

EMPLOYMENT BASED ON A FICTION: EVALUATING THE LEGITIMACY OF TRADITIONAL NOTIONS OF CONTRACT IN THEIR APPLICATION TO AN ATYPICAL EMPLOYMENT RELATIONSHIP

Andre M Louw
BA LLB LLM
Lecturer, Faculty of Law
University of KwaZulu-Natal, Durban

SUMMARY

This article will examine the employment relationship between players in professional team sports and their employers. It will focus briefly on the nature of this relationship and on some unique characteristics that serve to distinguish this relationship from the employment of other employees. The author argues that the general view that the employment contract is largely based on a fiction (in respect of the respective parties' bargaining power and freedom to contract) is of special importance in professional sport. As the traditional checks and balances which serve to assuage the employer's significant power are mostly absent in this context, and one encounters an additional factor that serves to further limit the rights and freedom of the player-employee (namely the degree to which the rules and regulatory conduct of sports governing bodies, and especially international sports governing bodies, form part of the employment relationship and are incorporated in the terms and conditions of employment), it will be argued that this fictional nature of the employment contract is especially relevant. It will further be argued that the courts' traditional view of the nature of sports governing bodies and of the basis for their authority over participants (including professional player-employees) needs to be reviewed. In light of this the author will argue that the construct of a contract cannot legitimately serve as basis for the incorporation of the rules and regulatory conduct of international sports governing bodies in the employment of players in the domestic context (also in light of constitutional freedoms and fundamental rights of employees), and that an alternative basis for the position of authority of such bodies in this context must be found. A future paper will continue this evaluation, with reference to the possible role of international law.

"In its inception [the employment relationship] is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'."

¹ Davies and Freedland *Kahn-Freund's Labour and the Law* 3ed (1983) 18.

*"The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical relationship."*²

1 INTRODUCTION

Our courts and the Commission for Conciliation, Mediation and Arbitration (CCMA), in the exercise of their jurisdiction over "employees" in terms of the common law and labour legislation, are increasingly faced with disputes regarding the employment of players in professional team sports.³ In light of this, it is surprising that little of substance has been said to date about the legal nature and implications of this specific relationship. This paper will focus on professional sports employment as an atypical form of employment in order to examine the peculiar characteristics of this context and their implications for traditional notions of the nature of the common law contract of employment.

Many commentators have observed that the employment contract, also outside the professional sports context, is largely based on a fiction; a fiction designed to obscure the reality regarding the respective parties' freedom of contract and equality of bargaining power.⁴ This state of affairs, which is

² Foster "Is There a Global Sports Law?" 2003 2(1) *Entertainment Law* 1 16.

³ It is generally accepted that professional players in team sports qualify as "employees" for the purposes of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998, and accordingly the employment relationship between such players and their employers (sports federations, governing bodies and the team management) fall under the provisions of the main labour legislation. For recognition of the employment status of players, see generally Le Roux "Under Starters Orders: Law, Labour Law and Sport" 2002 23 *ILJ* 1195; Jordaan "Sport and Employment" in Basson and Loubser *Sport and the Law in South Africa* (2000) Chapter 8-1; Prinsloo "Enkele Opmerkinge oor Spelerskontrakte in Professionele Spansport" 2000 1 *TSAR* 229 229-230; Van Niekerk "Labour Law in Sport: A Few Curved Balls" 1997 6(11) *Contemporary Labour Law* 91; in the case law *McCarthy v Sundowns Football Club* [2003] 2 *BLLR* 193 (LC); *Augustine and Ajax Football Club* 2002 23 *ILJ* 405 (CCMA) (where the CCMA assumed jurisdiction over an unfair dismissal dispute between a professional footballer and his club, although preferring to refer such dispute to private arbitration as agreed between the parties in the employment contract); *Smith v United Cricket Board* [2003] 5 *BALR* 605 (CCMA); *SARPA obo Bands/SA Rugby (Pty) Ltd* [2005] 2 *BALR* 209 (CCMA); and *SA Rugby (Pty) Ltd v CCMA* [2006] 1 *BLLR* 27 (LC).

⁴ See Davies and Freedland 18. Wallis "The LRA and the Common Law" 2005 2(9) *Law, Democracy and Development* 181 181-182 succinctly described the need for collective bargaining when discussing some shortfalls of a purely contractual analysis of employment:

"The law of contract does not provide an adequate vehicle for ensuring fairness in dismissal. Certain matters that we regard as basic to all employment such as annual leave and sick leave and limitations on hours of work in the interests of the health of workers, and the establishment of a basic floor of fair employment conditions, are simply not achievable by an individualised process of forming employment contracts ... To suggest that the common law alone should govern labour relations is manifestly an untenable proposition."

See also Simitis "The Rediscovery of the Individual in Labour Law" in Rogowski and Wilthagen (eds) *Reflexive Labour Law* (1994) 185.

acknowledged in most jurisdictions, as also in South Africa, is tempered by the protection provided through labour legislation and collective bargaining⁵ (and also constitutional protections such as the right to fair labour practices guaranteed in section 23 of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”) and international labour conventions).

The discussion will proceed to show that this fictional nature of the employment contract is even more prevalent, and relevant, in professional sport. This is due largely to the nature of the industry and also to traditional notions of the nature of sports organisations and governing bodies and the accepted basis for their authority over their members (including the professional athlete). In this relationship, however, the protections afforded to “normal” employees are largely absent. The provisions of sports-specific legislation mostly do not regulate the employment relationship, leaving such employees to seek protection in the more generally applicable (and often ill-suited) labour laws.⁶ Collective bargaining, a relatively recent development in professional sport in many jurisdictions, is also as a rule in most instances a rather weak form of protection for most player employees (such collective action bearing a significantly individualised nature, with top-tier players enjoying a position akin to “free agency”;⁷ and having limited application in

⁵ Du Toit “Labour and the Bill of Rights” 1996 *The Bill of Rights Compendium* par 4B10, observes the following:

“Law is ill-suited for the delicate task of regulating the dynamic interaction between employers and employees in detail. Economic efficiency and political democracy alike require a significant degree of local autonomy and devolution of decision-making within a framework of public policy. In this context, it has come to be widely accepted that the natural counterbalance to employer power resides in the power of workers acting collectively ... In other words, the function of labour law is not only to extend certain basic protections to employees (for example, by prohibiting excessive hours of work) but, more fundamentally, to create a framework for collective bargaining between organised labour and employers.”

⁶ Certain systems have adopted legislation specifically regulating professional sports employment. Compare Italy, which adopted a professional sports law in 1981 (Law 91 of 1981 (Official Gazette 27 March 1981)); Belgium (which enacted a Professional Sports Contract Act in 1978); and Greece (where the governance and development of professionalism in sport is regulated by Law 879/1979 as supplemented by Law 1958/1991). The Russian Federation has seen limited legislative involvement in professional sport (although the Federal Law on Physical Culture and Sports in the Russian Federation defines concepts such as a “professional sportsman” (art. 2) and a “contract on sports activities” (art. 25)), but there has been a call for more direct legislative intervention in order to provide an appropriate legal basis for one of the fastest growing industries in the Russian economy – see Loukine “Organisation of Professional Sports in the Russian Federation” 2005 1-2 *International Sports Law Journal* 21. Austria recently passed a Professional Athletes Bill (or “Berufssportlergesetz”), in terms of which athletes would no longer be viewed as employees of clubs but rather as self-employed persons (see the report available online on the website of FIFPro <http://www.fifpro.org/index.php?mod=one&id=12342> accessed on 16 August 2005).

⁷ It is important to note here that I am not referring to the practice of free agency as known in professional sports in the USA, whereby athletes are in certain circumstances (and in the absence of reserve clauses or other mechanisms that serve to limit mobility in employment) entitled to sign with another team at their whim, either in terms of certain restrictions or unrestricted.

I refer here to the position of athletes, even in team sports, as largely independent actors within the collective bargaining context. In the American professional sports market, players’ unions follow an atypical model of bargaining agents, quite distinct from their trade union counterparts in other industries. They function as exclusive bargaining agents for the

the environment of standard players' contracts – which are the norm in most of the professional sporting codes).⁸

On the other side of the coin, the employment relationship in this industry is characterised by a very significant intrusion upon the rights and powers of the player employee, which is unknown elsewhere in the world of work. Such intrusion is found in the binding status of the rules, decisions and other regulatory conduct of international sports governing bodies (ISGBs), which rules are integral not only to access to employment in this sphere but also tend to infuse the terms and conditions of the employment contract.

Accordingly, I will argue that, due to the fact that the fictional nature of the employment contract in sport is especially problematic, it is also especially important to determine the real legal basis for the incorporation into such contract of the rules of sports governing bodies. In light of the unsuitability of contract as such basis, I will argue that it is to be sought elsewhere. My conclusion is that such rules are incorporated in the relationship and derive their binding force from the "legislative" powers of these organisations. Having rejected contract as an illegitimate basis, as I aim to do here, I will argue in a future paper that the basis for such powers is in fact to be found in a peculiar species of public international law.

2 THE PROFESSIONAL SPORTS CONTEXT

From an evaluation of the nature and characteristics of international sports governing bodies it is unclear what the exact legal status of the rules,

employees they represent in respect of terms and conditions of employment, and collective bargaining takes place in an environment of standard players' contracts. However, these unions consciously promote competition by allowing individual athletes to independently negotiate certain terms of their employment, most notably remuneration and the duration of contracts. The player therefore, within a collective labour arrangement, enjoys a high degree of autonomy. See Wise and Meyer *International Sports Law and Business Vol 1* (1997) 90 *et seq.* Another example of this is found in Swedish ice hockey. The first collective labour agreement concluded between the Salaried Employees' Union (representing 250 professional ice hockey players) and the Employers' Alliance (representing clubs) in October 1999, specifically provided that employers and players were to reach individual agreement on salaries and other remuneration. All players' salaries are individual and differentiated, with young players often receiving less than the top salaries commanded by top players. See the report available online at <http://www.eurofound.eu.int/2000/02/feature/se0002126f.html> last accessed 16 May 2007.

In South African professional sport, as also elsewhere, this is also a feature of collective bargaining where "star players" are involved.

An added feature, which connects with this, is the nature of the employment of professional players as facilitating the exploitation of commercial opportunities (sponsorships, the licensing of image rights, *etc*) by individual players. Often such rights may come into conflict with the rights of employers and others as regulated by collective bargaining, in which event more individualised bargaining is required.

⁸ More will be said below regarding the use of standard players' contracts as contracts of adhesion.

regulations, decisions and other regulatory conduct of such entities is.⁹ Even in the context of international law, it is a difficult task to pinpoint the status of what will be termed a “self-developed body of law” relating to the governance of international sport. The status of one of the main sources of this body of law (the organisations) is itself anomalous;¹⁰ by extension, therefore, so is the body of law emanating from these sources.

The anomalous nature of such regulatory conduct poses a number of fundamental problems in the evaluation of their application to the employment of professional athletes. The body of South African labour laws provides a rather extensively regulated milieu within which employment rights and obligations of the parties (both employers and employees) in different sectors are to be evaluated. This milieu includes contractual and legislative, as well as constitutional and administrative, elements. Accordingly, the unique interaction of rules and regulations that derive from an external and international source – which is central to both access to employment in the professional sports sector as well as the actual terms and conditions of employment – requires definitive classification in order to place such rules in their proper context. We have come to a point in the development of professional sport where sentiments about the role of the law in sport, as expressed elsewhere more than 30 years ago,¹¹ no longer reflect the realities of employment in the modern context of playing sport for a living. Alas, one could argue that the words uttered at the Olympic Games in 1936 by the then president of the International Olympic Committee (IOC) to Adolf Hitler (arguably one of the most powerful men of the 20th century), more accurately reflect the modern-day power manifested by international sports governing bodies and their rules: “Excuse me, Mr. Chancellor, when

⁹ See Louw “An ‘Anomaly Tolerated by the Law’: Examining the Nature and Legal Significance of the International Sports Governing Body” 2007 22(1) *SA Public Law* 211-255.

¹⁰ It is important to note that ISGBs are inherently not governmental entities or associations of governments as this concept is known in international law and relations (eg, in respect of organisations such as the UN and the erstwhile North Atlantic Treaty Organisation or NATO). These organisations generally have as their members groups of individuals, federations, etc, from member countries as their actual members – this approach is in line with the traditional notion of sports governing bodies as voluntary associations based in contract (membership or affiliation). However, it should be noted that this might not constitute a general and universal rule: For example, in respect of the International Cricket Council, it has been held that the members of the organisation are not the governing bodies for cricket in the respective member countries, but the member countries themselves (see *Greig v Insole; World Series Cricket (Pty) Ltd v Insole* [1978] 3 All ER 449). It should be noted, however, that this finding was based on interpretation of the wording of the rules of the ICC (*Greig v Insole; World Series Cricket (Pty) Ltd v Insole supra* 506a-507j).

Determination of the question of the membership of an ISGB in any given case may need to proceed with reference to its constitution and other documentation. A finding that the members are sovereign states may significantly affect the nature and powers of such organisations and their role in the governance of sport as well as its regulation.

¹¹ Lord Denning declared the following in the English case of *Enderby Town FC v Football Association* [1971] 1 Ch 591 605:

“Justice can often be done better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports where no points of law are likely to arise and it is all part of the proper regulation of the game.”

the five rings are raised over the stadium, it is no longer Germany. It is the Olympics and we are masters here."¹²

While mention has been made elsewhere of the very extensive powers of sports governing bodies and organisations in regulating different aspects of the employment of professional athletes,¹³ a recent example, which arose in English Premier League football in May 2005, serves to bring home the point that one would be hard-pressed to find another industry where regulation can be so significant or even draconian.

