THE TRUE NATURE OF THE ATHLETE'S CONTRACT

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INTRODUCTION

The generally accepted point of view is that the athlete's contract[2] is one of employment.[3] This article aims to establish that while the athlete's contract certainly possesses similar characteristics to those of the contract of employment, it would be an oversimplification to perceive it as such. The ultimate purpose of establishing the true nature of this type of contract is to suggest to South African Courts, but also Courts in other jurisdictions, that care should be taken in determining the most suitable remedy for breach of the athlete's contract. In order to eventually address the question as to whether the athlete's contract is in fact *sui generis*, one must first determine the meaning of the term "*sui generis*" as it relates to contracts.

The meaning of *sui generis* as it relates to contracts

It is imperative to examine what exactly is meant by the term *sui generis* as far as it relates to contracts, and what the general characteristics of a *sui generis* contract entail (in other words, what makes a contract *sui generis*?). This must be done in order to indicate that the unique characteristics of the athlete's contract are sufficient to qualify it as *sui generis.*

According to Hawthorn and Hutchison,[4] the *sui generis* theory for determining the nature of a specific contract involves rendering the *naturalia*[5] of ordinary contracts inapplicable. If one considers that the *naturalia* of a specific contract is an aid to determine the rights and duties of parties to a contract, as well as the effects and consequences of their contract, it is clear that the *naturalia* of a specific contract will determine the nature of such contract.[6] If the *sui generis* theory were to be applied in order to determine whether an athlete's contract is in fact *sui generis*, the *naturalia* of the ordinary contract of service should be rendered inapplicable. The rights and duties of the parties to an athlete's contract differ from those of the ordinary contract of employment, along with the effects and consequences of such contract. Cooper[7] states that a contract should be classified by turning on the true intention of the parties thereto, which is to be inferred from the purpose of the agreement. According to the *sui generis* theory, this means that the athlete's contract, while possessing attributes of the ordinary contract of employment, is probably *sui generis*, because the purpose or object of the athlete's contract differs from that of the ordinary contract of employment. Also, it is a fact that the athlete's contract is sanctioned by law in more than one way. Most professional athletes' contracts are subject to the rules and regulations of the governing bodies that regulate the

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[2] "Athlete's contract" in this context refers to the contract entered into between a professional athlete in any sporting code and the club, union or franchise for which said athlete participates or plies his/her trade.

[3] Walker v Crystal Palace Football Club Ltd 1910 KB 87 92; Dempster v Addington Football Club (Pty) Ltd 1967 3 SA 262 265; Highlands Park Football Club Ltd v Viljoen and Another 1978 3 SA 191 (W) 192; Santos Professional Football Club (Pty) Ltd v Igesund and Another 2003 5 SA 73 (C) 79; A.M. Louw Sports Law in South Africa (2nd edn, Wolters Kluwer Law & Business 2012) 210; J. Anderson, Modern Sports law (1st edn, Hart Publishing 2010) 257; S. Gardiner and others, Sports Law (4th edn, Routledge 2012) 477.

[4] M. Hawthorn and D. Hutchison, 'Labour tenants and the law' in Murray and O' Regan (eds), *No place to rest: forced removals and the law in South Africa* (OUP 1990) 199.

[5] *Naturalia* are the legal principles of the law of contract that will apply to such contract in the absence of clauses to that effect in the contract itself. They refer to the terms automatically attached by law to a specific type of contract without them having to be inserted by the parties. See in this instance R.H. Christie & G.B. Bradfield, *The law of contract in South Africa* (6th edn, LexisNexis 2011) 165; Van der Merwe and others, *Contract: General Principles* (4th edn, Juta Law 2012) 283.

[6] Van der Merwe et al (n 5) 283.

[7] W.E. Cooper, The South African Law of Landlord and Tenant (Juta & Company Ltd 1973) 43.

sporting code in question. However, it would be impossible to simply classify the athlete's contract as *sui generis* without having first addressed what it entails in practice.

The contents of the athlete's contract

It has been well-documented that the relationship between professional athletes and their "employers" is one of employment, and therefore subject to statutes, rules and regulations pertaining to labour law.[8] However, it is the main object of this article to demonstrate that there are certain characteristics that contracts between professional athletes and their employers possess that make them unique in nature, or *sui generis*. In order to substantiate this, I shall focus on what the term "athlete's contract" entails and what makes it unique (in other words, confirm the belief that it is *sui generis*).

