

K Mould

A critical study of the recurring problem of repudiation in the context of professional rugby in South Africa with particular emphasis on transformative constitutionalism

Summary

Since rugby became a professional sport in the aftermath of the Rugby World Cup of 1995, the repudiation of sports contracts has become a general and recurring problem in the South African legal context. The legal problem of repudiation of sports contracts today is more prevalent than ever before, regardless of certain decisions wherein courts were willing to order coaches and players to specific performance of their contracts. This article attempts to find reasons for the courts' seeming unwillingness to grant orders of specific performance of sports (especially rugby) contracts, and suggests certain possible solutions to the recurring problem of repudiation in this context.

'n Kritiese besinning oor die herhalende voorkoms van repudiasie in die konteks van professionele rugby in Suid-Afrika

Sedert rugby 'n professionele sport geword het na afloop van die Rugby Wêreldbeker van 1995, het die repudiasie van sportkontrakte 'n algemene en herhalende probleem in die Suid-Afrikaanse regs konteks geword. Ondanks enkele uitsprake waarin houe bereid was om spelers en afrigters tot spesifieke nakoming van hul kontrakte te gelas, is die regsprobleem van repudiasie van sportkontrakte vandag meer prevalent as ooit tevore. Hierdie artikel poog om redes te vind vir houe se skynbare ongeneentheid om bevele van spesifieke nakoming van sport- (veral rugby) kontrakte te gelas, en stel enkele moontlike oplossings vir die herhalende probleem van repudiasie in hierdie konteks voor.

1. Introduction

Rugby became a professional sport in the aftermath of the 1995 Rugby World Cup. Professionalism has provided South African rugby players with financial stability and power. However, a legal problem has arisen and continues to exist which raises the question as to the true professionalism of rugby players in South Africa and abroad.

The problem which has emerged is that an ever-increasing number of professional sportsmen, in particular South African rugby players, dishonour

their contracts with the franchises and/or unions that employ them. In this regard, Le Roux states that there is a perception that the courts are reluctant to order specific performance in cases where the defaulting party must render a service of a very personal nature.¹ In the case of *Santos Professional Football Club (Pty) Ltd v Igesund and Another*,² however, it was decided that if parties conclude a contract on equal footing, the “employee” or player must honour his or her contract for the duration thereof. According to Cornelius, the courts are willing to order specific performance of sports contracts.³ This willingness was reaffirmed in the case of *Roberts and Another v Martin*.⁴ Despite these decisions, the problem of repudiation of sports contracts in South Africa is more evident today than ever before.

The purpose of this article is to investigate the reasons why “player-poaching” and repudiation of contracts have become such uncontrollable practices in the context of professional rugby in South Africa. To answer this question, one would have to investigate the effectiveness and nature of the remedies available to a party, in most cases the employer union or franchise, which has suffered damages because of the player’s repudiation. Currently, repudiating players depend on their constitutional right to freedom of trade, occupation and profession, which 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.⁵

There is very little, if any, constitutional protection of the rights of a union or franchise which has invested valuable time and money in the development of a player, just to see such a player repudiating his contract with the said union or franchise. This is a situation that must be rectified. It is submitted that such rectification will only be possible if the rules relating to fairness, equity and natural justice were strictly adhered to. This inherently implies a transformative approach with regard to the current Constitution.

Finally, suggestions are submitted as to how the *practice* of repudiation among professional South African sportsmen may be extinguished.

2. The right to freedom of trade, occupation and profession

Section 26 of the *Interim Constitution of the Republic of South Africa*⁶ reads as follows:

Economic activity

1 Le Roux 2003:116. See also Naudé 2003:269.

2 2003 (5) SA 73 (C). This case is discussed in detail further on in this article.

3 Cornelius 2005:29.

4 2005 (4) SA 163 (C).

5 Section 22 of the *Constitution of the Republic of South Africa*, 1996.

6 The interim Constitution came into operation on 27 April 1994.

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26(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

The abovementioned section was superseded by section 22 of the 1996 Constitution which has been mentioned above.

Section 22 provides for a right to “occupational choice” or “occupational freedom”.⁷ It is the latter that currently allows professional rugby players to repudiate professional contracts with alarming consistency.⁸ It has become general practice in the South African rugby context to repudiate a professional contract if such contract is not to the complete satisfaction of the player in question. The question must be raised why the law is allowing such practices to continue: Is it because there are gross defects in the contracts of most South African players, or because the right provided in section 22 of the Constitution has been awarded disproportionate importance?

3. The practical problem: The standard of contracts or the disproportionality of the Constitution?

Most professional rugby contracts in South Africa contain clauses similar to the following:

If the player, during the duration of this agreement, receives an offer to play rugby union within South Africa or overseas during or after the expiry of this agreement, the following shall apply;-

1. if the player is willing to accept the offer, he shall notify the franchise thereof and shall disclose, in writing, to the franchise the remuneration package offered to him and the franchise shall have a period of 21 (twenty-one) working days within which to match, by written notice to the player, the terms of the abovementioned offer. In this respect, the “matching” of the offer shall be deemed to refer to the matching of the remuneration package offered to the player. Should the franchise exercise its right by matching the said offer, the player shall contract with the franchise on the basis of that offer, the object

7 De Waal *et al* 2005:375. The authors also make mention of the fact that the replacement of section 26 of the interim Constitution with section 22 of the 1996 Constitution was a “highly controversial” issue. The Constitutional Assembly was eventually persuaded to replace the “economic activity” right of the interim Constitution.

8 During the South African domestic rugby seasons of 2008 and 2009, a total of six (known) provincial players committed breach of contract by forsaking the unions with whom they had previously contracted. By the end of May 2010, five of these six players had been omitted from their breach and allowed to play for their new unions in 2010 on the basis of section 22 of the 1996 Constitution.

being that the franchise will be given a preferential right to continue the employment of the player.