An independent commission of inquiry of the Football Association (FA) Premier League imposed very substantial fines on Chelsea Football Club (£300 000), Chelsea manager Jose Mourinho (£200 000) and Arsenal player Ashley Cole (£100 000), for their involvement in a "tapping up" scandal. The commission found that Cole and Mourinho had been guilty of attending a clandestine meeting with Chelsea FC at a London restaurant on 27 January 2005, in order to conduct negotiations for a transfer by Cole to the club. Cole, who was still under contract with Arsenal, was held to have contravened Premier League Rule K5, which governs approaches by contracted players to clubs and prohibits players from making such an approach without the permission of their employing club.¹⁴ Chelsea were found to be in breach of Rule K3, which contains a similar prohibition on clubs approaching contracted players, and Mourinho of breaching Rule Q regarding managers' conduct. The commission declined to order compensation to be paid also to Arsenal FC, as had been requested. Two players' agents, who were also alleged to have been involved in the transaction, were not sanctioned, as they did not resort under the jurisdiction of the League. The League indicated, however, that they would pass on the commission's findings to the FA, which, in turn, would pass them on to football's world governing body, FIFA.¹⁵

It was speculated that the parties would appeal the fines, and that the issue might be placed before the European courts.¹⁶ The main grounds would be that the relevant rules are in restraint of trade,¹⁷ and the drastic

¹² The IOC president at the 1936 Olympics in Berlin, Henri de Baillet-Latour, when confronting Adolf Hitler about Nazi prejudice against Jewish and African athletes – as quoted by McComb *Sports in World History* (2004) 83.

¹³ *Eg*, in respect of their disciplinary powers and in determining the framework for remuneration of athletes – see, generally, Louw 2007 22(1) *SA Public Law* 211-255.

¹⁴ For a similar provision in rugby union, see IRB Regulation 4.9 ("Approaches to Players").

¹⁵ Which would have jurisdiction to discipline one of the agents involved, the Israeli "super agent" Pina Zahavi.

¹⁶ From a report dated 1 June 2005, available online http://news.bbc.co.uk/sport1/hi/football/eng_prem/4596209.stm accessed 23 June 2005.

¹⁷ The independent commission, in a report by Sir Philip Otten, defended the regulations against claims of them being in restraint of trade, arguing that benefits to players far outweigh benefits to clubs. The European Commission has also backed the regulations, acknowledging that "professional footballers cannot be treated in the same way as non-sporting professions". From a report by Dickinson "FA Premier League defends 'tapping up' legislation" 2005-06-04 *The Times* <http://www.timesonline.co.uk/article/0,,27-1640854,00.html> accessed 2005-06-23.

size of the fines – the previous record for similar financial punishment for “tapping up” was in March 2002, when Liverpool was fined £20 000 for “illegally” approaching Middlesbrough defender Christian Ziege (who was fined £10 000).¹⁸ At the time of writing the outcome of such potential challenge is unknown.

This is just one example of a manifestation of the power dynamics between governing bodies and players in professional sport, which illustrates the very wide ambit of control over the individual participant. There are many others. As observed elsewhere, the restrictions inherent in so many of these rules (most notably, for example, the enforcement of transfer rules and other measures to restrict freedom of movement of players as well as eligibility for participation) have led to litigation in most jurisdictions, which has played a significant role in the very development of an international body of “sports law”.¹⁹ In light of this, it will be argued that recognition of a legal basis for the role of the rules of sports organisations in employment, and especially the rules of international sports governing bodies, is an essential exercise in order to provide clarity regarding the rights and obligations of the parties to this unique modern commercial relationship. The discussion that follows will identify the problems inherent in the traditional notion of the status of such rules.

3 IDENTIFYING THE PROBLEM: IN SEARCH OF A PARADIGM

It is submitted that there are two possible avenues for the incorporation of the regulatory conduct of ISGBs in the employment of professional players in the domestic context. The first is contract – this approach assumes or accepts that the employment contract of the athlete incorporates such rules and regulations as a matter of course. The gist of this approach is that the individual sports person subjects him/herself by means of contract to being governed by the decisions and rules of these bodies, which cover the conduct of the sport both on and off the field. In respect of the latter type of rules the governing body usually gives itself authority to do all things necessary “for the good of the game”.²⁰ Caiger has observed the following:

¹⁸ *Ibid.*

¹⁹ Litigation involving the employment of players in different sports, and especially systems of rules regulating the transfer of professional players, has played a significant role in shaping the development of the law relating to sport in most jurisdictions. Examples are: *Eastham v Newcastle United Football Association, Ltd* [1963] 3 All ER 139 (England); *Buckley v Tutty* (1971) 125 CLR 353 (Australia); *Blackler v New Zealand Rugby Football League* [1968] NZLR 547 (New Zealand); *ASBL Union Royale Belge des Societes de Football Association v Jean-Marc Bosman* [1996] CMLR 645 ECJ (Belgium); *Coetzee v Comitiss* 2001 1 SA 1254; and *McCarthy v Sundowns Football Club supra* (South Africa).

²⁰ Caiger “Sports Contracts, Governance and the Image as Asset”, unpublished paper presented at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 (copy on file with the author) 3.

“It is trite law that the basis on which sports bodies purport to govern rests on contract – usually a series of contracts. The sports body thus derives its jurisdiction and the exercise of the same over the sports person by virtue of a contract signed between the former and the latter. Where there is an absence of legislation concerned with the governance and regulation of a sport or sports activity the approach of the courts has generally been a reliance on the relevant contractual provisions governing the sport. Thus on the edifice of contract is built a whole panoply of powers regulating every aspect of the relationship between the sport’s governing body and the sports person – from discipline, making rules of the game as well as commercial aspects that may be relevant in this relationship.”²¹

It has also been observed that

“[T]he law of contract ... is the most important determinant of the content of variable legal relationships in sport. It is the legal tool with which the stage designers of sport create the scene; and it contains the script used by the sporting actors to play to the public ... Contract is usually the ultimate source of the regulatory jurisdiction of referees and governing bodies in sport, enabling the latter to determine the laws according to which sport is played ... and the former to implement those laws on the field of play.”²²

This approach of ascribing the regulatory jurisdiction and powers of sports governing bodies to contract as the primary source, which has found acceptance in most jurisdictions,²³ will be called the “contract theory”.

The second possibility is that, if it should be shown that the basis for incorporation and application of such rules is not in fact to be found in contract (as will be argued is the case), such rules and regulations are accorded legal force upon some other basis. Acceptance of this theory would require that such regulatory conduct be accorded an own status, divorced from contract, which is in line and compatible with general legal principles and specifically also constitutional principle. This approach will be called the “autonomous status” theory.

I will next attempt to explore the first of these two possible avenues with a view to providing the backdrop to determining the applicability of the second. The discussion will do so by first describing the contract theory and the role of contract in respect of enforcing professional athletes’ subordination to the

²¹ Caiger, unpublished paper presented at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 6.

²² Beloff, Kerr and Demetriou *Sports Law* (1999) 22.

²³ The discussion below (especially in respect of the judgment in *Cronje v United Cricket Board of SA* 2001 4 SA 1361 (TPD)) will look at developments in English law regarding approaches to judicial review of the decisions of sports governing bodies, which has traditionally grappled with the issue of the (purportedly) private and voluntary nature of sports governing bodies, which is based in application of the contract theory (see for instance Beloff *et al* 224 *et seq*). Wise and Meyer 198-199 remark that American courts follow a principle which they often articulate but sometimes do not adhere to:

“In the absence of fraud, illegality, violation of a civil or property right or the right to earn a living, the courts will not interfere with the internal affairs of a voluntary association or club, and will not second-guess the judgement of such bodies.”

German courts have apparently experienced fewer qualms regarding limitations on judicial review on the basis of the private nature of sports organisations – see Wise and Meyer *International Sports Law and Business Vol 2* (1997) 1178 *et seq*.

organisations governing the sporting code. It will then evaluate the legitimacy of this theory in light of our courts' pronouncements on the nature of the "contract" in this regard, as well as the nature of sports governing bodies as viewed by the courts. Finally, the discussion will contain some remarks about the illegitimacy of the contract theory in light of constitutional principles and current human rights discourse.

4 THE CONTRACT THEORY

The premise of the contract theory is found in the nature of sports governing bodies and the way in which participation in professional sport functions. Individual participants in professional sport ("employees" for the purposes of this article) are bound to the rules of international governing bodies which constitute a prime and comprehensive source of the terms and conditions of their employment.²⁴

This relationship will be termed the "chain of subjugation" of players: By virtue of participation in professional sport, which is generally open only to those persons who bind themselves by agreement to adhere to the rules of their employing organisations, clubs or federations (usually by means of standardised players' contracts); and in the light of the fact that such clubs, organisations and federations (as members of national federations or governing bodies) are indirectly also members of the international governing bodies and subject to their regulation; these participants are bound to adhere to the rules of such international bodies in order to participate.²⁵ In terms of a situation akin to the "closed shop" of a trade union that one might encounter in other industries, participation in the activity of professional sport (and therefore employment) is made conditional upon submission to the rules and regulations of sports governing bodies.²⁶ However, unlike the

²⁴ Compare the passages from Caiger quoted above. As the author states, this approach is "trite law".

²⁵ International sports governing bodies, which are strictly speaking positioned somewhere outside the athlete's employment relationship, in fact form part of what I choose to call the "composite employer" in professional team sports. On the edifice of contract (namely an amalgamation of the employment contract as well as the contract of membership of governing bodies in terms of the traditionally accepted notion of such bodies as voluntary associations) a number of controversial and far-reaching practices have developed within this industry that influence the rights and freedoms of professional athletes.

It is argued that this feature of the relationship is a major deviation from the norm in employment (in other sectors or industries), and one of the distinguishing features of this form of employment.

²⁶ I use the term "closed shop" here in a different meaning than that usually associated with a union where membership is compulsory and refusal to join would serve to deny the particular employee access to employment. I will argue that the very nature of employment in professional sport, due to the specific characteristics of the limitations on rights of access to this occupation by means of a system of subjugation (see the discussion that follows), functions as a "closed shop", in the sense that all potential candidates for employment as players in professional sport are in fact forced to conclude employment contracts in line with the system of rules and regulations existing in the particular sporting code. One is faced with a situation where players are forced to enter employment in a specified manner and on specified terms. It is debatable whether this situation in turn forces players to join players'

labour trade union, which has as its object the promotion of workers' rights through collective bargaining, international sports governing bodies are not foremost champions of the employment rights of participants.

The bases for this subjugation may vary. Lewis and Taylor, in discussing the grounds for jurisdiction of sports governing bodies (SGBs) over participants in respect of disputes, refer to a number of possibilities.²⁷

(i) A direct contractual link with a non-member participant:²⁸

While the participant (player) may not be a member of the SGB, a direct contractual link might be present in the form of a contract derived from an entry form for a competition (which entry form includes an undertaking by the participant to abide by the governing body's rules, for example, as they relate to a certain event);²⁹ alternatively it might be a case where the governing body has directly contracted the services of an athlete/player,³⁰ or an implied contract might arise on the basis, for example, of submission to doping control.

(ii) A link through the pyramid structure of governance:³¹

A jurisdictional link may also be established by a governing body requiring its members to make submission to the jurisdiction of the SGB a condition of the contract between the participant and the club. This may involve two separate contracts (with no direct contractual nexus between the SGB and the participant), or the creation of such a direct contract by means of the club acting as agent or representative of either the participant or the SGB.

unions as a necessary step to counter the inherent potential abuses of power by employers and governing bodies in the employment relationship.

Walters *The Professional Footballers' Association: A Case Study of Trade Union Growth* (2004) 10 observes that the Professional Footballers' Association (PFA) in England has a union density of 100%, which indicates that membership of the union appears to be the social norm amongst professional footballers. The author states that the PFA does not operate a closed shop, but represents a "closed union". This is different from a closed shop in that membership is only available to a concentrated group of workers; and the union can regulate its intake.

²⁷ Lewis and Taylor *Sport: Law and Practice* (2003) 51 (A2.16) *et seq.*

²⁸ A non-member participant is not a member of the governing body (although, *eg*, a member of a sports club or other organisation), but participates in the activity regulated by the governing body.

²⁹ *Eg*, see the litigation between Petr Korda and the International Tennis Federation, which involved the player's contravention of the rules of an event (which rules formed the basis for the Federation's disciplinary jurisdiction). Korda, who was the 4th ranked player in the world at the time, was tested positive for an anabolic steroid at the 1998 Wimbledon tournament. This was found to be a contravention of the International Tennis Federation's Programme, which governed the tournament. An Independent Review Board suspended Korda for one year and decided that he should forfeit all computer ranking points and prize money earned at the tournament.

³⁰ Compare the role of the International Cricket Council in contracting the services of international professional cricketers to represent it in the "World XI" (for the Johnnie Walker ICC Super Series) versus Australia, October 2005.

³¹ See the discussion of the "standard" pyramid structure model of sports governance as discussed in section 3 of the article by Louw 2007 22(1) *SA Public Law* 211-255.

(iii) A link through the desire to take part in authorised competition:

In practice, individual participants who want to take part in the sport at a developed level must do so by seeking to play in competitions sanctioned or organised by the SGB. In this event, the SGB can set the criteria for such participation, and any participant it rules against (*ie*, who has failed to comply with the rules) will not be able to play. It should be noted that this form of jurisdictional link also has another function, as it relates to the maintenance of the power of the relevant sports governing body.³²

The jurisdiction of a sports governing body (international or domestic) over an individual player participant may therefore either derive from a direct contractual relationship with such player, or otherwise from one of the above links. Such jurisdiction would of course also extend to the determination of the terms and conditions of employment of such players – this is discussed elsewhere. The issue under discussion here is central to the very classification or evaluation of the nature of the employment of players in professional sport. I believe that this phenomenon of subjugation, coupled with the composite nature of the sports employer, as well as the further characteristics of the “web of contractual relationships”³³ surrounding professional player employees, all combine to contribute to a characterisation of professional sports employment as not merely an atypical form of employment, but a hybrid one that in fact shows characteristics of both the employment contract as well as that of *locatio conductio operis*. This view will not be elaborated upon here.

