thereof would entail that an employer-club, union or franchise will have to

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<sup>35</sup> These conditions are found summarily in the English Employment Protection Consolidation Act, of which no South African counterpart exists.

<sup>36</sup> This much has been decided in cases like *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [1997] 2 BLLR 124 (LAC) and *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC).

<sup>37</sup> Gardiner *et al* 422.

<sup>38</sup> [2011] 10 BLLR 1024 (LC).

<sup>39</sup> *Value Logistics Ltd v Basson and Others* [2011] 10 BLLR 1024 (LC) at 1025.

<sup>40</sup> *Ibid.*

<sup>41</sup> Louw (2012) 271.

treat the athlete in their employ in a professional manner at all times, with due consideration of differing levels of skills and commitment of players, as well as the fact that professional athletes have differing personalities which must be managed in a professional way. Employer clubs, unions and/or franchises must be wary of discrimination against employees or an employee based on sex or sexual orientation, race and religious beliefs, among others. Such discrimination may well be the basis of constructive dismissal, should such dismissal comply with the requirements thereof as discussed above. Louw summarises the position accurately: the difference between common law rules with regards to termination of contracts and those established in terms of labour legislation, is that at the former, an indefinite contract can be terminated by either party. This can be done by merely providing the agreed notice and can in most cases be provided without any reason to terminate. The statutory position, on the other hand, is that the dismissal in question must comply with the requirement of fairness and fair dismissals.<sup>42</sup> Common law rules relating to the contract of employment incorporate the right not to be unfairly dismissed as an implied contractual term.<sup>43</sup>

Whereas constructive dismissal of a professional athlete is one of the most common occurrences of breach of contract committed by an employer in a professional sports relationship, it certainly isn't the only one. Louw<sup>44</sup> has stated that the ground for unfair dismissal provided for in section 186(1)(b) of the South African Labour Relations Act, mentioned above, has led to some high-profile South African sport decisions, which, although mentioned and discussed previously in this thesis, deserves a discussion within the current context as well.

### **11.3. Dismissal through non-renewal of fixed term contracts in sport<sup>45</sup>**

Because of a number of highly significant cases involving the above, it is justifiable to have a separate discussion thereof in this chapter. According to Louw, this form of dismissal is especially important in the context of professional sport, as well as in light of the prevalence of fixed-term contracts within that business.<sup>46</sup> In order to prove this type of dismissal, the employee in question must prove that he had harboured a reasonable expectation that his

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<sup>42</sup> Louw 272.

<sup>43</sup> *Old Mutual Life Assurance Co. Ltd v Gumbi* (2007) 8 BLLR 699 (SCA); *Boxer Superstores Mthathwa & Another v Mbenya* (2007) 8 BLLR 693 (SCA); Louw 272.

<sup>44</sup> Louw 273.

<sup>45</sup> The situation where an employee is wrongfully dismissed on the mentioned ground, is provided for in section 186 (1)(b) of the Labour Relations Act. However, depending heavily on Louw's discussion of the ground, the focus in this chapter will be on the mentioned ground as far as it concerns *athletes' contracts*.

<sup>46</sup> Louw 273.

contract would be renewed on the exact same or at least similar terms.<sup>47</sup> The challenge lies in determining the existence of a “reasonable expectation”. Guidelines would include assurances provided to the employee by the employer that the contract would be renewed on the same or similar terms, the reason for entering into a fixed-term contract in the first place, and the number of times the contract had already been renewed.<sup>48</sup> Once the dismissal has been proved unfair, the onus shifts to the employer to prove that the dismissal was both substantively and procedurally fair given the circumstances.<sup>49</sup> As stated above, several South African decisions regarding unfair dismissal based on section 186(1)(b) of the Labour Relations Act have been decided fairly recently.<sup>50</sup> One of the most significant cases of this kind to be highlighted by Louw, is *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd*.<sup>51</sup> *In casu*, the three applicants<sup>52</sup> were professional rugby players who represented their provincial team for part of the season, and the national team for the rest of said season. All three of them were contracted up until the end of the 2003 rugby season, which included the unsuccessful campaign for the World Cup in 2003.<sup>53</sup> The applicants alleged that they had had a reasonable expectation that they would continue to play for the national side in 2004, and that they would subsequently be offered contracts for 2004. The respondent, however, failed to renew their contracts on similar terms as in 2003.<sup>54</sup> The applicants claimed unfair dismissal in terms of section 186(1)(b) of the Labour Relations Act. The respondent argued, however, that the fixed term contract into which the applicants had entered with the respondent contained a provision stating expressly that the individual

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<sup>47</sup> Le Roux “Labour law in South African sport. A season of expectations?” 2006 *Int. Sports L.J.* 56; Grogan “Great Expectations” 1999 *Employment Law* 10; Louw 273.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Louw 273 makes mention of former South African cricketer Lance Klusener who reached a “lucrative” out-of-court settlement with the United Cricket Board of South Africa after having been unfairly dismissed in terms of section 186(1)(b) of the Labour Relations Act. Similarly, former South African cricketer and later professional coach Hylton Ackerman succeeded against the same Cricket Board following a non-renewal of his contract. The latter case was reported as *Ackerman & Another v United Cricket Board* 2004 ILJ 353 (CCMA).

<sup>51</sup> [2005] 2 BALR 209 (CCMA).

<sup>52</sup> Richard Bands, Christo Bezuidenhout and Victor Matfield.

<sup>53</sup> *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA) 210.

<sup>54</sup> *Ibid.* The reason for the non-renewal of their contracts on similar terms was probably the fact that a new national coach was appointed following the previous’ (Rudolph Straeuli) failed stint as national coach. The three applicants did not feature in the new coach’s plans for the national side, with the possible exception of Matfield, who later on did play a significant part in Jake White’s stint as national coach. The dependability of professional athletes on the coach and selectors for team selection in order to ply their trade, is one of the most important *sui generis* characteristics of the athlete’s contract. See the discussion hereof in chapter 3.



applicants had no expectation of the renewal of their contracts at expiry thereof.<sup>55</sup> The arbitrator consequently had to decide whether the applicant indeed possessed a reasonable expectation that their contracts be renewed. The arbitrator depended on Grogan in deciding that the test for a reasonable expectation was an objective one. The employee in question had to prove the existence of facts which would lead a reasonable person to anticipate renewal of his contract.<sup>56</sup> Considering factors like surrounding circumstances, the significance of the contractual stipulation, agreements or undertakings by the employer or practice or custom with regards to renewal or re-employment, the availability of the post, and the purpose or reason for concluding the fixed-term contract, the arbitrator had little hesitation in deciding that the applicants were indeed dismissed unfairly, as they had had a reasonable expectation based on the abovementioned considerations that their contracts would be renewed.<sup>57</sup> In reaching this decision, the arbitrator took great care in acknowledging the fact that the professional rugby environment was “insecure and uncertain, characterised by frequent change in coaches and management, with no clear policies or guidelines in respect of how contracts should be awarded or structured”.<sup>58</sup> Furthermore, the arbitrator stated that despite changes in management, the legal entity (employer) remained the same.<sup>59</sup> Therefore, if promises were made by a coach (as in the current case) on behalf of an employer, and that coach’s or manager’s employ were to be terminated, the employer on behalf of whom the promises were made would still be bound to the professional relationship. Furthermore, the arbitrator was not convinced by the explicit term in the contracts under discussion that no expectation was to be entertained by the players for renewal of their contracts. The reason for this was that conduct subsequent to the conclusion of the contract may give rise to reasonable expectations, as what happened in the case under discussion.<sup>60</sup>

Le Roux has highlighted two important issues regarding breach of contract committed by an employer in a contractual sporting relationship, as surfaced in the case of *Bands*. Firstly, it is doubtful whether the applicants’ expectations in the case under discussion were in fact reasonable in the circumstances. This is due to the highly publicised fact at the time that the

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<sup>55</sup> *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA) 215.

<sup>56</sup> Grogan (2009) 106; *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA) 216.

<sup>57</sup> *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA) 225.

<sup>58</sup> *Idem* 220.

<sup>59</sup> *Idem* 220.

<sup>60</sup> *Idem* 220.

coach's resignation or dismissal was imminent, and also that players knew quite well that different coaches preferred different playing styles, and consequently different players.<sup>61</sup> Secondly, Le Roux expressed her doubt as to whether Matfield's position was comparable to those of Bands and Bezuidenhout. The former had after all had successful annual national contracts since 2000, whereas the latter two had only ever had three-month World Cup contracts. Le Roux argued quite accurately that sports governing bodies in South Africa (and, it is submitted, abroad), would always be prone to claims of the nature of the case under discussion, in the light of the fact that players' careers are comparatively short, that South African team sports had a history of quick turnover of national coaches, and team composition was (and still is) dependent on not only form of players and strategy, but also matters such as injuries and transformation.<sup>62</sup>

The CCMA's decision in Bands was reviewed by the Labour Court.<sup>63</sup> *In casu*, the court agreed with Le Roux's argument that whereas a reasonable expectation for renewal of Matfield's contract was indeed created, the same could not be said for Bands and Bezuidenhout. In the judgment of the Labour Appeal Court, Tlatetsi AJA held that the central question for determination was whether a dismissal did in fact occur. The Labour Appeal Court<sup>64</sup> found that no such dismissal occurred, as the CCMA lacked the necessary jurisdiction to hear the dispute in terms of section 191 of the Labour Relations Act.<sup>65</sup> The LAC decided that section 186(1) (b) of the Labour Relations Act required both a reasonable expectation of the renewal of the fixed-term contract by the employee in question and a failure to do so by the employer. Additionally, the contract in question should be capable of renewal.<sup>66</sup> Furthermore, it was decided in the LAC that the players in question should have provided "more credible" facts to the court as to make their expectations reasonable in the face of clause 3.2. of the relevant contract, which have been alluded to above and read as follows:

"3.2. As this is a fixed term contract, it shall automatically terminate on [30 November 2003] and the player acknowledges that he has no expectation that this contract will be renewed on the terms herein contained, or on any other terms."

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<sup>61</sup> Le Roux 2006 *Int. Sports L.J.* 56 59; Louw 275.

<sup>62</sup> *Ibid.* All the factors stated here by Le Roux have been identified as *sui generis* characteristics of the athlete's contract in chapter 3 of this thesis.

<sup>63</sup> *SA Rugby Players' Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* (2006) 27 ILJ 1041 (LC); Louw 277.

<sup>64</sup> *Ibid.* The Labour Appeal Court is hereinafter referred to in the text as "LAC".

<sup>65</sup> *Ibid.*

<sup>66</sup> *SA Rugby Players' Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC).