Le Roux[9] has stated that "the attraction of sport is the uncertainty of the result." Blackshaw agrees with this and has stated that "the uncertainty of outcome of sporting competition…is the very nature and attractive aspect of sport and sporting endeavour."[10] This is certainly unique as far as the service in question is concerned. It may be argued, then that if the performance regulated by the contract in question is unique, so too is that contract. However, to truly confirm the nature of the athlete's contract, one must look closer at its characteristics.

Louw[11] lists the following characteristics of the "relationships of these people (professional athletes) to the unions or governing bodies to whom athletic or sporting services are rendered":

(i) The standard players' contracts all provide for an obligation on the part of the player to perform personal sporting services to the other party.

(ii) These athletic services are rendered subject to the control and direction of such other party- although the measure of such control may differ from that found with other employees, the inherent control is always present and especially evident in for instance the practice of selection of players for matches.

(iii) These agreements all provide for the absorption of the player's labour power in respect of the rendering of athletic services, either to the exclusion or semi-exclusion of other employers.

(iv) The remuneration payable as a reciprocal obligation in return for services rendered contains traditional elements found in the employment of other employees, e.g. medical aid and retirement contributions paid by the employer.

(v) These agreements provide for power on the part of the employer to discipline and dismiss players for misconduct or poor work performance, which in some cases exceed the measure of control (as found in "ordinary" employment contracts over the autonomy of the employee in respect of their physical integrity and the pursuit of outside or personal interests and activities).

(vi) The wording of the players' contracts in all these cases explicitly refer to the relationship as one of "employment", and to the parties as "employer" and "employee".

(vii) The relationship between the parties falls squarely within the legislative definition of employment, and such players are nowhere expressly excluded from the ambit of such legislation.

The characteristics listed by Louw above create the dominant impression that the contract between a professional athlete and his "employer" is one of employment. This is an oversimplification. While there are certain characteristics of the athlete's contract that do correspond with those of the employment contract, there are too many characteristics of the former that are too unique to be perceived merely as a contract of employment.

As early as 1910, the issue of the nature of the athlete's contract was addressed in the King's Bench's decision of *Walker v Crystal Palace Football Club Limited*.[12] The contents of

[8] Most notably in *Walker* (n 3) 92; *Dempster* (n 3) 265; *Highlands Park* (n 3) 192; *Santos* (n 3) 79; Louw (n 3) 222; Anderson (n 3) 257 and Gardiner and others (n 3) 394.

[9] R. le Roux, 'Under starter's orders: Law, Labour law and Sport' (2002) ILJ 23. See in this regard also Smailes, 'Sports law and labour law in the age of (rugby) professionalism: collective power, collective strength' (2007) Industrial Law Journal 57.

[10] Blackshaw, 'Match fixing in sport: a top priority and ongoing challenge for sports governing bodies' (2013) De Jure 948.

[11] Louw (n 3) 234-235.

[12] 1910 KB 87.

the contract in question included the duty of the club to pay the athlete.[13] It also included the athlete's duty to "play in all matches when required by the club and keep himself temperate, sober and in good playing form."[14] The contract was concluded for a period of one year.[15] Regarding the uniqueness of the contract, however, an interesting argument was made by one Russell, counsel on behalf of the club. Counsel argued that there was a "certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill, e.g., the club would have no right to dictate to him how he should play football."[16] Counsel's argument insinuated that while the contract between the professional athlete and the club that employed him was one of employment, there was something unique about the element of subordination as explained above. The element of uniqueness was found in the fact that the employee in question- a professional athlete- possessed certain skills that an "ordinary workman" did not possess, and therefore was not subordinate to his employer as far as the *way* in which he played the sport was concerned. This is possibly the primary difference between the "personal services" performed by an employee in an ordinary contract of employment, and a professional athlete in an athlete's contract. The latter is gifted in a way that the former is not - an athletic way. The argument here is not that the services performed by an athlete are the only type of unique services that can be performed under a contract. The services performed by a pilot,[17] for instance, are also unique. While there are many professions that may be considered unique, sport is the only profession in which it is essential for the professional participant to possess unique athletic skills in the code in question. The issue is that the services performed by an athlete are specific ones that require unique athletic skills in a unique exercise - that of sport. In the case of *Philadelphia Ball Club v Lajoie,*[18] the Pennsylvania Supreme Court simply referred to these as "unique skills".[19] It goes without saying that these skills are of such a nature as to attract spectators – people pay good money to see these special skills exhibited. Traverso J in *Coetzee v Comitis*[20] exclaimed that "the fate of professional soccer players is of public interest,"[21] hinting on the fact that because of their unique athletic skills, the public shows an extraordinary amount of interest not only in the athlete's skills, but also his private life. While there are many professions that require unique skills as explained above, none attracts as many spectators as professional sport does. Le Roux[22] has stated that the attraction of sport lies in the uncertainty of the result, and that this is the one feature that distinguishes sport from other forms of entertainment. The result is uncertain because of the fact that people with more-or-less equal athletic capabilities –all of them unique - compete against each other by exhibiting their special athletic skills. Furthermore, because sport, unlike any other business, places extreme demands on the bodies of the participants involved, the career of a professional athlete is extremely limited.