What this submission by participants to the jurisdiction of ISGBs illustrates, at the very least, is that the labour market for professional athletes is an extremely regulated and rigid one, as a result of the extensive powers of such governing bodies in setting the bar for participation. For example: While a South African rugby player may be relatively free to contract with clubs and provincial or regional unions, the most lucrative avenue is a national contract, with the national governing body for rugby, to represent South Africa as a Springbok in international competition. Such a contract constitutes the only possibility to enter the top-end market of professional rugby.³⁴ Otherwise, such a player would have to seek the

³² *Eg*, compare the following from the *European Model of Sport*, Consultation Document of Directorate-General X of the European Commission (1998), which provides as follows (3) in respect of the position of European sports federations at the top of the “pyramid of governance” in European sport (see the discussion in the article Louw 2007 22(1) *SA Public Law* 211-255):

“Every European federation allows only one national federation from each country to be a member. By means of rules, usually involving sanctions for those taking part in championships which have not been recognised or authorised by the international federations, these organisations try to maintain their position.”

³³ See Lewis and Taylor 804 (E1.3) *et seq*. For discussion of the web of contractual relationships in respect of sponsorship of events, teams, athletes, *etc*; see also Griffith-Jones and Barr-Smith *Law and the Business of Sport* (1997) 263 *et seq*.

³⁴ Displaying the monopsonistic power of a sports federation in terms of the employment of players – see the discussion in the concluding section below. Monopsony is also known as a “buyer’s monopoly”. Wikipedia defines a monopsony as follows:

greener grass abroad, for example, to represent England or Australia. The rules and regulations of the International Rugby Board, however, restrain him from doing so except in terms of the complicated restrictions imposed by its national eligibility rules.³⁵ The IRB's regulations are binding upon such a player by virtue of the provisions of the By-Laws of the Board (as read with the players' contract),³⁶ specifically By-Law 7 (entitled "Binding Agreement"), which reads as follows:³⁷

"Membership of the [IRB] by a Union³⁸ or Association³⁹ shall be effective as an agreement binding such Union or Association (which agreement requires such Union or Association to similarly by agreement bind its affiliated membership which such Union or Association undertakes to do) to abide by the By-Laws, Regulations and Laws of the Game and to accept and enforce all the decisions of the Board, Council and the Executive Committee (as the case may be) in respect of the playing and/or administration of the Game throughout the country or countries within the jurisdiction of such Union or Association. Any breach of this agreement or any conduct which may be prejudicial to the interests of the Board or of the Game shall render such Union or Association liable to disciplinary action in accordance with Regulation 18 the Regulations Relating to the Game."

IRB Regulation 4.5.1(c) provides that "any player receiving material benefit from a Union, Rugby Body or Club must have in place a written agreement with such Union, Rugby Body or Club"; Regulation 4.5.3 provides that "[o]nly a player who is currently registered with a Union shall be able to participate in competitions organised, recognised or sanctioned by that Union".

Therefore, while we often see support for the "voluntary nature" of association by players (and other persons) with sports governing bodies,⁴⁰ our rugby player in this example, even if he voluntarily prefers not to associate with the SA Rugby Union, will still be bound and restricted in his freedom of movement by the IRB rules. While such situation might be similar to that experienced by workers in other industries (who require visas or work

"[A] market form with only one buyer, called 'monopsonist', facing many sellers. It is an instance of imperfect competition, symmetrical to the case of a monopoly, in which there is only one seller facing many buyers."

See <http://en.wikipedia.org/wiki/Monopsony>.

³⁵ As contained in IRB Regulation 8 – compare the discussion of this regulation by Le Roux "Is Tsimba Chipped? Reflecting on the IRB Rule that a Player May Only Represent One Country" in Le Roux and Cornelius (eds) *Sport: The Right to Participate and Other Issues* (2003) 12.

³⁶ *Eg*, clause 3.1.10.1 of the South African rugby standard player's contract (Provincial) 2003 stated that "[t]he Player agrees, for the full duration of this agreement, to accept, abide by and comply with the constitution, by-laws, rules and regulations of the IRB, SARFU and the Province ..."

³⁷ IRB By-Laws, November 2004.

³⁸ "Union" defined as "every national Rugby Union for the time being in membership of the Board" – IRB By-Laws section 1.

³⁹ "Association" defined as "an Association of national Rugby Unions recognised by the Council and elected to be a member of the Board by a majority of at least three quarters of the Council" – IRB By-Laws section 1.

⁴⁰ This approach will be discussed below, with reference to the case of *Cronje v United Cricket Board of SA supra*.

permits or are otherwise subject to immigration laws in their country of choice), our scenario does not involve state action in terms of recognised principles regarding the movement of persons under international law. Our player is restricted by means of rules with a totally different pedigree.

Of course, employment in professional sport is not completely unique in respect of its rigid regulatory framework. We find numerous examples of other sectors, professions and occupations where access is rigidly scrutinised and controlled by internal or external agencies: examples are the medical and legal professions, civil aviation, and financial service providers. Many occupations involve licensing and qualification authorities, which exercise statutory rights to control access on a variety of grounds. However, the system in professional sport displays characteristics that are distinguishable. Most notably, rules regarding access do not derive from domestic legislation, but rather from (what I have argued to be) a unique, anomalous and nebulous body of “laws” issued by international associations with a decidedly private nature, but which exercise quasi-public powers.

Rights to access are further determined also with reference to the specific character of the professional sports industry⁴¹ and the employers operating within this sector, which system might be problematic in terms of constitutional principles and guarantees. In respect of the specific restrictions that function in professional sport, one should note particular provisions that are often incorporated in players’ contracts, which strictly speaking do not relate to actual performance of the duties of players on the field of play but rather govern other, normally “private” conduct. Players’ contracts often contain a clause regulating the personal conduct of players in respect of activities that may hold the potential for physical injury – for example, clause 8.5 of the Australian Cricket Board’s standard Match/Tour Contract 2001.⁴²

- “(a) During the Term, the Player will not, without the prior consent of the [Australian Cricket Board]:
- (i) engage in any dangerous or hazardous activity;

⁴¹ See *McCarthy v Sundowns Football Club supra* 195G-H. In this case, Waglay J also remarked as follows (198B-C) regarding specific characteristics of employment as a professional footballer:

“This Court must ... be mindful of the fact that, unlike any other employees, professional footballers only have a relatively short period within which to practice their profession, a profession which is inherently risky as they may suffer injuries which may ruin their careers; they are subjected to the vagaries of selection not faced by other employees; they are required to earn sufficient to sustain themselves and their families in a relatively short period and cannot simply, like any other employee, decide to move from one employer to another. Here we have a class of employees who face restrictions in carrying out the trade which restrictions can have an effect on their earnings that cannot be calculated with any degree of certainty.”

⁴² Wise and Meyer 702 provide an extract from clause 8 of the World League of American Football standard players’ contract:

“Without prior written consent of League, Player will not engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by money damages.”

See also Prinsloo 2000 1 *TSAR* 232.

- (ii) put his own or other players' safety at risk; nor
- (iii) engage in any activity that in the reasonable opinion of the ACB may cause the Player injury or otherwise affect the Player's ability to perform his obligations under this Contract.
- (b) The Player acknowledges that activities that fall within the scope of paragraph (a) include, without limitation, the following:
 - (i) flying in an aeroplane, helicopter or other airborne machine or device unless it is being operated by a major domestic or international airline or any of its subsidiaries ...;
 - (ii) participating in so-called 'extreme sports';
 - (iii) any form of rugby, rugby league, gridiron, soccer or Australian Rules football ...; and
 - (iv) indoor or outdoor rock climbing, hang gliding, parachuting or bungy jumping.⁴³

The players' contract often regulates players' conduct in respect of issues such as communication with the media, and sometimes such contracts even regulate where the player should live.⁴⁴ Sometimes such measures are taken to the extreme: The 2nd King Commission Interim Report, following the cricket match-fixing scandal in 2000, suggested a wide range of measures to combat corruption – these included random lie detector testing of players, room and luggage searches, a right for the United Cricket Board of SA to monitor players' phone calls and e-mail communications, that only mobile phones provided to players by the UCBSA should be allowed, and even that the possession of an unauthorised mobile phone should be a punishable offence.⁴⁵

⁴³ Clause 9.1.6 of the South African rugby standard player's contract (Provincial) 2003 provided as follows:

"During the Player's period of employment, the Player must not engage in any other sports or pastimes, including but not limited to absailing (*sic*), polo, steeple chasing, parachuting, ice-hockey, wrestling, boxing, martial arts, hang-gliding, paragliding and speed or durations tests or racing (other than on foot or in a yacht)."

For more on the regulation of players' "extracurricular conduct" by way of contract, see Griffith-Jones and Barr-Smith 176 *et seq.*

⁴⁴ *Eg*, clause 11(a) of the English FA Premier League and Football League standard players' contract, whereby the player agrees "not to live anywhere the club deems unsuitable for the performance of his duties". Lewis and Taylor 811 (E1.19) fn 5 mention the example of a residence clause that was considered in the judgment of *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787 – football manager Lou Macari had agreed to comply with an obligation to reside within a 45-mile radius of George Square, Glasgow. His failure to do so was one of the reasons for his dismissal, which the Scottish Court of Session held to be lawful.

⁴⁵ The Honourable Justice King 2nd *Interim Report: Commission of Inquiry into Cricket Match Fixing and Related Matters*, Cape Town, December 2000.

It is interesting to note that one of the suggestions for eradicating widespread corruption in cricket has been, simply, that players should be paid more. Preston, Ross and Szymanski *Seizing the Moment: A Blueprint for Reform of World Cricket* November 2000 (revised June 2001), suggest that the relatively low salaries earned by international cricketers (compared to other sports such as football and American professional sports) is one of the leading causes for corruption and players' willingness to accept relatively low bribes to fix matches (as was the case with the late Hansie Cronje). Preston *et al* suggest that this situation could be remedied by the establishment of a new international cricket competition involving club sides with star players from different cricketing nations, where players will be able to be paid

Finally, in respect of the peculiarly rigid regulation of the employment milieu of players in professional sport, the disciplinary rules and powers of governing bodies (which are usually also deemed to be incorporated in the employment contract) are also specifically relevant:

“The most important principle of private law, equality between the persons to whom the law applies, is put under great pressure in the disciplinary law of [sports governing bodies]. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared.”⁴⁶

Simon Boyes⁴⁷ has examined the issue of the highly restricted system of access to professional sports employment in an evaluation of the possible impact of the Human Rights Act⁴⁸ on the regulation of professional sport in the United Kingdom. The author speculates as to the possible application of Article 4 of the ECHR⁴⁹ (which deals with freedom from slavery, servitude and forced or compulsory labour), by referring to judicial precedent in the European context, specifically the 1983 Dutch case of *X v Netherlands*.⁵⁰ This case involved an application by a Dutch footballer regarding his transfer from one club to another, which was allegedly prevented by a prohibitive transfer fee and resulted in the player being denied an opportunity to take up

significantly more, thereby effectively removing the temptation to become involved in corruption.

⁴⁶ Soek “The Legal Nature of Doping Law” February 2003 Unpublished paper presented at the IDLL Sports Law Conference, University of Cape Town (copy on file with the author) 3-4 (quoting Paulsson “Arbitration of International Sport Disputes” 1993 9(4) *Arbitration International* 361).

It is interesting also to note that the disciplinary powers of ISGBs may cause specific hardship for individual athletes in light of the conflict of interests one often finds between international, national and domestic (club) participants in professional sport. For example: the South African national football team (“Bafana Bafana”) have in recent times, on various occasions, been forced to field an admittedly inferior team due to the commitments of certain star players. Players who participate in club football in Europe and the UK are often not able to play for the national team due to contract commitments with their primary employers. A similar situation occurred in 2004, when Australian national footballer Mark Viduka failed to participate in a friendly match between Australia and Venezuela, as Viduka’s English club side, Leeds, had requested that he withdraw from the match in order to honour his club commitments. The Australian Soccer Association (ASA) responded by preventing Viduka from playing in a subsequent Leeds v Manchester United fixture, on the basis of Regulation 40 of the FIFA Regulations for the Status and Transfer of Players (which provides that a player who fails to make himself available for international duty shall be prevented from playing for his club for a period of five days after the period for which the player should have been released). This type of scenario raises interesting questions as to restraint of trade (both in respect of the respective parties’ conduct as well as the import of the Regulation itself).

⁴⁷ Boyes “The Regulation of Sport and the Impact of the Human Rights Act 1998” 2000 6(4) *EPL* 517 525 (as discussed in Gardiner, James, O’Leary and Welch *Sports Law* (2001) 238 *et seq*).

⁴⁸ The Human Rights Act of 1998 incorporates the provisions of the European Convention on Human Rights (1950) into English law.

⁴⁹ The European Convention on Human Rights, see previous fn.

