Author: K Mould

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THE SUITABILITY OF THE REMEDY OF SPECIFIC PERFORMANCE TO BREACH OF A "PLAYER'S CONTRACT" WITH SPECIFIC REFERENCE TO THE *MAPOE* AND *SANTOS* CASES

Kenneth Mould*

1 Introduction

During the 1990s, rugby union formation in the Republic of South Africa developed rapidly from a system of strict amateurism to one of professionalism.[1] Professional participants in the sport received salaries for participation, and rugby became a business like any other. As in all forms of business, rugby had to be regulated more efficiently than had previously been the case. Tighter regulations were instituted by governing bodies, and ultimately labour legislation became applicable to professional rugby.[2]

The primary tool for regulating business in general is the contract. In fact, Whitehill goes so far as to state that "the professional sports industry is founded upon the basic contract".[3] Rugby, which effectively commenced functioning as a "business" in South Africa after the 1995 Rugby World Cup, is no exception. However, the exact nature of the contract regulating the relationship between a professional rugby player and his employer in South Africa, but also internationally, deserves closer attention. Naudè[4] has indicated how the contract between a professional football club and its head coach, whilst in essence a contract of employment, possesses certain *sui generis* characteristics. These characteristics have recently had a significant influence on the way in which South African courts perceive the contract regulating the relationship between a professional rugby player and his employer.[5] This article attempts to analyse the nature and functioning of the contract mentioned, while indicating how the *sui generis* characteristics applied to such contracts in the case of

* Kenneth Mould LL.M. Lecturer, Department of Private Law, University of the Free State. MouldKL@ufs.ac.za.

1 Cloete *Introduction to Sports Law* 3.
2 Cloete *Introduction to Sports Law* 4.
3 Whitehill 1981-1982 *Sw L J* 803.
4 Naudé 2003 *TSAR* 269.

Santos Professional Football Club (Pty) Ltd v Igesund[6] and discussed by Naudé have had a significant effect on the High Court decision in *Vrystaat Cheetahs (Edms) Beperk v Mapoe.*[7] Suggestions are made, based on the most recent authority, on how similar cases will be dealt with by the courts in future. In order to make these suggestions, the suitability of the contractual remedy of specific performance to breach of a player's contract in South African law must be investigated.

To indicate how the contract of employment that governs the relationship between the professional rugby player and his employer in South African law differs from the *prima facie* contract of employment, it is necessary to investigate the nature and development of the latter in South Africa and abroad. Only by determining what a contract of employment in the general sense of the term entails will one be able to prove that the contract between the professional rugby player and his employer in fact differs from the former, as it possesses *sui generis* characteristics. It can therefore be described as a *sui generis* contract of employment which demands a *sui generis* approach to determining the most suitable remedy in case of breach thereof.

2 The employment relationship in South Africa

In order to indicate how the fact that a player's contract possesses *sui generis* characteristics had an influence on the determining of an appropriate remedy for breach of contract in the case of *Santos Professional Football Club (Pty) Ltd v Igesund*[8] as well as the *Mapoe* decision mentioned above, the nature of the employment relationship and employment contract in South African law must be investigated.

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5 The contract of employment between a professional rugby player and his employer will be referred to in this article as a "player's contract", for clarity's sake.

6 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C).

7 *Vrystaat Cheetahs (Edms) Beperk v Mapoe* Case Number 4587/2010 decided on 29 September 2010 in the Free State Provincial Division of the High Court. Hereinafter referred to in the text as the *Mapoe*-case.

8 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C). Hereinafter referred to in the text as the *Santos*-case.

According to section 213 of the *Labour Relations Act*,[9] an "employee" is defined as the following:

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration;* and
> (b) any other person who in any other manner assists in carrying on or conducting the business of an employer; and "employed" and "employment" have meanings corresponding with that of "employee".

According to Van Jaarsveld and Van Eck, a contract of employment can be defined as "a mutual agreement in terms of which an employee makes available his services for a determined period and remuneration under authority of the employer".[10] The Code of Good Practice[11] states that a person will be considered an employee if, firstly, the person "works or renders services to the person or entity cited in the proceedings as his or her employer"[12] and secondly if one of seven factors is present in the relationship with one person or entity. These factors determine that a person would be considered an employee if one or more of the following is present:[13]

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that one person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;

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9 *Labour Relations Act* 66 of 1995. See also s 1 of the *Basic Conditions of Employment Act* 75 of 1997; s 1 of the *Employment Equity Act* 55 of 1998 and Van Jaarsveld and Van Eck *Principles of Labour Law* 50.

10 Van Jaarsveld and Van Eck *Principles of Labour Law* 49; Jordaan "Sport and Employment" 1.

11 GN 1774 in GG 29445 of 1 December 2006 (hereinafter referred to as the Code of Good Practice).

12 Code of Good Practice s 15.

13 Code of Good Practice s 18. See in this regard also Snyman and Deacon 2009 *PELJ* 147.

(f) the person is provided with the tools of trade or work equipment by the other person; or

(g) the person works for or renders services to only one person.