The nature of the three-month World Cup contracts was such as to be for a specific event and therefore by nature not renewable.<sup>67</sup> Consequently, it was decided that neither Bands nor Bezuidenhout had any reasonable expectation for the renewal of their contracts.<sup>68</sup> As far as Matfield (whose position had throughout been perceived as different from the other two applicants') was concerned, the court decided that his expectation of renewal was not reasonable either. This was based on the fact mentioned by Le Roux and discussed above that the player should have realised that the current coach (Straeuli, who had made the promises of renewal of their contracts to the players previously) would not be in his position for too long, and that a new coach would more likely than not have his own preferences as far as player selection were concerned.<sup>69</sup> As a final remark, the court stated that the three applicants' claims were based mainly on promises that were made to them, and they should perhaps rather have made use of their contractual remedies than rely on section 186(1)(b) of the Labour Relations Act.<sup>70</sup>

Despite this decision, the case of *Bands* highlighted the power that an employer in a professional sporting relationship may exert over athletes in its employ. Often, the athlete in question is dependent on its employer to perform his (the athlete's) contractual obligations satisfactorily. If the actions of the employer were to make it impossible or even difficult for the employee to perform said obligations, causing the latter to terminate the agreement in question, the employer must be held liable for its repudiation of the contract.

The obvious question that must be asked, is what protection an employee in the person of a professional athlete will possess against his employer's repudiating behaviour as discussed above. It is not sufficient to merely declare that employer-clubs, unions or franchises are often the cause of athletes terminating their professional contracts without providing possible solutions to the problem, or discussing possible (effective) remedies available to athletes in case of breach of contract by employers.

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<sup>67</sup> In this sense, the World Cup contract mentioned in this discussion was similar to the contract of piece work discussed in chapter 2 of this thesis, as far as it did not relate to a fixed term of service, but rather to the successful completion of a specific task. It is agreed with the Labour Appeal Court that no reasonable expectation could have been created for a contract of this nature.

<sup>68</sup> *SA Rugby Players' Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC) 857; Louw 278.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

#### **11.4. Remedies available to the professional athlete in case of breach of contract by his employer**

The contribution of this chapter to the thesis in general lies in suggestions as to the remedies which would be available to an employee who has been dismissed wrongfully. As in the case of breach of contract committed by a professional athlete, different jurisdictions will have different points of view on the most applicable remedy available to an athlete who has been the victim of breach of contract by his employer. So, for instance, Brennan has stated that in the various jurisdictions within the United States of America, negative injunction should be available as remedy against breach of an athlete's contract by the employer.<sup>71</sup> Because the origins, development and practical application of all available contractual remedies have been discussed in detail in previous chapters, especially chapter 9 of this thesis, this chapter will not contain similar discussions. What is essential to establish, though, is which remedies would be available to the athlete in case of breach of contract committed by the employer-club, union or franchise, and which of these would be the most suitable in order to minimise the occurrence of breach of contract by employers.

Special care should be taken in a discussion of contractual remedies for breach of athletes' contracts by employers. The reason for this is, as established in previous chapters, that the availability of certain contractual remedies (such as specific performance) differs from jurisdiction to jurisdiction and from country to country. Once again, one is faced with the enormous global predicament: what is the most suitable remedy for breach of an athlete's contract? Only this time, the instigator is not the *sui generis* professional athlete, but the equally unique club that employs him. According to Gardiner *et al*, the normal remedy for wrongful dismissal of an employee by an employer in the milieu of professional sport is damages for actual financial loss suffered.<sup>72</sup> It is extremely important to note that this is of course the Anglo-American position as to the primary remedy for breach of contract. It was established in chapter 6 of this thesis that courts in the United States of America would be much more inclined to order an injunction against a professional athlete, in order to compel

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<sup>71</sup> Brennan "Injunction against professional athletes breaching their contracts" 1967-1968 *Brook. L. Rev.* 61 at 63.

<sup>72</sup> Gardiner *et al* 423. "Actual financial loss" would, in the case of fixed-term contracts, include loss of earnings for the period of time left on the contract. This is unsatisfactory, however, as it would be very difficult to calculate the exact amount of money the athlete would have earned during the remainder of his fixed-term contracts in the form of specific match bonuses, public appearances and sponsorships, had it not been for his wrongful or constructive dismissal.

such athlete to serve out his contract.<sup>73</sup> Due to this seemingly irreconcilable legal difference in approaches by different jurisdictions to the most suitable contractual remedy in case of breach of athletes' contracts, a similar approach will be followed in the discussion of each remedy as was done in chapter 9, in order to ultimately determine how to solve the recurring problem of breach of athletes' contracts, this time by employers. The focus will, however, be on the suitability of each remedy for breach of *athletes' contracts* by *employers*, and not the other way around.

#### **11.4.1. Injunction, interdict and specific performance against an employer<sup>74</sup>**

The fundamental legal principle in English law and other Anglo-American legal systems is that courts will not compel performance of a contract of employment or any contract that involves personal services to be rendered.<sup>75</sup> This much has been established without any doubt in this thesis. Furthermore, there is no doubt that South African courts would currently have no hesitation in ordering specific performance of a contract of the kind mentioned above, including professional athletes' contracts. In chapter 6, it was established that while US courts in most states followed the same approach as English law, they were more inclined to order injunction against a defaulting party in case of breach of contract than their English, Australian, European and New Zealand counterparts. Therefore, the possibility of ordering injunctive relief to a professional athlete who has been dismissed wrongfully by an employer-club, union or franchise must be examined as a possible countermeasure for wrongful dismissal of an athlete.

It was decided in the King's Bench decision of *Warner Brothers Pictures Incorporated v Nelson*<sup>76</sup> that injunctions will not be granted if their practical effect would be the specific performance of a contract. The same principle would apply where an employer seeks to repudiate an athlete's contract from his (the employer's) side. In such a scenario, the athlete in question would theoretically possess the right to apply for an injunction compelling the employer to seize any practices that make the employee's working conditions intolerable. Likewise, if the employee has already terminated his contract because of constructive or

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<sup>73</sup> This is confirmed by Gardiner *et al* 423 fn 78, who state that "US courts are much readier to prevent professional sports participants from "jumping contracts". See in this regard in particular McCutcheon "Negative enforcement of employment contracts in the sports industries" 1997 *Legal Studies* 65.

<sup>74</sup> Although US courts refer to the remedy as an "injunction", it is the very same remedy known in South African law as a prohibitive interdict. Therefore, it must be assumed that the remedy as applied in the two jurisdictions ultimately have the same effect: preventing a contractual party from repudiating his contract.

<sup>75</sup> For confirmation of this fact, see Gardiner *et al* 423.

<sup>76</sup> [1937] KB 209. The case is discussed in chapter 6.

otherwise wrongful dismissal, theoretically it would be possible for such an employee to institute a claim based on an injunction (or interdict) to be reinstated. Injunctive relief has been granted in England in the context of professional sport before, albeit not against an employer. In the case of *Crystal Palace FC Ltd v Bruce*,<sup>77</sup> it was found that so-called “garden leave” clauses<sup>78</sup> were rife in professional football contracts at the time. The respondent in the case was the manager of the applicant. He wished to leave the applicant to become the manager of Birmingham City Football Club. The applicant sought an injunction against the respondent in order to enforce a “garden leave” clause against the latter with the effect that the respondent would have to remain in the employ of the applicant while not having access to any confidential information of the latter. The court decided that the applicant had legitimate interests to protect as Birmingham City FC were direct competitors to the applicant, and the respondent’s departure would have been detrimental to the applicant’s prospects for the rest of that season.<sup>79</sup> The court subsequently granted an interlocutory injunction to restrain the respondent from leaving the applicant’s service in breach of contract.

The decision in *Bruce* serves two all-important purposes. Firstly, it is a clear indication that even English courts would be willing to compel a professional athlete or member of management to honour his contract.<sup>80</sup> Secondly, and more importantly for the purposes of this chapter, the case highlighted several implicit duties of the employer in a professional sports-relationship to the athlete (employee) in such relationship. The duty to provide the employee with work has already been mentioned. According to Gardiner *et al*, this duty originally applied to people who worked on a commission or piecework basis, and sometimes to employees who needed to work in order to establish or enhance a professional reputation.<sup>81</sup> It is submitted that this duty is very apt in terms of the professional athletes’ contract. The reason for this submission is the fact that (as established in chapter 3 of this thesis) the professional athlete is a public commodity, and he’s commercial value is measured by the support, acknowledgment, and ultimately income he generates from paying spectators.

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<sup>77</sup> (2002) QBD (Unreported).

<sup>78</sup> “Garden leave” clauses entail a situation where employees are required to work out long notice periods before they are allowed to resign from their work. However, during these notice periods, the employees are instructed not to come to work, for fear of accessing confidential information or having dealings with the employer’s customers. It is obvious why such a clause would be rife in athletes’ contracts. However, there is a duty on an employer to provide the employee with work, as discussed in the text above.

<sup>79</sup> Gardiner *et al* 405-406.

<sup>80</sup> It is submitted that the interlocutory interdict granted by the court in *Bruce* had the exact same effect as would an order of specific performance would have had in the circumstances.

<sup>81</sup> Gardiner *et al* 405.

Consequently, in order to establish a reputation that draws crowds, an athlete must be provided with sufficient opportunity to exhibit his unique athletic skills. It is the duty of the employer in the person of the selectors or coach to provide the athlete with such opportunity. If the employer fails to provide the athlete with such opportunity, there is a strong case to be made out that the employer is making the employee's employment intolerable, and could very well constitute repudiation on behalf of the employer. This is also a clear indication that the *sui generis* nature of the athlete's contract requires a *sui generis* approach to determining the most suitable remedy for breach of contract (by the employer). Perhaps the legitimate interests of the employer have not been sufficiently regarded in this thesis up to this point.<sup>82</sup> It is submitted, however, that interests such as internal structures, coaching methods, game plans and management procedures, among others, are certainly ones that any employer should protect against exploitation by an athlete who wishes to repudiate his contract with that specific employer. Nevertheless, in order to have a legitimate claim to protection of these interests, an employer must ensure that it performs its duties – not only contractual, but also those implied judicially.

The duty to provide the employee with work is but one of the inherent duties that the employer has towards said employee. The significance of discussing these duties lies therein that if they were to be neglected, there would be a strong case to be made out for breach of contract by the employer. A duty of the employer that is likewise cardinal in the professional sport relationship is that to take reasonable care with respect to the health, safety and welfare of the employee.<sup>83</sup> This duty may be imposed by either common law or statute. An example of such an imposition in the South African context is found in the Standard Employment contract for professional South African rugby players.<sup>84</sup> Annexure "A" of said contract makes provision for the remuneration of the employee, and specifically provides for contributions to

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<sup>82</sup> Having stated this, South African professional sport has made rapid strides in attempting to make provision for employers to be compensated for the loss of players in which said employers have invested time and money. For example, section 5 of the South African Rugby Union's Regulations on player status, player contracts and player movement provides for compensation to be paid to an employer club, union or franchise which loses a player to another club, union or franchise. However, the amounts of compensation are prescribed in Schedule III of said regulations, and are meagre and unsatisfactory, to say the least. For instance, if a club, union or franchise loses the services of a Springbok rugby player, it is only entitled to an amount of R35 000 (provided the player is still under 23 in terms of section 5.3 of said Regulations). This amount will very seldom be an accurate reflection of the hours and money invested in the player. That is why, as has been submitted in chapter 7 of this thesis, the solution to the problem of repudiation of athletes' contracts by both employee-athletes and employer clubs, unions or franchises does not lie in formulae for compensation for breach of contract, but in enforcing the most suitable remedy for said breach. This is the primary contribution of this thesis.