⁵⁰ (1983) 32 DR 180.

employment at the other club. The player averred that the system infringed his rights in terms of Article 4. The European Commission on Human Rights dismissed the claim, on the basis that the player had freely entered into the contract with the first club, and therefore had knowingly subjected himself to the transfer rule. The Commission characterised the situation as “inconvenient”, but did not consider it to be “oppressive” or an “unavoidable hardship” within the meaning of Article 4. Boyes observes that the Commission’s approach implies that “where a profession has attached to it certain obligations it is implied that any person entering that occupation accepts those obligations and thus there is no force or compulsion”. The author argues, however, that this approach suggests that the Commission had not recognised the reality of a professional footballer’s situation:

“Being excluded from employment by all professional football clubs other than the one to which he is contracted will inevitably have the effect of compelling him to work for that club, or embark on an alternative career.”⁵¹

And, as Waglay J observed in *McCarthy v Sundowns Football Club*.⁵²

“The employment contract of professional footballers differs substantially from the contracts which one finds with other employees. In particular, a professional footballer cannot resign during the period of his contract of employment and take up employment with another club without agreement of his old club. If a professional footballer leaves a club after the period of his contract of employment, he cannot simply begin playing for another club unless and until he is provided with a clearance certificate by the club that he leaves as the [National Soccer League] would not register the player without a clearance certificate.”

While Boyes observes that the above approach of the ECHR may be less relevant after the European Court of Justice’s judgment in the seminal *Bosman* case⁵³ (which has signalled a shift in power in club-player relationships towards the player),⁵⁴ and in light of the fact that the restraint of trade doctrine in English law is more facilitative of the right of the individual to pursue employment than the rules of the Convention, it is submitted that the above remarks regarding the *Netherlands* case are illustrative of the peculiarity of professional sports employment in this regard. When one views this situation in the light of the problems inherent in the traditional concept of the “voluntary” nature of affiliation or association with sports employers and governing bodies (which will be discussed below), it is clear that the specific restrictions to access and employment in this context deserve special

⁵¹ Boyes, as quoted in Gardiner *et al* (2001) 239.

⁵² *Supra* 195G-H.

⁵³ *ASBL Union Royale Belge des Societes de Football Association v Jean-Marc Bosman supra*.

⁵⁴ The post-*Bosman* era has opened the way for a situation where players find it increasingly convenient to transfer from one team to another, and it is not uncommon for athletes to repudiate fixed-term contracts with one team organisation in order to pursue more lucrative deals elsewhere. See generally Le Roux “How Divine is my Contract? Reflecting on the Enforceability of Player or Athlete Contracts in Sport” 2003 15 *SA Merc LJ* 116. The public interest in such transfers of players is immense – compare David Beckham’s move to Real Madrid, which was voted as the most newsworthy event in international sport in 2003.

attention in light of constitutional principles. While it is true that many will say that the restrictions facing professional athletes are a mere nuisance in the light of the vast amounts of money star athletes earn, the constitutional implications remain pressingly relevant to the majority of athletes and would-be athletes who are not in so fortunate a position.⁵⁵

To reiterate: The chain of subjugation described above, in essence, functions as follows:

- (i) Athletes are, according to the rules and regulations of international sports governing bodies, obliged to pursue their participation in the sporting discipline in a certain prescribed manner;⁵⁶
- (ii) Such participation must generally take place by means of membership of, or affiliation to, the domestic governing body for the sporting discipline; and
- (iii) Such membership will, in turn, be established by means of contract⁵⁷ – the athlete is required to conclude an employment contract with a club, union or federation, according to which contract such athlete undertakes to be bound by the rules of the domestic governing body⁵⁸ (of which such club or union is a member) and, in turn, to be bound by the rules and regulatory jurisdiction of the ISGB.⁵⁹

We see therefore that this chain has two main links. The first is that of contract – the contract to which the athlete is a party is employed as a mechanism to found jurisdiction for the ISGB (although I will attempt to show

⁵⁵ Apart from restrictions in respect of access to participation and employment, the professional sports industry also displays other peculiarities in respect of restrictions on players in the pursuit of their chosen occupation. Compare the remarks of Waglay J in *McCarthy v Sundowns Football Club supra* 198B-C (see fn 41 above).

See also Pepe and Frerichs “Injustice Uncovered? Worker’s Compensation and the Professional Athlete” in Quirk (ed) *Sports and the Law: Major Legal Cases* (1996) 19:

“There is a common perception that professional athletes are overpaid and therefore do not need the legal protection afforded ordinary working people. But the fact is that many professional athletes are not grossly overpaid, and are not stars, but rather play in relative obscurity in the minor leagues. They finish out their careers without the benefit of million-dollar contracts ... For the most part, a professional athlete has only a few years to maximise income and prepare for a future without sports.”

⁵⁶ See the discussion above regarding the possible links upon which such obligation may be based, *eg*, a direct contractual link, a link through the pyramid structure of governance, or a link through the desire to take part in authorised competition.

⁵⁷ On the widespread use of standard players’ contracts in (South African) professional sport, see Prinsloo 2000 1 *TSAR* 231 *et seq*. Prinsloo remarks that the use of standard contracts holds certain benefits, for example the facilitation of collective agreements and also the establishment of control over clubs by higher sports bodies. See also discussion in the concluding section below.

⁵⁸ Which is itself subject to the jurisdiction and powers of the ISGB – compare the following from the FIA’s International Sporting Code (Chapter 1 section 3):

“Each National Club or Federation belonging to the FIA, shall be presumed to acquiesce in and be bound by this Code. Subject to such acquiescence and restraint, one single Club or one single Federation per country ... shall be recognised by the FIA as sole international sporting power for the enforcement of the present Code and control of motor sport throughout the territories placed under the authority of its own country.”

⁵⁹ See the IRB by-law quoted above.

that such mechanism is in fact based upon a fiction). The second link is that of regulatory exclusion – failure to submit to the system of a contract at the domestic level serves to exclude the athlete from official participation. This link is not based on contract but serves to supplement it. It is essentially derived from the “legislative” power of the ISGB, specifically its competence to set the framework for eligibility for participation in the sporting code. Gardiner *et al*, in evaluating the issue of the judicial review of the decisions of governing bodies (and specifically the problems associated with traditional notions of such jurisdiction in the UK context), observed the following:

“In many cases sporting bodies possess a monopoly in their particular field. Those wishing to have significant involvement in association football or horse racing in England, for example, have little realistic choice but to submit themselves to the authority of the Football Association or the Jockey Club respectively. It can be questioned therefore, whether it is right to disqualify such a relationship from the courts’ supervisory jurisdiction of judicial review on the basis that it is viewed as being ‘contractual’. The rules making up the ‘contract’ are presented on a ‘take it or leave it’ or ‘adhesionary’ basis, with no opportunity for the negotiation of terms. Individuals have no choice but to accept the terms if they wish to be involved in the sport. Thus, to refuse to subject a body to judicial review on the basis that the relationship is based on consensual agreement is questionable.”⁶⁰

When one analyses the actual functioning of this system in practice, the analogy of a chain appears to be especially apt.⁶¹ What this system inevitably reminds one of is forced servitude or slavery.⁶² It is clear that the system functions by creating an obligation for otherwise free actors to pursue their occupation as professional athletes within a very rigidly regulated framework for participation, by affiliating themselves contractually to bodies they might otherwise not have been keen to join, and, by doing so, completing a vicious circle whereby they submit themselves to the regulatory powers and jurisdiction of an international body. Any refusal to comply with this system results in failure to qualify for participation – in effect excluding the professional athlete from practicing such occupation.

⁶⁰ Gardiner *et al* (2001) 203.

⁶¹ Lewis and Taylor 804, who describe the situation of the employment of players in professional sport as a “web of relationships”, remark that “the possible contractual relationships surrounding players can be many and varied”. This “web” conveys similar connotations of “captivity” and forced servitude.

⁶² This character of professional sports employment (or, more specifically, of many of the mechanisms used through the years by employers in this context in order to, *eg*, promote competitive balance between teams in professional leagues), has been recognised since the early years of professional sport. Compare the following remarks:

“Like a fugitive slave law, the reserve rule denies [the player] a harbor or livelihood, and carries him back, bound and shackled, to the club from which he attempted to escape ... He goes where he is sent, takes what is given him, and thanks the Lord for life.”

John Montgomery Ward, President of the Brotherhood of Professional Baseball Players (which was founded in the USA in 1887 but disbanded in 1891), on the pernicious effect of the “reserve clause” system which was secretly created by baseball club owners in 1879, and was to be the main reason behind the development of players organizing collectively for bargaining purposes – as quoted by Schubert, Smith and Trentadue *Sports Law* (1986) 151.

See also discussion of the case of *Coetzee v Comitis* below.

In respect of the functioning of a “web of contracts” between players, clubs, teams or franchises, and domestic and international governing bodies, it is interesting to note an apt example from England regarding the incorporation of terms and conditions of collective agreements in players’ contracts. Collective agreements between trade unions and employers are presumed under English common law and statute law not to be legally binding on the parties to such agreements, and therefore of not having the status of contracts.⁶³ Gardiner *et al* cite the standard players’ contract utilised in English professional cricket as a prime example of the process of incorporation of the terms of such a collective agreement⁶⁴ in players’ contracts. While the collective agreement is not binding on either of the organisations which negotiated it (players’ union and governing body), it is binding as an individual contract (with a player) on any club which adopts it with respect to its individual players.⁶⁵

This further illustrates the power of a sports governing body to create legal obligations for other parties, while remaining in essence at arms length from the contractual relations so established. While such a collective agreement would be based on a mandate from players to a players’ union, it is interesting to note that the eventual parties and persons bound by the terms of such agreement are not parties thereto.

In evaluating the legitimacy of the theory of contract as the basis for the system of players’ participation in employment, one is confronted with the interaction between issues of freedom of contract, equality of bargaining power, and fundamental rights of freedom of association,⁶⁶ freedom of trade and occupation, and the right to fair labour practices.⁶⁷

It has long been recognised in the legal philosophy of modern democracy that “the need to balance one citizen’s freedom with that of his fellow citizens became particularly urgent as industrial development led to a glaring discrepancy between formal freedom and actual lack of freedom on the part of ‘the greatest number’”.⁶⁸ The concept of individual freedom of contract has therefore undergone gradual modification, especially as it functions within the individual employment and collective labour environments:

“The state makes protective laws and attaches statutory obligations to the individual contract; inequality of bargaining is mitigated by freedom of association in trade unions which contract on behalf of the individual. But a crisis is reached when employers’ or workers’ organisations claim the monopoly of fixing terms in an industry, to the extent of making employment dependent on membership of the organisation and acceptance of its terms. At this point freedom of contract gives way to equality of bargaining. The modern

⁶³ See Gardiner *et al* (2001) 532 fn 17 (and the authority cited there).

⁶⁴ In this case an agreement concluded between the Test and County Cricket Board (now the England and Wales Cricket Board) and the Professional Cricketers’ Association.

⁶⁵ Gardiner *et al* (2001) 533.

⁶⁶ S 18 of the Constitution.

⁶⁷ S 23 of the Constitution.

⁶⁸ Friedman *Legal Theory* 4ed (1960) 368.

worker or employer, at least in the more strongly organised industries, has very little if any individual freedom of contract left ... Another vital restriction of practical, as distinct from theoretical, freedom of contract is the increasing predominance of the standard contract ... Freedom of contract is still regarded as an essential aspect of individual freedom; but it has no longer the absolute value attributed to it a century ago."⁶⁹

While the erosion of personal freedom and also equality of bargaining is therefore universally encountered in all labour markets and contexts, the professional sports industry is a distinct situation. In other industries, the inequalities inherent in the labour/capital relationship have been assuaged to an extent by collective bargaining. Trade unions operate to protect the freedom of individuals in a climate of increasingly powerful employers. Where the right to freedom of association is threatened by arrangements such as closed shops, this is condoned in the name of the ultimate redeeming value of collective bargaining – the many simply have more power than the few. Accordingly, the monopolistic powers referred to in the above quoted passage are countered by the fact that unions exist to protect the individual from the ravages of this inequality.

In professional sport, neither the employers nor the unions are the monopolists, *per se*. The monopolist is a weird conglomerate of those governing the game, usually an association of anomalous nature (and sometimes dubious jurisdiction) that employs the institution of contract in order to enforce such monopoly against employers, unions and individual “workers” alike.⁷⁰ Ultimately, the besieged individual rights and freedoms

⁶⁹ Friedman 368-369. Compare also Sachs J in *Barkhuizen v Napier* Unreported Constitutional Court Case No. CCT 72/05 (decided 4 April 2007) par 141 of his dissenting judgment:

“I should add that the legal convictions of the community should not be equated with the convictions of the legal community. The doctrine of sanctity of contract and the maxim *pacta sunt servanda* have through judicial and text-book repetition come to appear axiomatic, indeed mesmeric, to many in the legal world. Their virtue if applied in an unlimited way is not self-evident, and their reach, if not their essence, have come to be severely restricted in open and democratic societies. This has happened over several decades through the overlapping effects of consumer protection struggles, scholarly critiques, legislative interventions and creative judicial reasoning. The jurisprudential pedestal on which it once imperiously stood has been singularly narrowed in the great majority of democratic societies. Our new constitutional order, I believe, further attenuates its one-time implacable application.”

⁷⁰ Wilberforce J, in the English judgment of *Eastham v Newcastle United Football Association Ltd supra* 150, described the retain-and-transfer system in football as follows:

“The system is an employers’ system, set up in an industry where the employers have succeeded in establishing a united monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organised than the employees. No doubt the employers all over the world consider this system to be a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interest.”

Blanpain *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law* (2003) 6, has described the transfer system in European (Belgian) football as follows:

“This transfer system is made possible by the so-called federal structure of the clubs and associations, which are in fact a legal world-wide cartel and abuse their monopolistic position. Throughout the closed structure of clubs and associations a player can actually change his club or association only if the clubs or associations concerned agree to it. And whoever has the key to the door is ready, with their hand out, to demand transfer sums. Money has to be paid at every step. This federal structure encourages human trafficking, all over the world.”

referred to have no inherent countervailing protection within the context of the relations between rule-maker, employer, employee and union. The protection, if any, of these rights must originate from somewhere else.⁷¹ The law must determine to what extent the market should condone the trampling of individual freedoms.