When considering these factors, it is clear that professional sportsmen and sportswomen can be classified as "employees" governed by "contracts of employment".[14] It should be noted, however, that this fact applies only to professional participants in team sports, such as rugby and soccer. Self-employed professional sportsmen and sportswomen, such as tennis players, boxers and golfers, fall instead into the category of "entrepreneurs" or independent contractors, whose professional contracts are based on the Roman law *locatio conductio operis*, or contract of work.[15] In the case of *Walker v Crystal Palace Football Club*,[16] Cozens-Hardy MR confirmed the fact that the professional sportsman, in this case a football player, is considered an employee of the club that employs him, despite the *sui generis* nature of his services. This is evident from the following statement of the court in this case:

> It has been argued before us very forcibly by Mr Russell that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g., the club in this case would have no right to dictate to him how he should play football. I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the club for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody.[17]

One must consequently first accept the fact that although the nature of the services provided by a professional rugby player differs from the services provided by an

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14 The "contract of employment" mentioned here is based on the Roman law *locatio conductio operarum*, or contract of service. In this regard see also Prinsloo 2000 *TSAR* 229; Jordaan "Sport and Employment" 1.

15 Gardiner *et al Sports Law* 477; Jordaan "Sport and Employment" 1.

16 *Walker v Crystal Palace Football Club Ltd* 1910 1 KB 87 (CA). Hereinafter referred to in the text as the *Walker*-case.

17 *Walker v Crystal Palace Football Club Ltd* 1910 1 KB 87 (CA) 92.

employee in the general sense of the word, the relationship that exists between the player and his employer is in essence one of "employment" as defined above.

According to Le Roux, the South African concept of the contract of employment, whilst a new one, is currently in a state of relative unity.[18] Because there are undeniable similarities between the development of the contract of employment in South Africa and Britain, Le Roux correctly depends on the development of this type of contract in English law.[19] In Britain, the existence of a "master and servant" relationship was established, up until the 1970s, by applying the "control test".[20] This test basically proclaimed that a person would be considered an employee if such a person were to be "told what to do and how to do it by someone else, with little or [no] choice in the matter".[21] In South Africa, the "master and servant" laws were repealed in 1974.[22] However, the current South African definition of a contract of employment still possesses an element of authority of the employer over the employee. In the court's decision in the *Walker*-case, Cozens-Hardy made mention of the argument that "there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g. the club in this case would have no right to dictate to him how he should play football".[23] Although the court did not agree with this argument (which was presented on behalf of Walker), it is a valid argument nonetheless, especially in the context of professional rugby union today. Van Jaarsveld and Van Eck claim that there is much difference of opinion as far as the nature and description of the feature of "authority" in the contract of employment is concerned. These authors believe that the relationship of authority between the employer and employee in South African law encompasses three components.[24] These components are: the services are rendered in respect of a subordinate

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18 Le Roux 2010 *ILJ* 139-165.

19 Le Roux notes that she relied on the views of Deakin on the evolution of the contract of employment in Britain. See Le Roux 2010 *ILJ* 140.

20 Le Roux 2010 *ILJ* 148; Blackshaw "Professional Athlete" 1; Gardiner *et al Sports Law* 477.

21 Le Roux 2010 *ILJ* 148; Blackshaw "Professional Athlete" 1; Gardiner *et al Sports Law* 477.

22 Le Roux 2010 *ILJ* 142.

23 *Walker v Crystal Palace Football Club Ltd* 1910 1 KB 87 (CA) 92.

24 Van Jaarsveld and Van Eck *Principles of Labour Law* 54.

relationship; the services are rendered under control and supervision; and the employer gives guidance to the employee during the rendering of the services.[25]

When these components are considered, it is clear that Cozens-Hardy's decision in the *Walker*-case was based on the fact that he considered a professional sportsman to be an employee in every sense of the word. What these components entail is that the employee has a duty to behave in a subordinate manner towards his employer under supervision of the latter, and accept the guidance of the employer in services he or she renders.[26] This argument was confirmed in the case of *Colonial Mutual Life Assurance Society v Macdonald.*[27] *In casu,* the court stated the following:

> In the former case (*locatio conductio operarum*) the relation between the two contracting parties is much more intimate than in the latter (*locatio conductio operis*), the servant becoming subordinate to the master, whereas in the latter case the contractor remains on a footing of equality with the employer. Where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant. He is entitled at any time to order the servant to desist, and if the matter is sufficiently serious may even dismiss him for disobedience. Although the opportunity of supervising and controlling which a master is able to exercise over a servant may vary greatly with circumstances, it cannot be said to be altogether unreasonable to hold him liable for the torts of his servant. But because even in the case of a master and servant effective supervision and control is in some case difficult if not entirely absent that is no reason for extending the liability of the principal to include the torts of a man over whose actions he has no say whatever.[28]

Le Roux notes that this decision is sometimes erroneously understood as authority for the proposition that the employer must have actual control over the employee's work.[29] In fact, the court never required more than a mere right to control, and conceded that actual control could even be absent.[30] This is, however, not to say that control should not play any role when a decision must be made as to whether or not an employment relationship exists, as insinuated in the *Walker*-case.[31]

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25 Van Jaarsveld and Van Eck *Principles of Labour Law* 54.
26 Van Jaarsveld and Van Eck *Principles of Labour Law* 54-55.
27 *Colonial Mutual Life Assurance Society v Macdonald* 1931 AD 412.
28 *Colonial Mutual Life Assurance Society v Macdonald* 1931 AD 412 433.
29 Le Roux 2010 *ILJ* 150.
30 Le Roux 2010 *ILJ* 150.
31 Le Roux 2010 *ILJ* 150; *Walker v Crystal Palace Football Club Ltd* 1910 1 KB 87 (CA) 92.