<sup>83</sup> Gardiner *et al* 406.

<sup>84</sup> As promulgated in 2011.

a player's medical aid, income protection scheme and pension fund. An amount is also to be deducted from the player's salary for unemployment insurance as prescribed by statute. If, for instance, an employer club, union or franchise were to neglect or refuse to make the abovementioned contributions to a professional athlete in any sporting code, such employer club, union or franchise would be in breach of contract. In the South African context, it is submitted that an athlete who has suffered disadvantage because of such breach, would possess the remedy of specific performance against the employer, possibly in the form of an interdict to compel the latter to make the necessary contributions. Because of the physical nature of professional sport, it is in fact essential that employers provide for the health, safety and welfare of their employee-athletes.

A final duty of the employer towards the employee in a sporting relationship which ought to be discussed under the heading of remedies in the form of injunction or interdict (or, for that matter, specific performance) is the duty of the employer to maintain mutual trust and confidence.<sup>85</sup> This duty was identified in the 1970's, mainly to expand the circumstances where a resignation of an employee could be construed as a dismissal.<sup>86</sup> This makes it very relevant to the current discussion. According to this specific duty, the employer will be in breach of contract if it neglects to ensure that an employee in its employment is not exposed to verbal and physical abuse and harassment in the working environment. As mentioned above, this is of particular relevance in the context of sport, where unofficial initiation and fine "ceremonies" are at the order of the day. Gardiner *et al* asks the significant question as to what extent swearing, barracking, public criticism or humiliation and practical jokes from managers and team mates under the guise of building team spirit should be tolerated.<sup>87</sup> As explained above, if such behaviour and activities were to cross the boundaries of legality as far as racism, sexism and/or harassment is concerned, the employer may well be liable for breach of contract due to the neglect of the duty to maintain mutual trust and confidence of its employee/s.<sup>88</sup> More significantly, Gardiner *et al* ask the important question as to whether the refusal of an employer club, union or franchise to select a player might constitute the breach of the duty under discussion. This is a question of fact. Firstly, the reason for the non-selection of the player must be established. If, for argument's sake, the non-selection serves as punishment for the player expressing a legitimate disagreement with the manager or coach,

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<sup>85</sup> Gardiner *et al* 406.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*



there would be breach of contract on the side of the person who refuses to select the player.<sup>89</sup> If such conduct by the employer were to lead to a destruction of the mutual trust and confidence of the employment relationship, it would constitute constructive dismissal of the employee. The latter will, for the purposes of the current discussion of the possible remedy of injunctive relief or interdict, certainly possess such remedy against the employer. This will be the case in South African law, but also in Anglo-American legal systems, albeit theoretically in case of the latter.

Specific occurrences of neglect of an employer's duties towards its employees have been discussed above, and it has been suggested that such breach would constitute breach of contract justifying injunctive relief in favour of the employee so affected. However, there are certain elements which must be proved by the latter before a court would grant said injunctive relief. Although these elements were confirmed in the English case of *Timeplan Education Group Ltd v NUT*,<sup>90</sup> and referred specifically to elements to constitute a tort, it is submitted that they are as relevant to modern South African sports law as to English Tort law at the time. These elements included firstly that the defendant had persuaded or induced the breach of contract, possibly by a club in order to move a player to break his contract with his current club. Secondly, that the defendant knew of the existence of the contract. Thirdly, that the defendant had the intention to persuade, procure or induce the breach of contract. Fourthly, that the claimant (which in the relevant scenario would be the athlete against whom the assumed breach has been committed) had suffered more than nominal damage, and lastly, that the claimant could rebut any defence of justification suggested by the defendant.

To summarise the position as to injunctive relief in both South African and Anglo-American legal systems, the position is clear: an employee-athlete against whom breach of contract has been committed by his employer, has the right to claim specific performance of the latter's contractual obligations. In Anglo-American systems, similar injunctive relief will not readily be granted, as the contract in question is still one of personal services. However, Gardiner *et al* suggest that particularly in European football, the sanctions contained in the FIFA rules would probably allow an English or European court to grant an injunction against an employer club, union or franchise for a specific period equating as a competitive period to a football season. The basis for such an injunction would be the protection of legitimate

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<sup>89</sup> Gardiner *et al* 407.

<sup>90</sup> [1997] IRLR 457. See also Gardiner *et al* 424.

interests in sport.<sup>91</sup> Perceived from the employee-athlete's side, it would mean the protection of his professional sporting interests guaranteed by his contract of employment.

#### 11.4.2. Damages suffered by the employee-athlete

According to the positive interest method of calculating damages, a claimant should be placed in the financial position he would have been had it not been for the breach of contract in question. As mentioned in previous chapters, the calculation of an appropriate amount of damages in case of breach of an athlete's contract is nigh impossible. This is just as true when the breach in question is committed by the employer, inducing the athlete to terminate the contract.<sup>92</sup> Despite this difficulty, most legal systems apart from South Africa's still proclaim that damages is the most suitable remedy for breach of an athlete's contract. In the case of breach of contract by the athlete, Gardiner *et al* note that a clause may be inserted in the contract specifying the amount of money which would be payable to his employer in case of breach. If such an amount is excessive, a Court will have to determine an appropriate amount of damages according to normal and current principles.<sup>93</sup>

The question must be asked however if the same principles would apply if an award of damages is sought by an athlete against an employer club in the case where the latter has committed breach of contract. In the matter of *Kevin Keegan v Newcastle FC*,<sup>94</sup> a manager of a Premier League football club (Keegan) was contractually allowed to have the final say regarding the recruitment of players. The club entered into a loan agreement with a Uruguayan player by the name of Ignacio Gonzalez, contrary to the wishes of said manager. This led to inevitable conflict between the manager and the employer-club, which left the former no choice but to resign from his managerial duties. The tribunal that heard the matter decided that there had been a fundamental breach of the contract in question, and that the manager had consequently been constructively (and by implication wrongfully) dismissed.<sup>95</sup> What is relevant to the current discussion, however, is that the contract contained a clause stating that in case of the type of breach which occurred in the matter at hand, Keegan would be entitled to compensation in the amount of £2 million. This amount, he claimed, was less

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<sup>91</sup> Gardiner *et al* 424.

<sup>92</sup> *Idem* 425.

<sup>93</sup> *Idem* 425.

<sup>94</sup> Reported as "Managers' Contracts: Constructive Dismissal: Kevin Keegan v Newcastle FC (2009) 7 (12) WSLR." Accessed from [www.premierleague.com](http://www.premierleague.com) at 21 February 2014. This is a decision by the Premier League Manager's Arbitration Tribunal.

<sup>95</sup> See a discussion of the case at Gardiner *et al* 422.

than his actual loss. Very importantly and relevant to this discussion as well as the statement made above and in especially chapter 7 of this thesis, the arbitration tribunal found that *it was impossible accurately to pre-estimate any loss*.<sup>96</sup> Gardiner *et al* provide the example from the *Keegan*-matter of Keegan having been able to immediately enter a new contract following his constructive dismissal, or on the other hand could have remained unemployed for a significant period of time. The award of £2 million reflected his salary over a six-month period, plus a “cushion” of £500 000 would he have been unable to secure employment once his period of restraint of trade had expired.<sup>97</sup> Therefore, the clause in question was not a penalty clause against the club, but a valid attempt at providing for liquidated damages.<sup>98</sup> The inappropriateness of damages as contractual remedy for breach of an athlete’s contract by the employer was, it is submitted, once again proved inadequate.

A similar decision to that in *Keegan* was found in the case of *Stransky v Bristol Rugby Ltd*.<sup>99</sup> *In casu*, the club’s director was to approach Stransky to discuss the latter’s potential employment as professional coach. Negotiations took place and Stransky left these under the impression that he would indeed be employed by the club. Steps were taken by the club to secure a working permit for Stransky and he was even introduced to the players he would be coaching as part of his new employment. A contract was drafted, but not yet signed. Two months after the initial negotiations, the club decided no longer to employ Stransky. The director, with whom the latter had met earlier, denied having had any negotiations with Stransky or that he ever offered Stransky employment. This testimony was, however, rejected by the court, and it was found that the club was in repudiatory breach of the contract which came into existence two months earlier.<sup>100</sup> As far as an award of damages was concerned, the court rejected the argument that Stransky was entitled to nominal damages only.<sup>101</sup> The reason for this was quite unique to the circumstances at hand: there was no guarantee that Stransky, who was a foreigner, would secure a work permit and thus be able to find employment with another (or the same) club. He was consequently awarded damages for the period of the contract only.<sup>102</sup> By implication, however, he would have been entitled to nominal charges had he been certain of obtaining a working permit in the United Kingdom.

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<sup>96</sup> Gardiner *et al* 426.

<sup>97</sup> A discussion of this restraint of trade is found in chapter 8.

<sup>98</sup> Gardiner *et al* 426.

<sup>99</sup> Unreported case number 11/12/2002 QBD.

<sup>100</sup> Gardiner *et al* 397-398.

<sup>101</sup> Gardiner *et al* 426 fn 90.

<sup>102</sup> *Ibid.*

By the same argument, had he not been a foreigner, he would have been entitled to nominal damages as a result of his employer's repudiation. The question must be raised (for the umpteenth time) how the court would have calculated said nominal damages. Stransky had suffered no direct damages according to the positive interest, as he never actually even commenced his employment. Furthermore, the court would have been hard-pressed to determine the potential value of the coach, as at the stage of signing the contract, he had not made any name as a professional coach. The fact that he had previously been a recognised international *player*, it is submitted, was irrelevant to the question at hand, as this was not a guarantee as success as a coach.