2. save as is provided for in 1. above and subject to the player's right to discuss the matter with his legal representative, the player shall keep any offer made to him for employment as a rugby player after the expiry date of this agreement strictly confidential and shall not disclose either the existence of the details of any such offer to the public nor shall he allow it to be disclosed to the press or other players contracted by the franchise. In this respect, the player acknowledges that any disclosure as to his employment or proposed employment otherwise than by the franchise is an issue which is likely to have a negative impact amongst the contracted franchise players and accordingly that it is of the utmost importance that there be no unauthorised disclosure prior to the expiry of this agreement.
3. the player shall under no circumstances enter into any contract with any other franchise, whether in South Africa or overseas, prior to the expiry of the 21-day period stipulated in clause 1. Should the player act in breach of this provision, the franchise shall be entitled to refuse to issue a Clearance Certificate to allow transfer of the player to another franchise, until such time that agreement has been reached between the franchise and such other franchise for payment of a development (transfer) fee as determined by the franchise.⁹

A clause like the abovementioned one will have the following practical implications:

- (i) An opposing franchise may at any time approach a player who is still under contract with his current franchise.
- (ii) The player must inform his current employer of the offer by the opposing franchise, so as to provide the current employer the opportunity to "match" such offer.
- (iii) If the player's current employer matches the remuneration package offered by the opposing franchise, the player is obliged to stay with his current employer. If, however, the current employer is unable to match the remuneration package, the player will be free to enter into a contract with the opposing franchise.¹⁰

9 This clause, while not identical, is in essence certainly similar to the relevant clause currently included in South African Super 14 player contracts.

10 In the case of *Golden Lions Rugby Union v Venter and Others* (unreported case no. 2007/2000), the contract which the defendant had entered into with the plaintiff contained a similar escape clause as the one provided in the text above. The defendant received an offer to play for the Sharks franchise, which is located in Durban on the South African East coast. His contract stated that if his current employer (the Golden Lions Rugby Union) was able to "match" any offer received by a player from an opposing union or franchise within a specified period, the player was obliged to stay with his current employer. The Golden Lions Rugby Union matched the offer of the Sharks in monetary terms, but the court decided that they (The Golden Lions Rugby Union) could not match the other benefits on offer by the Sharks, namely superior coaching staff and the opportunity to train on the beach. This

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- (iv) The player is not allowed to enter into a contract with the opposing franchise before a certain period (21 days in the abovementioned example) has expired. It is this implication that is currently being contradicted by players.

The question must be raised why it should be necessary for a union or franchise who is in an obligatory agreement with a player to be “allowed” a time period to match an offer received by such player from another union or franchise at all. The player is bound to his contract (or at least ought to be, provided that such contract was concluded on equal footing), and there is no reason why a union or franchise should have to match any offers from competitors while the player in question is still obligated to them. If a player were to sign a contract with a different franchise or union whilst still obligated to his current franchise or union, such a player would be committing blatant breach of contract and should certainly have to pay appropriate damages, or, more effectively, be compelled to serve out his or her contract.

This raises another reason for the current practice of repudiation of contracts by South African rugby players. Most player-contracts contain a clause providing for a so-called “development fee” or “transfer fee” to be paid to the transferor-union or franchise by the transferee-union or franchise for the services of the player in question.¹¹ This “transfer fee” constitutes nothing but an acknowledgment of guilt — both by the transferee-union or franchise and the repudiating player.¹² What aggravates the problem is that there are currently four rugby unions in South Africa that can be described as financially powerful, and it is no surprise that these four unions possess the bulk of South Africa’s top rugby players.¹³ While unions that are not as financially powerful would without exception have preferred to maintain the player in question’s services, such unions realise that the reluctance of South African courts to force a player to render a service of such a personal nature as the playing of rugby means that they must be content with the pay-off. The player has a protected constitutional right to freedom of trade and occupation, but no reciprocal duty towards his employer. Le Roux states clearly that the Constitution basically has had no effect on decisions made in the current context.¹⁴ As far as this inequitable state of affairs is concerned, it is submitted that the time has come for the Constitution of South Africa to transform.

decision rendered the inclusion of similar clauses obsolete, except in cases of more meticulous wording of such clauses.

11 Le Roux 2003:120.

12 In fact, the European Court of Justice already expressed doubt about the acceptability of the “transfer fee” in the case of *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* 1996 All ER (EC) 97.

13 For interest’s sake, it ought to be mentioned that a franchise such as the Sharks has an annual budget of more than four times that of the Cheetahs, although both teams play in exactly the same competitions, namely the Super 14, which consists of the best regional teams from South Africa, Australia and New Zealand, and the domestic Currie Cup competition.

14 Le Roux 2003:123.

4. Exacerbation of the problem: The reluctance of the Courts to grant orders of specific performance

It has already been mentioned, and well documented elsewhere, that South African Courts (with the exception of the Full Bench in the *Santos* case mentioned above and discussed below) are reluctant to grant orders for specific performance of services of a personal nature such as the playing of rugby and the duties that accompany this service. This reluctance should, however, have ceased with the abovementioned decision, and yet, as will be indicated below, in 2010 the Cape High Court refused to compel two professional rugby players to honour their contracts with their (then) employer. In order to qualify the solution to the problem identified above, one would have to examine the various courts' reasoning in the matters where opportunities which had arisen for South African courts to compel sportsmen to honour their professional contracts were not seized.

4.1 *Troskie en 'n Ander v Van der Walt*¹⁵

Ironically, the first substantial dispute regarding breach of contract by a player occurred in an era when rugby was still strictly considered an amateur sport, both locally and abroad. In the abovementioned case, Nico van der Walt, who played for Free State in the early nineties, had entered into a contract with the appellant in the abovementioned application on the 24th of January 1991.¹⁶ The entire contract reads as follows:

Nico het R1 500 gekry van 1991 in 1990.