While it should be remembered that this decision was made during a period in which the "master and servant" approach was still strictly adhered to in South African law, the sentiment was confirmed in the case of *Smit v Workmen's Compensation Commissioner*,[32] in which the Appellate Division had to decide whether the appellant was in fact an employee or "workman" as contemplated by section 3(1) of the *Workmen's Compensation Act.*[33] The Court in the person of Joubert JA, while finally substituting the "control test" of English law with the so-called "dominant impression"-test,[34] came to the same conclusion as in the *Colonial Mutual Life Assurance*-case referred to above as to the fact that an employee effectively operated under the authority of the employer.[35]

Having established what the employment relationship in South Africa currently entails, it is essential to establish how the contract between a professional sportsman or sportswoman as an employee and his or her employer in South African law relates to this relationship, and more importantly, how the latter relationship differs from the former.

3 The position before professionalism in rugby union: *Troskie v Van der Walt*

Although the decision in the case of *Troskie v Van der Walt*,[36] which dates back to the amateur era of rugby, strictly speaking falls outside of the scope of this article, mainly because in the case of *Troskie* no relationship of employment existed between the contracting parties, various relevant legal points were dealt with by the

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32 *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).

33 *Workmen's Compensation Act* 30 of 1941.

34 In the case of *Ongevallekommissaris v Onderlinge Versekeringsgenootskap Avbob* 1976 4 SA 446 (A), in conceding that control by an employer over an employee is no longer decisive in determining the presence of a relationship of employment, the court decided that when a certain relationship exhibits characteristics of employment as well as of another type of relationship, the court must ask itself what dominant impression is created by the contract. See also Le Roux 2010 *ILJ* 155; Joubert *General Principles* 1.

35 It must be kept in mind, though, that in the *Colonial Mutual Life Assurance*-case, the respondent was eventually classified as an independent contractor under the *locatio conductio operis*, while in the *Workmen's Compensation Commissioner*-case, the appellant was eventually classified as an employee or "servant" under the *locatio conductio operarum*.

36 *Troskie v Van der Walt* 1994 3 SA 545 (O).

court *a quo* as well as the full bench of the High Court. *In casu*, Van der Walt, who played for the Free State rugby team in the early nineties, had entered into a contract with the appellant in the abovementioned application on the 24th of January 1991.[37] The entire contract read as follows:

> Nico het R1 500 gekry van 1991 in 1990.
> Vandag 24-1-91 van R4 000 is R3 000 vir Nico se rugby by O/G[38] R1 000 sal ons besluit of dit 'n deel van 1992 is of 'n lening.
> (Get)
> N van der Walt (1991-seisoen)
> (Get)
> WP Troskie[39]

The first appellant and the respondent had thus entered into a contract which basically obliged the respondent to play rugby for the second appellant (Old Greys Rugby Football Club) for the entire 1991 season. In return, the respondent was to be paid the amount of R4 000.[40] As it turned out, the respondent joined the opposing Collegians-club on 18 February 1991, with the intention of forthwith playing his club rugby for that particular club. The requirements for repudiation as a form of breach of contract were at the time of the decision as follows:[41]

- The debtor (respondent in current case) must have no intention of honouring his/her part of the contract.
- The debtor (respondent in current case) must inform the creditor (first appellant in current case) of his/her intention not to honour the contract.
- The creditor (first appellant in the current case) must accept the debtor's repudiation as an act of breach of contract.[42]

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37 *Troskie v Van der Walt* 1994 3 SA 545 (O) 548.
38 The "Old Greys" club in Bloemfontein.
39 *Troskie v Van der Walt* 1994 3 SA 545 (O) 548.
40 As stated earlier, the contract in question was entered into in an era when all levels of rugby union played in South Africa still had to adhere to the amateur code. The contract stated expressly that the respondent was to be paid for playing rugby, which made the contract for all practical and legal purposes void *ab initio*. See *Troskie v Van der Walt* 1994 3 SA 545 (O) 550.
41 Van der Merwe *et al Contract: General Principles* 363-364.
42 It has been argued with some merit that this requirement is obsolete, most notably by Hutchison *Forms of Breach* 311.