What the abovementioned practical examples illustrate, is that damages is an inadequate remedy for the professional athlete, coach or manager who has been disadvantaged by the repudiation of his employer. More often than not, the wronged athlete will accept the awarded damages as alternative to receiving nothing at all. It is doubtful, however, whether an award of specific performance or injunctive relief against the employer (compelling the employer to make the employee's working environment and conditions more tolerable) would have the appropriate effect, because of the potential destruction of mutual trust between the contracting parties by the employer as discussed in this chapter above. However, the same argument may be made as in chapter 2 of this thesis: both an employer-club and its employee-athletes must function in a professional business. Therefore, if an athlete should request a court to order its employer to make the former's working environment and conditions more tolerable and the court should decide to grant such a request, the applicant (athlete) would carry the risk of the employer's attitude being less than agreeable towards him. Similarly, the employer would obviously have to abide by the court's order in the matter. The fact of the matter is that both parties should compel themselves to work together in a professional manner, as particularly large amounts of money are involved in just about any professional sporting relationship.<sup>103</sup>

## 11.5. Conclusion

The challenge of this chapter lies in the fact that much of its essence has already been alluded to, mentioned and even discussed in detail in previous chapters. So for instance, the

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<sup>103</sup> "Large amounts of money involved" is somewhat of an understatement. It was reported on 24 February 2014 that Wayne Rooney had signed a five-and-a-half-year contract with his club Manchester United which would earn him the amount of £300 000 per week. As stated in chapter 6, this does not even put Rooney in the top 10 money earners from sport in the worlds. See <http://talksport.com/football/rooney-pens-new-bumper-deal-manchester-united-140224> accessed at 24 February 2014.

suitability of the remedies of specific performance, interdict (injunction) and damages for breach of athletes' contracts has been evaluated, argued and discussed in chapter 9. The restraint of trade as method of preventing repudiation of an athlete's contract has similarly been discussed in chapter 10. The importance and relevance of this chapter is settled in the fact that it provides an entirely different approach to determining the most suitable remedy for breach of an athlete's contract: from the point of view of the athlete against whom repudiation has been committed by his employer club, union or franchise.

Care has been taken in this chapter to distinguish between circumstances in which the employer directly repudiates the contract, for instance by refusing to renew a contract at all or does renew it but on different and less advantageous terms to the employee, and circumstances in which the employer makes the employee's working conditions so intolerable that the latter has no choice but to terminate his contract unilaterally. This chapter has set out to indicate that employers are quite often to blame for employees repudiating their contracts, especially in the business of professional sport. This happens in a variety of ways, most often in the form of constructive dismissal and non-renewal of fixed-term contracts where a reasonable expectation exists to do so. These two forms have been discussed in detail in this chapter in order to establish the nature of the problem of breach of athletes' contracts committed by employers. Furthermore, possible remedies available to an athlete against whom breach of contract has been committed have been identified and discussed in this chapter. Because of the global nature of the problem of repudiation of athletes' contracts by employers, all remedies identified in chapter 9 have been discussed, with the accent on breach committed by employers. As in especially chapter 9, the main problem experienced in determining the most suitable remedy for breach of an athlete's contract, is the fact that different jurisdictions attach different levels of suitability and importance to the same contractual remedies. So, for instance, South African courts would currently have no objection to ordering specific performance against a party in breach of an athlete's contract. Similarly, South African courts would be willing (at this point in time) to order a prohibitive interdict giving effect to a restraint of trade clause on a contract. Anglo-American legal systems perceive specific performance as a mere remedy settled in equity, which would not be granted- especially in case of breach of contracts involving personal services.<sup>104</sup> In order to address this problem as satisfactorily as possible, this chapter set out to identify and

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<sup>104</sup> It has, however, been noted in this chapter and established in chapter 6 that US Courts are more willing to order injunctive relief against either an employer or employee in breach of an athlete's contract than their English, European and Australasian counterparts.

discuss the problem of breach of contract by the employer in the form of constructive dismissal. The reason why constructive dismissal has been identified as the most significant form of breach of contract committed by the employer in a professional sports-relationship, is because it is usually the athlete who eventually terminates the contract, which causes the latter to be branded a scapegoat. This is so despite the fact that in the case of constructive dismissal, the termination takes place *as a result of the employer's repudiation*. In the South African context, the Labour Relations Act provides for six examples of where “dismissal” can take place. These have been identified in this chapter as an employer terminating a contract with or without notice,<sup>105</sup> an employer failing to renew a fixed-term contract on the same or similar terms,<sup>106</sup> an employer refusing an employee to resume work after having taken legal maternity leave,<sup>107</sup> an employer has dismissed a number of employees, re-employed some of them and refused to re-employ others,<sup>108</sup> constructive dismissal,<sup>109</sup> and finally, if an employer provided the employee with working conditions substantially less favourable than did the employee's previous employer.<sup>110</sup> Because of its relevance and significance to the athlete's contract and the business of sport in particular, constructive dismissal was identified (as already stated above) as the primary threat as far as unfair dismissal by an employer of an employee is concerned. It basically entails that an employer makes the working conditions of the employee so intolerable that the latter has no choice but to resign his employment.<sup>111</sup> Interestingly, the court in the South African case of *Jooste v Transnet t/a South African Airways*<sup>112</sup> stated that the term “constructive dismissal” was neither found in the Labour Relations Act 66 of 1995 nor in any other South African statute. Neither was this concept known to South African common law. However, according to Fouché,<sup>113</sup> the concept has always constituted an unfair labour practice in terms of the decisions of the former Industrial Court of South Africa. This fact has been confirmed in several post-constitutional South African decisions. Examples of constructive dismissal, as have materialised from South African case law, have been provided in this chapter. These include unilaterally decreasing the status of an employee, setting unreasonable sales margins

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<sup>105</sup> Section 186 (1) (a) LRA.

<sup>106</sup> Section 186 (1) (b) LRA.

<sup>107</sup> Section 186 (1) (c) LRA.

<sup>108</sup> Section 186 (1) (d) LRA.

<sup>109</sup> Section 186 (1) (e) LRA.

<sup>110</sup> Section 186 (1) (f) LRA.

<sup>111</sup> Van Jaarsveld *et al* 165.

<sup>112</sup> [1995] 5 *BLLR* 1 (LAC).

<sup>113</sup> Fouché in Du Plessis *et al* 273.

and unilaterally decreasing the employee's salary.<sup>114</sup> In the discussed case of *Halgreen v Natal Building Society*,<sup>115</sup> the applicant was compelled to resign his office after the respondents had failed to keep their promise of promotion to the former and subsequent ill-treatment.<sup>116</sup> The employer (respondent) could not prove that the employee's (applicant's) dismissal was justified by misconduct or poor performance on the latter's behalf.<sup>117</sup> However, in the case under discussion, the court decided that if the employee has terminated the agreement, it was up to him to prove that such termination was inevitable because of the employer's ill-treatment. The importance of the *Halgreen*-case is found in the summary of South African law relating to constructive dismissal. The court stated that if the conduct of an employer constituted a fundamental breach of the contract of employment, the employee may accept said conduct as breach of contract, with the subsequent effect of dismissal of the employee by the employer.<sup>118</sup>

Although there is no doubt that South African law has adopted the principles governing constructive dismissal, it has been established in this chapter that it is still an extraordinary and unique form of dismissal which is not generally accepted easily.<sup>119</sup> Therefore, it must be re-iterated that the onus of proving constructive dismissal rests firmly on the employee who claims to have been dismissed unfairly. According to *Van Jaarsveld et al*,<sup>120</sup> such an employee must prove that any continuous occupation under the employer is intolerable, that such intolerability was caused by the employer, that no alternative exists but to resign, that the contract of service has been terminated, and that the employee never had the intention to terminate the employment agreement. If so proved, constructive dismissal has the same legal consequences as actual lawful dismissal,<sup>121</sup> which suggests similar contractual remedies. As far as South African law is concerned, it was decided in *Jooste* that an employee against whom repudiation has been committed in the form of constructive dismissal, has the option to either accept said repudiation and claim damages from the employer, or to hold the employer to the actual terms of the contract by way of specific performance.<sup>122</sup> If the employee has

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<sup>114</sup> *Van Jaarsveld et al* 165.

<sup>115</sup> (1986) 7 ILJ 769 (IC).

<sup>116</sup> *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) 771.

<sup>117</sup> *Idem* 775.

<sup>118</sup> *Idem* 775.

<sup>119</sup> *Van Jaarsveld et al* 166.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Gardiner et al* 421.

<sup>122</sup> *Jooste v Transnet Ltd t/a South African Airways* [1995] 5 BLLR (LAC) 1. It is extremely important to remember that repudiation need not be accepted in South African law any longer in order to constitute breach of contract. The act of repudiation is in itself a breach of the contract in question. See the case of

chosen to terminate the working relationship permanently, specific performance would obviously not be available to him. This will most probably occur where the mutual trust and confidence of a contractual relationship have been destroyed by the employer by way of discrimination on grounds of race, sex, sexual orientation or religious belief.<sup>123</sup>

In English law, certain conditions must be met by an employee if he wishes to claim for constructive dismissal. Firstly, there must be either actual or anticipatory breach of contract by the employer. Secondly, the breach in question must be sufficiently important to justify the employee's resignation. Thirdly, the employee must leave as a result of the employer's repudiation or in answer thereto, and finally, the employee must not delay too long in terminating the contract for risk that he might be perceived to have accepted the initial breach.<sup>124</sup> These conditions are indicative of the fact that English law has a similar perception to South African law of constructive dismissal, what it entails and the requirements thereof.

As far as constructive dismissal in case of athletes' contracts is concerned, an interesting form of such type of dismissal which is unique to the athlete's contract has been identified in this chapter. Gardiner *et al* make mention of so-called "locker-room" behaviour in sport comprising actions such as banter and practical jokes that might not be tolerated in more "typical" forms of employment.<sup>125</sup> It has been submitted that if an employer club, franchise or union allowed this kind of behaviour to get out of hand with the result that a specific athlete is forced to terminate his working relationship with said employer the latter may be liable for the constructive dismissal of the employee. It should not be forgotten, though, that unfair treatment is an element of constructive dismissal, as was decided in the South African case (and therefore only applicable to South African law) of *Value Logistics Ltd v Basson and Others*.<sup>126</sup> The fact that unfair treatment is a requirement for constructive dismissal, finds noteworthy relevance in the case of athletes' contracts. The *sui generis* nature of the latter, it has been submitted, demands that employers have a responsibility to treat professional athletes in their employ in a professional manner at all times, failing in which case there is a strong case to be made out on behalf of the athlete of constructive dismissal (should the athlete terminate the professional relationship). For this reason, employer clubs, unions

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*Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

<sup>123</sup> Gardiner *et al* 422.

<sup>124</sup> Harvey *et al* (eds) (2009) paragraph 403.

<sup>125</sup> Gardiner *et al* 422.

<sup>126</sup> [2011] 10 BLLR 1024 (LC).



and/or franchises should be wary of discrimination against its employee-athletes on grounds like sex, sexual orientation, race and religion.