Van dag 24-1-91 van R4 000 is R3 000 vir Nico se rugby by O/G¹⁷ R1 000 sal ons besluit of dit 'n deel van 1992 is of 'n lening.

(Get)

N van der Walt (1991-seisoen)

(Get)

WP Troskie¹⁸

The first appellant and the respondent had thus entered into a contract which basically obligated the respondent to play rugby for the second appellant (Old Greys Rugby Football Club) for the entire 1991 season. In return, the respondent was to be paid the amount of R4 000.¹⁹ As it turned out, the respondent joined the opposing Collegians club on 18 February 1991, with

15 1994 (3) SA 545 (O).

16 *Troskie en 'n Ander v Van der Walt*: 548.

17 The "Old Greys"-club in Bloemfontein.

18 *Troskie en 'n Ander v Van der Walt*: 550.

19 As mentioned earlier in the text, the contract under discussion was entered into in an era when all levels of rugby played in South Africa still had to adhere to the amateur code. This contract stated expressly that the respondent was to be paid for playing rugby, which made the contract for all practical purposes void *ab initio*. See *Troskie en 'n Ander v Van der Walt*: 550.

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the intention of forthwith playing his club rugby for that particular club. The requirements for repudiation as a form of breach of contract are as follows:²⁰

- The debtor (respondent in current case) must have no intention of honouring his/her part of the contract.
- The debtor (respondent in current case) must inform the creditor (first appellant in current case) of his/her intention not to honour the contract.
- The creditor (first appellant in the current case) must accept the debtor's repudiation as an act of breach of contract.

In the case under discussion, the respondent's actions left no doubt as to the fact that he did not intend to honour his contract. The creditor (first appellant) was informed of this intention. However, the creditor did not accept the debtor's repudiation in this matter,²¹ and herein lies the interest of this case. The creditor (Troskie in his personal capacity and on behalf of the Old Greys club) applied for an order *compelling* the debtor (Van der Walt) to play for the Old Greys club for the entire course of the 1991 season. In essence, the appellant sought an order for specific performance of the obligations in question. The question, which had to be answered, was whether a court could order specific performance of a contractual obligation that will essentially compel a rugby player to play for a team for which he was unwilling to play. Le Roux states, as already mentioned above, that the perception exists that "courts are reluctant to order specific performance in cases of breach of contract where the defaulting party is required to render performance of a very personal nature, such as contracts of employment."²² Christie agrees, stating that:

an order for the specific performance of a contract of employment will, in the exercise of the Court's discretion, not normally be granted ... the reason why the Courts have not granted such orders remain as valid as ever, provided it is remembered that in every case the Court has a discretion.²³

Kerr adds that "no Court, for example, can force a singer to sing or an artist to paint a picture because these tasks require the application of highly personal skills".²⁴ These statements certainly rang clear in the case under discussion. Wright J, writing on behalf of the full bench, held the following:²⁵

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

20 Van der Merwe *et al* 2007:363-364.

21 *Troskie en 'n Ander v Van der Walt*: 548.

22 Le Roux 2003:116.

23 Christie 2006:528.

24 Kerr 1989:530.

25 *Troskie en 'n Ander v Van der Walt*: 552.

afhanklik sal wees van die besondere speler se spesifieke eienskappe en ook sy verhouding met die klub vir wie hy rugby speel. Dit is sterk te betwyfel of daar in die besondere omstandighede van hierdie saak ooit 'n bevel van spesifieke nakoming gepas sou kon wees, heeltemal afgesien van die feit dat die amateurkode van die Internasionale Rugbyvoetbalraad ook nog van toepassing is.

In addition, the court *a quo* in the current case, in the person of Malherbe JP, decided the following:²⁶

Na my mening is dit 'n belaglike smeekbede en sal geen redelike Hof so 'n bevel tot spesifieke nakoming van Van der Walt se beweerde kontraktuele verpligting gelas nie.

What is interesting about the decision of Wright J above, is that he emphasises that in the current case an order for specific performance may never be granted, *afgesien van die feit dat die amateurkode van die Internasionale Rugbyvoetbalraad ook nog van toepassing is*.²⁷ By implication, an order for specific performance in similar circumstances would not have been granted, even if rugby had already been a professional sport at the time of the judgment. The decision was arguably correct at the time, especially since it agreed with South African common law on the matter of an order *in forma specifica*.²⁸ The reality, however, is that the decision at that stage, just before the dawn of professionalism in rugby, left the law of contract with no significant remedy (except of course damages which, it is submitted, is an inadequate remedy in these circumstances) for the breach of a professional rugby contract by an employee.

4.2 *Coetzee v Comititis and Others*²⁹

The abovementioned case presents facts which are in essence similar to the *Troskie* case. *In casu*, the applicant was a professional soccer player who had approached a club called Ajax Cape Town for a contract to play professional soccer.³⁰ The latter club was concerned about the match fitness of the applicant, and requested a club called Vasco da Gama, which acted as a “nursery” for Ajax in order to get players back to peak match fitness, to accommodate the applicant.³¹ The applicant eventually played for the Vasco da Gama club from January 2000 until the end of that season in April/May 2000, after which the applicant approached the first respondent (Comititis, who at that time was the owner of the Ajax club) to play for the Ajax club.³² The latter informed the former that there was no prospect of him playing for the club, but refused to let him play for a different club before such other club had paid a

26 *Troskie en 'n Ander v Van der Walt*: 553.

27 *Troskie en 'n Ander v Van der Walt*: 552.

28 That is performance as specified in the contract between the relevant parties.

29 2001(1) SA 1254 (C).

30 *Coetzee v Comititis and Others*: 1258.

31 *Coetzee v Comititis and Others*: 1258.