It should also be noted at this point, however, that the principle of freedom of contract (and of the role of the maxim *pacta sunt servanda*) should in South Africa be interpreted and applied with specific reference to the values underlying our constitutional order. In this regard, the Constitutional Court recently stated the following (by way of Ngcobo J's majority judgment) in the case of *Barkhuizen v Napier*:⁷²

“On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.”

Whether the professional athlete's contract of employment (and specifically its inclusion of the regulatory powers of sports governing bodies) can always be said to be “freely and voluntarily undertaken” is of course the central question to this analysis. The following section will examine an instance where this very issue came under scrutiny by a South African court.

⁷¹ It should be noted, however, that the phenomenon of “unionisation” and collective bargaining is gradually assuming a more prominent role in professional sports employment internationally (see, eg, the paper on the growth of the English PFA – Walters). Sports such as rugby and cricket have recently seen the emergence of players' associations at domestic as well as international level (eg, FICA, the Federation of International Cricketers' Associations), with varying success in respect of their clout in bargaining on employment issues with sports governing bodies. In football, FIFPro (established in 1965, the worldwide representative organisation for footballers, which currently represents 40 national associations) has been representing players on matters ranging from transfer disputes to the use of players' names and likenesses in computer games. The organisation has even initiated an international tournament for players not under contract. FIFPro is assuming an increasingly important role in respect of issues of regulation of the game of football, especially in Europe, where it has recently been instrumental as a role-player in tripartite negotiations with the European Commission and the European Professional Football Leagues (EPFL) on issues such as UEFA's suggestions for the imposition of “home-grown players” rules. For more information on the organisation, see www.fifpro.org.

For an examination of the rise and role of players' associations as collective bargaining agents in professional sports in Australia and New Zealand; and see Dabscheck “Industrial Relations in Australasian Professional Team Sports” 2004 30 *The Otemon Journal of Australian Studies* 3-22.

⁷² *Supra* par 57.

5 JUDICIAL OPINION ON THE LEGITIMACY OF THE CONTRACT THEORY IN PROFESSIONAL SPORTS EMPLOYMENT

Traverso J expressed serious reservations regarding the legitimacy of the system of subjugation of professional athletes in the Cape Provincial Division judgment of *Coetzee v Comitis*.⁷³ In this matter, the court was confronted with an application by a professional soccer player to declare the National Soccer League (NSL)'s constitution, rules and regulations relating to the transfer of professional soccer players whose contracts had terminated, to be contrary to public policy and unlawful and/or inconsistent with the provisions of the Constitution⁷⁴ and therefore invalid.⁷⁵ In evaluating the lawfulness of the rules and regulations concerned, Traverso J recognised the chain of subjugation and hierarchy of links in this chain, which is applicable to professional soccer players:

“It is common cause between the parties that professional football in South Africa is regulated and controlled by the NSL. Any club or footballer wishing to play professional football must be registered with the NSL. If a player is not registered he cannot play for any club that is affiliated to the NSL. The NSL is an association which has as its primary purpose the control and management of professional football in South Africa. All professional football clubs in South Africa are affiliated to the NSL, which in turn is affiliated to [the South African Football Association]. SAFA is in turn affiliated to [the Confederation of African Football Associations] and FIFA, the world body of professional football. The hierarchy is therefore: NSL; SAFA; CAF; FIFA.”⁷⁶

The court continued to set out the regulations of the NSL that were relevant to the dispute, including the following:

“13.1 Every player designated as a professional shall have a written contract with the club employing him.

...

14.1 Only a player who is currently registered by the League shall be permitted to participate in official matches of the League.”⁷⁷

⁷³ *Supra*.

⁷⁴ Especially s 10 (right to dignity) and s 22 (right to freely choose and pursue an occupation).

⁷⁵ The facts appear from the judgment *Coetzee v Comitis supra* 1256F-1259C.

⁷⁶ *Coetzee v Comitis supra* 1257C of the judgment. The judge continued to describe the position of clubs in this hierarchy as follows (1265J-1266B):

“The individual clubs are all compelled to be members of the NSL. The NSL, in terms of clause 2 of its constitution, is a body corporate, capable of suing and being sued in its own name. The NSL is the *only* professional soccer body recognised by SAFA. All members of the NSL are subject and bound to the NSL constitution and its rules and regulations, as well as the rules and regulations relating to various league and club competitions. The NSL is the body which represents *all* the affiliated clubs and *all* the affiliated clubs are represented on the board of governors of the NSL. Each club therefore has direct representation on the board of governors, and the NSL is therefore the representative body of all the clubs.”

See also the remarks by Waglay J in *McCarthy v Sundowns Football Club supra* 194B of the judgment.

⁷⁷ *Coetzee v Comitis supra* 1259F of the judgment.

Traverso J, in coming to the conclusion that the relevant provisions of the NSL's constitution and the rules and regulations enforced by it amounted to an unreasonable restraint of trade which was against public policy and therefore unlawful and inconsistent with the Constitution, made the following remarks which are germane to the issue under discussion (and are quoted extensively here):

"[The effects of the regulations of the NSL] are: All professional players must belong to a club which is affiliated to the NSL. All members of the NSL are bound by its constitution, rules and regulations. Every player who receives remuneration in excess of travel and hotel expenses shall be regarded as a professional player. The result is that every player who earns an income (however meagre) from soccer will be regarded as a professional soccer player, and is obliged to enter into a written agreement with the club that employs him."⁷⁸

It is no answer to say ... that 'there is no obligation on any footballer to play professional football'. This contention is frivolous and shows a scurrilous disregard for a person's (and in particular the applicant's) right to choose his profession freely. Of course, I accept that any profession must be regulated to a certain extent – these regulations can be internal or imposed by statute. Whatever the case may be, a profession can only be regulated in a manner which does not violate the constitutional rights of individuals ... If we should find that the regulations violate one or more of the applicant's or other football players' fundamental rights, then it follows as a matter of logic that the only choice with which a professional football player is faced is to enter into a contract which violates these rights,⁷⁹ thereby offending public policy, or not to play football at all. This is no choice.

[A] player, in terms of the NSL rules, is helpless. He can give no input in respect of the transfer fee, and, if all else fails, he is at the mercy of an arbitrator who determines the compensation payable according to a formula for which there is no rational basis. The player would then be treated just like an object. His figures will be fed into the formula and an amount will pop up! Not very different from the manner in which the book value of a motor vehicle is determined! ... In my view, this procedure strips the player of his human dignity as enshrined in the Constitution.⁸⁰

[T]he applicant, or any person who wants to play professional soccer, is subject to the rules and regulations which I have set out above. In my view, these rules are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired. In my view, these rules violate the most basic values underlying our Constitution. *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.*⁸¹

⁷⁸ *Coetzee v Comitis supra* 1267B-C. See also the remarks by Waglay J in *McCarthy v Sundowns Football Club supra* 194F-G of the judgment.

⁷⁹ *Coetzee v Comitis supra* 1269H-1279A.

⁸⁰ *Coetzee v Comitis supra* 1271C. The judge examined the functioning of the NSL transfer fee system at 1268-1269 of the judgment. In coming to the conclusion quoted in the text, the court referred (1270J-1271B) to the judgment of Wilberforce J in the English case of *Eastham v Newcastle United Football Club* (of the Chancery Division judgment reported (1964) 413 427), where the following was said:

"The transfer system has been stigmatised by the plaintiff's counsel as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and, indeed, to anyone not hardened to acceptance of the practice it would seem inhuman, and incongruous to the spirit of a national sport."

⁸¹ *Coetzee v Comitis supra* 1273C-D (emphasis added).

It will be noted that these remarks were confined to condemnation of the relevant rules and regulations of the NSL regarding the transfer fee system, declaring such rules to be unconstitutional and unlawful as constituting an unreasonable restraint of trade. Accordingly, and at first glance, these remarks may not appear to reflect a more fundamental condemnation of the actual system or chain of subjugation discussed above, which forces players wishing to participate in the professional game to conclude agreements binding them to the matrix of regulation of international and domestic football.

However, it is submitted that a reading of the passage italicised in the last quoted section of the judgment says exactly that. In fact, one must accept that the court held, as part of the *ratio decidendi* of the judgment, that the absence of choice on the part of prospective players on whether or not to shoulder the burden of this chain by means of a contract of employment, amounts to the absence of voluntarily obtained consensus to such contract. These words can have no other meaning, and their import is clear.

The effect of this is far-reaching. It amounts to a condemnation of the whole system upon which all professional sports operate in South Africa (and indeed globally). It questions the very basis for enforceable contracts of employment in this context, while also raising questions regarding the bargaining power of professional athletes. More significantly, it raises the question of whether this system of subjugation (and therefore the rules and regulations of ISGBs and domestic sports bodies underlying it) still has any validity in South African law. Apparently it does, as our courts have not been inundated with litigation to declare contracts of employment of large numbers of professional football, rugby and cricket players invalid and unenforceable. And our courts have nowhere else elected to do this *mero motu*.

It is submitted that, at the very least, the condemnation expressed in *Comitis* serves to deny contract as a legitimate basis for the application of the regulatory conduct of international sports governing bodies to professional players in the domestic context.

Mention has been made above of the relevance of constitutional principle in evaluating the legitimacy of the system of subjugation that operates in professional sports employment.⁸² Developments in other jurisdictions, notably Europe, are paving the way to increased regulation of sports governance with a view to protection of the rights and interests of individual participants and fans.⁸³ This process appears to be inevitable, in light of the

⁸² In this regard, only some brief observations will be included here. The impact of different provisions of the Constitution will not be assessed in much detail, in light of the limited scope of this paper.

⁸³ One issue that is specifically relevant in this regard is that of the migration of (young) players from Africa to Europe to play football, an increasing trend that has been described as "a hideous slave trade that plunders the continent" (Issa Hayatou, president of the CAF). Gardiner "Quotas in Sport: Some Reflections from Europe" in Le Roux and Cornelius (eds) *Sport: The Right to Participate and Other Legal Issues* (2003) 88 remarks:

experience to date regarding the abuse of power, mismanagement and general apathy towards the rights of athletes as displayed by sports governing bodies.

Foster, in referring to the *Bosman* judgment's⁸⁴ confirmation of protection of the fundamental right to freedom of movement under the European Treaty, has sounded a note of caution regarding the European Court of Justice's conceptual distinction between sporting and economic issues:

"This distinction may prove difficult to apply. It is artificial and assumes that sport had an original amateur purity that has been sullied by the invasion of money into sport. What may be more useful to the players' interests in the long run is the development of a more human rights based approach to their legal protection, so that players have freedom of expression and the right to a fair trial in disciplinary proceedings."⁸⁵

Foster proposes that the best way forward in the regulation of professional sport in the EU is a system of supervised autonomy of the industry by the European Commission. It is argued that, as sports governing bodies have shown that they cannot be trusted to have sole autonomy and self-governance over their sport, such self-regulation should be permitted only subject to "a proper 'rule of law' system of governance".⁸⁶ An important element of such a system would be a minimum condition that the constitutions of sports federations are democratised to give greater representation to the players.⁸⁷

In our evaluation of the relationship between sports governing bodies and player employees in South Africa, one should bear in mind that our Constitution has introduced a fundamental shift in all areas of social, commercial and other interaction. Central to this new dispensation is the recognition of certain fundamental rights and freedoms, and values that underpin the Bill of Rights in its protection of the individual against state and other conduct – these values and freedoms are foundational to our supreme law and our courts are obliged to consider such values in the development and application of the common law.⁸⁸ In the context of the employment of

"The activities of unlicensed player agents are viewed as a contributory problem. The human rights organisation, Sport and Freedom, has investigated up to 1 000 similar cases, involving players from Africa, South America and Eastern Europe. As with other forms of trade in human labour within Europe, such as prostitution, and in traditionally low-paid industries, such as agriculture and clothing, this form of football migration can indeed be perceived as a modern form of slave trade."

See also Blanpain 5 *et seq.* For trends in respect of player migration in (English) cricket, see Maguire and Stead "'Cricketers of the Empire' Cash Crops, Mercenaries and Symbols of Sporting Emancipation" in Maguire *Power and Global Sport: Zones of Prestige, Emulation and Resistance* 2005 63-86.

⁸⁴ See *ASBL Union Royale Belge des Societes de Football Association v Jean-Marc Bosman supra*.

⁸⁵ Foster "Can Sport be Regulated by Europe? An Analysis of Alternative Models" in Caiger and Gardiner *Professional Sport in the EU* (2001) 63.

⁸⁶ Foster 64.

⁸⁷ *Ibid.*

⁸⁸ See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) par 54; *NK v Minister of Safety and Security* (2005) 26 ILJ 1205 (CC) 1213-1215; *Barkhuizen v Napier supra* par 15.

professional soccer players, Traverso J in *Comitis* expressly recognised this imperative. In arriving at the court's decision in condemning the NSL's player transfer rules, the judge referred to section 7(1) of the Constitution, which reads as follows:⁸⁹

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The court continued to hold that the procedure for implementing the transfer system "strips the player of his human dignity" as enshrined in section 10⁹⁰ of the Constitution.⁹¹

Another provision that is relevant here is that of section 9 of the Constitution, the equality provision contained in the Bill of Rights.⁹² I have elsewhere discussed the relevance and impact of the right to equality (and of the applicable equality legislation) in the context of sports transformation.⁹³ For present purposes, I will only speculate as to the possible impact of this right on the system of subjugation that functions in respect of access to professional sport. Does the unique nature of the regulatory system here constitute potential infringement of the rights of athletes to equal protection before the law? While the restrictions on access occasioned by the absence of choice in concluding contracts of employment do not constitute unfair discrimination on any of the listed grounds, *per se*, it is submitted that one is definitely confronted with a situation where professional athletes (or prospective professional athletes) are subjected to a different regulatory regime than employees in other sectors; a regime that (as we have seen) is rather suspect in respect of its legitimacy and respect for accepted legal principles and individual rights and freedoms, while simultaneously imposing much more significant restrictions on the individual's liberty.