Although it has been submitted in this chapter that the constructive dismissal of professional athletes is one of the most common occurrences of breach of contract committed by an employer, there are other forms of such breach as well. Focusing on the types of breach most commonly committed by employers in a professional sporting environment, this chapter has provided a detailed discussion of cases in which an employee-athlete is dismissed through non-renewal of fixed-term contracts. The reason why this ground has been highlighted and discussed, is because all athletes' contracts (provided they resort under *locatio conductio operarum*) are fixed-term ones. Furthermore, there have been some highly significant South African decisions on this form of breach by the employer involving South African sportsmen, the most important of which has been discussed in this chapter. Louw states that this form of dismissal is especially relevant in the context of professional sport.<sup>127</sup> An employee, who claims to have been dismissed in this manner, must prove that he had harboured a reasonable expectation that his fixed-term contract would have been renewed on the same or at least similar terms.<sup>128</sup> Although guidelines exist as to when an expectation of this kind would qualify as "reasonable", determining reasonability of expectation remains a challenge. In the case of *SA Rugby Players' Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd*<sup>129</sup> it was decided eventually that while one of the applicants did indeed possess a legitimate expectation of renewal of his fixed-term contract, the other two applicants did not possess such a reasonable expectation. The difference between the two "groups" of players was that the formerly mentioned had actually been a party to a substantial fixed-term contract before, whereas the other two had merely been parties to short-term contracts which lasted only for one tournament. It has been submitted that the latter type of contract was actually one of piece work (*locatio conductio operarum*), as it was entered into in view of the fulfilment of a specific task (the Rugby World Cup of 2003). It was decided by the Labour Appeal Court that these two players, unlike the former, did not objectively possess any reasonable expectation of renewal of the mentioned contracts of piece work, as provided for by section 186(1) (b) of the Labour Relations Act. What is important to mention as far as the initial arbitrator's decision was concerned, is that the latter made specific mention of the fact

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<sup>127</sup> Louw 273.

<sup>128</sup> Le Roux "Labour law in South African sport. A season of expectations?" 2006 *Int. Sports L.J.* 56; Grogan "Great Expectations" 1999 *Employment Law* 10; Louw 273.

<sup>129</sup> [2005] 2 BALR 209 (CCMA).

that the professional rugby environment (and, for that matter, professional sport in general) was “insecure and uncertain, characterised by frequent change in coaches and management, with no clear policies or guidelines in respect of how contracts should be awarded or structured.”<sup>130</sup> Furthermore, the case highlighted the power that an employer may exert over athletes in its employ. If the actions of the employer were to make it difficult or impossible to perform his duties in terms of the contract between the parties to the extent that the athlete terminates the contract, the employer will be in breach of said contract.

Having discussed the potential ways in which an employer could commit breach of contract against an employee, the focus of the current chapter shifted to possible remedies available to an employee (especially a professional athlete) against whom breach of contract has been committed in the form of repudiation by the employer.<sup>131</sup> The challenge of this discussion lay in the fact that all possible contractual remedies for breach of athletes’ contracts in South Africa and abroad have already been discussed and evaluated in detail in this thesis. Therefore, the approach has been taken in the relevant part of this chapter to evaluate the suitability of the same remedies from the point of view of availability thereof to the employee in case of breach by the employer. Furthermore, the focus has been set on the specific availability and suitability of the mentioned remedies in case of breach of an *athlete’s contract*.

As in chapter 9, the predicament of different viewpoint of different jurisdictions on the same contractual remedies emerged once again in this chapter. Remedies involving specific performance of the contract in question (and also remedies compelling the employer to make the athlete’s working conditions more tolerable) have been discussed separately from the remedy of damages. It has been established in this thesis that courts in Anglo-American legal systems would not grant specific performance or positive injunctive relief in cases involving contracts of personal services such athletes’ contracts. This is so despite the fact that US courts seem to be somewhat more willing to grant injunctive relief than its English, European and Australasian counterparts. Contrary to this point of view, South African courts do not currently seem to have any reservation in ordering specific performance of an athlete’s contract. With sport being a global business, this does present a significant problem. Therefore, the purpose of this thesis (as stated throughout) is not to suggest effective

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<sup>130</sup> *SA Rugby Players’ Association (SARPA) on behalf of Bands and Others v SA Rugby (Pty) Ltd* [2005] 2 BALR 209 (CCMA) 220.

<sup>131</sup> “Repudiation”, for clarity’s sake, entails conduct by the employer which would constitute unfair or constructive dismissal, as discussed in the text.

formulae for calculation of damages in case of breach of an athlete's contract, nor is it the purpose of this thesis to suggest suitable transfer rules – these exist already. The purpose of this thesis is to suggest to South African courts the most suitable remedy for breach of an athlete's contract, even if the transgressor is the employer club, union or franchise. Obviously, South African courts must inevitably take into account that many South African professional athletes ply their trade with professional clubs abroad. Consequently it would be naïve to ignore the viewpoints of foreign jurisdictions on the suitability of the remedies which have been discussed in this chapter. For this reason, foreign case law on the most appropriate remedy in case of breach of athletes' contracts *by the employer* has been interwoven with discussions of South African case law on the same matter.

In the landmark King's Bench decision of *Warner Brothers Incorporated v Nelson*<sup>132</sup> the court decided that injunctions will not be granted if their practical effect would be specifically performing the contractual obligations in question. In a scenario where the employer repudiates the athlete's contract in question, the employee-athlete would theoretically possess the right to apply for an injunction compelling the former to make his working conditions more tolerable. If such an employee has already terminated his contract due to intolerable working conditions caused by the employer, theoretically it would be possible for the employee to apply for an injunction (interdict in the South African context) compelling the employer to reinstate him on the same or similar terms. Even in English law relating to athletes' contract in particular, injunctive relief has in fact been granted in the case of *Crystal Palace FC Ltd v Bruce*.<sup>133</sup> In deciding that the football club in question had legitimate interests to protect, the court granted injunctive relief prohibiting the respondent (who was a team manager of the applicant) to gain any knowledge of the club's management, game plans and contractual obligations for a specific period known as the period of "garden leave".<sup>134</sup> The importance of the *Bruce*-decision, it has been submitted, is two-fold. Firstly, it has indicated English courts' willingness to grant injunctive relief in case of athletes' contract when equity demands it. Secondly, the decision highlighted several implicit duties of the employer in a professional sporting relationship. If these duties are not complied with, the strong possibility exists that the employer might be liable for termination of the contract in question by the employee-athlete. This entails that the employer has a duty to provide the athlete with the opportunity to exhibit his unique athletic skills by selecting said athlete for

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<sup>132</sup> [1937] KB 209.

<sup>133</sup> (2002) QBD (Unreported).

<sup>134</sup> *Gardiner et al* 405-406.

the team. The employer's duty further includes the providing of internal structures, professional coaching, game plans and management procedures in order to make the working conditions (in case of an athlete's contract, these would include training facilities) of the athlete viable. The duty of the employer to provide the professional athlete with work includes the duty to provide for unemployment and medical insurance- the latter being especially important in the context of professional sport where physical injury is a constant and real threat and may be the effective cause of termination of an athlete's professional career.

A rather more challenging duty of the employer which has been identified in this chapter is that of maintaining mutual trust and confidence. According to this duty, an employer will be in breach of contract if it neglects to ensure that an employee is not exposed to any form of abuse or harassment in the workplace. If an employer fails in this duty, causing the employee-athlete to terminate the working relationship, the former may be guilty of repudiation and the latter would have the option of requesting a court to compel the employer to restore the mutual trust and confidence. Whether a court would grant such an order, is doubtful, as in many cases the breach of mutual trust and confidence would be irreparable. Five elements required to constitute neglect of an employer's duties towards the athlete were confirmed in the case of *Timeplan Education Group Ltd v NUT*.<sup>135</sup> Firstly, the employer had persuaded or induced the breach of contract, secondly, the employer must have had knowledge of the existence of the contract, thirdly, the employer must have had the intention to persuade, procure or induce the contract, and fourthly, the claimant must have suffered more than nominal damages due to the breach, and lastly, there should be no defensible justification for the breach in question. If these elements are present, courts (especially in Anglo-American legal systems) would seriously consider granting injunctive relief to the employee athlete against his employer.

As far as contractual remedies effecting performance of the athlete's contract by the employer are concerned, English, European, US and Australasian courts would not grant them readily, contrary to South African courts. However, Gardiner et al state that in order to protect an athlete's legitimate interests, equity would in certain cases demand of the aforementioned courts to grant injunctive relief to an athlete against whom repudiation has been committed by his employer-club, union or franchise.

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<sup>135</sup> [1997] IRLR 457.

Because injunctive relief, including specific performance, would not be readily granted by courts in Anglo-American common law systems, the suitability of damages as remedy for breach of contract by the employer has been discussed in this chapter. Gardiner *et al* note that damages should be contractually stipulated. This, however justifiable, is not an effective practice. This much has been learned from firstly the case of *Kevin Keegan v Newcastle FC*<sup>136</sup> and secondly the case of *Stransky v Bristol Rugby Ltd.*<sup>137</sup> In the former case, it was contractually stipulated that the manager of a football team would receive £2 million in case of premature termination of his contract due to conduct on the employer-clubs part. Although the manager argued that the amount in question was significantly less than he could have earned working for another club, the tribunal found that “it was impossible accurately to pre-estimate any loss”.<sup>138</sup> In other words, damages were almost impossible to calculate in a case where the employer-club had committed breach of contract in the form of repudiation and subsequent constructive dismissal. A similar problem was encountered in *Stransky*. Although the applicant in the matter never actually commenced his occupation as manager of the respondent, the court decided that the value of the contract must be paid out to the former as a result of breach of contract committed by the latter. Although it is submitted that this was probably a fair manner in which to determine an amount of damages, it fails to take into account considerations such as the fact that if the applicant had taken up the employment, the club could possibly have won a tournament resulting in added bonuses and sponsorships for said applicant, which would have resulted in an increase in the manager’s (and, for the sake of argument, a professional athlete’s) worth. On the other hand, it might well have happened that the applicant would have been unsuccessful at performing his managerial duties, which would possibly have led to a depreciation of his monetary value to the club. It comes down to the fact that damages are an unsuitable remedy for breach of contract by the employer, as is the case in breach of contract by the employee.

The purpose of this chapter is to indicate and discuss breach of contract committed by an employer, especially in a sporting relationship. More importantly, the remedies available to an employee in such a relationship have been evaluated and discussed. The conclusion is that, in South African law, an employer may be compelled to ensure that the employee’s working conditions are tolerable. In the foreign jurisdictions discussed, equity would sometimes

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<sup>136</sup> (2009) 7 12 WSLR.

<sup>137</sup> Unreported case number 11/12//2002 QBD.

<sup>138</sup> Gardiner *et al* 426.

demand a similar approach, provided that compelling the employer to honour his contractual duties serves the purpose of protecting the athlete in question's legitimate interests.