32 *Coetzee v Comititis and Others*: 1258.

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transfer fee in the amount of R50 000.00.³³ The applicant contended that the National Soccer League of South Africa's constitution, rules and regulations relating to the transfer of professional soccer players whose contracts have terminated were contrary to public policy and unlawful or inconsistent with the provisions of the Constitution.³⁴ Traverso, J decided, unsurprisingly, that the constitution and regulations of the National Soccer League were indeed unconstitutional, as it limited players to claim free transfer to other clubs or become free agents.³⁵ In effect, the Court decided that a player could not be forced (or even blackmailed) to remain at a club for which the player was not inclined to play.³⁶

4.3 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*³⁷

On 20 July 2001, the applicant in the abovementioned case, a professional soccer club, and the first respondent, a professional soccer coach, entered into a contract stating that the latter would coach the former's professional team for a period of two years from 20 July 2001 to 30 June 2003.³⁸ On the 24th of June 2002, the first respondent wrote a letter of termination of his services to the applicant, effectively committing breach of contract in the form of repudiation. The applicant approached the Court for an order of specific performance against the first respondent, which would, if granted, compel the latter to serve as head coach of the former until 30 June 2003. The contract contained the following clause:

9.1. Should the head coach commit any breach of this agreement and fail to remedy such breach within 14 days after registered post of notice from the club or its attorneys requiring the head coach to do so, the club shall have the right to cancel forthwith, or to take action against the head coach for specific performance of his obligation under the agreement.³⁹

This clause clearly provided for the remedy of specific performance in the event of breach of contract by any of the parties.

The reasons provided by the first respondent for wanting to leave the service of the applicant were as reasonable and convincing as any. These reasons included a lack of security of employment, wishing to relocate his family to

33 *Coetzee v Comitis and Others*: 1258.

34 *Coetzee v Comitis and Others*: 1259.

35 *Coetzee v Comitis and Others*: 1274.

36 It must be borne in mind that the facts of this case differ from other similar cases in so far as the Ajax club refused to release the applicant *after* his contract with them had already lapsed. Consequently there is no indication of breach of contract by the player. The applicability of this case lies therein that the Court decided that a player could not be forced to remain at a club for which that player was not inclined to play.

37 2002 (5) SA 697 (C). This is the decision by Desai J writing for the Court *a quo*. The decision of the full bench will be discussed later.

38 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 698.

39 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699.

Cape Town, “and a much better offer received from another club”⁴⁰ (author’s emphasis). Desai J in fact stated expressly that “the respondent’s principal reason for leaving the applicant is a commercial one, namely that he has secured a better contract.”⁴¹ Mr Arendse SC on behalf of the applicant contended that “it would be a blatantly unfair labour practice, constituting an infringement of the applicant’s constitutional rights, to allow the first respondent to resile from his contract purely on the basis that he has received a better offer.”⁴²

Desai J went so far as to state that the first respondent could not avoid the consequences of performing under the contract by merely alleging an unwillingness to continue to perform under the contract.⁴³ The Court further stated that “a party may resile from a contract only on one of the recognised grounds relating to breach or repudiation or upon notice where this is provided for in the contract.”⁴⁴ However, in deciding whether the remedy of specific performance was a relevant one in this particular case, the Court stated the following:⁴⁵

The nature of the services are of such a personal nature that it would be virtually impossible to determine whether the first respondent is functioning optimally. He no longer wishes to work for the applicant. Should I compel him to be their coach for a further 12 months? Would this not compromise his dignity? He has problems with regard to his family which may or may not be resolved if he moves on to another team. Furthermore, first respondent’s relationship with applicant has deteriorated. There has been a great deal of publicity, perhaps fuelled to some extent by the applicant or its lawyers, which has undoubtedly exacerbated the ill-feeling between the parties. I do not believe that in these circumstances they will be able to restore a working relationship, let alone the intimate relationship of that of a coach and his team.

A similar path was followed as the one in *Troskie and Coetzee supra*. However, Desai J did make mention of the fact that counsel for the appellant lodged a note referring to the reported case of *Brisley v Drotsky*,⁴⁶ wherein Cameron JA stated the following:

... the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ...⁴⁷

The applicability of the *Brisley v Drotsky* case to the current topic is briefly discussed and evaluated below.

40 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699. The club referred to is the Ajax Cape Town Club.

41 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699. The first respondent received a signing-on fee of R250 000.00 at the applicant, with a monthly salary of R30 000.00. The offer he had received from the second respondent consisted of a signing-on fee of R800 000.00 with a monthly salary of R62 000.00.

42 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699.

43 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699.

44 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 699.

45 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 701.

46 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*: 702.

47 *Brisley v Drotsky* 2002 (4) SA 1 (SCA): 5.

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4.4 *Santos Professional Football Club (Pty) Ltd v Igesund and Another*⁴⁸

Upon Desai J's decision, Santos Professional Football Club lodged an appeal to the full bench of the Cape Provincial Division. The unanimous decision of the full bench in this case offered a precedential solution to the entire problem regarding player-poaching in South Africa, and possibly even internationally. Unfortunately, as indicated below, this decision did not have the required effect.

The essence of this case lies therein that Foxcroft J actually conducted a serious search into the true nature of the remedy of specific performance in South African law (more attention is paid to the nature of this remedy below). The nature of the remedy was compared to a similar remedy in English law, and the origin of the remedy in South African law was investigated. This is an indication that the Court's eventual decision should probably be regarded as the most thoroughly researched one in the context of the remedy of specific performance with regard to sport contracts.