In the case under discussion, the respondent's actions left no doubt as to the fact that he did not intend to honour his contract. The creditor (first appellant) was informed of this intention. However, the creditor did not accept the debtor's repudiation in this matter.[43] The creditor (Troskie in his personal capacity and on behalf of the Old Greys club) applied for an order *compelling* the debtor (Van der Walt) to play for the Old Greys club for the course of the 1991-season. In essence, the appellant sought an order for specific performance of the obligations in question. The question which had to be answered was if a court could order specific performance of a contractual obligation that would essentially compel a rugby player to play for a team for which he was unwilling to play. Wright J, writing on behalf of the full bench, held the following:[44]

> Die aard van die dienste wat in die onderhawige saak gelewer moes word, is die speel van rugby vir 'n besondere klub. Die lewering van die betrokke diens is nie alleen afhanklik van die persoonlike entoesiasme, bereidwilligheid en deursettingsvermoë van die besondere speler nie, maar ook is daar aan die betrokke dienste 'n groot mate van kundigheid, bedrewenheid en vaardigheid van persoonlike aard verbonde en wat afhanklik sal wees van die besondere speler se spesifieke eienskappe en ook sy verhouding met die klub vir wie hy rugby speel. Dit is sterk te betwyfel of daar in die besondere omstandighede van hierdie saak ooit 'n bevel van spesifieke nakoming gepas sou kon wees, heeltemal afgesien van die feit dat die amateurkode van die Internasionale Rugbyvoetbalraad ook nog van toepassing is.

In addition, the court *a quo* in the current case, in the person of Malherbe JP, decided the following:[45]

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

What is interesting about Wright J's decision is that he emphasises the fact that in the current case an order for specific performance may never be granted, "afgesien van die feit dat die amateurkode van die Internasionale Rugbyvoetbalraad ook nog van toepassing is".[46] By implication, an order for specific performance in similar circumstances would not have been granted, even if rugby had already been a

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43 *Troskie v Van der Walt* 1994 3 SA 545 (O) 548.
44 *Troskie v Van der Walt* 1994 3 SA 545 (O) 552.
45 *Troskie v Van der Walt* 1994 3 SA 545 (O) 553.

professional sport at the time of the judgment. Le Roux stated in 2003 that the perception existed that "courts are reluctant to order specific performance in cases of breach of contract where the defaulting party is required to render performance of a very personal nature, such as contracts of employment".[47] Christie agrees with this statement, noting that "an order for the specific performance of a contract of employment will, in the exercise of the court's discretion, not normally be granted… the reason why the courts have not granted such orders remain as valid as ever, provided it is remembered that in every case the court has a discretion".[48] Kerr adds that "no court, for example, can force a singer to sing or an artist to paint a picture because these tasks require the application of highly personal skills".[49]

The *Troskie*-decision had a significant influence on some decisions with similar facts in the professional era of sport. Consequently, these decisions must be investigated before deciding on the appropriateness of the remedy of specific performance in case of breach of a player's contract, or any other contract of employment for that matter that involves the rendering of "services of a personal nature".

4 The position after rugby union became professional

4.1 Santos Professional Football Club (Pty) Ltd v Igesund[50]

The main difference between the context in which the *Troskie*-case was decided and that in which the *Santos*-case was decided was the fact that in the latter, a contract of employment existed between the parties. The applicant in the abovementioned case, a professional soccer club, and the first respondent, a professional soccer coach, had entered into a contract stating that the latter would coach the former's professional team for a period of two years from 20 July 2001 to 30 June 2003.[51] On the 24th of June 2002, the first respondent wrote a letter of termination of his services

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46 *Troskie v Van der Walt* 1994 3 SA 545 (O) 552.
47 Le Roux 2003 *SA Mercantile Law Journal* 116.
48 Christie *Law of Contract* 528.
49 Kerr *Principles of the Law of Contract* 530. Kerr's statement is probably derived from the English decision in *Lumley v Wagner* 42 ER 687.
50 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C).
51 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 698.

to the applicant, effectively committing breach of contract in the form of repudiation. The applicant approached the court for an order of specific performance against the first respondent, which would, if granted, compel the latter to serve as head coach of the former until 30 June 2003. The contract contained the following clause:

> 9.1. Should the head coach commit any breach of this agreement and fail to remedy such breach within 14 days after registered post of notice from the club or its attorneys requiring the head coach to do so, the club shall have the right to cancel forthwith, or to take action against the head coach for specific performance of his obligation under the agreement.[52]

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

The reasons provided by the first respondent for wanting to leave the service of the applicant were as reasonable and convincing as any. These reasons included a lack of security of employment, wishing to relocate his family to Cape Town, "*and a much better offer received from another club*"[53] (author's emphasis). Desai J in fact stated expressly that "the respondent's principal reason for leaving the applicant is a commercial one, namely that he has secured a better contract".[54] Arendse SC on behalf of the applicant contended that "it would be a blatantly unfair labour practice, constituting an infringement of the applicant's constitutional rights, to allow the first respondent to resile from his contract purely on the basis that he has received a better offer".[55]

Desai J went so far as to state that the first respondent could not avoid the consequences of performing under the contract by merely alleging an unwillingness to continue to perform under the contract.[56] The court further stated that "a party may resile from a contract only on one of the recognised grounds relating to breach or

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52 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699.