In *Dempster v Addington Football Club*the athlete's contract demanded from the athlete to do the following:

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

(b) Attend all training sessions and matches and all other functions as directed, and at the sole discretion of the team manager, in regard to professional soccer.[23]

[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid 92.
[17] As in the case of Nationwide Airlines (Pty) Ltd v Roediger and Another 2008 (1) SA 293 (W).
[18] 202 Pa. 210; A. 973; 1902.
[19] ibid.
[20] 2001 1 SA 1254.
[21] ibid 1264.
[22] Le Roux (n 9) 1195.
[23] 1967 3 SA 262 (D).

The first requirement is a clear indication that the physical attributes of the athlete had to be protected to such an extent that he would be capable of performing the demanding physical exercises required to play football. Although some other professions also require physical health, none requires the subject to be in such peak physical condition as in the case of sport. This is also the reason why athletes are constantly tested for the presence of prohibited substances in their systems.[24] Because sport involves (to the greatest extent) activity of a physical nature, it would be unfair towards competitors if athletes were to enhance their physical attributes in an unnatural manner. This fact distinguishes sport from any other profession, in which employees would be expected to improve their performance by any legal means (which is to say means that are not criminal in nature) necessary. An athlete who increases his athletic performance by taking stimulants, will most likely be expelled, whereas a regular employee will most likely be awarded for doing huge amounts of work due to his or her taking stimulants. The opposite is also true as far as sport is concerned: whereas an athlete should refrain from doing anything to enhance his performance in an unnatural manner, he should also take care not to engage in any type of activity that would lead to the restriction of his abilities. This is why many standard athletes' contracts contain clauses which prohibit athletes from participating in activities which could potentially be detrimental to such athletes' physical health and wellbeing. Because of the uniqueness of the athletic skills required by the persons under discussion, the nature of the services in question is obviously also unique. In a word, these services can be described as "highly personal". In the case of *Troskie en 'n Ander v Van der Walt,*[25] Wright J held the following:

> The nature of the services which had to be rendered in the matter at hand, is the playing of rugby for a specific club. The rendering of the relevant services depends not only on the enthusiasm, willingness and perseverance of the player in question, but said services demand a fair amount of expertise, skill and aptitude of a personal nature which will be dependent on the specific player's characteristics and also his relationship with the club for which he plays.[26]

The relevance of Wright J's decision to this article lies in the very first sentence of his decision above. He hints on the fact that the services in question are of a nature that requires a significant amount of knowledge and skill of a personal nature, and also that the services in question would demand specific characteristics (as well as capabilities) of the athlete. Desai J in *Santos Professional Football Club v Igesund and Another*[27] made specific mention of the fact that the "the nature of the services are of such a highly personal nature….,"[28] thereby confirming that the contract in question was not an ordinary contract of employment, but one that involved "services of a highly personal nature", therefore making it extraordinary. Although the contract in question was one between a professional football coach and a club, the legal principles governing the contract were exactly the same as what would have been the case had it been a contract between a professional athlete and a club.[29] Foxcroft J in the case of *Santos*

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

[25] 1994 3 SA 545.

[26] ibid 552.

[27] 2002 5 SA 697 (C).

[28] ibid 701.

[29] W.T. Champion, *Sports Law Cases, Documents, and Materials* (Aspen Publishers 2005) 8 (states that contracts for coaches are similar to players' contracts).

Professional Football Club v Igesund and Another[30] made great strides towards indicating that the contract between a professional soccer coach and his club was not an ordinary contract of employment. In fact, Foxcroft J's decision led to some scrutiny, most notably by Naudé,[31] discussed below. *In casu*, Foxcroft J stated the following:

> It is important, in my view, to bear in mind that this was not a case of an ordinary contract of employment. It differed from an ordinary contract (of employment), both in respect of the signing-on fee and the job description dealt with below.[32]

This statement was followed up by the following:

> First respondent in this appeal is certainly no ordinary servant, but a contracting party, contracting on equal terms with applicant, and being able to command a high sum of money to do so. He is also given carte blanche in the exercise of his duties.[33]