The first applicable point the Court makes is that one should be reminded that both parties had agreed to the fact that breach by either of them would render the right "to take action for specific performance" to the other party.⁴⁹ On this point, the Court made it abundantly clear that the right to decide upon a suitable remedy rests with the injured party, and it is not for the party in breach to prescribe to the injured party which remedy to pursue, as the first respondent had attempted to do *in casu*.⁵⁰ Foxcroft J stated:

As I have tried to show, defendant (first respondent) has no right to prescribe how the plaintiff will make the election provided by law.⁵¹

The abovementioned statement is the first indication that the Court felt that there had to be a way, especially in a professional era of sports, not to let the obligation of honouring a contract of employment become a watered-down phenomenon. The Court further stated that on the facts of the case, there did not seem to be any inequity in obliging the first respondent to adhere to his contract.⁵² In fact, according to the Court, the appellant (Santos) was the only party that would be prejudiced if the first respondent were to be compelled to perform, and subsequently were to perform insufficiently.⁵³ The question raised by Desai J as to whether an order compelling the first respondent to continue working for an employer for which he did not want to work, would compromise his (first respondent's) dignity, was answered by Foxcroft J in the negative:⁵⁴

48 2003 (5) SA 73 (C).

49 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 76.

50 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 81-82.

51 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 81.

52 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 85.

53 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 85.

54 *Santos Professional Football Club (Pty) Ltd v Igesund and Another* (Full Bench): 86.

It must be remembered that we are dealing with a contract which first respondent entered into freely and voluntarily and in terms of which he agreed to an order of specific performance being made.

The Court decided that a binding agreement had existed between appellant (applicant in the Court *a quo*) and first respondent. The Court ordered the first respondent to continue as head coach of the appellant until 30 June 2003 on the terms and conditions set out in the memorandum of agreement between the parties.

This decision was, from a legal point of view, to set professional sport in South Africa, and especially the honouring of professional sport contracts, on the right path. In expounding the legal position in the wake of the case, Cornelius stated in 2003 that “while an athlete is still under contract, he or she can and should be restrained from moving to another club without permission from the current club.”⁵⁵ Naudé added that “setting a precedent that even such an ‘abnormal’ employment contract can never be specifically enforced may give rise to grave injustice and the evasion of plain contractual duties.”⁵⁶ Sadly, six years onwards, the decision seems not to have had the desired effect (refer to footnote 6). The question should be asked why Courts are still reluctant to order specific performance in the case of repudiation of sport contracts.

The decision by the full bench in the *Santos* case provided a potential solution to the problem of player-poaching in South African sport. The key to the decision was of course that the parties had contracted on equal terms and in equal capacities, and therefore it could not be argued by the first respondent that he had contracted under duress. In order to ascertain whether this decision was a correct and sustainable one, one would have to investigate the true nature of the remedy of specific performance, with particular reference to the South African legal context.

5. The nature of specific performance

Specific performance is described as the primary remedy for breach of contract.⁵⁷ Consequently, a party is in principle entitled to insist upon proper and full performance by the other party.⁵⁸

In early Roman law, a contractant who committed breach of contract could not be ordered to deliver a thing or render a service, but only to pay a sum of money.⁵⁹ In later Roman times and certainly in Roman-Dutch law, it became

55 Cornelius 2003:731.

56 Naudé 2003:281.

57 Eiselen 2009:319.

58 Eiselen 2009:319; Bhana *et al* 2009:253. Van der Merwe *et al* 2007:383; Christie 2006:523; Kerr 1989:528.

59 Van der Merwe *et al* 2007:383; De Wet & Yeats 1978:189; *Troskie en 'n Ander v Van der Walt*: 550. Du Plessis 1998 proved that the remedy of specific performance, although not quite fully developed, was a familiar one in Roman law.

Mould/A critical study of the recurring problem of repudiation in the context of professional rugby in South Africa with particular emphasis on transformative constitutionalism possible for a contractant to obtain an order for specific performance.⁶⁰ Under the influence of English law, in terms of which specific performance has always been viewed as an exceptional remedy.⁶¹ South African courts began to exercise their discretion in such a manner “that it appeared as if an order for specific performance would be automatically refused whenever particular circumstances were present”.⁶² This approach was in direct contrast to the South African legal one, which stated that an order for specific performance should be refused in exceptional circumstances only.⁶³ The English legal concept of specific performance was first introduced into South African law by Innes J in the case of *Farmers’ Co-op Society (Reg) v Berry*.⁶⁴ The Court stated specifically that:

... there are many cases in which justice between the parties can be fully and conveniently done by an award of damages.⁶⁵

This statement, according to Christie, gave rise to the argument that specific performance should not be granted because damages would be an adequate remedy.⁶⁶ Christie calls this a “false argument”.⁶⁷ In the case of *Haynes v Kingwilliamstown Municipality*⁶⁸, De Villiers AJA exclaimed that

It is settled (in our law) that although the Court will as far as possible give effect to a plaintiff’s choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance ...⁶⁹

The Court proceeded to list the appropriate grounds upon which a Court would be able to exercise its discretion. These grounds are the following:

- i. Where damages would adequately compensate the plaintiff.
- ii. Where it would be difficult for the Court to enforce its decree.
- iii. Where the thing claimed can readily be bought anywhere.
- iv. Where specific performance entails the rendering of services of a personal nature.
- v. Where it would operate unreasonably harshly on the defendant, or where the agreement giving rise to the claim is unreasonable, or

60 Eiselen 2009:319; Bhana *et al* 2009:253; Van der Merwe *et al* 2007:383; Kerr 1989:528; *Troskie en ’n Ander v Van der Walt* 550.

61 Christie states in fact that damages was the only remedy the old English common law courts could offer for breach of contract. Other remedies, such as specific performance, were developed in the Chancery Court, which was described as a court of equity, not a court of law. Hence, damages came to be described as a legal remedy and specific performance, among others, as an equitable remedy.

62 Van der Merwe *et al* 2007:383.

63 Van der Merwe *et al* 2007:383.

64 1912 AD 343.