53 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699. The club referred to is the Ajax Cape Town Club.

54 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699. The first respondent received a signing-on fee of R250 000.00 at the applicant, with a monthly salary of R30 000.00. The offer he had received from the second respondent consisted of a signing-on fee of R800 000.00 with a monthly salary of R62 000.00.

55 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699.

repudiation or upon notice where this is provided for in the contract".[57] However, in deciding whether the remedy of specific performance was a relevant one in this particular case, the court stated the following:[58]

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

The court succumbed to the perception of reluctance to order specific performance in cases of breach of contract where the defaulting party is required to render performance of a very personal nature (such as contracts of employment) mentioned by Le Roux[59] and Christie[60] above. What the court failed to take into account is that the nature of the contract of employment in the current matter (as well as the nature of a player's contract in general) differed somewhat from the nature of a *prima facie* contract of employment. To substantiate this statement, one must investigate the full bench decision in this, and also Naudé's remarks following the decision.

4.2 Santos Professional Football Club (Pty) Ltd v Igesund[61]

The importance of the full bench's decision lies therein that Foxcroft J conducted a search into the true nature of the remedy of specific performance in South African law. The nature of the remedy was compared to a similar remedy in English law, and the origin of the remedy in South African law was investigated. This is an indication that the court's eventual decision should probably be regarded as the most

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56 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699.
57 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 699.
58 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 (C) 701.
59 Le Roux 2003 *SA Mercantile Law Journal* 116.
60 Christie *Law of Contract* 528.
61 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C).

thoroughly-researched one (at the time) in the context of the remedy of specific performance with regard to players' contracts, but also to the nature of the player's contract.

The first applicable point the court makes is that one should be reminded that both parties in the current case had agreed to the fact that breach by either of them would render the right "to take action for specific performance" to the other party.[62] On this point, the court made it abundantly clear that the right to decide upon a suitable remedy rests with the injured party, and it is not for the party in breach to prescribe to the injured party which remedy to pursue, as the first respondent had attempted to do *in casu*.[63] Foxcroft J stated: "As I have tried to show, defendant (first respondent) has no right to prescribe how the plaintiff will make the election provided by law."[64]

The abovementioned statement was the first indication that the court felt that there had to be a way, especially in a professional era of sport, not to let the obligation of honouring a contract of employment become a watered-down phenomenon. The court further stated that on the facts of the case there did not seem to be any inequity in obliging the first respondent to adhere to his contract.[65] In fact, according to the court, the appellant (Santos) was the only party that would be prejudiced if the first respondent were to be compelled to perform, and subsequently were to perform inadequately.[66] The question raised by Desai J as to whether or not an order compelling the first respondent to continue working for an employer for which he did not want to work would compromise his (the first respondent's) dignity was answered by Foxcroft J in the negative:[67]

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

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62 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 76.
63 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 81-82.
64 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 81.
65 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 85.
66 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 85.
67 *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 5 SA 73 (C) 86.

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

In expounding the legal position in the wake of the case, Cornelius stated in 2003 that "while an athlete is still under contract, he or she can and should be restrained from moving to another club without permission from the current club".[68] Naudé added that "setting a precedent that even such an 'abnormal' employment contract can never be specifically enforced may give rise to grave injustice and the evasion of plain contractual duties".[69]

The full bench-decision in *Santos* established the fact that while the courts may have been reluctant before 2003 to order specific performance in cases of breach of contract where services of a very personal nature must be rendered by the defaulting party, the nature of the contract of employment between a professional sportsman or sportswoman (an employee) and his or her employer is *sui generis,* and should therefore be approached differently from the *prima facie* contract of employment. Because of this *sui generis* personal nature of the relationship and the contract, it is submitted that in similar cases specific performance would in fact be the most suitable remedy. This opinion is supported by Naudé,[70] who identifies four reasons why the court in the *Santos*-case granted specific performance of the contract in question. Firstly, it was emphasised that the contract was not "an ordinary contract of employment".[71] Van der Merwe *et al* echo this decision by stating the following:

> The factor that tipped the scales was that the contract in issue was not an ordinary contract of employment. The parties contracted on an equal footing and the employee enjoyed much latitude in performing his duties. There also was no breakdown in the interpersonal relationship and no recognised hardship to the defendant.[72]

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68 Cornelius 2003 *TSAR* 731.
69 Naudé 2003 *TSAR* 281.
70 Naudé 2003 *TSAR* 270.
71 Naudé 2003 *TSAR* 270.
72 Van der Merwe *et al Contract: General Principles* 385.

Three features of the said contract were relied upon to confirm the its uniqueness, namely:

1. The court emphasised the fact that clause 9 of the contract granted the right to sue for specific performance in case of breach.[73] This relates closely to the following statement by Cameron JA in *Brisley v Drotsky:*[74]

> On the contrary, the Constitution's values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy informs also the constitutional value of dignity.

   Consequently, a person must be held bound to what he or she may have contracted on because of the constitutional values mentioned by Cameron JA.