What made the contract a unique one as opposed to one of employment, according to Foxcroft J in *Santos*, was the fact that it made provision for a "signing-on" fee and that the job description of the professional coach included the fact that the employer-club had no right to prescribe to the coach how to do his job. Naudé[34] reiterates this characteristic identified by Foxcroft J, by stating that interference by the club in the execution of the professional coach's duties would even have led to breach of contract by the club. It is evident then that the working relationship did not imply one in which the employee was subordinate to the employer.[35] This is clearly a move away from the ordinary contract of employment. Naudé goes even further in explaining why the contract in question was not an ordinary contract of employment. The fact that the professional coach had contracted on equal terms with the club's representatives, and was consequently able to demand a large sum of money for his services, was another *sui generis* characteristic of the contract in question.[36] The coach possessed an increased amount of bargaining power, based on the fact that he was a "highly successful and respected coach".[37] There was therefore not a situation where the "employee" was presented with a unilateral contract favouring the employer's interest.[38] Naudé makes mention of a potential characteristic that the Court in *Santos* did not identify, and that is the fact that if any damages were to be caused by the breach of the type of contract in question, it would be more difficult to quantify than would be the case in ordinary employment sectors. This characteristic would be even more of a substantial one if the party in breach of contract (if such breach were to occur) was very difficult to replace because of the possession of certain "special skills", discussed above.[39] Something that must also be kept in mind, according to Naudé, is that the loss of a professional player or coach may even affect the interests of potential sponsors and fans. Recently, Seedat C in the private arbitration matter of *Mmethi and Bloemfontein Celtics Football Club*[40] reiterated the fact of "special skills" possessed by professional athletes in no uncertain terms.

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[30] 2003 5 SA 73 (C).
[31] T. Naudé, 'Specific performance against an employee. Santos Professional Football Club Ltd v Igesund' (2003) SALJ 269.
[32] *Santos* (n 3) 76.
[33] ibid 79.
[34] Naudé (n 31) 271.
[35] ibid.
[36] ibid.
[37] ibid.
[38] ibid. This rang true to what Louw (n 3) 215 describes as follows: "In line with developments elsewhere, and in parallel with more general developments in South African society and its new constitutional order in the movement towards democracy, freedom and respect for human rights, South African employment law saw the development of a more rights-based approach to the employment relationship in a bid to counter the traditionally strong employer-biased relationship occasioned by the nature of the common law contract of employment." Whereas it is agreed with Louw that there has indeed been a shift of focus, the culture of the "strong employer-biased relationship" is still very problematic as far as labour relations are concerned. In the case of SARPA on behalf of Bands & Others v SA Rugby (Pty) Ltd (2005) 26 ILJ 176 (CCMA); [2005] 2 BALR 209 (CCMA) it was argued that because the contract of a professional rugby player in South Africa is a standard one, players could not really negotiate the terms of their contract, and had to accept most of the contents as it stood.
[39] Naudé (n 31) 272.
[40] (2012) 33 *ILJ* 1307 (ARB).

The arbitrator stated that professional football clubs sought out players with "exceptional talent and deft skills"[41] because of the fact that (South African, but certainly also foreign ones of all sporting codes) "rampage for glory."[42]

Because of the fact that athletes are considered assets to the clubs, unions or franchises which they represent,[43] they certainly do possess increased bargaining power when negotiating the terms of their contracts and thereafter, a fact alluded to above. Blackshaw[44] has stated that one must also keep in mind that an athlete's image rights are considered to be capital assets, and that these image rights are naturally always transferred when an athlete is transferred. This is in itself a move away from the traditional relationship between "master" and "servant" and is certainly a *sui generis* characteristic of the athlete's contract. The other *sui generis* characteristic mentioned by Foxcroft J in *Santos* and referred to above, was the payment of a signing-on fee. This characteristic is but a small requirement which has its origin in the general requirement of athletes having to be registered with national and international federations regulating the sporting code in question. Regulation 4.1 of the South African Football Association's Regulations on the status and transfer of players reads as follows:

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

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

> 3.4. Only a Player who is currently registered shall be able to participate in competitions organised, recognised or sanctioned by that Province or SARU.[45]