65 *Farmers’ Co-op Society (Reg) v Berry*: 350.

66 Christie 2006:523.

67 Christie 2006:523.

68 1951 (2) SA 371 (A).

69 *Haynes v Kingwilliamstown Municipality*: 378.

where the decree would produce injustice, or would be inequitable under all the circumstances.⁷⁰

It is the fourth and fifth grounds mentioned above that are currently contributing to the practice of “player-poaching” in South African rugby in a significant way. The following excerpts from two subsequent cases prove that the abovementioned grounds need not be as restrictive as they were made out to be under English law.

Firstly, in the case of *Benson v SA Mutual Life Assurance Society*⁷¹, Hefer JA confirmed that a right to specific performance was indeed in existence, subject only to the qualification that the Court had a discretion to grant or to refuse an order for performance.⁷² Hefer JA continued stating that “this right [to specific performance] is the cornerstone of our law relating to specific performance.”⁷³ Finally, in discussing the appropriateness of an order for specific performance, Hefer JA criticised the incorporation of the English legal concept into and application of specific performance in South African law:

I have already dealt fairly extensively with a plaintiff’s right according to South African law to demand performance and referred to the fact that the Courts will as far as possible give effect to that right. That is not the position in England. At common law a plaintiff has no right to demand performance; his only remedy is a claim for damages. Specific performance is a form of equitable relief which could originally only be obtained in the Court of Chancery in accordance with well-defined rules. The most important rule, from which many others derived, was that specific performance would not be granted where the plaintiff could be compensated adequately by damages.⁷⁴

The Court then concluded its statement with the following:

... and so 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. *There is neither need nor good reason for this process to continue* (author’s emphasis).⁷⁵

Despite this 1986 statement of the legal position, Courts are still reluctant to order specific performance.⁷⁶ It should be borne in mind that the facts of the *Benson* case were evidently different from any of the sport employment contract cases discussed above, but surely the principles regarding specific performance should stay the same? The question as to why Courts are still reluctant to order a party who has contracted on equal foot and terms with another party to comply with his or her obligations under an employment

70 *Haynes v Kingwilliamstown Municipality*: 378.

71 1986 (1) SA 776 (A).

72 *Benson v SA Mutual Life Assurance Society*: 782.

73 *Benson v SA Mutual Life Assurance Society*: 782.

74 *Benson v SA Mutual Life Assurance Society*: 785.

75 *Benson v SA Mutual Life Assurance Society*: 785.

76 Le Roux 2003:116.

Mould/A critical study of the recurring problem of repudiation in the context of professional rugby in South Africa with particular emphasis on transformative constitutionalism contract becomes even more difficult to answer when one considers secondly, the case of *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*.⁷⁷ In his decision, Van Dijkhorst J went so far as to state that “in our law, the grant of specific performance does not rest upon any special jurisdiction. It is an ordinary remedy to which in a proper case an applicant is entitled.”⁷⁸ Regarding the matter of a Court’s discretion in granting an order of specific performance, Van Dijkhorst J phrased the legal position as follows:⁷⁹

1. The discretion must be exercised judicially. It is not arbitrary or capricious but sound and reasonable.
2. It is not confined to specific types of cases.
3. It is not circumscribed by rigid rule.
4. Though it governs itself as far as it may by general rules and principles, it at the same time withholds or grants relief according to the circumstances of each particular case when these rules and principles will not furnish any exact measure of justice between the parties.
5. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are absolutely binding in all cases.
6. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future enquiries.

The Court posed the question whether a rule of law exists in terms of which a party’s wrongful cancellation of a contract of *personal service* (author’s emphasis) puts an end to the contract despite the fact that the other party does not accept this repudiation (as occurred in the *Troskie* and *Santos* cases). If the answer to this question were to be in the affirmative, it would follow that no order for specific performance could be granted as there would be no contract in force.⁸⁰ The Court answered the question thus:

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.⁸¹

The situation wherein an employer seeks an order for specific performance against an employee, is a little more complicated, because the personal freedom of the employee is at issue.⁸² The obvious risk that arises is that it may be considered forced labour. Van der Merwe *et al* state that “a distinction

77 1982 (4) SA 151 (T).

78 *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*: 155.

79 *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*: 156.

80 *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*: 156.

81 *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd and Another*: 156.

82 Van der Merwe *et al* 2007:385.

is drawn between an undertaking by an employee not to enter into the service of another employer during the term of his contract of service and a positive undertaking to enter into the service of an employer. The former type of undertaking would be enforced more readily than the latter.”⁸³ However, in both the *Troskie* and *Igesund* cases, the employee had given an undertaking not to enter into the service of another employer, and yet did just that. In the *Troskie* case, an application to compel the employee to honour his contract was refused, as had been done in the *Igesund* case by the court *a quo*. The full bench in the latter case rectified the situation, and it is submitted that there need be no reason why contemporary decisions should not follow the precedent set by the full bench in the *Igesund* case. The key to the full bench’s order in the *Igesund* case is explained by Van der Merwe *et al* as follows:

The factor that tipped the scales was that the contract in issue was not an ordinary contract of employment (author’s emphasis). The parties contracted on an equal footing and the employee enjoyed much latitude in performing his duties. There also was no breakdown in the interpersonal relationship and no recognised hardship to the defendant.⁸⁴

It seems to be implied by Van der Merwe *et al* that the order for specific performance was granted on the basis that the parties had contracted on *equal footing*, and that therefore the sports contract is in fact a contract *sui generis* and not an “ordinary” contract of employment at all. This certainly deserves finer analysis.