⁸⁹ *Coetzee v Comitis supra* 1271 of the judgment.

⁹⁰ S 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

⁹¹ *Coetzee v Comitis supra* 1271 of the judgment.

⁹² S 9 reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁹³ See Louw "Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport" 2004 15(1), 15(2) and 15(3) *Stell LR* 119, 225 and 409; and Louw "Transforming South African Professional Sport: Some Observations on Recent Developments" 2005 2(9) *Law, Democracy & Development* 193-218.

Finally, I will direct the reader's attention to section 22 of the Constitution, which provides 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."

As mentioned, Traverso J discussed this right in the *Comitis* case in respect of the impact of the NSL's transfer rules for professional footballers, and stated the following:

"Of course, I accept that any profession must be regulated to a certain extent – these regulations can be internal or imposed by statute. Whatever the case may be, a profession can only be regulated in a manner which does not violate the constitutional rights of individuals ..."⁹⁴

Again, one must consider whether these remarks should not also be read as bringing the legitimacy of the system of subjugation in access to employment in professional sport into question. To what extent can the rules and regulations of international governing bodies, which establish what amounts to a rigidly regulated system of enforced and restricted servitude, be found to constitute "regulation by law" which is consonant with the requirement that regulation of the individual athlete's freedom of trade and occupation must be reasonable and must not infringe constitutional rights and freedoms? As has been observed,⁹⁵ it has been held that section 22 of the 1996 Constitution does not protect the same rights as was the case under section 26 of the interim Constitution.⁹⁶ In *JR 1013 Investments CC v Minister of Safety and Security*⁹⁷ it was stated that section 22 protects only the right to choose a trade, occupation or profession, and not the right to actually participate in such activity. The court stated the following:

"While the choice of any trade, occupation or profession is open to all, the realisation of that choice is a different matter. The right to engage in any activity is always subject to a variety of restrictions, some of them natural, others man-made. Most of these restrictions have nothing to do with constitutional rights."⁹⁸

While one could therefore argue that the regime for participation as a player in professional sport constitutes such a man-made restriction, it is submitted that the court's reasoning in *Comitis* necessitates a finding that such restriction amounts, at the very least, to a restraint of trade. And, as Le Roux has argued,⁹⁹ the determination of whether a restraint of trade offends public policy¹⁰⁰ requires an evaluation of public policy to be "rooted in our

⁹⁴ *Coetzee v Comitis supra* 1269H-1279A of the judgment.

⁹⁵ Le Roux 25.

⁹⁶ Act 200 of 1993.

⁹⁷ 1997 7 BCLR 925.

⁹⁸ *JR 1013 Investments CC v Minister of Safety and Security supra* 928F.

⁹⁹ Le Roux 26.

¹⁰⁰ *Magna Alloys and Research (SA)(Pty) Ltd v Ellis* 1984 4 SA 874 (A).

Constitution and the fundamental values it enshrines".¹⁰¹ In the light of the impact of this regime on the dignity, and possibly other fundamental rights, of players or would-be players, it is doubtful that such restrictions could be said to be in line with public policy.¹⁰²

All things considered, the *Comitis* judgment appears to have expressly rejected the first link of the chain of subjugation. By holding that the contract in terms of which participation is structured is not of a voluntary nature, the very existence of a valid contract is reduced to that of a fiction – something that is not at all alien to sport as it has developed to date.¹⁰³

6 THE “EXCLUSION PRINCIPLE”; OR THE “LEGISLATIVE” POWERS OF SPORTS GOVERNING BODIES

So, if we have established that the first link in the chain is suspect, what of the second? What relevance does the exclusion principle have, as a manifestation of the “legislative” powers of international sports governing bodies?

Lewis and Taylor¹⁰⁴ discuss a very interesting approach to the issue of the jurisdiction of an ISGB over an individual athlete, in the absence of a contract to that effect. The authors refer to an English case involving the International Amateur Athletics Federation, namely *Walker v UKA and IAAF*.¹⁰⁵ In this matter, Walker had been acquitted of a doping offence by the United Kingdom Athletics (the national governing body) disciplinary body. The IAAF disagreed with the verdict and sought to bring disciplinary proceedings against the UKA before an IAAF arbitral panel, with the aim of

¹⁰¹ See Le Roux 26. See also the following remarks by Traverso J in *Comitis*:

“I am, however, firmly of the view that considerations of public policy cannot be constant. Our society is an ever-changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights” (1270 of the judgment).

¹⁰² As in the *Comitis* judgment, Vermooten J in the earlier case of *Highlands Park Football Club Ltd v Viljoen* 1978 3 SA 131 (W) also identified the phenomenon that professional footballers are generally more often treated as chattels than persons:

“The [club’s] only assets consist of contractual rights which bind its football players to play football for the [club]. These rights are commonly regarded as cedable and saleable amongst football clubs. It is common practice for football clubs to sell and purchase the obligations of professional footballers to play football for a particular club ... Under [the conditions of the transfer system] players are, in common football parlance, “bought and sold” between clubs” (192-193 of the judgment).

¹⁰³ The use of a contractual fiction in cases relating to sport is deeply rooted also in one of the most fundamental aspects of participation. In English law, the case of *Clarke v Dunraven* [1897] AC 59, HL (also known as *The Satanita* – the case involved a maritime collision between two yachts participating in a regatta) is often cited as authority for the proposition that in a competition, competitors enter into contracts with each other to observe the rules of such competitions. This is accepted even though there may be no evidence of offer and acceptance, the traditional notion for the establishment of a valid contract.

¹⁰⁴ 166.

¹⁰⁵ (3 July 2000, unreported) (Toulson, J), (25 July 2000, unreported) (Halett, J), IAAF Arbitral Award 20 August 2000 reported as [2001] 4 ISLR 264 – Lewis and Taylor 166 fn 1.

having a ban imposed on the athlete. The athlete then sought a High Court declaration that he was only subject to the jurisdiction of the UKA and not the IAAF. While UKA argued that it was right to acquit the athlete, it conceded that the IAAF was entitled to bring arbitration proceedings against such acquittal before an IAAF Arbitration Panel, the decision of which UKA had a right and a duty to enforce.¹⁰⁶

Lewis and Taylor observe that UKA and the IAAF based the contention that the athlete was subject to the IAAF arbitration on two grounds, the first of which was the following:

“[I]rrespective of whether there was any contract between the IAAF and Walker, the IAAF could require UKA as a result of its contractual relationship with the IAAF to act so as to prevent his being eligible to compete. The IAAF was in control of its own eligibility criteria, one of which was that a player should not have been guilty of a doping offense. If the IAAF held Walker to have been guilty of a doping offense, then he was simply ineligible, and that ineligibility would have to be respected by all members of the IAAF ... Putting it in more general terms, *a sports governing body (or an international governing body) can by its contractual authority over a club (or a national governing body) insist on the latter's enforcing the former's own contractual rights further down the chain ...* Alternatively, a sports governing body can simply refuse to accept the entry into any event of a player which it has disciplined, on the basis that eligibility to entry is determined by reference to the rules, whether or not they contractually bind the player, and force clubs and other governing bodies to do the same.”¹⁰⁷

It is submitted that this argument (especially as contained in the italicised part of the above extract), highlights the fact that the true basis for the jurisdiction that international governing bodies (or all other bodies further up the chain, with no direct contractual relationship with the athlete) exercise over athletes, cannot be found in contract. In the light of Traverso J's remarks above, it is clear that the absence of a voluntary basis for submission by athletes indicates that some other basis for the application of an ISGB's jurisdiction to individual participants must be found. What the above extract shows, is that this basis is far more likely to be the “legislative” powers of ISGBs, that is, their rule-making competence in regulating participation in the sporting code.¹⁰⁸ It appears that this legislative competence operates to introduce jurisdiction through the back door, as it were, in the absence of a contractual basis for jurisdiction.

¹⁰⁶ See Lewis and Taylor 166.

¹⁰⁷ *Ibid* (emphasis added). Lewis and Taylor state that the court did not determine the validity of this argument.

¹⁰⁸ Compare also the following remark from the *Bosman* judgment (*ASBL Union Royale Belge des Societes de Football Association v Jean-Marc Bosman supra*, where the transfer rules and nationality restrictions relating to professional footballers in Belgium were challenged in terms of the freedom of movement and competition provisions of EC law (article 48(39) of the EEC Treaty), ultimately leading to the amendment by FIFA of its transfer rules):

“The UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players” (par 11).

This remark refers to the rule-making competence of governing bodies as a substitute for contract.

This view is enforced when one considers the accepted notion in our law of privity of contract, which was transplanted from English law. This entails that the legal consequences of a contract are in principle restricted to those participating in it as principals. It means, conversely, that the parties concluding a contract are not at liberty to infringe upon the sphere of outsiders by imposing legal consequences on them.¹⁰⁹ This notion has long been accepted as applying in our law¹¹⁰, and operates to determine a contract, which attempts to impose duties on a person who is not a party to it, as ineffective with regard to such person.¹¹¹

It is submitted that the argument outlined in the highlighted passage from Lewis and Taylor's discussion of the *Walker* case above, is incompatible with the notion of privity of contract as accepted in our law. The application of contractual rights that exist between an international sports governing body and its member national federation or governing body, in respect of an athlete who is not a party to such contract, would violate the privity of such contract and could not, legitimately, found any legally enforceable obligations on the part of such athlete. Although this seems to denote common practice in sports disciplinary codes:

"To found jurisdiction for disciplinary tribunals the constitution of a club should provide for affiliation and subordination to the constitution of its regional union; a regional union should provide for affiliation and subordination to the constitution of its national union; and a national union should provide for affiliation and subordination to the constitution of its governing international body ... This will constitute the contractual nexus between the member at club level up to the international body, with the latter usually responsible for the rules of the game ..."¹¹²

An alternative mechanism, which would avoid the problem of privity, is that of agency. The second basis for a link between participants and governing bodies as discussed by Lewis and Taylor, and mentioned above,¹¹³ is that a direct contractual link may be established between a governing body and a participant, whereby the club or employer of the player acts as representative of either the player or the governing body. This would therefore constitute a direct contract between governing body and player,

¹⁰⁹ Lubbe and Murray *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3ed (1988) 407.

¹¹⁰ *Eg, Thal v Baltic Timber Co* 1935 CPD 110; *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Kooperasie Bpk* 1972 1 SA 761 (A).

¹¹¹ *Barclays National Bank Ltd v H J de Vos Boerdery Ondernemings (Edms) Bpk* 1980 4 SA 475 (A); and *Starkey v McElligot* 1984 4 SA 120 (D).

¹¹² Basson "Disciplinary Proceedings in Sport" in Basson and Loubser *Sport and the Law in South Africa* (2000 loose-leaf) Ch 6-28. Basson acknowledges that "the jurisdictional basis can be more complicated in professional sport", where professional players are often contracted by a body distinct from a regional union, often this is a private company that acts as the "commercial arm" of the union.

¹¹³ A jurisdictional link established by a governing body requiring its members to make a submission to the jurisdiction of the SGB a condition of the contract between the participant and the club. This may involve two separate contracts (with no direct contractual nexus between the SGB and the participant), or the creation of such a direct contract by means of the club acting as agent or representative of either the participant or the SGB.

which would provide legitimate rights on the part of the governing body to enforce its rules against such player directly through such contract. However, in the light of the practical reality of the chain of subjugation as discussed, the problem of an absence of choice to contract on the part of the player (as emphasised in *Comitis*) would, it is submitted, also serve to bring the legitimacy of such a purported contract into question. We would again be faced with the question whether such a contract can be said to have been freely entered into. Accordingly, it is submitted that the mechanism of agency can also not save the contract theory.

The alternative formulation in the quoted passage from Lewis and Taylor is also troublesome. It states that “[a]lternatively, a sports governing body can simply refuse to accept the entry into any event of a player *which it has disciplined*, on the basis that eligibility to entry is determined by reference to the rules, whether or not they contractually bind the player, and force clubs and other governing bodies to do the same”.¹¹⁴ Clearly, as the exposition of the *raison d’être* of international sports governing bodies has shown,¹¹⁵ ISGBs do enjoy an inherent competence of setting the rules of the game in the interests of uniformity, standardisation, *etcetera* – a competence that has frequently been recognised as an extension of the role of such bodies as custodians of a public interest. This “rules of the game” jurisdiction is generally uncontroversial. The exercise of this competence legitimises the jurisdiction outlined in the quoted passage. However, reference to a player *who has been disciplined* is troublesome. In the absence of contractual disciplinary powers (and therefore a contract), any such action would be contrary to the notion of privity and therefore of no force or effect against such player. It is suggested that the quoted passage succinctly sets out the “exclusion link” of our chain. It is clearly based upon the “legislative”, “rules of the game” jurisdiction of an ISGB, and has no basis in contract.

7 THE ROLE OF CONTRACT IN LIGHT OF THE TRADITIONAL NOTION OF THE LEGAL NATURE OF SPORTS GOVERNING BODIES

Next, in continuing to evaluate the legitimacy of the chain of subjugation’s foundation in contract, we must turn to the judgment in *Cronje v United Cricket Board of South Africa*.¹¹⁶ This case is not only relevant to the question of the appropriate role of contract in the employment of players, but also in respect of the very nature of sports governing bodies in the evaluation of the traditional notion of a “voluntary association”, which notion has played a key role in determining the extent to which the conduct of such bodies is open to review by courts of law.