## CHAPTER 12: CONCLUSION AND RECOMMENDATIONS

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### 12.1. Conclusion

The primary question posed by this thesis is this: is specific performance of contractual obligations the most suitable remedy for breach of an athlete's contract? The answer to this question serves one main purpose: to attempt to stem the ever-rising tide of repudiation of athletes' contracts on a global scale. What this thesis aims to contribute to jurisprudence, is to indicate to South African courts the most suitable remedy for breach of athletes' contracts where such breach is committed by professional South African athletes plying their trade either in the Republic or elsewhere. Different jurisdictions around the globe have different approaches to the same contractual remedies. Specific performance is, while the primary contractual remedy in South Africa (derived from Roman-Dutch law) considered a mere equitable remedy<sup>1</sup> in jurisdictions based on English common law.<sup>2</sup> This presents a significant legal problem, due to the global nature of professional sport. A particular athlete may be employed by a professional club in the United Kingdom, but may also be a member of the national team of South Africa, with a separate contract governing that relationship. Should said athlete repudiate the contract with the club, the latter would, according to English law, merely possess the remedy of damages for breach of contract. Should the athlete commit breach of his national contract, South African legal principles would suggest that the management of the national team would have the right to demand specific performance of the contractual obligations in question. Such a scenario does not create legal certainty at all. Therefore, attempts have been made in this thesis to resolve this uncertainty by offering practical, but also realistic solutions.

In order to address the challenges noted above, this thesis has set out to establish the one common notion regarding a contract: that it is found in consensus between contractual parties. Put differently, if contractual parties are *ad idem* as to the contents of the contract between them and the legal consequences they wish to create, then they will be bound to that contract. The basis of consensus as the basis of all contracts was established in Roman law,

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<sup>1</sup> By "equitable remedy" is meant one that would only be granted should the principles of equity demand it.

<sup>2</sup> Referred to in this thesis as "Anglo-American" legal systems.

and was given effect in Roman-Dutch law through the maxim *pacta sunt servanda*. It is with this basis of a contract in mind that this thesis aims to contribute to the jurisprudence of our time.

The first chapter of this thesis made a detailed study of the meaning of the term “athlete’s contract”. In order to determine the most suitable remedy of breach of said type of contract, it is inevitable to determine first and foremost what type of contract is being dealt with – in other words, its true nature. General academic opinion would have the athlete’s contract constituting one of employment. This is, as explained in chapter 1, an oversimplification, and it has been submitted that the athlete’s contract is in fact entirely *sui generis*.

If a professional athlete were to be seen as someone different from a mere employee, then there ought to be characteristics which make the former different from the latter. These differing characteristics are highlighted and discussed in chapter 3. A *sui generis* nature would require a *sui generis* approach to determining the most suitable remedy for breach of that particular type of contract.

Because the statement that an athlete’s contract is not simply one of mere employment differs potentially from the points of view of most authors on sports law as well as several (local and foreign) court decisions, an in depth-explanation as to the *reasons* for this statement, as well as a discussion of *how* the athlete’s contract is different from both the contract of service and that of piece work, have been provided in chapter 3. Through detailed discussions of several local and foreign decisions (foreign case law is just as relevant as local case law for the purposes of this discussion, as the contract under discussion is not one that is limited to one country only – it is the same in all jurisdictions, because it regulates business of a global nature: sport) chapter 3 suggests that the an athlete’s contract contains the following characteristics that are entirely *sui generis*:

Personal services of a unique *athletic* nature:

The contract of service involves services of a personal nature. The athlete’s contract, however, involves highly specialised *sporting* services demanding the party thereto to possess unique athletic talents in the code concerned. These unique athletic skills have been described in the case of *Philadelphia Ball Club Ltd v Lajoie*<sup>3</sup> as “unique” and by Prinsloo as “unique

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<sup>3</sup> 202 Pa. 210; A. 973 978.



and extraordinary”.<sup>4</sup> Because of the fact that the display of these unique athletic abilities attract huge amounts of spectators, an athlete is required to be in peak physical condition at all times.<sup>5</sup> This requirement is provided for – uniquely - in an athlete’s contract. It is true that some other professions also require employees to be in good physical condition.<sup>6</sup> However, sport is the only profession in which a participant (or “employee”) may be penalised for improving his performance in an unnatural way, such as through the use of banned substances. This is because the attraction of sport is found in the uncertainty of the result. If anyone should manipulate this uncertainty, the attraction of sport would disappear. For this reason, illegal substance abuse and match-fixing are considered cardinal sins in the context of professional sport.<sup>7</sup> This is true of team as well as individual sport. In the latter, the contractual relationship is somewhat different, as explained in chapter 1, as the relationship is not between an athlete and an “employer”- club, but between an athlete and the organisers of a specific event. Despite the code, there is no denying that the possession of unique athletic ability is one of the elements that make professional athletes and the contracts that govern them unique.

### Equal bargaining power

Because of athletes’ attractiveness to spectators of sport, it is obvious that such athletes would possess increased bargaining power when having to negotiate the terms of a fixed-term contract or appearance fees (in case of an athlete being an independent contractor in an individual sporting code). This is especially true of athletes who have already distinguished themselves as true sporting “super stars”. Mention has been made in chapter 6 of this thesis of what is referred to by Champion as “juice”, which is defined as the “ability to write your own ticket based on unique skills and rampant popularity.” The more “juice” a professional athlete possesses, the higher his bargaining power. This has been submitted as a truly unique characteristic of the athlete’s contract.

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<sup>4</sup> Prinsloo “Enkele opmerkinge oor spelerskontrakte in professionele spansport” 2000 *J.S. Afr. L.* 229 232.

<sup>5</sup> Champion (2000) 7 states that athletes “are paid as entertainers who are playing a game”.

<sup>6</sup> For instance, pilots.

<sup>7</sup> Although the evil of match-fixing in professional sport falls outside the ambit of this study, it is made all the more loathsome because of the unique characteristic of sport as a profession that the attraction is settled in the uncertainty of the result. For a discussion of match-fixing in particular, see Cornelius “Cricket’s Underworld: Fighting Illegal Gambling and Match-fixing” 2013. *Global Sports Law and Taxation Reports* 17 and Blackshaw “Match fixing in sport: a top priority and ongoing challenge for sports governing bodies” 2013 *De Jure* 945.

### Subjectivity to rules and regulations governing a specific sporting code

The third unique characteristic of an athlete's contract which has been identified in chapter 1 of this thesis is the fact that every professional (and, for that matter, amateur) athlete is subject to the rules and regulations governing his particular code of sport. This may also have the effect that any particular athlete may at any given time be a party to more than one athlete's contract at the same time.

### Limited professional career

Because of the importance attached to physical abilities, an athlete's professional career is extremely limited.<sup>8</sup> Furthermore, an athlete's performance in terms of his contract depends on whether he is provided with sufficient opportunity of displaying his unique athletic skills.

The abovementioned characteristics are an undeniable indication of the *sui generis* nature of the athlete's contract. Chapter 3 contains with a discussion of the meaning of "*sui generis*" as it relates to contract, and it was argued that if one renders the *naturalia* of ordinary contracts inapplicable,<sup>9</sup> the athlete's contract is unique without doubt. The relevance hereof is that if the athlete's contract is unique, it would require a unique approach to determining the most suitable contractual remedy for breach thereof. For the purpose of determining the latter, a definition of an "athlete's contract" has been suggested in chapter 3 for the first time in law literature. It reads as follows:

"A reciprocal contract in terms of which an athlete, who possesses unique athletic talents in the sporting code concerned, must render services of a highly personal, unique sporting nature to an organisation (in the form of a governing body, club, union or franchise) or to an event organiser for a fixed period or until his participation in a specific tournament comes to an end".

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<sup>8</sup> In *Mmethi and Bloemfontein Celtics Football Club* (2012) 33 ILJ 1307 (ARB) at 1317, the arbitrator said that footballers (and for that matter, all professional athletes) had a "short productive capacity". See in this regard also Champion 7.

<sup>9</sup> According to the *sui generis* theory for determining the nature of a specific contract as advocated by Hawthorn and Hutchison in Murray and O' Regan (eds) (1990) 199.

Having established the nature of the athlete's contract, the suitability of the contractual remedy of specific performance to breach of said type of contract had to be determined. Before this could be done, however, it was essential to establish the nature, origins and development of said remedy. Because of the uncertainty of the availability of the remedy of specific performance in Roman law, chapter 4 of this thesis has been dedicated entirely to investigating and discussing the possible origins of the remedy in Roman law. The approach has been taken to discuss the possible existence of the remedy (or remedies resembling it) during each stage of legal development in Roman law. The reasoning behind this has been to ensure that the possibility that specific performance originated in Roman law, is analysed and discussed in detail. The primary purpose of chapter 4 is consequently to establish the origins of specific performance and trace its development in Roman law.

Winkel, for one, has no doubt that the *legis actio* of *manus iniecto* constitutes the origin of the modern remedy of specific performance, and it can therefore be stated unequivocally that the remedy originated (in however primitive form) during the period of the kings.<sup>10</sup>

Du Plessis confirms that although specific performance was not known as an actual remedy in Roman law, it was a proper extra-judicial aid for ensuring performance of a contractual obligation, for which proper methods and procedures existed. Although not prevalent, it has been submitted in chapter 3 that orders resembling specific performance were at least familiar during the time of the Roman Republic. This is especially eminent from the writings of Gaius, a lot of which was based on the law according to the Twelve Tables.

The *Digesta* contains text that is indicative of the possibility, availability and acceptability of orders *in forma specifica*. Justinian's Digest 42 1 13 1 is often quoted, according to Du Plessis,<sup>11</sup> as proof that specific performance would never be granted in Roman law. This is a misconception, as the relevant text merely prescribes damages as remedy in *ad faciendum*-cases. It is true, however, that orders resembling specific performance would only be granted where the performance in question remained possible.<sup>12</sup> This is still true in current South African law, as indicated in chapter 3. The contribution of the third chapter to the thesis in general lies in the fact that it indicates without any doubt that remedies resembling that of specific performance were familiar in Roman law. The *legis actiones* were the first

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<sup>10</sup> Winkel in Hallebeek and Dondorp (eds) 9.

<sup>11</sup> Du Plessis (1988) *THRHR* 354.

<sup>12</sup> Declareuil (1927) 326; Du Plessis (1988) *THRHR* 354.

occurrence of the modern day concept of specific performance, but it was due to the formal act of *nexum* that Gaius claimed that actual delivery of contractual performance as a result of a court order was familiar in Roman law.<sup>13</sup> This is important, because specific performance may only be suggested as suitable remedy for breach of athletes' contracts if its origins are certain and beyond dubiousness.

The uncertainty as to the availability of specific performance as primary remedy for breach of contract in Roman law was evident from the works of the most prominent Roman-Dutch writers. The viewpoints of these writers on the availability (and more importantly, suitability) of specific performance in Roman-Dutch law have been discussed extensively in chapter 5 of this thesis. The purpose of these discussions in an entirely separate chapter is that the Roman-Dutch system of law is the common law of South Africa. If, therefore, specific performance was familiar to and accepted as primary contractual remedy in Roman-Dutch law, there should be no hesitation that it must hold such position in current South African law as well. More significantly, in such a case a strong argument could be made that specific performance ought to be the primary remedy for breach of athletes' contracts, at least as far as South African law is concerned.