6. Sport contracts: *Sui generis* or *classicus*?

Prinsloo opines that when a player and a club (also franchise or union) agree that the player would play for that club for a determined period and that such a player would be paid for his services, a contract of employment is concluded.⁸⁵ In the South African rugby context, the employer will not only be the relevant franchise or union, but also the provincial or national body.⁸⁶ In a typical contract of a professional South African rugby player, the relationship that exists between such player and the union or franchise to which such player is contracted has been defined as a “labour relationship”.⁸⁷ In order to determine whether this classification is indeed accurate, one would have to look at the definition of a contract of employment. Van Jaarsveld and Van Eck define such a contract as follows:

A contract in terms of which services are rendered under the authority of the employer for remuneration and for a fixed term.⁸⁸

83 Van der Merwe *et al* 2007:385.

84 Van der Merwe *et al* 2007:385.

85 Prinsloo 2000:229.

86 Prinsloo 2000:229. The current national body governing rugby is known as the South African Rugby Union (SARU).

87 Prinsloo 2000:230.

88 Van Jaarsveld & Van Eck 1998:50.

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Stalwarts of the amateur era in which rugby was played will disagree with the fact, but sport (in a more contemporary era) certainly qualifies as the rendering of a service. Currently, contracts are being concluded for fixed terms and players play for remuneration. It is the element “under authority of the employer” which proves to be extremely troublesome in view of the fact that Prinsloo states that the contract between a rugby player and his union or franchise is indeed one of employment.⁸⁹

According to Van Jaarsveld and Van Eck, “the existence of a relationship of authority between employer and employee is an important feature of this (employment) contract”.⁹⁰ They continue to state that the mentioned relationship of authority between an employer and employee encompasses three components, namely:

- (i) The services are rendered in respect of a subordinate relationship;⁹¹
- (ii) the services are rendered under control and supervision,⁹² and
- (iii) the employer gives guidance to the employee during the rendering of the services.⁹³

The first of the abovementioned elements is in direct contrast to the consideration of the full bench in the *Santos* case, namely that parties to a sports contract usually negotiate and contract on equal terms and in equal capacities.⁹⁴ If the *ratio* in the *Santos* case were considered to be accurate, then it would mean that a sports contract, while certainly similar in nature to an employment contract, differs from the latter on the basis that no “subordinate relationship” exists between the parties, either during negotiations or during the ensuing relationship. There is support for the notion that the Court in the *Igesund* case indeed declared a sports contract to be *sui generis*. Naudé states that the first indication in the abovementioned case that the Court did not consider the contract in question to be an ordinary contract of employment was that the Court stated that the said contract provided expressly for the right to specific performance in case of breach.⁹⁵ Secondly, Naudé states that in the relevant contract in the *Igesund* case, “the first respondent was given *carte blanche* in the execution of his most important duty under the contract, to coach and select the appellant’s team.”⁹⁶ It is agreed with Naudé that this specific characteristic of the contract under discussion should in itself exclude a sports contract from the definition of an ordinary contract of employment provided above.⁹⁷ The fact that a coach, as in the *Igesund* case, or a player in any other case, is granted *carte blanche* as to the rendering of his or her

89 Prinsloo 2000:230.

90 Van Jaarsveld & Van Eck 1998:53.

91 Van Jaarsveld & Van Eck 1998:54.

92 Van Jaarsveld & Van Eck 1998:54.

93 Van Jaarsveld & Van Eck 1998:54.

94 See also the points made by Naudé in this regard, discussed below.

95 Naudé 2003:270.

96 Naudé 2003:271.

97 Provided, of course, that the clause under discussion is indeed present in all sports contracts.

services, does not square with the components or elements of a contract of employment mentioned by Van Jaarsveld and Van Eck, and it should therefore certainly not be classified as such.⁹⁸ In any contract regulating a relationship between a professional sportsman and his or her employer, the former will of course be expected to conduct him- or herself in such a manner as not to bring the name of his or her employer-union or franchise into disrepute, nor breach his or her duty to behave in a proper manner towards his or her employer. As far as the contractual relationship is concerned, though, the parties should have equal footing regarding pre-contractual negotiations and the determining of all practical aspects of the ensuing obligatory relationship. It is fair to assume that a rugby player who has achieved professional status in his sport, would possess the knowledge and skill to conduct his services without prescription from the union or franchise that employs him.⁹⁹ The final indication that the contract entered into between the appellant and the first respondent was not a mere employment contract is the large sum of money the latter had commanded from the former.¹⁰⁰ Naudé argues (it is submitted correctly) that the first respondent in the *Igesund* case could certainly not be seen as the servant in a typical “master and servant” relationship.¹⁰¹ Similarly, the bargaining power of professional sportsmen, especially rugby players in South Africa, has since 1995 increased to such an extent that it would be fair to say that no professional rugby player would ever be in a subordinate position to the employer or potential employer as far as pre-contractual negotiations but also contractual relations themselves are concerned.

It is submitted that sports contracts should be perceived by the law as being of a *sui generis* nature. However, in order to qualify this classification, a sports contract should comply with certain requirements. Firstly, all pre-contractual negotiations between the player and his or her potential employer should be conducted on equal footing, meaning that the parties should possess equal bargaining power in order to determine the content of their contract. Secondly, while both parties will certainly have certain duties towards each other, the ensuing contractual relationship should in no way involve subordination of any of the parties, particularly the player. As mentioned above, a professional sportsman ought to be entrusted with his duties to such an extent that he would be considered able to perform them without constant interference by his employer-union or franchise. Thirdly, and most importantly, a sports contract should always make specific provision for the right to specific performance in case of breach of contract by either party. Based on the previous requirement of equal bargaining opportunities and status of the parties as far as the contract

98 In the contractual relationship between the appellant and the first respondent in the *Igesund* case, the coaching, as well as the selection of the team and other tasks relating to said team, was left entirely in the hands of the first respondent. The “employee” was certainly not in a subordinate relationship with the “employer”.