2. The first respondent was given carte blanche in the execution of his professional duty of coaching and team selection.[75] The contract itself prohibited the club from interfering in the coaching, selection and substitutions of the team.[76] This effectively cancelled out the essential element of authority by the employer over the employee as discussed above, and should in itself be sufficient motivation for the fact that the contract in question (as well as the player's contract in general) was a *sui generis* employment contract, in terms of which specific performance in case of breach was the most appropriate remedy.

3. The first respondent (and subsequently the defaulting party) had contracted on equal terms with the employer. This fact appears from the large sum of money the former commanded.[77] This is a clear indication that the first respondent was not a "servant" in the typical "master and servant" relationship mentioned above.

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73 Naudé 2003 *TSAR* 271.
74 *Brisley v Drotsky* 2002 4 SA 1 (SCA).
75 Naudé 2003 *TSAR* 271.
76 Naudé 2003 *TSAR* 271.
77 Naudé 2003 *TSAR* 271.

The second reason why the court granted specific performance in the *Santos*-decision, was because specific performance was (and is) considered the primary remedy for breach of contract in South African law. This was firmly established in *Benson v SA Mutual Life Assurance Society,*[78] wherein Hefer JA exclaimed that the right to specific performance in South African law was decided as long ago as 1882.[79] In deciding this, the court in the *Santos*-case effectively rejected the proposition that specific performance should not be granted where an award of damages would adequately compensate the aggrieved party.[80] This decision had a significant influence on later decisions of the same kind, most notably in the *Mapoe*-decision discussed below. What the court in *Santos* did not take into account according to Naudé, was the suggestion in the *Benson*-case that the adequacy of damages, as well as other obstacles to the granting of specific performance derived from English law, "remained valid factors which are to be considered on the same basis as any other relevant fact".[81] It should be kept in mind that granting the remedy of specific performance against a defaulting contractant should not have an unjust or inequitable result.

The third reason why the court in the *Santos*-case saw it fit to grant an order of specific performance was the fact that the first respondent's reason for wanting to end the employment relationship with his employer was a commercial one, and was not based on a breakdown in the relationship.[82] In case of a breakdown in the employment relationship, such a breakdown may certainly be a consideration against specific performance, especially if the employer is partly to blame for the breakdown.[83] Forcing an employee to remain bound to a contract in terms of which the employment relationship has been damaged may well intrude on the employee's dignity, as Desai J stated in the *Santos*-decision, writing on behalf of the court *a quo*. It would not be a valid excuse for an employee to claim that the relationship between himself or herself and his or her employer has deteriorated *because* of his (the

78 *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A).
79 *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 782.
80 Naudé 2003 *TSAR* 272.
81 *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 785, as quoted by Naudé 2003 *TSAR* 272.
82 Naudé 2003 *TSAR* 277.
83 Naudé 2003 *TSAR* 278.

employee's) breach. If the employer should elect to apply for an order of specific performance, it means that such an employer is willing to carry the risk that the employee might not perform optimally if forced to honour his or her contract.

The fourth and final reason identified by Naudé as to why the Full Bench in the *Santos*-case ordered specific performance of the contract in question was the fact that "practical considerations were irrelevant to the court's equitable discretion to refuse specific performance, which should be based only on "recognised hardship to the defaulting party".[84]

When considering these reasons for granting the remedy of specific performance of a contract of employment, it is clear that the employment contract in question possessed some characteristics that are *sui generis* in nature, and that this actually enabled the court to grant specific performance despite the fact that it could very easily have ordered a surrogate of damages to be paid by the defaulting party. If, however, damages had been ordered, the order would have made a mockery of the employment contract in South Africa. It is submitted that the decision of the full bench in the *Santos*-case was correct, which is why the decision was followed by the High Court in the *Mapoe*-case.[85]

4.3 Confirmation of the correctness of the full bench-decision in *Santos: Vrystaat Cheetahs (Edms) Beperk v Mapoe*

The first respondent in the *Mapoe*-case had signed a valid contract of employment on the 30th of May 2008 in terms of which he was bound to play professional rugby for the applicant until the 31st of October 2011.[86] During the course of 2010, however, the first respondent repudiated his contract with the applicant by signing another contract of employment with the second respondent (Sharks (Edms) Beperk). The matter was referred for arbitration on the grounds that, firstly, the

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84 Naudé 2003 *TSAR* 279.

85 In this case, the court actually used the term "diensspelerskontrak", which confirms the *sui generis* nature thereof. See *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 90.

86 *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 7.

contract between the applicant and the first respondent was invalid, and secondly, that the employment relationship between the parties had broken down irretrievably.[87] Furthermore, the first respondent claimed that the applicant had discriminated against him by making him sign the contract in question while he was only twenty years old, not represented by an agent, ignorant and inexperienced.[88] It was ordered by the arbitrator that the first respondent had to honour his contract with the applicant until it lapsed on 31 October 2010. The first respondent ignored the arbitrator's order and continued practising with the second respondent. The applicant then applied for an interdict to compel the first respondent to comply with his (the first respondent's) contractual obligations, which, if granted, would effectively result in an order of specific performance against the first respondent.