Voet states that a party in Roman-Dutch law who sought recovery of property in terms of a contract had the right to demand delivery of the property itself, and not only a surrogate of the monetary value of such property.<sup>14</sup> However, according to Wessels,<sup>15</sup> there was always some debate among Roman-Dutch writers on Voet's submission mentioned above. On the one hand was the group of writers who felt that no one could be compelled to commit a certain act, whereas on the other hand, some writers believed that this could indeed be done according to civil law.<sup>16</sup> Grotius was an advocate of the former point of view. Relying on Justinian's Digest,<sup>17</sup> he states that a party who has promised to do something could honour such promise by paying the other party the value of said performance or a penalty.<sup>18</sup> It has been submitted in chapter 5 that Grotius probably meant for a contractant to have a choice between actual delivery of a thing and paying a monetary surrogate. This point of view was

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<sup>13</sup> See Gaius / 4 48.

<sup>14</sup> Voet 6 1 31, as translated by Gane (1955). Voet's statement has been confirmed by Lambiris 35.

<sup>15</sup> Wessels (1908) 612, as confirmed by Lambiris 35 and Gross (1934) *SALJ* 349.

<sup>16</sup> Wessels 612; Gross (1934) *SALJ* 349.

<sup>17</sup> In particular *D* 42 1 13 1.

<sup>18</sup> *Gr* 3 3 41, as translated by Steyn 31.

shared by Voet, as is evident from his *Commentarius ad Pandectas*.<sup>19</sup> Despite Voet and Grotius's points of view, it has also been submitted that most of the other prominent Roman-Dutch writers differ from these.<sup>20</sup> It is generally accepted that Voet and Grotius's points of view were inconsistent with Dutch practice of the time. This has been confirmed in chapter 5 by a discussion of the Dutch procedure of "gijzeling", by which a contractual debtor could be compelled to specifically perform an act previously agreed upon.<sup>21</sup> The procedure was described as follows in the 1580 Ordinance on the procedure in the Dutch lower Courts:

"The judgment debtor shall be ordered to place himself in gijzeling in a certain inn under penalty of ten guilders...If he places himself in the inn, and having been there for 14 days is not as prudent to perform the act to the satisfaction of the court, he shall be apprehended and lodged in the gaol at a cost of 3 pennies per day. If, after having been lodged in the gaol for a month, the judgment debtor still does not satisfy the judgment, the judgment holder shall be entitled to request the court to tax the act and convert it into a money judgment."<sup>22</sup>

It is distinctly clear that a judgment debtor could be compelled by this procedure to render specific performance.

The procedure known as "gijzeling" vanished almost entirely after the adoption of the French *Code Civil* and *Code de procedure civile* following the Napoleonic invasion of Holland.<sup>23</sup> This did not prevent Courts in early South African decisions to adopt the general practice of Roman-Dutch law to compel a person who had committed breach of contract, to specifically perform his contractual obligations. One of the primary examples of an early South African decisions in which the right to specific performance was discussed, is that of *Cohen v Shires, McHattie and King*.<sup>24</sup> *In casu*, the court stated that the creditor had the right to elect the remedy he wanted, and if he chose specific performance, the court would oblige him by granting such remedy.<sup>25</sup> This view is supported by Dondorp, who states that there was no reason in early South African law to assert that the creditor had to be content with damages in

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<sup>19</sup> Voet 19 1 14. See also Lambiris 36 and Gross (1934) *SALJ* 351.

<sup>20</sup> Most notably Groenewegen 42 1 13 1; Huber 2 2 9-10; Van der Keessel 3 3 41; Van der Linden 1 14 7 and Van Leeuwen 1 4 19 10. Despite the opinions of these writers, Kotzé CJ was influenced by Voet's point of view on the matter in the early South African case of *Cohen v Shires, McHattie and King* 1881-1884 (1) SAR TS 41.

<sup>21</sup> The mentioned discussion in chapter 4 relies heavily on the work of Willem de Groot, published in 1667.

<sup>22</sup> *Ordonnantie van de lustitie in den steden en ten platte lande van Holland*, 1580. Article 31.

<sup>23</sup> Dondorp "Decreeing specific performance: a (Roman-) Dutch legacy" 2010 (1) *Fundamina* 40.

<sup>24</sup> 1881-1884 (1) SAR TS 41.

<sup>25</sup> *Cohen v Shires, Mchattie and King* 1881-1884 (1) SAR TS 41 at 45.

case of non-compliance of contractual duties by the debtor.<sup>26</sup> This is still the position in South African law today.

Despite the fundamentality of the remedy of specific performance to South African law of contract, English law had somewhat of a profound influence on South African decisions regarding the availability of the remedy up until the landmark decision of *Benson* referred to above. Because of this significant influence, chapter 6 of this chapter set out to discuss the remedy of specific performance as perceived in English law. The aim of said discussion is to indicate the fundamental differences between the two systems' perception of the suitability and even availability of the remedy in case of breach of athletes' contracts in particular. Chapter 7 has been aimed at indicating how current South African courts perceive the remedy of specific performance, and why these courts erred in adopting (even if only partially) the English perception of the remedy in question. The reason for this statement is founded in the fundamental differences between the perception of specific performance as contractual remedy in English law and that in South African law.

The position and suitability of the remedy in English law have been summarised quite accurately in the case of *Ryan v Mutual Tontine Westminster Chambers Association*,<sup>27</sup> in which the court proclaimed that as contractual remedy, specific performance would only be granted in cases where the ordinary remedy of damages would not be adequate compensation for breach of contract. The court followed this up by deciding that the remedy (of specific performance) "has always been treated as discretionary". Herein is settled the fundamental difference between the remedy as perceived by English law and that as perceived by Roman and Roman-Dutch law. Despite this difference, early South African decisions are "littered" with English precedent,<sup>28</sup> and to this day it is still uncertain whether a (South African) court has the discretion to order specific performance of contractual obligations.<sup>29</sup> In the case of

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<sup>26</sup> Dondorp (2010) *Fundamina* 51.

<sup>27</sup> [1893] 1 Ch. 116.

<sup>28</sup> The most relevant of these cases are discussed in detail in chapter 5. In none of these is English influence more evident than in that of *Farmers Co-operative Society (Reg.) v Berry* 1912 AD 343. *In casu*, the Court stated that despite the decision in *Thompson v Pullinger* (1894) (1) Off Rep 298 that the right to the remedy of specific performance, where in fact performance remained possible, was beyond all doubt in South African law, the Court still had "discretion in determining whether or not decrees of specific performance should be made." Innes J went even further to state that "there are many cases in which justice between the parties can be fully and conveniently done by an award of damages." See *Farmers' Co-Operative Society (Reg.) v Berry* 1912 AD 343 at 350.

<sup>29</sup> In one of the landmark cases on specific performance in South Africa – *Benson v SA Mutual Life Assurance*

*Buxton v Lister*,<sup>30</sup> it was decided beyond any doubt that while (English) courts possessed a discretion to grant specific performance of contractual obligations, they would never do so if the contract in question involved services of a personal nature.<sup>31</sup> If equity demanded, courts of Equity would consider granting specific performance only if damages failed to provide the plaintiff with a “complete” remedy.<sup>32</sup> This is especially relevant to breach of contracts involving services of a unique nature, such as the athlete’s contract. Nevertheless, current English law proclaims that specific performance would never be granted if there is lack of mutuality between contracting parties,<sup>33</sup> if performance involved personal services, or if an order of specific performance would require the court to supervise the granting of said order.<sup>34</sup>

Because of the fact that South African courts have only had to consider the nature of the professional athlete’s contract fairly recently, and subsequently are somewhat divided (as is evident from South African case law on the matter) as to how the breach of such contract should be approached in terms of finding the most suitable remedy in case thereof, chapter 8 of this thesis entails a fairly detailed study of how courts in foreign jurisdictions treat breach of athletes’ contracts. What makes chapter 8 all the more relevant to the purpose and aim of this thesis, is that the athlete’s contract is a global legal tool and governs the same type of relationship in all countries, despite their respective systems of law. Cases decided on the most suitable remedy for breach of athletes’ contracts in the United States of America, the jurisdiction of the European Union, the United Kingdom, Australia and New Zealand have been discussed and considered in chapter 8. These jurisdictions have been selected meticulously because of their rich legal history regarding the treatment of athletes’ contracts, and more particularly the most suitable remedy in case of breach thereof.

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*Society* 1986 1 SA 776 (A)- Hefer JA stated specifically that such discretion was available to South African courts in deciding on the suitability of specific performance in any particular case. This is contrary to Roman and Roman-Dutch law, and is not aimed at creating legal certainty.

<sup>30</sup> [1746] 3 Atk. 383.

<sup>31</sup> *Buxton v Lister* [1746] 3 Atk. 383 at 386.

<sup>32</sup> *Adderley v Dixon* [1824] 1 Sim & St 607.

<sup>33</sup> Guest 515.

<sup>34</sup> This factor has also been adopted, quite erroneously, by South African Courts, most notably in *Troskie en ‘n Ander v Van der Walt* 1994 (3) SA 545 (O) and *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2002 (5) SA 697 (C). However, it was rejected by Foxcroft J in *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C), who stated that the plaintiff who requests specific performance carried the risk of the defendant not performing optimally should such an order be granted against the latter.

Early US decisions relating to athletes' contracts indicated that US courts, although accepting English doctrine as to the most suitable remedy for breach of contract in general, considered the professional athlete's contract as sufficiently unique to require a different approach to determining the most suitable remedy for breach thereof. Although specific performance was not granted in any of these early US decisions, negative injunction was, which remedy, as submitted in chapter 6, is often more restrictive to the athlete in question as would specific performance be. Furthermore, relevant US decisions such as that in *Boston Professional Hockey Association v Cheevers*<sup>35</sup> have suggested that damages as contractual remedy for breach of athletes' contracts is "speculative, uncertain and as a practical matter, impossible to ascertain." Therefore, it has been submitted in chapter 6 that US courts consider the athlete's contract as *sui generis* to the extent that they would attempt to enforce such contract in case of breach thereof, if not directly by way of specific performance, then indirectly by way of negative injunction.

Decisions made within the jurisdiction of the European Union regarding the nature of the athlete's contract and treatment thereof by the courts within that Union have been discussed specifically in chapter 6 because of the fact that the intersection of sport with the EU is one of the most important aspects of modern sports law.<sup>36</sup> Few other cases have made as important a contribution within the jurisdiction of the EU (and in other jurisdictions) to the way in which athletes' contracts are perceived as that of *Union Royale Belges des Sociétés de Football ASBL v Bosman*.<sup>37</sup> Because of this decision, the institutions of the EU have started to give more detailed attention to and appreciation of the nature of sport and the extent to which sport can be regulated by legal and judicial intervention.<sup>38</sup> The case had a rapid and clear effect on the perception of said type of contract within the EU. When having to decide on the need to compensate employer-clubs for breach of contract by athletes in their employ, the court of Justice has decided that such compensation should indeed be paid "in recognition of the financial outlay undertaken by the club(s) in developing the player."<sup>39</sup> Although not damages in the legal-technical sense of the word, it has been submitted that the payment of such compensation amounts to a sort of pay-off by the club that has "stolen" the services of an

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<sup>35</sup> 472 F.2d 127. (1<sup>st</sup> Cir. 1972).