99 This does not imply that a player would be allowed not to comply with game plans, team structures, disciplinary procedures, *etcetera*. It merely implies that a professional player should be shown the necessary belief that his basis skills and knowledge of the game are sufficient for the performing of his duties in terms of the contract.

100 Naudé 2003:271.

101 Naudé 2003:271.

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... 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.¹⁰³

Cameron JA concluded his decision by stating:

The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract *enhances rather than diminishes* our self-respect and dignity (author's emphasis).¹⁰⁴

The remedy of specific performance should therefore be a primary one in the case of repudiation of a *sui generis* sports contract, based on the elements provided above. The submission that a sports contract should indeed be seen as *sui generis* must be qualified by equitable considerations. Unfortunately, the Constitution's current focus is more on equality than equity.¹⁰⁵ To qualify this statement, one would have to inspect the nature of the English-legal concept of equity, before a submission can be made that the Constitution needs to transform to such an extent as to balance the abovementioned two values.

7. Equity

The word "equity" is defined by the Oxford English dictionary as "the quality of being fair and impartial" or "a branch of law based on natural justice, to be used when existing laws would be unfair or inappropriate." Pearce and Stevens state that "equity connotes justice and fairness, so that to act 'equitably' is synonymous to acting 'fairly'".¹⁰⁶

In the case of *Council of Mining Unions v Chamber of Mines of SA*,¹⁰⁷ the court stated that even though conduct may be lawful, it might not necessarily be fair.¹⁰⁸ De Waal *et al* add that "whether conduct is fair or not necessarily involves a degree of subjective judgment"¹⁰⁹ and that "any understanding of fairness must involve weighing up the respective interests of the parties — as

102 2002 (4) SA 1 (SCA).

103 *Brisley v Drotsky*: 35-36.

104 *Brisley v Drotsky*: 36.

105 Acknowledgment is hereby given to the Honourable Mr Justice Fred Beckley for his insights into this matter.

106 Pearce & Stevens 1998:3.

107 1985 (6) ILJ 293 (IC).

108 At 295C.

109 De Waal *et al* 2005:392.

well as the interests of the public.”¹¹⁰ Perhaps the finest description of what equity (which can be described as an element or outflow of the term “fairness”) entails with regard to the current article is provided by Pearce and Stevens who mention that “cases should be decided in a way which is fair and right ...”¹¹¹. It is submitted with all due respect that Courts have erroneously applied the rules of equity in the cases discussed above by declaring that a sportsman or woman cannot be forced to render services of a nature as personal as the playing or coaching of sports. What the Courts should have concluded was that if a sportsman or woman had entered into a contract freely and willingly, equity would demand of such a party to honour his or her contract, and at the occurrence of attempted repudiation, be held to such contract by way of a court order for specific performance of their contracts. Lewis states that the court should, in appropriate circumstances, be “given a mandate to scrutinize the ‘fairness’ or ‘reasonableness’ of contractual terms”.¹¹² If contractual terms were found to be fair, surely the courts should then also be granted a mandate to enforce performance in terms of such terms, should one of the parties attempt to repudiate the contract. Brand states correctly that it is not necessary to “find a specific constitutional value, expressly referred to in the Constitution, to underpin every rule of contract law.”¹¹³ It is submitted, however, that more consideration should be given to the value of fairness or equity in a decision that involves repudiation of a professional rugby contract by a professional rugby player in South Africa. Of course, the courts will need a mandate from the Constitution. This means that the value of equity must be absorbed into the Constitution, so as to provide the courts with support in applying this value to cases before them. It is suggested that the Constitution be transformed to such an extent as to lend more weight to the concept of equity in South African law. Transformative constitutionalism is not a simple procedure, however, as it entails:

a long term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relations in a democratic, participatory, and egalitarian direction.¹¹⁴

By implication, transformative constitutionalism can only become active as far as specific performance and equity is concerned if the Constitution itself is first transformed so as to lend a greater weight to equity.

8. Conclusion and suggestions

The problem of repudiation of professional rugby contracts in South Africa will continue to increase unless, firstly, players start taking responsibility for their legal actions of signing contracts, and secondly, Courts adopt an attitude of

110 De Waal *et al* 2005:392.

111 Pearce & Stevens 1998:3

112 Lewis 2003: 330.

113 Brand 2009:86.

114 Klare 1998:150; Van Marle 2009:286.

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compelling players to honour contracts that have been entered into freely and willingly by said players. It is important to note, however, that Courts will not be able to adopt this attitude if the standard of professional contracts is such that a player who wishes to rescind will always find a loophole in the contract to do so. Therefore, it is suggested that unions and/or franchises ensure that each and every contract concluded with a player is of a high standard of professional drafting, and will govern the contractual relationships between the union or franchise and that specific player in an effective manner. By treating sports contracts as *sui generis* legal tools, and not merely another form of employment contract, the problem of sub-standard drafting will be reduced.

It is important that the remedy of specific performance be awarded its rightful position in the law of contract: that of primary remedy in the case of breach. The remedy should be a smaller, poorer union or franchise's second greatest asset after the player himself. In order to allow the Courts the opportunity to clamp down on players committing breach of contract in the form of repudiation, the former should be granted a mandate by the Constitution to consider the value of equity when deciding on a player's lot. As stated above, the Constitution as it currently stands does not lend enough weight to this important value. It is submitted that the time has come for the Constitution to transform to such an extent that it includes even the principle of equity, originally derived from English law. This will simplify the process of transformative constitutionalism with regard to specific performance of a contractual duty. Adding more weight to the value of equity would mean that a union or franchise, which has spent large amounts of money and energy in establishing a certain player as a marketable entity, is not deprived of the services of such a player whilst still in a contractual relationship with him.

The remedy is available and the legal position is clear. The time has come, however, to create a fair legal environment within the context of South African rugby by providing unions or franchises with equal Constitutional protection against repudiation of professional sports contracts by professional players.

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