These are but two examples of regulations demanding of athletes to be registered with a national and/or international sporting body or federation. It is a fact that no organised sport can function without regulation by governing bodies. Such regulation provides that the rules according to which sport is played, but also according to which the participants in the sport are regulated, are honoured.[46] Because the contracts of professional athletes are subject to these regulations, it sometimes occurs that a professional athlete may at any given time be a party to several athletes' contracts at once. So, for instance, a professional rugby player in South Africa may be a party to a contract with his provincial union, another contract with a Super Rugby franchise, and also with his Rugby Championship franchise;[47] or a professional cricket player may at any given time have a contract with his South African provincial franchise, an Indian Premier League franchise and an English county side. Furthermore, if such a player is selected for the national side, he will enter into yet another athlete's contract with the national body. This is an occurrence which is absolutely unique as far as mercantile law is concerned. No other occupation would create the possibility of a single "employee" being a party to up to three different contracts, but required to perform the same type of services in all three. As far as the subjectivity of these contracts to the regulations of governing bodies is concerned,

[41] ibid 1317.
[42] ibid.
[43] In *Highlands Park* (n 3) 192 the Court stated that "the applicant's (Highlands Park Football Club Ltd) only assets consist of contractual rights which bind its football players to play football for the applicant. These rights are commonly regarded as cedable and saleable amongst football clubs."
[44] Ian Blackshaw, *The Professional Athlete* (Congress on Sports Law, Berlin, April 2006).
[45] The South African Rugby Union.
[46] Examples of these national and international governing bodies are the South African Rugby Union (SARU), which governs professional rugby in South Africa and its international counterpart, the International Rugby Board (IRB). Reference has also been made in this chapter to the National Soccer League (NSL) which governs professional football in South Africa, and its international counterpart, Federation Internationale de Football Association (FIFA). Football players in South Africa, for example, may also be registered with (and therefore subject to the rules and regulations of) the South African Football Association (SAFA), the Premier Soccer League (PSL), the Confederation of African Football (CAF), the South African Sports Confederation and Olympic Committee (SASCOC) as well as the International Olympic Committee (IOC).
[47] The Rugby Championship is an annual one competed between the top provincial sides of South Africa, New Zealand and Australia.

Waglay J in *McCarthy v Sundowns Football Club and Others*[48] made great strides in explaining why the contract in question differed "substantially from the contracts which one finds with other employees."[49] The Court stated that a professional footballer (read: professional athlete) may not resign his current employment during the existence of his contract with the employer, without agreement of this (current) employer. Also, even if the contract between the athlete and his current club has expired, the employer still needs to furnish the player with a clearance certificate in order to make the player eligible to play for his new club.[50] Each and every proffessional football player in South Africa had (and still has) to sign a standard National Soccer League[51]Player's Contract as well as a registration form demanding of the player in question to bind himself to the NSL Constitution and Regulations. The contract mentioned is a fixed-term one, which would obviously terminate unless new agreements have been entered into and the player has been registered with his new employer.[52] All these stipulations, it was argued by Waglay J, contributed to the uniqueness of the contract between a professional, duly registered football player in South Africa and his "employer". The same arguments were made by Traverso J in *Coetzee v Comitis*[53] and in *Botha v Blue Bulls Company (Pty) Ltd and Another*.[54] The effect of this unique type of contractual agreement is that the athlete's contract is more often than not subject to another, collective contract, and failure to comply with the provisions of the latter would probably render the former invalid.

CONCLUSION

The athlete's contract has been classified as a contract of employment. However, this article has set out to indicate that there is many a valid reason to believe that this is certainly an oversimplification, and that said contract is in fact *sui generis*. To substantiate this statement, several *sui generis* characteristics of the athlete's contract have been identified. This first of these is that the athlete's contract regulates personal services of a unique *athletic* nature. The nature of these services is such that it requires the athlete in question to keep his body in peak physical condition. It also means, however, that a professional athlete's career is very limited compared to other professions. The second *sui generis* characteristic of the athlete's contract which has been identified is that, contrary to the old "master and servant" contracts, the athlete possesses bargaining power equal to the club when negotiating his or her contract with the latter. This is because a professional athlete is able to generate huge amounts of income simply by exhibiting his or her unique athletic skills. Although an athlete may exhibit his or her athletic skills freely, he or she must do so within the limits set by rules and regulations governing the particular sporting code participated in. This is the third *sui generis* characteristic of the athlete's contract identified in this article.

Having established the true nature of the athlete's contract, the suggestion is consequently made that Courts should perceive said type of contract with care and sensitivity, particularly when having to decide the most appropriate contractual remedy for breach thereof. This is ultimately the contribution this article aims to make to jurisprudence.

[48] Unreported case number J4373 of 2002, delivered in the Labour Court of South Africa on 30 September 2002.
[49] ibid 4.
[50] ibid 4.
[51] Widely known by its acronym, "NSL".
[52] *McCarthy* (n 48) 4.
[53] 2001 1 SA 1254 (C).
[54] Unreported case number JR1965/2005, delivered by the Labour Court of South Africa on 27 June 2008.