¹¹⁴ Emphasis added.

¹¹⁵ See, generally, Louw 2007 22(1) *SA Public Law* 211-255.

¹¹⁶ *Supra*.

The *Cronje* case involved an application by the late Hansie Cronje, former national cricket captain, for an order reviewing and setting aside a resolution by the United Cricket Board of South Africa (hereinafter “the UCB”). The resolution by the UCB was issued following the international scandal that arose from Cronje’s proven involvement in large-scale and repeated offences involving corruption and “match fixing”, which conduct was held (by the International Cricket Council and the UCB) to constitute conduct “wholly inimical with the whole ethos of cricket”.¹¹⁷ Following the public scandal, Cronje was replaced as captain of the national team and he subsequently withdrew from the team; when his contract with the UCB expired shortly thereafter, the UCB did not renew it. After Cronje decided to quit representative cricket and his association with the UCB, the Board passed a resolution banning him for life from all its activities and those of its affiliates.¹¹⁸ Cronje challenged this resolution, *inter alia* on the grounds that it constituted an infringement of his right to fair administrative action as contained in section 33 of the Constitution,¹¹⁹ and that he had been denied the right to a fair hearing as guaranteed in terms of the rules of natural justice.

The court, by way of Kirk-Cohen J, dismissed Cronje’s application and held that the UCB’s resolution had not amounted to disciplinary action. Also, the court emphasised the fact that the only powers the UCB had were those derived from its constitution, which was a contract between the Board and its members. At the time of issuing of the resolution, Cronje was not a member of the UCB, as there was no contract of membership or employment in place between the applicant and respondent. The court accordingly found that the UCB had been entitled to pass the resolution as a means of exercising its right of non-association against Cronje, as guaranteed in section 18 of the Constitution – in fact, the court held that the organisation had not only been entitled but also “correct” in doing so.

On the issue of whether the rules of natural justice applied to this resolution, the judge held that these rules come into play “whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing

¹¹⁷ Then President of the UCB, the late Mr Percy Sonn, as quoted (1368J) in the judgment. For further reading on the 2000 match fixing scandal in cricket, see Gouws – *And Nothing but the Truth?* (2000); Oosthuizen and Tinkler *The Banjo Players: Cricket’s Match Fixing Scandal* (2001); Gardiner *et al* (2001) 365 *et seq*; Sir Paul Condon *Report on Corruption in International Cricket* (Report of the ICC’s Anti Corruption Unit, April 2001), available: http://www.icc-cricket.com/corruption/condon_report.html; King J *Final Report: Commission of Inquiry into Cricket Match Fixing and Related Matters* 2001, available: <http://www.info.gov.za/otherdocs/2001/kingfinal.pdf>; Qayyum J *Report of Judicial Commission*, Pakistan Cricket Board, Lahore 1998; Central Bureau of Investigation *Report on Cricket Match Fixing and Related Malpractices*, New Delhi 2000; and Rae *It’s Not Cricket* (2001) 254 *et seq*.

¹¹⁸ The facts appear from the judgment (*Cronje v United Cricket Board of South Africa supra* 1365-1370). For a brief summary of the case, see Basson Ch 6-4 *et seq*.

¹¹⁹ Act 108 of 1996.

rights”.¹²⁰ Kirk-Cohen J continued to state that this did not apply to the UCB, by remarking as follows:

“The [UCB] is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded ... The conduct of private bodies ... is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice ... The respondent is not vested with any statutory powers, nor is it subject to any statutory duties ...”¹²¹

It is submitted that the judgment of the court in *Cronje* is wrong. The reasoning followed in concluding that the UCB’s powers are private in nature and have no public significance, clearly flies in the face of the practical realities of governance in professional sport and, more specifically, the employment of professional players. It sets a dangerous precedent, which threatens to perpetuate a feudal system of servitude that is out of step with the modern world. Caiger, in characterising the judgment as “a case that causes or should cause concern”, has expressed his reservations about the correctness of Kirk-Cohen J’s reasoning in rather strongly worded terms:

“[T]he court insisted on maintaining the public/private dichotomy which severely militates against a realistic approach in sports law and is tinged with a sense of unreality ... It is this type of thinking which will do nothing for the development of sports law. It is this attitude which is almost anti-diluvian (sic), which refuses to acknowledge the public dimension of private acts.”¹²²

Cronje serves to perpetuate a dated and obsolete view of the role of governing bodies in sport as that of purely private entities. It denies developments elsewhere in recognition of the changing face of sports governance, and specifically the challenges posed by the continued commercialisation of sport and its governance.¹²³ The judgment denies developments in respect of legislative and judicial intervention in sport in other jurisdictions, such as Europe and the United Kingdom; in effect its value as legal precedent promises to isolate South African sports law in a pocket of “medieval” judicial conservatism and ambivalence. It promises to subvert any development of a rights-based approach to address the quandary of marrying the rights and obligations of professional athletes with the interests and powers of sports governing bodies, which is a special imperative in the light of constitutional values.

It is submitted that the court’s views in *Cronje* regarding the private nature of the UCB are also not in line with the judgment of the Constitutional Court

¹²⁰ With reference to the (then) Appellate Division judgment in *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A), as quoted (1375C-D) in the *Cronje* case.

¹²¹ *Cronje v United Cricket Board of South Africa supra* 1375D-1376C of the judgment.

¹²² Caiger Unpublished paper delivered at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 10-11.

¹²³ See the discussion in the article referred to in note 115 above. See also discussion of the trend “towards a conflation of public and private law in respect of disciplinary proceedings as a form of administrative action affecting individuals” – Basson Ch 6-37 to Ch-45.

in *President of the Republic of South Africa v South African Rugby Football Union* (hereinafter “the SARFU case”).¹²⁴ This matter concerned a dispute regarding the appointment, by then South African President Nelson Mandela, of a commission of enquiry to investigate the affairs of SARFU. The case involved a number of intricate issues of constitutional and administrative law, but also necessitated the Constitutional Court, in the course of its judgment, to express a view on the nature of the administration of rugby (and of SARFU as the national governing body) in respect of its relation to the public interest.

The court in SARFU remarked that there “can be no doubt that the administration and management of the game of rugby may be a matter of great public concern”.¹²⁵ The court referred in this regard to the New Zealand High Court case of *Finnegan v New Zealand Rugby Football Union Inc*,¹²⁶ where the following was held:

“While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far ... We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.”¹²⁷

The court in *SARFU*, in determining whether SARFU was more than a “private institution” in the meaning of the Commissions Act¹²⁸ (which required the appointment of a commission of enquiry by the President to relate to a matter “of public concern”¹²⁹), continued to find as follows:

“SARFU and its constituent unions may be governed by private law and it may be that their funds are earned in activities governed by private law, but the determination of the appropriate branch of law under which such activities are governed does not mean that such activities and the funds which they generate cannot be matters of public concern. Much of SARFU’s income derives from ticket sales, broadcasting contracts, hiring fees for stadiums and sponsorship contracts, all of which directly concern the public. What is more, much of SARFU’s expenditure relates to the development of rugby in schools and elsewhere, and in providing facilities for the playing of rugby, again matters which directly engage the public, particularly in relation to steps taken to address past discrimination. It follows that the public at large has a legitimate concern in the manner in which SARFU and its constituent unions manage the financial aspects of the game of rugby and make it accessible to those wishing to participate in the game as well as those wishing to watch

¹²⁴ 2001 1 SA 1 (CC).

¹²⁵ Par 181 of the judgment.

¹²⁶ [1985] 2 NZLR 175 (CA)

¹²⁷ *Finnegan v New Zealand Rugby Football Union Inc supra* 179. The *Finnegan* case involved an application by a member of a rugby union club in New Zealand, challenging the proposed tour of the New Zealand All Blacks to South Africa in 1985. The court held that the player had the necessary standing to bring such action. For discussion of this case, see *Kelly Sport and the Law: An Australian Perspective* (1987) 1987 60-62.

¹²⁸ Act 8 of 1947.

¹²⁹ See the court’s explanation of the meaning of this term (par 171 *et seq*) of the judgment.

games at stadiums or on television or to listen to them on the radio ... Moreover, any inquiry into the management of rugby in this country necessarily entails an inquiry into the affairs of SARFU and its affiliates, since they are entrusted with every aspect of the game's management."¹³⁰

Similarly, in *Comitis*, Traverso J (in addressing a point *in limine* regarding the applicant player's standing to bring an application challenging the governing body's transfer rules) stated:

"The [National Soccer League] is a body which performs a public function. Soccer is a sport which enjoys large support. The fate of soccer players is of public interest. If, as contended by the applicant, the regulations of the NSL violate the fundamental rights of the professional players, such as fair administrative action, fair labour practices, freedom of association, human dignity etc, this is patently a matter of such vast public interest, that a narrow approach would be inappropriate."¹³¹

It is unclear how the above reasoning from the *SARFU* and *Comitis* cases can fail to apply similarly to the United Cricket Board, which is in a virtually identical situation as regards the governance, administration and management of cricket in South Africa. Apart from the actual powers exercised by the UCB, the consequences of its resolutions¹³² and the interests involved in the administration of South African domestic and international cricket, one should also not lose sight of the widespread commercialisation of the game. In the light of the modern realities of professional cricket (as in other sports) it is doubtful that one can still employ a traditional notion of the voluntary association in this context:

"Voluntary associations can be defined as legal relationships that arise from an agreement between three or more persons to achieve a common object, primarily other than the making and division of profits. As such, voluntary associations are for the most part bodies of persons who combine to further some common end or interest that may be social, sporting, political, scientific, religious, artistic or humanitarian in nature, or that otherwise stands apart from private gain and material advantage."¹³³

Surely a national governing body's remit in respect of regulating and exploiting financial spin-offs from the playing of the modern game does not fit this mould. Kirk-Cohen J's insistence on focusing on the private nature of the Board, to the exclusion of consideration of the effects of the exercise of its powers – which are anything but private – is confusing. It is submitted

¹³⁰ Par 182-183 of the judgment.

¹³¹ *Coetzee v Comitis supra* 1264 of the judgment.

¹³² *Eg*, see the resolution to abolish transformation quotas in the national team and senior provincial sides (taken at the Board's National Consolidation Conference at Kievits Kroon, 7 July 2002), which led to the appointment of a Ministerial Committee to investigate the validity of the Board's claims that it had exceeded its expectations in respect of transformation.

¹³³ Basson "Clubs and Other Associations in Sport" in Basson and Loubser *Sport and the Law in South Africa* (2000 loose-leaf) Ch 4-1, with reference to *Cameron v Hogan* (1934) 51 CLR 358.

that this approach is also not in line with the earlier judgment of the Appellate Division in *Jockey Club of South Africa v Forbes*.¹³⁴

Further support for this criticism of *Cronje* can be found in the unreported judgment of the Cape of Good Hope Provincial Division of the High Court in *Tirfu Raiders Rugby Club v SA Rugby Union*.¹³⁵ In the *Tirfu Raiders* case, the court was asked to examine the nature of the powers exercised by the SA Rugby Union and its affiliate provincial unions, *inter alia* relating to determining competitions and logs. The court observed the following (by way of Yekiso J):¹³⁶

“The [SA Rugby Union] exercises these powers on its members, being the Provincial Unions and other associate members. The Provincial Unions, which are members and affiliates in terms of [SARU’s] Constitution, are themselves autonomous voluntary associations and in positions of authority to the clubs affiliated to them. The position of authority is clearly hierarchical, with [SARU] occupying a position of authority and the Provincial Unions and their affiliate clubs being in a subordinate position. The relationship of authority and subordination is clearly evident. The Provincial Unions and the clubs affiliated to these Unions, in turn, have stakeholders who have a substantial interest in their very existence. These stakeholders would be the sponsors, who would have an interest through their sponsorship programmes, members of the clubs affiliated to these Unions and the rugby loving public. The public interest in these organisations cannot be over emphasized. There is, in my view, a significant public interest element involved in these organisations to constitute a need to act in a manner that affects or concern the public.”

The court held that the actions of the Union were sufficiently public in nature to warrant application of the provisions of the Promotion of Administrative Justice Act,¹³⁷ which Act defines “administrative action” as “any decision taken, or any failure to take a decision by ... [a] natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which

¹³⁴ 1993 1 SA 649 (A). The *Forbes* case involved a trainer who had been found guilty of contravening the Jockey Club’s rules regarding the doping of horses, and had been fined. The trainer brought an application challenging the disciplinary decision under Rule 6 of the Uniform Rules of Court, requesting that the imposition of the fine be voided and that an order for repayment be made. The Jockey Club argued that such application had taken the wrong form, and that the application should have been made under Rule 53 for a review of the disciplinary proceedings. The court (by way of Kriegler AJA), while acknowledging that the Jockey Club was a voluntary association and that the relationship between the parties was contractual, proceeded to accept (“albeit with some reservations”) that the relief requested constituted relief “tantamount” to that afforded by a superior court in the exercise of its so-called review jurisdiction. The judge continued:

“It can further be assumed, once again with reservations ... that Rule 53 extends to decisions of domestic tribunals and does not apply only to breaches by officials of duties imposed on them by public law” (659 of the judgment).

While these remarks do not display unqualified support for the view that a body such as the Jockey Club exercises public functions, the judgment does display a willingness to accept that the (disciplinary) decisions of such a body are not purely private and relating only to contract, and may have consequences that are more akin to those of public bodies.

¹³⁵ Case No 8363/2005.

¹³⁶ Par 23-24 of the judgment.