<sup>36</sup> This is according to Gardiner *et al* 146.

<sup>37</sup> [1995] ECR I-4 1 9 2.

<sup>38</sup> Gardiner *et al* 146.

<sup>39</sup> See specifically the case of *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United*, case number C-325/08 as decided by the European Court of Justice.



athlete from another club. It has also been submitted, however, that such compensation, like in the case of an award of damages, is inadequate as contractual remedy. Currently, damages is considered the most suitable remedy for breach of athletes' contracts, and an athlete will not be compelled by and court within that Union to honour his contractual obligations should he decide to breach same.

Although an entire chapter has been allocated to the perception of English courts of the contractual remedy of specific performance, chapter 8 contains a discussion of the perception of those courts of the athlete's contract. This is essential to determining whether courts within the UK may in future consider enforcing athletes' contracts despite damages being the primary contractual remedy in law within said jurisdiction. English decisions relating to athletes' contracts must be considered especially significant, as the UK possesses one of the richest histories as far as the treatment of sport and the contracts governing it is concerned.

It has been established that despite recognising the *sui generis* nature of the athlete's contract, there is no doubt that courts within the UK will not grant specific performance upon breach of said type of contract.<sup>40</sup>

A discussion of relevant court decisions on how breach of athletes' contracts within the Commonwealth of Australia has been approached has made a substantial contribution to chapter 8 and its purpose within this thesis. It has been submitted that English common law forms the basis of Australian jurisprudence, and furthermore that Australia currently counts among the most successful sporting countries in the world in many codes, including Olympic ones. In a landmark decision regarding both restraint of trade as well as specific performance, the Supreme Court of Victoria in *Buckenara v Hawthorn Football Club*<sup>41</sup> was requested by a football club to grant specific performance against a player who wished to repudiate his contract with said club. Subsidiary to an order of specific performance, the club in question also applied for an injunction which would prevent the player from playing for any competing club in the same league. The court decided that it would not be unreasonable to enforce a restraint of trade clause barring an athlete from entering into a contract with another club *while still under contract*. Furthermore, the court was more than willing to grant the

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<sup>40</sup> This is evident from the discussed cases of *Mortimer v Beckett* [1920] 1 Ch 571; *Walker v Crystal Palace Football Club* [1910] 1 K.B. 87 and more recently *White v Bristol Rugby* [2002] IRLR 204.

<sup>41</sup> [1988] VR 39.

injunction mentioned. A discussion of the treatment of athletes' contract in New Zealand has led to the same submissions.

The common denominator as far as the most suitable remedy for breach of an athlete's contract among the jurisdictions discussed in chapter 8 is concerned, seems to be negative injunction. This remedy is not unfamiliar to South African law: the prohibitive interdict. It is not an attempt of this thesis to negate specific performance as primary contractual remedy in South Africa. In order to find some kind of uniformity as to the treatment of athletes' contract globally, it has been considered essential that *all* the remedial possibilities for breach of contract in *South Africa* must be considered. This has been done in chapter 9 of this thesis.

The contractual remedy of damages has been considered first and foremost in said chapter as a possible effective alternative to specific performance (in South African law) for breach of an athlete's contract. It has been established that there is virtually no effective way to determine the material position a club, union or franchise would have been in had it not been for a particular employee-athlete's repudiation. This is because an athlete, who had possibly commenced his professional career in mediocre fashion, could stealthily rise to be a "superstar" drawing huge crowds with his athletic skills and abilities. Therefore, the remedy of damages is not a suitable one for breach of athletes' contracts.

The interdict as contractual "remedy" has been suggested above as a possible "common denominator" for breach of athletes' contracts in global jurisdictions. As mentioned previously, injunctive relief is perceived to be the most suitable form of contractual remedy in case of breach of athletes' contract in the USA, Australia and New Zealand. Doubt has been expressed in chapter 9 about the suitability of said remedy for breach of said type of contract.<sup>42</sup> The reason for this expression of doubt is firstly because an interdict is actually used to enforce a restraint of trade, and secondly because the purpose of the interdict is exactly the same as that of specific performance: to compel a party to honour his contract for fear of a severe reprimand. However, it does seem to be the only "common denominator" as far as remedies for breach of contract on a global scale are concerned.

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<sup>42</sup> It has been submitted that the negative injunction as it is known in the jurisdictions mentioned is nothing other than the "prohibitory" interdict which was so well-known in Roman law.

The penalty clause has likewise been suggested as possible remedy for breach of athletes' contracts both in South Africa and abroad. The suggestion has been offered that penalty clauses merely serve as substitute for damages, according to Joubert.<sup>43</sup>

In deciding on the most suitable alternative to the remedy of specific performance for breach of contract in South African law, it does seem that, when studying the relevant South African decisions on breach of athletes' contracts, the prohibitive interdict (or "prohibitory" interdict as known in Roman law) is the only suitable alternative. However, it is predicted that courts in the UK will continue perceiving damages as the only suitable remedy for breach of contracts of personal service such as athletes' contracts, and South African courts will in the foreseeable future compel athletes to honour their contracts with their employers. This is not a satisfactory state of affairs, as it will do nothing to address the main problem posed by this thesis: the constant repudiation of athletes' contracts globally.

The purpose of chapter 10 is to establish whether the effective use of restraint of trade clauses could stem the tide of breach of athletes' contracts. Very importantly, it has been submitted in chapter 10 of this thesis that care should be taken to note there is a significant difference between the restraint of trade as perceived in English law and that as perceived in Roman and Roman-Dutch law. The main difference is that a contractual clause in restraint of trade is perceived as contrary to public policy according to English law, whereas this is certainly not the case in Roman and Roman-Dutch, and consequently South African law.<sup>44</sup>

South African law relating to restraints of trade has followed Roman and Roman-Dutch precedent on the matter closely. It has been confirmed in the landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*<sup>45</sup> that the concept that contracts in restraint of trade were against public policy, is foreign to both Roman and Roman-Dutch law.<sup>46</sup> Furthermore, the court in *Magna Alloys* stated that the requirement in English law that a party who wished to

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<sup>43</sup> Joubert 270.

<sup>44</sup> This was confirmed in *Katz v Eftimiou* 1948 (4) SA 294 (O); 4 All SA 482 (N), as well as in *Roffey v Catterall*, *Edwards & Goudré* 1977 (4) SA 494 (N) and *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1994 4 SA 874 (A).

<sup>45</sup> 1984 (4) SA 874 (A).

<sup>46</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 884.

enforce a restraint of trade must prove the reasonableness thereof “was contrary to our (South African) law.”<sup>47</sup>

Therefore, as far as restraints of trade as tool for ensuring that athletes’ contracts are no longer repudiated at the current rate, it has been submitted that in South African law relating to athletes’ contract, it (restraint of trade) may well prove effective, especially since a contractual restraint of trade will be enforced through interdict.

Chapter 11 of this thesis contains a discussion of those instances where an employer-club, union or franchise commits breach of contract instead of the athlete involved. The relevance of this chapter to the thesis in general is to indicate firstly that employers are often to blame for the repudiation of athletes’ contracts in particular *by the athlete*, but also to suggest the most suitable remedy for breach of athletes’ contracts committed by said clubs, unions or franchises.

One of the most important manners in which breach of contract is committed by employers, especially in professional sporting relationships, is through constructive dismissal. Constructive dismissal in sports relationships may take on a rather unique guise. So, for instance, Gardiner *et al* mention so-called “locker-room” behaviour, which includes constant picking on a particular athlete by management or fellow-athletes.<sup>48</sup> Such behaviour may become intolerable to the extent that the athlete in question is compelled to end his professional relationship with his employer-club. According to the South African decision of *Value Logistics Ltd v Basson and Others*,<sup>49</sup> the employer must be found to have acted unfairly towards the employee, which would entail that in the case of “locker-room” behaviour, the employer may well be liable for constructive dismissal. Be that as it may, if constructive dismissal is proved on behalf of the employee in question, it will be considered an acceptance of the employer’s repudiation, and the relevant contractual remedies would be available to the employee.

A form of breach of contract committed by the employer which has led a fair amount of litigation as far as professional sport is concerned, is dismissal of an employee-athlete

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<sup>47</sup> *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 888.

<sup>48</sup> Gardiner *et al* 422.

<sup>49</sup> [2011] 10 BLLR 1024 (LC).

through non-renewal of a fixed-term contract.<sup>50</sup> If an athlete can prove that he had a reasonable expectation that his contract would be renewed on the same or similar terms, he would be successful in a claim of dismissal through non-renewal of his fixed-term contract.<sup>51</sup> As far as remedies for breach of contract committed by the “employer” in a professional sporting relationship is concerned in South African law, specific performance may well be granted where an employer has committed breach of contract. In Anglo-American systems,<sup>52</sup> injunctive relief will probably be the most suitable remedy for said type of breach. This will take the form of a court ordering the employer to cease any conduct which makes the continued of the employee intolerable or unbearable. For the very same reasons discussed above, damages have once again been submitted as unsuitable remedy for breach of athletes’ contracts by employer-clubs, unions or franchises.

## 12.2. Recommendations

There is no doubt that specific performance is the most suitable remedy for breach of athletes’ contracts either by the athlete in question or the relevant employer-club, union or franchise. However, due to the global nature of sport as a business, the only universal remedy for breach of said type of contract seems to be the prohibitive interdict, otherwise known as negative injunction against the repudiating party. Due to the fact that a professional athlete may at any given time be party to two, possibly even three different athletes’ contracts for performing the same service, and that the athlete may in terms of each different contract be subject to a different “employer” who may be domiciled in different countries, it is suggested that South African courts seriously consider the prohibitive interdict as most effective manner of stemming the global tide of repudiation of athletes’ contracts. By adopting a united approach to determining the most suitable remedy for breach of athletes’ contracts, legal certainty as to the matter at hand will be created for the first time in South African, but also international, professional sport. This will only become reality when both South African and foreign courts provide the athlete’s contract with the full recognition it deserves: that of *sui generis*, global legal tool. The time has come for professional athletes as well as the clubs,

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<sup>50</sup> Louw 273 states that this form of dismissal is especially important in the context of professional sport as well as in light of the prevalence of fixed-term contracts within that business. This form of dismissal is provided for in section 186(1)(b) of the South African Labour Relations Act.

<sup>51</sup> Le Roux 2006 *Int. Sports L.J.* 56; Grogan 1999 *Employment Law* 10; Louw 273.

<sup>52</sup> For clarity’s sake: legal systems with English common law as bases.

unions and/or franchises that employ them to recognise the basis upon which all contractual agreements are founded: *pacta sunt servanda*.

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