In hearing the application for the interdict, Van Zyl J made mention of clause 13 of the *South African Rugby Union Regulations Player Status, Player Contracts and Player Movement*, which states that if a player, agent or province should be guilty of transgressing any of the regulations, certain remedies would be available to the innocent party, among which damages to be paid to the latter occurs.[89] Van Zyl J decided that none of the remedies that appear in the list would be suitable in the current matter, as they would not have the same result as to the protection of the applicant's interests. The court dealt with the *Benson* decision discussed above, as well as the decision in *Haynes v Kingwilliamstown Municipality*,[90] especially regarding the matters of "undue hardship" to the player if he were to be compelled to comply with his contractual obligations, and the "discretion of the court" to grant specific performance in case of breach of contractual obligations.[91] The first and second respondents relied heavily on the *Troskie*-decision discussed above in attempting to prove that a court could not grant an order of specific performance for the rendering of personal services. This argument was rejected by Van Zyl J, who correctly stated that the *Troskie*-case was decided in an era wherein rugby players

87 Vrystaat Cheetahs (Edms) Beperk v Mapoe 4587/2010 (29 Sep 2010) 7.
88 Vrystaat Cheetahs (Edms) Beperk v Mapoe 4587/2010 (29 Sep 2010) 55. This was a relatively poor claim considering Cameron JA's decision in Brisley v Drotsky 2002 4 SA 1 (SCA).
89 Vrystaat Cheetahs (Edms) Beperk v Mapoe 4587/2010 (29 Sep 2010) 90-91.
90 Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A).
91 Vrystaat Cheetahs (Edms) Beperk v Mapoe 4587/2010 (29 Sep 2010) 90.

still had to conform to the amateur code.[92] The court went further by stating that the facts of and context in which the *Santos*-case was decided related more closely to the current case. Not surprisingly, the court depended primarily on the full bench decision in *Santos*, which has already been dealt with in detail above. Consequently, it was decided that the court's discretion would be exercised in favour of the applicant. The first respondent was compelled to honour his contractual obligations to the applicant.

It is submitted that the court's reasoning and ultimate decision was correct in view of current South African authority. In order to predict what the outcome of a possible appeal in the current case would be, one has to investigate the suitability of the remedy of specific performance in case of breach of a player's contract.

5 The suitability of the remedy of specific performance in case of breach of a player's contract

It has been stated above and well argued elsewhere that the remedy of specific performance is a primary one in South Africa, as opposed to England,[93] where it is at most a secondary or equitable remedy. Consequently, a party is in principle entitled to insist upon proper and full performance by the other party.[94]

In early Roman Law, a contractant who committed breach of contract could not be ordered to deliver a thing or render a service, but only to pay a sum of money.[95] In later Roman times and certainly in Roman-Dutch law, it became possible for a contractant to obtain an order for specific performance.[96] Under the influence of English law, in terms of which specific performance has always been viewed as an

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92 *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 95-95.

93 This is evident from the classic English case of *Lumley v Wagner* 42 ER 687.

94 Eiselen "Remedies" 319; Bhana, Bonthuys and Nortjè *Students' Guide* 253. Van der Merwe *et al Contract: General Principles* 383; Christie *Law of Contract* 523; Kerr *Principles of the Law of Contract* 528; *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 90.

95 Van der Merwe *et al Contract: General Principles* 383; De Wet and Van Wyk *Kontraktereg* 189; JJ du Plessis in his article "Spesifieke nakoming: 'n Regshistoriese herwaardering" in the *Journal for Contemporary Roman Dutch Law (THRHR)* of August 1988 proved that the remedy of specific performance, although not quite fully developed, was a familiar one in Roman law.

96 Eiselen "Remedies" 319; Bhana, Bonthuys and Nortjé *Students' Guide* 253; Van der Merwe *et al Contract: General Principles*; Kerr *Principles of the Law of Contract* 528.

exceptional remedy,[97] South African courts had begun to exercise their discretion in such a manner "that it appeared as if an order for specific performance would be automatically refused whenever particular circumstances were present".[98] This approach was in direct contrast to the South African legal one, which has always stated that an order for specific performance should be refused in exceptional circumstances only.[99]

The situation where an employer seeks an order for specific performance against an employee is a little more complicated, because the personal freedom of the employee is at issue.[100] The obvious risk that arises is that it may be considered forced labour. Van der Merwe *et al* state that "a distinction is drawn between an undertaking by an employee not to enter into the service of another employer during the term of his contract of service and a positive undertaking to enter into the service of an employer. The former type of undertaking would be enforced more readily than the latter".[101] However, in both the *Troskie* and *Santos* cases the employee had given an undertaking not to enter into the service of another employer, and yet did just that. In the *Troskie* case an application to compel the employee to honour his contract was refused, as was done in the *Santos*-case by the court *a quo*. The full bench in the latter case as well as Van Zyl J in the *Mapoe*-case rectified the matter. The question that needs to be answered with regard to future South African decisions in similar matters is if the remedy of specific performance is a suitable one in case of breach of a professional player's contract.