¹³⁷ Act 3 of 2000.

adversely affects the rights of any person and which has a direct, external legal effect ...”¹³⁸

As has been remarked, the court in *Cronje* refused to adopt “an effects approach” to the conduct of the UCB, thereby abdicating a responsibility to align its judgment with the realities of professional sport:

“There needs to be a clearer recognition that the public/private divide is often artificial and unrealistic and constitutes a denial of the proprietary rights of the individual. It is no answer to say that a contract was entered into – since the contractual relationship is not always between equals and the sports person who wants to exercise his profession is obliged to sign up to the rules of the game without a choice. Most of these rules are necessary – but where commercial interests are concerned – can it be said that sports authorities serve any interest but their own.”¹³⁹

The reasoning in *Cronje* loses sight of the fact that the evaluation of the question to what extent the conduct of a nominally “private” organisation should be open to “public law” review depends on more than just the source or origin of the powers of such organisation. As was remarked in the English case of *R v City Panel on Take-overs and Mergers ex parte Datafin*:¹⁴⁰

“Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual ... then clearly [this is] not subject to judicial review. But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review ... The essential distinction ... is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.”¹⁴¹

It is further contended that the views expressed in the *Cronje* case are especially incompatible with the condemnation of the system of subjugation of professional players as expressed in *Comitis*. Acceptance of the fact that the chain of subjugation of players is founded on erroneous interpretation of the role of contract and involves the use of a fictional construct that is out of touch with reality and functions in an unreasonable manner (which is probably contrary to the public interest and fundamental constitutional values), serves to exclude any finding that this very construct can form the foundation for a “voluntary association”.¹⁴² We therefore see that Kirk-Cohen

¹³⁸ S 1.

¹³⁹ Caiger Unpublished paper presented at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 11-12.

¹⁴⁰ [1987] 1 All ER 564. This case dealt with a challenge by a company involved in a take-over bid, of a decision by the City Panel on Take-overs and Mergers, a self-regulating body that produced and managed the City Code on Take-overs and Mergers governing the procedure to be followed in the take-over of listed public companies. The Panel has no statutory, prerogative or common law powers – see the discussion in Gardiner *et al* (2001) 201-202.

¹⁴¹ *R v City Panel on Take-overs and Mergers ex parte Datafin supra* 582 of the judgment – see Gardiner *et al* (2001) 202.

¹⁴² See the quotation in the text to fn 133 above.

J's view reflects an outdated perception of the realities of professional sport, while also proclaiming the supremacy of a fiction that serves to run counter to the rights of individuals. It is submitted that our law will not tolerate a "private institution" with "private" powers, immune from scrutiny in the public interest, which is built on the foundation of such a dubious construct, and has such potential to harm the rights and interests of others. While a conservative approach that perpetuates a view of the decisions of sporting bodies as conduct of a private nature seems to be in line with developments elsewhere (for example in England), this approach has frequently been criticised.¹⁴³ Even in England, we saw recognition of the potential "public relevance" of the effects of the decisions of sports bodies as early as the mid-1960s. In the case of *Nagle v Feilden*¹⁴⁴ the court was prepared to exercise its jurisdiction to examine the rules of the English Jockey Club, which excluded women from participating as jockeys, although there was no contractual relationship between the parties. Lord Denning remarked:

"When authorities exercise a predominant power over the exercise of a trade or profession, the courts may have jurisdiction to see that this power is not abused ... If a practice in this respect is invalid as being contrary to public policy, there is ground for thinking that the court has jurisdiction to say so."¹⁴⁵

McArdle has observed that the 1987 English case of *Datafin*¹⁴⁶ had, ostensibly, provided courts with the opportunity to extend judicial review to the decisions of sports governing bodies. This had, however, not happened. In fact, in the wake of the judgments in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*¹⁴⁷ and *R v Football Association, ex parte Football League Ltd; Football Association Ltd v Football League Ltd*¹⁴⁸, it appears that the issue is of "academic interest" only.¹⁴⁹ It is clear, however, that this situation may need to be reappraised in the light of the fact that the Human Rights Act of 1998 fails to define a "public authority" – in effect courts in the UK will need to determine, on a case by case basis, whether a body is a public authority and, if so, the decisions of such body might be subject to restrictions in line with the traditional notion of judicial review performed against public bodies.¹⁵⁰

¹⁴³ See, eg, the discussion in *Beloff et al* 224 *et seq.*

¹⁴⁴ [1966] 2 QB 633.

¹⁴⁵ *Nagle v Feilden* *supra* 647 of the judgment.

¹⁴⁶ See the text to fn 140 above.

¹⁴⁷ [1993] 2 All ER 853 (CA) – see the discussion of this case in *Cronje v United Cricket Board of SA* *supra* 1378F *et seq.*

¹⁴⁸ [1993] 2 All ER 833 (QB) – see *Cronje v United Cricket Board of SA* *supra* 1377H-1378D.

¹⁴⁹ McArdle *From Boot Money to Bosman: Football, Society and the Law* (2000) 173.

¹⁵⁰ *Ibid.* See also Lewis and Taylor 127 and 236-241. It should be noted that Kirk-Cohen J in the *Cronje* case declined to apply *obiter dicta* from the English *Aga Khan* case (fn 147 above), in determining whether the rules of natural justice should apply to the UCB. The majority judgment in the *Aga Khan* case appears to have revolved around the existence of a contract between the parties, and Bingham MR stated the following:

"It is unnecessary for the purposes of this appeal to decide whether decisions of the Jockey Club may ever in any circumstances be challenged by judicial review and I do not do so. Cases where the applicant or plaintiff has no contract on which to rely may raise different considerations and the

The approach followed in *Cronje* is out of touch with legal developments elsewhere, which display a leaning towards the application of public law notions to the conduct of private bodies when the rights of individuals come under fire.¹⁵¹ South Africa has a Constitution and a Bill of Rights, which binds natural and juristic persons.¹⁵² Our constitutional framework demands that bodies, which exercise powers that may significantly infringe upon the rights of the public and individuals, should toe the line in respecting fundamental rights. And our courts should be empowered to evaluate this, as a matter of course.

8 CONCLUSION

On the basis of the above, and the problems inherent in taking a narrow view of the purely private nature of the employment relationship of players in professional sport and of the rights and duties arising in this context, it is submitted that the contract theory should be rejected as the basis for application of the regulatory conduct of international sports governing bodies to individual participants. This is especially imperative if one considers the practical circumstances of the employment of players in professional sport. Participants in the major South African professional sports of rugby, soccer and cricket are employed in terms of standard players' contracts, which are contracts of adhesion. This is borne out not only by the nature of the contract and the relatively insignificant role of collective bargaining, but also by accepted notions of the peculiar economic nature of the professional sports industry and, more specifically, of the employer in this context. Apart from the economic peculiarities of the competitive relations between teams within a league,¹⁵³ economists have also specifically recognised the unique character of the economics of professional sports in respect of the relationship between players and their employers. In the context of American professional sports, it has been observed that the industry constitutes a textbook example of a bilateral cartel, made up of club or team owners and unionised players. The club owners exercise monopoly power in the product

existence or non-existence of alternative remedies may then be material" (The *Aga Khan* case 867e-f, as quoted in *Cronje v United Cricket Board of SA supra* 1379B-C).

(*R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* 867e-f, as quoted in *Cronje v United Cricket Board of SA supra* 1379B-C).

¹⁵¹ In respect of the rights of individual participants to challenge the jurisdictional and "legislative" might of sports governing bodies, which display the extensive regulatory powers over both commercial and "sporting" aspects of sport in the modern context, one might ask whether the principle applied by the US Supreme Court in *Koszela v National Association of Stock Car Auto Racing* 646 F.2d 749 (2nd Cir. 1981) is not preferable. In this case, where a stock race car owner and his driver claimed that NASCAR, a voluntary for-profit association, had misapplied its rules in determining the rightful winners of two races, the court held that the maxim of judicial non-interference in the affairs of voluntary associations does not strictly apply where the association is primarily a business run for profit and in which its members have no rights whatsoever in its internal governance; and where the association has complete dominance over the particular field with little choice for competitors but to join. See Wise and Meyer 199.

¹⁵² See ss 8(2) and (3) of Act 108, 1996.

¹⁵³ See discussion of this issue in Louw 2007 22(1) *SA Public Law* 211-255.

market,¹⁵⁴ and monopsony power¹⁵⁵ in the input market¹⁵⁶ – they constitute the only “buyer” for the product of player labour. While the South African and American professional sports industries are very different, this proposition also holds true also in our major professional sports (as has been illustrated above in discussion of the restrictions of access for prospective participants).

This last characteristic should also be considered in any determination of whether a contract of adhesion such as that of the player’s employment contract is in line with public policy. Sachs J, in his dissenting judgment in *Barkhuizen v Napier*,¹⁵⁷ observed the following in this regard (in the specific context of standard form-contracts):¹⁵⁸

“‘[F]reedom of contract’ has long been defined in terms of the separation of the market and the state, private and public law; at its fullest reach, it is the doctrine of laissez faire. But to use such a framework to deal with contracts of adhesion, is to err both in valuing highly a claim to freedom that is inapposite, and to overlook the elements of liberty that are actually at stake. Far from enforcement of the organisation’s standard form terms furthering fundamental human values, the standard document grows out of and expresses the needs and dynamics of the organisation ... [T]he use of contracts of adhesion enables firms to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms” (own emphasis).

It is submitted that the professional sport employment context is extremely apposite to this last observation; even though the circumstances of contracting overshadow the physical form of the contract of adhesion at stake here. This last, coupled with the exclusionary nature of submission to the regulatory powers of ISGBs,¹⁵⁹ shows that the fiction of consensual agreement is in fact nothing more than an extension of the “legislative” powers of governing bodies. This was recognised in English law nearly 35 years ago, in the context of the application of the rules of natural justice to the regulatory conduct of a sports governing body:

“The rules of a body like [the Football Association] are often said to be like a contract. So they are in legal theory. But it is a fiction – a fiction created by lawyers to give the courts jurisdiction ... Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association.”¹⁶⁰

¹⁵⁴ In respect of the entertainment “product” provided through games and events.

¹⁵⁵ See fn 34 above for an explanation of “monopsony”.

¹⁵⁶ The input of labour power by players/athletes.

¹⁵⁷ *Supra*.

¹⁵⁸ Par 145, with reference to Rakoff “Contracts of Adhesion: An Essay in Reconstruction” 1983 96 *Harvard LR* 1173 1237.

¹⁵⁹ *Ie*, the fact that a failure to submit to such regulatory powers by means of such contract serves to exclude the (prospective) athlete from participation in the professional and/or elite game.

¹⁶⁰ *Enderby Town FC Ltd v The Football Association Ltd supra* 606. See also Lewis and Taylor 123, who remark that:

“[A governing body’s] decisions affects the rights of a range of individuals and businesses, often without there being a contractual relationship between them establishing the right or conferring jurisdiction on the governing body to make decisions affecting those individuals and/or businesses. Even where there is a nominal contractual relationship, arguably it is often not truly consensual or

And, as Foster has implied, it may be prudent to consider the total context of the relationship between athlete and governing body (a “sociological analysis”) and not simply what such relationship has traditionally been called:

“Although the relationship between an international sporting federation and an athlete is nominally said to be contractual, the sociological analysis is entirely different. The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical relationship.”¹⁶¹

To summarise, therefore: The traditional notion of the contract theory as underpinning the chain of subjugation of players, which is found in practice in all the professional sports, is based on a fallacious acceptance of the legitimacy of a fiction, which has little substance in reality and in fact constitutes an illegitimate and unreasonable restriction of the rights of players and is open to testing in light of public policy and constitutional principles.¹⁶² This notion is out of date and inconsistent with legal development elsewhere (in respect of regulation of professional sport and legislative and judicial intervention in this area) as well as rights adjudication under the South African Constitution.

Clearly, the issue of the status of the regulatory conduct of ISGBs, which is the very iron from which the links of the chain of subjugation are forged, is central to determining the basis for their application to players in the domestic context. It is submitted that the above rejection of contract as basis for this regulatory nexus serves to expose such rules even more critically to domestic judicial scrutiny – we cannot validly argue that professional athletes, merely through choosing to pursue a sporting occupation,

voluntary but rather a constitutional arrangement of rules, regulations and codes of conduct that is deemed to apply to all those who participate in the sport.”

See also the pronouncement by the Belgian Doornik Labour Tribunal of 18 February 2000 (as quoted by Blanpain 9), where the following was said regarding the football transfer system:

“Purely private rules such as those by the Football Association cannot take precedence over the contractual will of the parties. A contract of employment which relates to an issue of mandatory law and which is even partly a matter of public order ranks more highly than rules originating from a private institution.”

However, even if one disregards the fiction of a consensual agreement in the context of voluntary association as the basis of the nexus between player and governing body and considers the position of players in professional sport purely on a viewing of their contracts as constituting employment contracts in the normal sense, it should be remembered that inherent in this notion is the acceptance of the fundamental inequality associated with this type of contract:

“In its inception [the employment relationship] is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment’.”

Davies and Freedland 18.

¹⁶¹ Foster Spring 2003 2(1) *Entertainment Law* 1 16.

¹⁶² *Eg*, the right to human dignity as described in s 10 of the Constitution, and the right to equality in s 9 – see the discussion above.

automatically consent to a trampling of their constitutional rights as a matter of course.

I will explore a possible alternative basis for the domestic application of such regulatory conduct in the employment of professional athletes in a future paper, which will examine what I believe to be the autonomous status of such rules in light of developments in international law. For now, it is hoped that our courts and others who are faced with disputes involving the employment of professional athletes will make more of an effort to evaluate the substantive elements of this relationship in light of the surrounding circumstances and its characteristics, without merely applying labour laws and traditional notions of contract law. Our constitutional dispensation guarantees protection to all, and does not exclude those who “play for a living”.