Whitehill[102] expresses the opinion that if professional sportsmen and sportswomen were allowed to freely disregard their contractual obligations, the sports industry's existence would be threatened.[103] Because a professional player's worth cannot be

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97 Christie *Law of Contract* 521 states in fact that damages was the only remedy the old English common law courts could offer for breach of contract. Other remedies, such as specific performance, were developed in the Chancery Court, which was described as a court of equity, not a court of law. Hence, damages came to be described as a legal remedy and specific performance, among others, as an equitable remedy.

98 Van der Merwe *et al Contract: General Principles* 383.

99 Van der Merwe *et al Contract: General Principles* 383.

100 Van der Merwe *et al Contract: General Principles* 385.

101 Van der Merwe *et al Contract: General Principles* 385.

102 Whitehill 1981-1982 *Sw L J* 803.

103 Whitehill 1981-1982 *Sw L J* 804-805.

calculated in monetary terms ("dollar damages" as Whitehill refers to it), the historic remedy in most states of the United States of America for a player's breach of contract is negative injuction.[104] This makes the decision in the case of *Philadelphia Ball Club Ltd v Lajoie*[105] applicable to the South African context. In this case the defendant, a professional baseball player, was lured away from the plaintiff, with which he had had a valid contract, by an opposing American League club. The incentive used by the latter to lure the defendant away from his existing contract was exactly the same as that in the *Santos* and *Mapoe* cases*,* namely an increased salary.[106] While the trial court in *Philadelphia Ball Club Ltd* refused to grant injunction, based on the fact, firstly, that the defendant did not posses such unique abilities as to make him impossible to replace and secondly, that the contract lacked the requisite mutuality, the Pennsylvania Supreme Court rejected these reasons and ordered the defendant to remain in the plaintiff's service for the remainder of their contract.[107] *In casu*, it was established that if a player possessed "unique skills" and contributed to the sport he or she played or the employer he or she represented in a unique manner, then equity would demand that such a player be forced to honour his or her contract with his or her employer.[108] Whitehill concedes that situations may arise in which the services of a player would be easily replaced, and the employer would not suffer irreparable harm. In these cases, damages would be an adequate and suitable remedy to the employer. However, once the "uniqueness test" mentioned above has been passed by the player in question, "the determination of irreparable harm is automatic", and specific performance is the only suitable remedy.[109] In the *Mapoe*-case it was established that the first respondent was indeed a unique player, not only because of his obvious exceptional talent, but also because

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104 Whitehill 1981-1982 *Sw L J* 805. "Negative injunction" is described as an order "preventing the defendant from performing the same contractual duties for anyone other than the plaintiff for the remainder of the contract period". (See Whitehill 1981-1982 *Sw L J* fn 20.) Thus, it is in essence similar to the remedy of specific performance as it is known in South African law. It is interesting to note that this is described as a "traditional" remedy, while in English law, as stated in the text, specific performance is an exceptional remedy at most.

105 *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; 51 A 973 (1902).

106 *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; 51 A 973 (1902) 976. See Van Zyl J's comment at *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 97, where she refers to the contract in question as a "commercial" one. See further *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 5 SA 697 699.

107 *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; 51 A 973 (1902) 978.

108 *Philadelphia Ball Club Ltd v Lajoie* 202 Pa. 210; 51 A 973 (1902) 976; Whitehill 1981-1982 *Sw L J* 807; Uberstine and Grad 1987 *LELJ* 1.

109 Whitehill 1981-1982 *Sw L* 811. See also Uberstine and Grad 1987 *LELJ* 10.

he was a black player. Van Zyl J made mention of the "gentleman's agreement" that existed, and still exists, between teams that compete in the Currie Cup and the South African Rugby Union, which entails that every team that takes the field should contain a quota of at least three black players. At the time of the decision the applicant in the *Mapoe*-decision had struggled to find black players of Currie Cup standard.[110] This fact made the first respondent even more "unique" to the applicant, and made his compliance with his contract even more important. The possibility was even raised by the court that if the applicant did not comply with the "gentleman's agreement" mentioned above, it (the applicant) would be subject to sanctions or fines imposed by the South African Rugby Union.[111]

6 Conclusion

Having investigated the relevant nature of the employment relationship in South Africa, it has been established that the relationship between a professional sportsman or sportswoman and the club or union that employs him or her is one of employment. However, it has also been established that this relationship, and consequently the contract that governs it, possess certain *sui generis* characteristics. Because of these *sui generis* characteristics, the remedy of specific performance, which is not regularly granted in cases of breach of contract of personal services (such as the playing of rugby union), has been established as the most suitable remedy. If the player's contract in question has been found to be valid, fair and legal, there is no reason why a court should grant an employer a surrogate of damages where the latter has applied for an order of specific performance. It is submitted that the decisions in the *Santos* and *Mapoe* cases, therefore, were correct, based on existing South African and applicable foreign law.

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110 *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 25-26.
111 *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 4587/2010 (29 Sep 2010) 28.

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ILJ	Industrial Law Journal
LELJ	Loyola Entertainment Law Journal
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA	Mercantile Law Journal South African Mercantile Law Journal
Sw L J	Southwestern Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg