
THE EXPLOITATION OF YOUTH ATHLETES IN SOUTH AFRICA

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DECLARATION

I declare that 'The Exploitation of Youth Athletes In South Africa' is my own work, that it has not been submitted before any degree or for any examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

SIGNED

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KEY WORDS

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SUMMARY

The likes of Hansie Cronje, Francois Steyn and Benni McCarthy have all paved a way for young athletes to fulfill their dreams of representing their countries at the highest level at young ages. The journey to stardom for ambitious youth athletes is one filled with many obstacles. For many of them the journey begins at schools or training academies. In this journey they will be confronted with the pressure of playing for successful sporting schools which adopt strict training regiments; ones resembling that of professional teams. They will be required to diligently commit themselves to their coaches' onerous demands while simultaneously maintaining adequate academic grades. Many of them will have to maneuver past behaviour which infringes their constitutional rights and essentially amounts to abuse. The road to success is a tough and lonely one for many of these athletes. Given the psychological and emotional immaturity of a child, should this road that a youth athlete embarks on, in pursuit of a better life, be filled with better protection by the law?

The object of this study is to investigate whether youth athletes in South Africa are economically exploited. This inquiry will involve an examination of the current position of school sport and whether the position of a youth athlete can be equated to that of a professional athlete. The relationship in which youth clubs and academies have with youth athletes will also be considered together with any possible abuse that such athletes may be susceptible to, including human trafficking. The investigation is conducted with reference to relevant legislation, comments of authors and case law.

The dissertation concludes by submitting that youth athletes are susceptible to economic exploitation and various other forms of abuse. It is recommended that the law be developed to accommodate the *sui generis* needs of youth athletes and that the State, together with the relevant sporting associations, adopt a unified approach in ameliorating any threats posed towards these children.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 INTRODUCTION

The re-admission of South Africa into international sport provided a platform for the advent of professionalism in the country.¹ Although traditionally regarded as a pastime, sport in South Africa has soared into a lucrative industry with sport associations and clubs becoming business enterprises.² In recent times the law as it applies to sport has received attention in issues concerning the law of delict, law of contract, labour law and constitutional law.³ Claims have been made that sports law is not an independent branch of law and is merely an application of basic legal principles as it applies to sport.⁴ Those who favour sports law as an independent field of law point to the increased sport related litigation and legislation.⁵ It is doubtful however that mere judicial recognition over sport related matters supports any claims that a new area of law has emerged.⁶ What is required is to indicate distinct and unique doctrines that are applicable to sport and no other area of law.⁷ Any unique and distinct doctrines would most likely be brought to light by the relationship between television and sport. The interconnectedness of television and sport has had a profound impact on the nature of sport.⁸ Sporting events such as the Rugby World Cup and the FIFA World Cup can now be viewed by the world at large.⁹ This has brought about the need to establish rules that accommodate televised sport.¹⁰ Television has impacted sport in such a manner that in some instances broadcasting schedules have artificially contributed to the outcome of matches.¹¹ Its greatest contribution would be the interconnectedness it has

¹ Cornelius 'Sport and the Law in South Africa' 2002 TSAR 173 173.

² Ibid.

³ See *Roux v Hattingh* 2012 6 SA 428 (SCA), *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2002 23 ILJ 2001 (C), *Coetzee v Comititis and others* 2001 22 ILJ 331 (C). These cases dealt with delictual, contractual, labour and constitutional issues respectively relating to sport.

⁴ Grayson *Sport and the Law* 2 (1994) xxxvii.

⁵ Gardiner *et al Sports law* (1998) 74.

⁶ Le Roux 'Under Starter's Orders: Law, Labour Law and Sport' 2002 23 ILJ 1195 1196.

⁷ Beloff *et al Sports law* (1999) 3.

⁸ Le Roux 2002 23 ILJ 1195 1197.

⁹ Ibid.

¹⁰ *Idem* 1198.

¹¹ Ibid. During the semi-final of the 1992 Cricket World Cup in Australia, played between South Africa and England, a match interrupted by rain was shortened to allow for television schedules.

created for sport and other forms of business.¹² As a result large clubs such as Manchester United rely on two-thirds of their earnings to be produced from activities not directly related to attracting spectators on the field.¹³ Injuries suffered by athletes in their scope of work may also have a unique feature to sport that do not apply in ordinary workplaces.¹⁴ Doping regulations and transfer regulations, as practices or doctrines with legal consequences, also suggest that sports law may be a separate area of law.¹⁵ Sports law may often involve the application of substantive legal principles.¹⁶ There is no denying however that it is an emerging area of law, one in its infancy stages, with a bright future.¹⁷ In order to reach the stages of adolescence, sports law must still answer a few questions. One of the questions is how sports law applies to children and what effect this application might have?

1.2 RESEARCH PROBLEM AND PURPOSE OF STUDY

The growth of sport in the country has created a platform for youth athletes to compete at an elite level in their respective sporting codes.¹⁸ The most common platform for children to participate in sport are schools which provide facilities and coaches.¹⁹ Private institutions called youth academies and youth clubs also provide platforms for children to hone their natural skills and abilities in sport.²⁰ Such institutions can be contrasted to schools as they were traditionally introduced as talent identification schemes.²¹ Schools on the other hand provide sport programs

¹² Le Roux 2002 ILJ 1195 1197.

¹³ Beloff *et al* 133.

¹⁴ Le Roux (2002) 23 ILJ 1195 1200. The Compensation for Occupational Injuries and Diseases Act 13 of 1993 provides for compensation for injuries suffered at the workplace. Le Roux considers 'to what extent can it be claimed that a neck injury arising out of a collapsed scrum is 'not expected' if the evidence clearly indicates that scrums collapse during every rugby match?'

¹⁵ *Idem* 1209.

¹⁶ *Ibid.*

¹⁷ Beloff *et al* 5.

¹⁸ *Norodien v Ajax Cape Town Football Club (Pty) Ltd t/a Ajax Cape Town Football Club & others* 2015 36 ILJ 472 (LC) 473.

¹⁹ See s 5A(2)(a) of the South African Schools Act 84 of 1996. Take note that s 5A(2)(a) must be read together with s 46(3)(a) as both are applicable to public and independent schools respectively.

²⁰ Andre M Louw 'Should the playing fields be levelled? Revisiting affirmative action in professional sport' 2004 Stell LR 409 426 where reference is made to the former Minister of Sport and Recreation Mr Balfour's Parliamentary Media Briefing of 2002-08-15 (available online at www.polity.org.za/html/govdocs/speeches/2002 last accessed on 18 September 2017) where he discusses the need of establishing a national sport academy.

²¹ The former Minister of Sport and Recreation Mr Balfour's Parliamentary Media Briefing of 2002-08-15 (available online at www.polity.org.za/html/govdocs/speeches/2002 last accessed on 18 September 2017).

as part of their curriculum.²² These institutions are also not statutory bodies like schools.²³ The commercialization of sport has resulted in schools placing significant importance in their sporting programs.²⁴ This has born fruit as many successful ‘sporting schools’ secure lucrative sponsorship deals, an increment in enrolling students and obtain revenue from television rights due to the broadcasting of their sport events.²⁵ There would appear to be no obligation for a school to compensate their athletes for their efforts exerted on the field as these athletes are considered as learners.²⁶ What would appear from this is that an institution, tasked by the South African Schools Act No. 84 of 1996 (hereinafter referred to as the Schools Act) to provide ‘education’ to its learners, may be operating as a sport business enterprise at the expense of its students who are children.²⁷ Youth academies and youth clubs are not regulated by national legislation.²⁸ These academies and clubs are subject to the rules of the national associations they are members of.²⁹ In recent times an increasing number of illegitimate sport academies have been formed.³⁰ This has resulted in young athletes being housed in substandard conditions and being regarded as objects which academies may dispose of at their leisure.³¹ Young athletes with the aspiration of playing professional football in these institutions have been also victims of several forms of abuse including human trafficking.³² Human trafficking would appear not to be an issue unique to sport, but an issue that affects multiple disciplines.³³

This dissertation will focus on the economical exploitation of youth athletes in South Africa. The main issues to be considered are: whether school athletes can be considered as ‘sport workers’ or employees and entitle them to the benefits and protection provided to employees in terms labour

²² See s 5A(2)(b) of the South African Schools Act 84 of 1996.

²³ Beloff *et al* 18.

²⁴ Vosloo *A Sport management program for educator training in accordance with diverse needs of South African Schools* (PHD thesis 2014 North-West University) 83.

²⁵ *Ibid.*

²⁶ See s 1 of the South African Schools Act 84 of 1996.

²⁷ *Ibid.*

²⁸ Louw *Sports law in South Africa* (2010) 156.

²⁹ *Ibid.*

³⁰ ‘SAFA warns of fly-by-night academies’ last accessed from <http://www.sanews.gov.za/south-africa/safa-warns-fly-night-football-academies> on 5 September 2017.

³¹ *Ibid.*

³² The Fédération Internationale des Associations de Footballeurs Professionnels ‘Trafficking football players in Portugal’ last accessed from <https://www.fifpro.org/news/trafficking-football-players-in-portugal/en/> on 17 September 2017.

³³ Ebbe & Das *et al Global Trafficking in Women and Children* (2007) 3.

law; whether the conducting of youth academies and youth clubs in South Africa presently compromises the safety of children and impairs their rights; and finally, the impact of human trafficking on child athletes. In considering these issues, this dissertation investigates whether there is sufficient regulation by the law to ensure that children who participate in sport are not exploited both at a school level and at a youth academy and youth club level. Where the law is found wanting, alternative solutions will be provided after identifying the most suitable model for South African law. It must be noted that due to the limitations placed on this paper, focus will be placed on developmental sport pertaining to Rugby and Soccer. For the purposes of the paper, the word ‘schools’ refers to secondary or high schools as described by the Schools Act. The term ‘child’ or ‘youth-athlete’ is not limited to minors who are under the age of 18, but also refers to major learners who are still students in secondary schools. This term does not relate to children under the age of 15.

1.3 OUTLINE OF CHAPTERS

This dissertation will be divided into five chapters. The first chapter will briefly outline the scope and purpose of the dissertation. The same chapter will indicate the research problem and the issues that the dissertation will explore.

Chapter two will examine whether athletes attending school for the purposes of playing sport can be regarded as employees. The same chapter will consider whether image rights can be regarded as remuneration or employment income. The chapter will conclude with an overview of the principles discussed and will offer an alternate model for South African law.

Chapter three of this study will investigate legal principles as they apply to youth academies, youth clubs and children. An enquiry will be made as to whether the government should be permitted to intervene in the conducting of business of these institutions in order to combat abuse suffered by children. The chapter will finally consider the possible economical exploitation of children the rules governing football academies perpetuate. The chapter will conclude with an overview of the principles discussed in the chapter and offer an alternative model for South African law.

Chapter four will explore the human trafficking of children in various industries. The impact of human trafficking on youth athletes will be considered as well as the relevant rules and policies. The chapter will conclude with an overview of the principles discussed in the chapter and offer suggestions that can be applied in South Africa and the international community.

The final chapter will conclude by summarizing the research done and will make suggestions and recommendations for South African law as it applies to children in sport. The chapter will finally conclude by indicating that youth athletes are subject to economical and other forms of exploitation in South Africa and that the law should be developed to ensure that children are better protected.

CHAPTER 2: SCHOOL SPORT

2.1 INTRODUCTION

An investigation into the history of education in South Africa will indicate that the educational system in South Africa has been plagued by inequalities caused by systems designed to segregate learners.³⁴ The reform of education has been an important part of the constitutional transition.³⁵ Transforming the previous school system into a democratic and non-discriminatory system has been a difficult task.³⁶ The White Paper on Education and Training³⁷ was approved by cabinet shortly after South Africa became a democratic state.³⁸ Subsequent to this was a recommendation that was made for a national framework for school organization and school governance.³⁹ The White Paper on the Organization, Governance and Funding of Schools⁴⁰ was then introduced.⁴¹ It identified six main areas which included: the principles underlying a new framework, the organization of schools, governance in schools, building of schools and implementing a new system of school organization and governance.⁴² Once it was approved by cabinet the Draft South African Schools Bill was prepared for approval.⁴³ The Draft South African Schools Bill was drafted with the intent of capturing the core elements of the Constitution.⁴⁴ Once the Bill became law, it operated as the South African Schools Act and was implemented in 1997.⁴⁵ The Schools Act is an integral national statute promulgated by Parliament to provide uniform norms

³⁴ Davel *Introduction to child law in South Africa* (2000) 284.

³⁵ *Idem* 285.

³⁶ *Idem* 284.

³⁷ GG 16312 of 1995-03-15.

³⁸ Davel 284.

³⁹ *Ibid.*

⁴⁰ GG 16987 of 1996-02-14.

⁴¹ Davel 284.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Idem* 285.

⁴⁵ *Ibid.*

and standards for all schools in South Africa.⁴⁶ It reinforces the essential values of equality of treatment in a democratic education system as well as the importance of eliminating poverty through education.⁴⁷

Perhaps the most important function of the Schools Act is to ensure that South African schools provide learners with an education.⁴⁸ An analysis of the Schools Act will indicate that education consists of formal education and non-formal education.⁴⁹ The latter referring to extra-curricular activities and the former concerning conventional academic classes. In discharging the obligation of educating learners, schools are permitted to structure their own curricular and extra-curricular activities.⁵⁰

Sport traditionally at schools was adopted for recreational purposes and sought to educate learners on the importance of physical fitness and a well-balanced lifestyle.⁵¹ The commercial growth of school sport suggests however that schools are moving away from this traditional approach.⁵² Competitive sport in schools has resulted in increased media attention and has thus driven schools to seek a more professional approach towards school sport.⁵³ Schools employ professional coaches and lure talented athletes to form part of their programs, with the object of

⁴⁶ Davel 285.

⁴⁷ The preamble of the Schools Act provides ‘Whereas the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and Whereas this country requires a new national system for *schools* which will redress past injustices in educational provision, provide an education of progressively high quality for all *learners* and in so doing lay a strong foundation for the development of all our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all *learners, parents* and *educators*, and promote their acceptance of responsibility for the organisation, governance and funding of *schools* in partnership with the State; and Whereas it is necessary to set uniform norms and standards for the education of *learners* at *schools* and the organisation, governance and funding of *schools* throughout the Republic of South Africa’.

⁴⁸ See s 1 of the Schools Act.

⁴⁹ *Idem* s 5A(2)(a).

⁵⁰ *Idem* s 21(b). The wording of the section suggests that only public schools have to apply to the Head of Department to be allocated the function of determining their curriculum. Independent schools are at liberty to determine their curriculum subject to s 46(3) that provides that the curriculum determined by independent schools shall not be inferior to that of public schools.

⁵¹ Parkhurst Primary School Sport And Extra-mural policy 2013.

⁵² Vosloo 43. For an illustration of the movement away from the traditional ways of operating in sport, see also Fourie *et al* ‘The leisure and sport participation patterns of high school learners in Potchefstroom’ 2011 1 South African Journal for Research in Sport, Physical Education and Education 33 70.

⁵³ *Idem* 83.

generating income and increasing pupil enrolment by marketing their school through the achievements of their athletes and sport teams.⁵⁴ In recent times schools have utilized scholarships to procure the services of student athletes in relatively the same fashion available to professional teams.⁵⁵ With a student being a source of income and virtually treated like a professional athlete, absent the title and protection, this begs the question of whether a student should be regarded as an employee of the school.

2.2 STUDENT OR EMPLOYEE?

The Code of Good Practice⁵⁶, issued by the National Economic Development and Labour Council in terms of section 2000A(4) and section 203 of the Labour Relations Act⁵⁷, provides for a set of guidelines for determining whether persons are employees.⁵⁸ In order to be presumed an employee, an applicant must show that they work for a person or an entity cited as their employer in the proceedings and prove that any of the seven listed factors is present in the relationship with that entity or that person.⁵⁹ It must be noted that the presumption will apply regardless of the form of the contract.⁶⁰ Accordingly a statement in a contract that someone is not an employee will not be conclusive evidence in rebutting the presumption.⁶¹ The seven listed factors are:

- i. the manner in which the person works is subject to the control or direction of another person;
- ii. the person's hours of work are subject to the control or direction of another person;
- iii. in cases of an organization, the person forms a part of that organization;

⁵⁴ Ibid. See also s 7.13 of the Constitution of the South African Rugby Union 2016 which permits the South African Rugby Union to transfer money to schools for the furtherance of rugby. This illustrates one of many ways in which schools are benefiting commercially by having successful sporting programs.

⁵⁵ 'Elite rugby schools clash over player poaching' last accessed from <http://www.enca.com/south-africa/elite-rugby-schools-odds-over-player-poaching> on 18 September 2017.

⁵⁶ GG 1774 of 2006-12-01.

⁵⁷ Act 66 of 1995.

⁵⁸ See s 2 of GG 1774 of 2006-12-01.

⁵⁹ Idem s 15.

⁶⁰ Idem s 16.

⁶¹ Ibid.

- iv. the person has worked for that person for an average of 40 hours per month over the last three months;
- v. the person is economically dependent on the other person for whom he or she works or renders services;
- vi. the person is provided with the tools of trade or work equipment by the other person; or
- vii. the person only works for or renders services to one person.⁶²

The Labour Relations Act⁶³ defines an employee as:

‘(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 person who in any manner assists in carrying on or conducting the business of an employer’.⁶⁴

From the above it would appear that an applicant must establish one of the seven listed factors to be presumed an employee and proving that they satisfy the definition of an ‘employee’ would strengthen the presumption.⁶⁵ In terms of Roman-Dutch law, it is a trite principle that a contract cannot be enforced in the absence of *animus contrahendi*.⁶⁶ Cloete seems to accept this proposition, arguing that in the absence of an intention to enter into a contract of employment, no employment relationship can exist.⁶⁷ This principle has the effect of excluding children who voluntarily enrol in schools and who voluntarily incur all the costs associated with being a student from qualifying as an employee.⁶⁸ It is submitted however, that learners who are granted full sport scholarships, and as such their contract between the school and them differs to that of

⁶² See s 18 of GG 1774 of 2006-12-01.

⁶³ Labour Relations Act 66 of 1995.

⁶⁴ Idem s 213. A similar definition is also found in the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998.

⁶⁵ See s 22 GG 1774 of 2006-12-01.

⁶⁶ Louw 206.

⁶⁷ Cloete *et al Introduction to sports law in South Africa* (2005) 74.

⁶⁸ Ibid.

an ordinary learner, may not so easily be precluded. These students will therefore be the focus of this enquiry.

It has generally been accepted by South African courts that a professional soccer player is an employee.⁶⁹ The implication would therefore be that an amateur is not an employee.⁷⁰ The case of *Coetzee v Comitis*⁷¹ concerned an allegation that the The National Soccer League Rules (hereinafter referred to as the NSL Rules), which prevented Mr Coetzee from being transferred to another club, constituted a restraint of trade. The court, in an *obiter dictum*, confirmed that a professional soccer player could be deemed as an employee.⁷² In this case the court seemed to rely on the definition of the NSL Rules in arriving to its conclusion.⁷³ The court appeared not to rely on any other authority but the NSL Rules in finding that Mr Coetzee, a footballer, was an employee because he was a professional for the purposes of the NSL Rules.⁷⁴ In the case of *McCarthy v Sundowns Football Club*⁷⁵ the court was tasked to determine the existence of an employment contract between a football club and a player. The court noted that employment contracts of footballers differ from that of ordinary employees.⁷⁶ The court found that because the NSL regulates professional football, this meant in accordance with its rules, that a football player will be deemed to have football regarded as his occupation if he plays for a club affiliated with the National Soccer League.⁷⁷ From the above cases it is apparent that courts are not reluctant to apply rules belonging to sport associations to determine whether an employment relationship exists between a player and a club.

⁶⁹ Louw 219.

⁷⁰ Ibid.

⁷¹ 2001 22 ILJ 331 (C).

⁷² *Coetzee v Comitis* 344.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ 2003 24 ILJ 197 (LC).

⁷⁶ *McCarthy v Sundowns Football Club* 201.

⁷⁷ *Idem* 200. See also article 29.1.2 of The National Soccer League Handbook 2016 which provides 'A professional is a *Player* who has a written *contract* with a *Member Club* and is paid more for his footballing activity than the expenses he effectively incurs in playing *football*'.

English law has had its imprint in South African law since the early 18th century.⁷⁸ The history of South Africa will suggest that there have been attempts to eradicate the influence of English law.⁷⁹ The most notable attempt occurred after World War II where Afrikaans-speaking Roman-Dutch law purists sought to return South Africa to Roman-Dutch law.⁸⁰ On the other hand, those who supported the use of English law opposed their view as they believed English law provided practical solutions to problems.⁸¹ Despite this, the use of English law and its influence on South African law has survived. The ‘reliance theory’⁸², as it applies to the law of contract, is an example of a borrowed English precedent in South African law.⁸³ The case of *Smith v Hughes*⁸⁴ established this rule, which was then adopted into our law in *Van Ryn Wine and Spirit Company v Chandos Bar*⁸⁵.⁸⁶ Employment contracts as they apply to sport in England have been considered in cases dating back to the beginning of the 20th century.⁸⁷ One of the earliest and most applicable cases in this regard is that of *Walker v Crystal Palace Football Club*⁸⁸. This case concerned a determination of whether a football player, applying his trade at Crystal Palace Football club, could have his performances categorized under contract of employment. In determining this Cozens-Hardy MR remarked on the *sui generis* nature of a player’s services.⁸⁹ This, he held, was unique to services performed in traditional workplaces.⁹⁰ The court did not dwell on the intention of the parties to conclude an employment contract, but rather considered

⁷⁸ Greenbaum & Maisel *Foundations of South African Law Critical issues for law students* (2002) 60.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² The rule as it applies to ‘apparent contracts’ which occur where one party’s actions creates the impression that there was a certain intention which they, in fact, did not have.

⁸³ Greenbaum & Maisel 61.

⁸⁴ (1871) LR QB 597. At 607 the court states ‘... if, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’

⁸⁵ 1928 TPD 417. At 423 the court stated ‘It is for the court in each case to have regard to all the circumstances and to decide whether the person sought to be bound has rendered himself liable by his unreasonable conduct. And I think that in order to hold him liable on the contract, the inference that he was assenting to the terms proposed by the other party must not only be reasonable, but must also be a necessary inference. If there are a number of reasonable inferences, which may be drawn, including one of assent, then the hypothetical reasonable man is not entitled to select the inference of assent and to disregard the others.’

⁸⁶ Greenbaum & Maisel 61.

⁸⁷ See *Kingaby v Aston Villa FC*, *The Times*, 28 March 1912.

⁸⁸ [1910] 1 KB 87 CA.

⁸⁹ *Walker v Crystal Palace Football Club* 92.

⁹⁰ *Ibid.*

the nature and form of the parties' performances.⁹¹ The court applied the 'control test' and found that Mr Walker was obliged to obey the directions and instructions of the club whether on or off the field and as such, for the purposes of the control test, he could be considered as an employee.⁹² The court found that this proposition was strengthened by the fact that by the nature of his services in any particular game, Mr Walker would be bound by the instructions of the captain or whoever was a delegate of the club as the case may be.⁹³ It would appear that this approach followed in English law is not foreign to South African law, as it has been held in South Africa that the right to control is sufficient to establish an employment contract.⁹⁴ As far as the control test is concerned the case of *Tshabala v Moroka Swallows Football Club Ltd*⁹⁵ illustrates a similar approach followed by the court in *Walker v Crystal Palace*⁹⁶. In this case there was a dispute as to whether Mr Tshabalala, a coach of Moroka Swallows Football Club, was an employee of the latter or an independent contractor.⁹⁷ In this regard, the court stated that there are two tests to determine whether a person is an employee or an independent contractor.⁹⁸ These are 'the supervision or control' test and the 'dominant impression' test.⁹⁹ The court found that the coach was subject to the club's control and despite being given freedom in the selection of his team; his performance was under the supervision of the chairman of the club.¹⁰⁰ In addition to this, considering the circumstances surrounding Mr Tshabalala's contract and the terms of the contract, the dominant impression test indicated to the court that he could not have been anything other than an employee.¹⁰¹ The court in *Santos Football Club (Pty) Ltd v Igesund*¹⁰² considered *inter alia* the job description of Mr Igesund, as a coach of Santos Football Club, to establish that a unique employment relationship existed between the parties.¹⁰³

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid. See also Mould 'The suitability of the remedy of specific performance to breach of a "player's contract" with specific reference to the Mapoe and Santos cases' (2011) 14 PER 189.

⁹⁴ *Rodrigues v Alves* 1978 4 SA 834 (A) 842.

⁹⁵ 1991 12 ILJ 389 (IC).

⁹⁶ 1910 1 KB 87 CA.

⁹⁷ *Tshabala v Moroka Swallows Football Club Ltd* 390.

⁹⁸ *Idem* 392.

⁹⁹ Ibid.

¹⁰⁰ *Idem* 397.

¹⁰¹ *Idem* 398.

¹⁰² 2002 23 ILJ 2001 (C).

¹⁰³ *Santos Football Club (Pty) Ltd v Igesund* 2004.

From the above what is apparent are the common characteristics the English system has with South African law. The influence of English law in South Africa, since the early 19th century, is no doubt one of the explanations for this as discussed above. The application of the control test in employment law in both jurisdictions is a notable similarity. However, it would appear that South African courts are reluctant to apply pre-existing employment principles in determining whether an employment relationship between a player and a club exists as suggested by the cases of *Coetzee v Comitiss*¹⁰⁴ and *McCarthy v Sundowns Football Club*¹⁰⁵. It is in this regard that South African law could possibly learn from English law. As established above employment law, as it is applied to sport in England, is not a novel concept as it has been applied for over a century.¹⁰⁶ This would indicate that sports law in English law is of a more established nature compared to South Africa, who have only recently recognized professionalism in sport.¹⁰⁷ The approach in *Walker v Crystal Palace*¹⁰⁸ would require that South African courts consider established employment law principles in determining an employment relationship between an athlete and a club as opposed to relying on sport associations' policies. This approach would not be a major variance in South African law; as such an approach has been applied in cases concerning an employment relationship between a coach and a club.¹⁰⁹

In regards to rugby in South Africa, it appears that despite the unique employment environment of a professional rugby player, a player can be considered as an employee.¹¹⁰ The South African Rugby Union Player Status, Player Contracts And Player Movement Regulations¹¹¹ defines a 'player' as someone who is registered with a club and/or province.¹¹² Read together with the definition of a 'contract player', it would appear that a professional rugby player is someone who

¹⁰⁴ 2001 22 ILJ 331 (C).

¹⁰⁵ 2003 24 ILJ 197 (LC).

¹⁰⁶ See *Kingaby v Aston Villa FC*, *The Times*, 28 March 1912.

¹⁰⁷ *Cornelius* 2002 TSAR 173 173.

¹⁰⁸ 1910 1 KB 87 CA.

¹⁰⁹ See *Tshabala v Moroka Swallows Football Club Ltd* 1991 12 ILJ 389 (IC) and *Santos Football Club (Pty) Ltd v Igesund* 2002 23 ILJ 2001 (C).

¹¹⁰ *SA Rugby Players Association on behalf of Bands & others v SA Rugby (Pty) Ltd* (2005) 26 ILJ 176 (CCMA) 177.

¹¹¹ 2014.

¹¹² See article 1 of the South African Rugby Union Player Status, Player Contracts And Player Movement Regulations 2014.

is contracted to a province and/or club and receives a material benefit, which may consist of money, gifts or any other benefits that exceeds any expenses incurred as a result of the game.¹¹³ In this regard the definition of a professional for the purposes of rugby is very similar to that of the NSL Rules for the purposes of football.¹¹⁴ The case of *Vrystaat Cheetahs (Edms) Beperk v Mapoe*¹¹⁵ seems to confirm this definition as the court, although not tasked to determine what constitutes a professional rugby player, accepted that Mapoe in accordance with his contract received remuneration from his provincial union and as such this indicated that he was a professional player.¹¹⁶ The case of *Troskie v Van der Walt*¹¹⁷, concerned a contractual dispute between Mr Troskie and Old Grey Rugby Football Club over an alleged repudiation by the former. It was agreed that Mr Van der Walt would play for Old Grey Rugby Football Club for the entire season of 1991 in exchange for R4000.¹¹⁸ The court remarked that the fact that Mr Troskie received remuneration for his services rendered the contract void as all levels of rugby had to adhere to the amateur code.¹¹⁹ This case was of course heard before the professionalism of rugby in South Africa. A common theme in the cases of *Troskie v Van der Walt*¹²⁰ and *Vrystaat Cheetahs (Edms) Beperk v Mapoe*¹²¹, although decided in different eras, is that remuneration received by the players together with a provincial or club contract is a decisive factor in determining whether such a player is a professional and consequently an employee.

It would appear that the approaches followed by the South African courts above in determining an employment relationship between a player and an institution would result in a youth-athlete, who applies his trade at a school, not being considered an employee of the school.¹²² This would largely be due to the fact that the youth athlete concerned falls outside the ambit of the NSL Rules and the South African Rugby Union Player Status, Player Contracts And Player Movement Regulations as they do not have a contract with member clubs and do not receive remuneration

¹¹³ See article 1 of the South African Rugby Union Player Status, Player Contracts And Player Movement Regulations 2014.

¹¹⁴ See article 29.1.2 of the National Soccer League Handbook 2016.

¹¹⁵ 2014 JDR 1630 (FB).

¹¹⁶ *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 6.

¹¹⁷ 1994 3 SA 545 (O).

¹¹⁸ *Troskie v Van der Walt* 548.

¹¹⁹ *Idem* 550.

¹²⁰ 1994 3 SA 545 (O).

¹²¹ 2014 JDR 1630 (FB).

¹²² See *McCarthy v Sundowns* 200; *Coetzee v Comititis* 344; and *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 6.

that exceeds costs attached to playing the sport.¹²³ Considering that successful sport schools employ a professional regime in their sporting programs and are permitted to commercially exploit the talent of an athlete in the same manner as a professional club, it is interesting whether this exclusion of youth athletes as professionals does not impact on their right to equality and dignity.¹²⁴ According to Currie and De Waal, formal equality means the “law must treat individuals in like circumstances alike”.¹²⁵ As such, formal equality would require that youth-athlete’s who are contracted to schools, by virtue of a scholarship agreement, should be treated the same as athletes contracted to a provincial union or a ‘professional club’ since the performances of the respective athletes are similar and are performed in line with the objects of the contracted institutions.¹²⁶ In addition, in both instances the institutions benefit from commercially exploiting the performances of the athlete.¹²⁷ In terms of the right to dignity, the Labour Court in *Louw v Golden Arrow Bus Services (Pty) Ltd*¹²⁸ recognized that the payment of different wages for equal work or work of equal value has the potential to impair the dignity of a person.¹²⁹ In line with this principle it is argued that a youth-athlete, in rendering equal work as that of a contracted athlete, should receive equal benefits.¹³⁰ Differential treatment in this regard, as held by *Louw v Golden Arrow Bus Services (Pty) Ltd*¹³¹, could impair the dignity of a youth athlete contracted to a school. As this case concerned unfair labour practices, an argument can be made that unfair labour practices can only be claimed by employees by virtue of section 186(2) to (d) of the Labour Relations Act¹³² as such the principle in *Louw v Golden Arrow Bus Services (Pty) Ltd*¹³³ is inapplicable to youth athletes as presently they are not considered as employees.¹³⁴ It is however submitted that section 23(1) of the Constitution enshrines the right of ‘everyone’ to fair labour practices and as such the principle laid out in this case remains relevant for the

¹²³ See *McCarthy v Sundowns* 200; *Coetzee v Comitis* 344; and *Vrystaat Cheetahs (Edms) Beperk v Mapoe* 6.

¹²⁴ See s 9 and s 10 of the Constitution of the Republic of South Africa, 1996.

¹²⁵ Currie & De Waal *The Bill of Rights Handbook* 6 (2015) 213.

¹²⁶ Vosloo 83.

¹²⁷ Ibid.

¹²⁸ 2000 21 ILJ 188 (LC).

¹²⁹ *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) 196. See also van Niekerk *et al* Law@Work 3 (2015) 141.

¹³⁰ By equal benefits I refer to the benefit of being regarded a professional and consequently an employee.

¹³¹ 2000 21 ILJ 188 (LC).

¹³² 66 of 1995.

¹³³ 2000 21 ILJ 188 (LC).

¹³⁴ In terms of s 186(2)(a) to (d) of the Labour Relations Act 66 of 1995 unfair labour practices is defined in reference to an employee.

purposes of this discussion.¹³⁵ From the above it would appear that the present application of national associations' rules to youth athletes could amount to exploitation and an infringement of these athletes' constitutional rights. It remains to be seen what results the application of pre-existing employment principles in South African law will yield.

In terms of the Code of Good Practice¹³⁶ in order to be presumed an employee a claimant, alleging an employment relationship, must prove one of the seven listed factors.¹³⁷ In addition to this, a claimant may prove that they satisfy the definition of an employee in terms of the Labour Relations Act.¹³⁸ With regard to the latter requirement a claimant will have to indicate that they, in the course of their services, do not operate as an independent contractor and receive or are entitled to receive remuneration.¹³⁹ They must also show that they assist in the carrying of the business concerned.¹⁴⁰ To determine whether these principles above render a youth athlete an employee, the law within the US is considered.

The last several decades have experienced a surge of litigation by people involved in intercollegiate sport in America.¹⁴¹ The National Collegiate Athletic Association (hereinafter referred to as the NCAA) is the governing body of American college athletics.¹⁴² It was formed in 1906 initially to reshape sport by promoting safety in college sport and eliminating dangerous tactics that resulted in the injuries of many athletes.¹⁴³ Since its inception, the NCAA has generated billions of dollars due to the commercialization of college sport.¹⁴⁴ The NCAA boasts television figures envied by professional sport leagues around the world that in turn assists in the procurement of lucrative endorsement deals.¹⁴⁵ As a result of the commercial benefits of this system, American colleges compete among one another to secure the best talent and recruit such

¹³⁵ See *NEWU v CCMA & others* 2007 7 BLLR 623 (LAC) 628.

¹³⁶ GG 1774 of 2006-12-01.

¹³⁷ See s 15 of GG 1774 of 2006-12-01.

¹³⁸ Act 66 of 1995.

¹³⁹ See s 213 of the Labour Relations Act 66 of 1995.

¹⁴⁰ *Ibid.*

¹⁴¹ Weiler *et al Sport and the Law: Text, Cases and Problems* 5 (2015) 773.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Idem* 775.

talent by means of scholarships.¹⁴⁶ Despite this, the NCAA maintains that a student athlete is an amateur as their participation is motivated by education.¹⁴⁷ Notable similarities may be noted between the positions in South Africa and America, in that both systems resemble a professional model.¹⁴⁸ The contrast however is that America has a stronger collegiate and high school system and sport programs at these colleges generate more revenue than any high school in South Africa.¹⁴⁹ The case of *Taylor v Wake Forest*¹⁵⁰ illustrates the control American colleges exercise over the performances of their athletes. In this case, Gregg Taylor was recruited by Wake Forest University and in terms of his scholarship contract he was to honour and obey the rules of Wake Forest University and maintain eligibility for intercollegiate athletics.¹⁵¹ During his time at Wake Forest University, Gregg Taylor's academic performance dropped to 1.0 which was below the 1.35 standard.¹⁵² In an effort to revive his marks he stopped attending football practices and his GPA rose to 1.9.¹⁵³ He decided to stop playing football in his sophomore year and his performance rose to 2.4.¹⁵⁴ The University consequently revoked his scholarship.¹⁵⁵ The court gave judgment in favour of the University finding that Gregg Taylor was bound to honouring the rules and directions of the University and by not attending practices he was in contravention of his obligations.¹⁵⁶ In regards to the position of a youth athlete in South Africa and given the similarities intercollegiate athletics has with the high school sport system in South Africa, it would appear that for the purposes of the requirement of 'the manner in which the person works is subject to the control or direction of another person', a youth-athlete's performance, similar to Gregg Taylor, would be subject to the control of the school. This is premised on the fact that if a youth athlete were to stop attending practice like Gregg Taylor they would possibly have their scholarship revoked.¹⁵⁷ In addition, 'control' is further suggested by Gregg Taylor being required to honour the rules and instructions of his university; something no doubt the scholarship

¹⁴⁶ *Idem* 776.

¹⁴⁷ *Idem* 775.

¹⁴⁸ *Idem* 773.

¹⁴⁹ *Idem* 774.

¹⁵⁰ Court of Appeals of North Carolina, 1972. 16 NC.APP. 117, 191 S.E.2d 379.

¹⁵¹ *Weiler et al* 907.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Idem* 908.

¹⁵⁷ Vosloo 83. See also Donnelly 'Child labour, sport labour: Applying child labour laws to sport' 1997 32 *International Review for the Sociology of Sport* 389 389.

contract in South Africa would also require.¹⁵⁸ I turn now to whether the scholarship contract in South Africa amounts to remuneration. The case of *O'bannon v National Collegiate Athletic Association*¹⁵⁹ (hereinafter referred to as *O'bannon*) concerned a group of student athletes who challenged the NCAA's rules prohibiting them from receiving compensation from their respective universities in exchange for their services rendered. The NCAA argued that in prohibiting remuneration in any form, it was adhering to its tradition of preserving amateurism in college sport.¹⁶⁰ The evidence presented during trial suggested that the NCAA was not applying its amateurism rules consistently and this was due to the malleable nature of the NCAA's definition of amateurism.¹⁶¹ It was argued on behalf of the NCAA that paying student athletes would undermine the integrity of academics and as such scholarships, which are defined merely as 'grants in aids' by the NCAA bylaws, were sufficient as they afforded students the opportunity to pursue their education further.¹⁶² On the contrary, an expert witness suggested that the time demands of athletic obligations prevented these athletes from achieving any academic success.¹⁶³ The court however accepted that a scholarship was a grant in aid, as defined by the NCAA, and that prohibiting athletes from receiving compensation would compromise the integrity of college sport as a model founded on education.¹⁶⁴ In the context of South African school sport, it would appear that this approach followed in *O'bannon* would be applicable in terms of the Schools Act and the Children's Act¹⁶⁵. The purpose of the School's Act is to ensure that schools are operating as educational institutions and to interpret a scholarship to mean remuneration would undermine its objects, as schools would then become sporting commercial institutions.¹⁶⁶ In keeping with its objects and purposes, and preserving the amateur nature of high school sport, it would be appropriate to interpret a scholarship as merely constituting a grant in aid as envisaged by *O'bannon*.¹⁶⁷ As was noted in *O'bannon*, the athletic commitments of

¹⁵⁸ See *Crystal Palace v Walker* 92. Given the nature of a sportman's performance he has to obey the instructions of the team he is playing for. See also Donnelly 389.

¹⁵⁹ 7 F. Supp. 3d 955 - District Court, ND California 2014.

¹⁶⁰ *O'bannon v National Collegiate Athletic Association* 973.

¹⁶¹ *Idem* 1000.

¹⁶² *Idem* 987.

¹⁶³ *Idem* 81.

¹⁶⁴ *Idem* 966.

¹⁶⁵ Children's Act 38 of 2005.

¹⁶⁶ See s 1 of Schools Act.

¹⁶⁷ *O'bannon v National Collegiate Athletic Association* 987.

youth athletes has the potential to compromise their academic success.¹⁶⁸ In the South African context the Children's Act¹⁶⁹ provides that labour which endangers the well-being and the education of a child is prohibited.¹⁷⁰ By employing a professional approach towards high school sport and being permitted to commercially exploit the services of a youth-athlete, schools may be in contravention of this provision of the Children's Act¹⁷¹ as this approach taken by schools may compromise the academic commitments of youth-athletes.¹⁷² The preservation of amateurism of high school sport, in line with the Schools Act, would require that a clear differentiation be made between professional and amateur sport as applicable to high school sport.¹⁷³ An institution categorized under an 'amateur' classification should not be permitted to operate as a professional association. In this regard, perhaps South Africa may learn from Italian Law. The employment of players in professional team sport in Italy is regulated by specific sport employment legislation.¹⁷⁴ Articolo Legge 91/1981 (Laws 91 of 1981) consequently amended the previous legal framework in Italy and currently recognizes sport workers as employees.¹⁷⁵ Laws 91 of 1981 pays special attention to the practice of sport in the context of an employment relationship.¹⁷⁶ By providing for a special set of regulations that cater for the *sui generis* characteristics of sport in Italy, Laws 91 of 1981 ensures that there is a clear distinction between professional and amateur sport.¹⁷⁷ It is submitted that by codifying *sui generis* employment principles as they apply to sport, Italian law avoids the current uncertainty South Africa faces in regards to the classification of school athletes as professionals. Owing to the fact that it has not been very long since professionalism in South Africa was recognized, South Africa can learn further from Italy in this regard as employment law, as it applies to sport in Italy, has had

¹⁶⁸ Idem 81.

¹⁶⁹ Act 38 of 2005.

¹⁷⁰ See s 141 of Children's Act 38 of 2005 read together with the definition of child labour in s 1. See also s 28(f)(ii) of the Constitution of the Republic of South Africa, 1996.

¹⁷¹ Act 38 of 2005.

¹⁷² Vosloo 83.

¹⁷³ See s 1 of the Schools Act. By requiring that a schools primary obligation is to provide learners with an education, this would imply that recreational activities the school participates in is conducted within the rules of amateurism.

¹⁷⁴ Louw 243.

¹⁷⁵ Article 3 of Laws 91 of 1981.

¹⁷⁶ Colucci *Sports law in Italy* (2010) 73.

¹⁷⁷ Ibid.

considerably more judicial exposure than South Africa.¹⁷⁸ As such sports law in Italy is of a more developed nature.

From the above it is apparent that the application of sporting associations' rules in determining whether a youth athlete is an employee yields unfavourable results that potentially infringe the constitutional rights of children. The application of pre-existing employment principles would suggest that a youth athlete could possibly be categorized as an 'employee'. This result would be the most accurate portrayal of reality, however as alluded to by *O'bannon*, this would undermine the integrity of the Schools Act and the preservation of amateur high school sport would be compromised. This concern should not however condone the continued professional approach schools have in their sport as this has the potential to affect the well-being and educational development of a child as provided for in the Children's Act¹⁷⁹.

2.3 DO IMAGE RIGHTS AMOUNT TO REMUNERATION?

After noting the considerable similarities between intercollegiate sport and professional sport, the court in *O'bannon* permitted the payment of licensing revenue and intellectual property rights to college athletes that could be capped by the NCAA.¹⁸⁰ Although maintaining that an NCAA athlete was an amateur the court, by permitting these forms of compensation, seemed to have conflated the term 'amateur' and 'professional'. The majority in the subsequent appeal noted this as it stated that the District Courts finding in this regard contradicted the notion of an amateur, as precluding any forms of compensation is what makes an athlete an amateur.¹⁸¹

The use of the image rights of a sport star has grown significantly in recent times.¹⁸² The commercial value attached to image rights has led sportpersons to allow third parties to make use

¹⁷⁸ Colucci 74.

¹⁷⁹ Act 38 of 2005.

¹⁸⁰ *O'bannon v. National Collegiate Athletic Association* 1008.

¹⁸¹ *O'bannon v. National Collegiate Athletic Association*, 802 F. 3d 1049 Court of Appeals, 9th Circuit 2015 1079.

¹⁸² Cloete *et al* 176.

of their fame.¹⁸³ Of late, successful sporting personalities earn more for the work they do off the field than the work they do on it.¹⁸⁴ Cloete describes image rights as:

‘...the ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media.’¹⁸⁵

Whether the payment of image rights amounts to remuneration is a question that has been considered in English law for tax purposes.¹⁸⁶ English law is referred to here due to the historical influence English law has had on company and tax law in South Africa.¹⁸⁷ In England the employment income, which is the payment a club makes to a player for his playing services, is regarded as remuneration.¹⁸⁸ Image rights on the other hand are considered as capital assets.¹⁸⁹ This is illustrated in the case of *Sport Club, Evelyn and Jocelyn v Inspector of Taxes*¹⁹⁰, where the court found that where a ‘sport person can separate their provision of promotion services from their playing services’, the compensation in this regard will be viewed as capital assets and not as remuneration.¹⁹¹ The court in *Portsmouth City Football Club Ltd & others*¹⁹² confirmed that image rights are taxed differently from employment income.¹⁹³

The South African Revenue Services (hereinafter referred to as SARS) published a ‘Draft guide on the taxation of professional sport clubs and players’¹⁹⁴ in an attempt to set out the manner professional sport players will be taxed.¹⁹⁵ This draft is however not to be used as a legal

¹⁸³ Idem 175.

¹⁸⁴ Ibid.

¹⁸⁵ Idem 176.

¹⁸⁶ Cloete ‘The taxation of image rights: A comparative analysis’ 2012 3 *De Jure* 556 560.

¹⁸⁷ Visser *et al Gibson: South African Mercantile and Company Law* 8 (2004) 486.

¹⁸⁸ Cloete 2012 3 *De Jure* 556 560.

¹⁸⁹ Ibid.

¹⁹⁰ 2000 STC (SCD) 443.

¹⁹¹ Cloete 2012 3 *De Jure* 556 560.

¹⁹² [2010] EWHC 2013 (Ch).

¹⁹³ Portsmouth [2010] EWHC 2013 (Ch) para 19.

¹⁹⁴ Date of issue: Nov 2010 also available at <http://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-43%20-%20Draft%20Guide%20on%20the%20Taxation%20of%20Professional%20Sport%20Clubs%20and%20Players.pdf>

¹⁹⁵ Cloete 2012 3 *De Jure* 556 564.

reference and accordingly is not binding.¹⁹⁶ The Revenue Laws Amendment Act¹⁹⁷ provides the taxation of sport persons is residentially based.¹⁹⁸ Any sportperson who qualifies as a ‘resident’ is liable to pay taxes in regard to their worldwide gross income.¹⁹⁹ The case of *ITC 1735*²⁰⁰, which concerned the use of a professional golfer’s image rights, illustrates that image rights payments form part of a sportperson’s income and will be included in their taxable income.²⁰¹ According to Cloete, in order for the payment of image rights not to be regarded as part of taxable income a sportperson, similar to the position in the England, must separate their promotional services from their playing services.²⁰²

The US Court of Appeals for the ninth circuit (hereinafter referred to as the US Court of Appeals) in the subsequent appeal of *O’bannon* found that any payment of image rights to college athletes would be in contravention of the amateurism rules of college sport.²⁰³ In the South African context, if the judgement in *ITC 1735*²⁰⁴ is accepted, any payments made to the use of a youth athletes personality or likeness could be seen as a form of compensation that may be taxed as taxable income.²⁰⁵ Such compensation however may defeat the objects of amateurism in school sport as indicated by the US Court of Appeals.²⁰⁶ The District Court however found that payments made to college athletes could be kept in a trust which they could make use of once they graduate.²⁰⁷ It is submitted that this approach would be a viable option for South Africa as any payments made in respect to the intellectual property rights of a youth athlete may undermine the objects of the Schools Act and the preservation of amateurism but, if these payments are only made available upon graduation, this would still be in compliance with amateur rules.

¹⁹⁶ Draft guide on the taxation of professional sport clubs and players 2010 i.

¹⁹⁷ 59 of 2000.

¹⁹⁸ See s 2 of the Revenue Laws Amendment Act 13 of 2016.

¹⁹⁹ Ibid.

²⁰⁰ 64 SATC 455.

²⁰¹ *ITC 1735* 457.

²⁰² Cloete 2012 3 De Jure 556 566.

²⁰³ *O’bannon v. National Collegiate Athletic Association* 1079.

²⁰⁴ 64 SATC 455.

²⁰⁵ *ITC 1735* 457.

²⁰⁶ *O’bannon v. National Collegiate Athletic Association* 1079.

²⁰⁷ *Idem* 1007.

2.4 CONCLUDING REMARKS

Presently South African courts are relying on sport associations' rules to determine whether a sport person is an employee of a club.²⁰⁸ This approach has the potential to prejudice persons who, for the purposes of labour law, may be considered as employees. Youth athletes are such persons who would face the harsh effects of the application of these rules.²⁰⁹ The application of these rules does not consider that successful sporting schools operate in a similar nature to professional clubs and as such athletes at these schools could be considered as employees.²¹⁰ The English approach is perhaps the most appropriate in this regard. Pre-existing employment principles should determine whether a sport person is an employee and consequently reveal the true state of affairs.²¹¹ English law is referred to in this regard as it has a deep historic influence on South African law and the implementation of the English approach would not be a major variance from South African law.²¹² In addition to this due to the extensive judicial exposure of employment law pertaining to sport in England, it may be argued that sports law in England is of a more established nature than South Africa.²¹³ In line with the law within the US, a scholarship presented to a youth athlete should not be construed as remuneration as this would undermine the objects of the Schools Act and would not assist in the preservation of amateurism in high school sport.²¹⁴ The United States of America is referred to in this regard due to the strong school system it has and the notable similarities between college sport and high school sport in South Africa.²¹⁵ In keeping with the aim of preserving amateurism in high school sport, it is submitted that schools should not be permitted to adopt a professional approach towards school sport. To ensure that no further uncertainty can be caused as to the perimeters professional and amateur sporting institutions may operate within, perhaps legislative intervention is appropriate. In this regard Italian sports law may be learned from. Italian sports law is referred to as through its history it has gone through several changes and reforms.²¹⁶ This would suggest that it has had

²⁰⁸ See *Coetzee v Comitiss* 344; *McCarthy v Sundowns* 201.

²⁰⁹ See s 9 and s 10 of the Constitution of the Republic of South Africa, 1996.

²¹⁰ Vosloo 83.

²¹¹ Ibid.

²¹² *Rodrigues v Alves* 843.

²¹³ See *Walker v Crystal Palace* 1910 1 KB 87 CA; *Kingaby v Aston Villa FC*, *The Times*, 28 March 1912.

²¹⁴ *O'bannon v National Collegiate Athletic Association* 966.

²¹⁵ See discussion above.

²¹⁶ Colucci 73.

time to develop into a certain body of law, something South African sports law has yet to achieve.²¹⁷ As such South Africa could cater for the *sui generis* nature of employment principles as they relate to sport by codifying them and ensuring that there is legal certainty in such matters. It is further submitted that any payments received in respects to a youth-athlete's intellectual property rights, in line with the objective of preserving amateurism in high school sport, should be kept in a trust which is made available to the athlete upon graduation. Having considered youth athletes in schools, a question that begs an answer is what the position of child athletes in youth clubs and youth academies are in?

²¹⁷ Ibid. See also Cornelius 2002 TSAR 173 173.

CHAPTER 3: YOUTH ACADEMIES AND YOUTH CLUBS

3.1 INTRODUCTION

The private governance of sport in South Africa is based on club or sport association, which is a voluntary association.²¹⁸ Organization of all forms of amateur and professional sport, excluding school sport, is based on association and therefore contract.²¹⁹ Clubs are made up of members who conclude a contract of membership, while the clubs contract with one another in order to submit to a higher regulatory power such as a provincial or national union.²²⁰ In the South African context and in terms of football, such power would be in the form of the South African Football Association (SAFA).²²¹ Any player wishing to play professional football in South Africa must do so under the auspices of SAFA.²²² Professional clubs in South Africa generally have a professional/amateur split.²²³ The amateur split generally relates to the club's youth academy or youth club for purposes of sport development.²²⁴ SAFA enacted the SAFA Regulations on Football Academies²²⁵ that provides for the monitoring, regulation and organization of all football youth clubs and academies in South Africa.²²⁶

3.2 SAFA REGULATIONS ON FOOTBALL ACADEMIES AND CHILDREN'S RIGHTS

The Convention on the Rights of the Child (CRC)²²⁷ recognizes that children are entitled to special care and assistance due to their physical and mental immaturity that makes them

²¹⁸ Basson & Loubser *Sport and the Law in South Africa* (2000) ch 4-1.

²¹⁹ Louw 156.

²²⁰ Basson & Loubser ch 4-1.

²²¹ *McCarthy v Sundowns* 200.

²²² Ibid.

²²³ Basson & Loubser ch 4-35.

²²⁴ The former Minister of Sport and Recreation Mr Balfour's Parliamentary Media Briefing of 2002-08-15 (available online at www.polity.org.za/html/govdocs/speeches/2002_last accessed on 18 September 2017).

²²⁵ 2011.

²²⁶ See the preface of the SAFA Regulations on Football Academies 2011.

²²⁷ 1577 UNTS 3. The UN General Assembly adopted the CRC on 20 November 1989 and it came into force on 2 September 1990. South Africa signed the CRC on 29 January 1993 and ratified it on 16 June 1995 without filing any reservations or interpretative declarations.

susceptible to prejudicial influences.²²⁸ Section 28 of the Constitution embodies the rights of children in South Africa.²²⁹ The Constitution recognizes the right of children to have full opportunity for play that promotes their general culture and well-being.²³⁰ Section 28(2) provides that children's best interests are of paramount importance in every matter concerning the child.²³¹ Section 28(1)(b) provides that children have a right to family care or parental care, or to appropriate alternative care when removed from the family environment.²³² The Children's Act²³³ also realizes these rights and further provides that persons not holding parental rights and responsibilities, in respect to a child, have the duty of protecting the child from abuse or exploitation and safe-guarding the child's health and well-being.²³⁴ In the case of *S v Sheldon-Lakey*²³⁵, which concerned an allegation that a teacher had sexual relations with a minor, the court decided that the fact that the perpetrator was an educator aggravated the matter.²³⁶ In this, the court suggested that educators are in a position of trust in respect to services they perform for children and are tasked with providing care for them.²³⁷ In the case of *S v Hewitt*²³⁸, a tennis coach was found to have abused his duty of care in regards to players he was coaching.²³⁹ The coach was found guilty of rape and indecent assault of three minor girls.²⁴⁰ In light of the principles above and the application of them in recent cases it is apparent that children have a right to appropriate care and to be protected from abuse.²⁴¹ As such parents, when sending their children to sport clubs, expect that clubs will provide a safe environment for the child and that their children will be educated about sport and develop life-skills such as teamwork and strategy development.²⁴² Parents ultimately place their trust in sport clubs and academies.²⁴³

²²⁸ See the preamble of the CRC.

²²⁹ See s 28 of the Constitution of the Republic of South Africa, 1996.

²³⁰ Cloete *et al* 164.

²³¹ See s 28(2) of the Constitution of the Republic of South Africa, 1996.

²³² *Idem* s 28(1)(b).

²³³ Act 38 of 2005.

²³⁴ See s 32 of Children's Act 38 of 1995.

²³⁵ 2016 (2) SACR 632 (NWM).

²³⁶ *S v Sheldon-Lakey* 640.

²³⁷ *Ibid.*

²³⁸ 2017 (1) SACR 309 (SCA).

²³⁹ *S v Hewitt* 316.

²⁴⁰ *Ibid.*

²⁴¹ Cloete *et al* 164.

²⁴² *Ibid.*

²⁴³ *Ibid.*

As discussed above, the SAFA Regulations on Football Academies²⁴⁴ provide for the monitoring, regulation and organization of all youth clubs and academies in South Africa. The regulations provide that no applicant will be offered a license to run an academy or club if they are in contravention of any child protection laws.²⁴⁵ The rules further provide that no one shall be employed as a staff member of a club or academy unless they have completed a background check that has been verified by the police.²⁴⁶ Although this is commendable of the rules, it is concerning that the rules do not provide for periodical assessments of youth athletes in academies and clubs for the purposes of determining whether child protection laws are still being adhered to.²⁴⁷ Child offenders thrive in conditions where there is a lack of accountability. Examples of this include the following cases: In the case of *S v Hewitt*²⁴⁸ Mr Hewitt, the accused, was an ex-professional tennis player who was the coach of three young girls. The court found the accused had been left alone to groom the complainants over a period of 14 years.²⁴⁹ In *Bothma v Els and Others*²⁵⁰ the complainant, who was 13 years old at the time of the incident, alleged that she had been sexually abused over a period of two years by the accused. In the case of *S v SM*²⁵¹ a senior pastor of a church was found guilty of sexually abusing a minor. The court found that the minor had been groomed by the pastor for over a period of three years.²⁵² These cases illustrate that child offenders who lack accountability are free to abuse a child for extensive periods of time.²⁵³ Authoritative figures in these cases were not present which is why the offenses continued for so long. By providing for periodical child assessments in youth clubs and

²⁴⁴ 2011.

²⁴⁵ See the preface of the SAFA Regulations on Football Academies 2011.

²⁴⁶ *Idem* s 3.

²⁴⁷ *Idem* s 1 which provides that ‘The SAFA Youth Development Committee and Technical Committee of SAFA will monitor the Football Club Academies, Centres of Excellence, Development Centres and Satellites operated by Clubs and/or organizations to ensure compliance with this Section of these Rules and will, in particular, procure that each is visited at least 4 times each season by a person appointed for that purpose by the Board. Such person shall be entitled to have access to all records kept in accordance with the requirements of these Rules.’ The rules do not expressly provide that children will be assessed and an investigation will be made as to whether their rights are being protected.

²⁴⁸ 2017 (1) SACR 309 (SCA).

²⁴⁹ *S v Hewitt* 315.

²⁵⁰ 2010 (1) SACR 184 (CC).

²⁵¹ 2013 (2) SACR 111 (SCA).

²⁵² *S v SM* 122.

²⁵³ In *S v Hewitt*, the accused committed the offense after establishing trust with the complainants parents, who then allowed him to drop the complainant home after practice sessions. In *S v SM*, the accused used his position as a senior pastor to gain the victim’s mother’s trust, which then gave him unfettered freedom to accompany the victim on holidays and to invite her to parties. Further the accused, as a senior pastor, appeared to be an unlikely child offender, hence why there was a lack of accountability from the community.

academies, this would ensure that offenders are not offered the opportunity to groom minor's over extended periods of time. In each of the cases above, the complainants did not have platforms that made them comfortable in reporting the abuse.²⁵⁴ By providing this periodical assessment, SAFA would ensure that there are platforms available for youth athletes to report abuse without any fear or prejudice, as children could report any offense to persons appointed to counsel and assess them.²⁵⁵ Considering the number of children susceptible to abuse in private care, this begs the question of whether the State is permitted to intervene in issues concerning the regulation of youth academies and clubs in South Africa.

3.3 STATE INTERVENTION OF PRIVATE ASSOCIATIONS

A distinction must be made regarding 'interventionist' and 'non-interventionist' models of governmental regulation.²⁵⁶ In the case of 'interventionist', this refers to countries that have the State at the centre of sport.²⁵⁷ The regulation of sport is thus a public function that is then delegated to respective sport federations.²⁵⁸ 'Non-interventionist' States on the other hand regulate sport federations under the general private law association.²⁵⁹ Sport federations in non-interventionist States therefore have greater freedom in the regulation of their respective sporting codes.²⁶⁰ An example of an interventionist State is France where sport is seen as a public good and a social service responsibility of the State.²⁶¹ The model adopted in the United Kingdom resembles that of a non-interventionist approach.²⁶² Legislative intervention in sport in the United Kingdom is only done as a last resort, in response to pressing public interest.²⁶³

²⁵⁴ In *S v Hewitt*, the first complainant had a bad relationship with her mother and upon reporting the abuse to her mother, it was dismissed by her. This suggest that at the time there was no platform for her to report the offense.

²⁵⁵ In *S v SM* the complainant was reluctant to disclose her abuse as she feared that she would be left homeless and lose the care she was being provided.

²⁵⁶ Lewis & Taylor *Sport: Law and Practice* (2003) ch 5-11.

²⁵⁷ Caiger & Gardiner *Professional Sport in the EU: Regulation and Re-regulation* (2000) 62.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Louw 62. Other countries that have adopted an interventionist model to governance are Italy, which have Articulo Legge 81/1981 that governs the employment of athletes in professional sport and Greece where the governance and development of professionalism in sport is regulated by Law 879/1979.

²⁶² *Idem* 61.

²⁶³ *Ibid.* Issues which are of pressing public interest include, among others, child protection.

South Africa appears to be experiencing a mixed system regarding State intervention in sport.²⁶⁴ The State has intervened in sport on issues concerning the funding of sport federations²⁶⁵, affirmative action in sport and policies concerning the investment of sport participants elected to represent the country.²⁶⁶ Despite this, the judiciary has in judgments indicated that South Africa follows a non-interventionist model.²⁶⁷ The question is whether the regulation of youth academies and clubs is an area that the State should intervene in despite the institutions being private bodies.

In certain exceptions, private bodies are vested with public powers by statute.²⁶⁸ They are then subject to the rule of public law in exercise of their functions.²⁶⁹ In the case of *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*²⁷⁰ the court held that certain conduct of the Johannesburg Stock Exchange was subject to review under public law, despite being a private body.²⁷¹ The court made it clear that this was only because there was legislation that required the Johannesburg Stock Exchange to exercise its powers in the public interest.²⁷² It would appear that this position is similar to English law. English law is referred to in this regard because of its similarities with South African law and the strong academy system it has regulated by the Football Association.²⁷³ In the case of *R v Football Association*²⁷⁴ the court held that the Football Association was a private body and not a public body despite controlling football all over England and exercising extensive powers in doing so.²⁷⁵ The court found that the lack of evidence, such as statute, that suggested that if the Football Association was not established the

²⁶⁴ Louw 63.

²⁶⁵ See s 10(3) of the National Sport and Recreational Act 110 of 1998.

²⁶⁶ *Idem* s 4.

²⁶⁷ *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) 1375. The court stated “The respondent 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 applicant, indeed, makes the point that it ‘has no statutory recognition or any ‘official’ responsibility for the game of cricket in South Africa’. The conduct of private bodies, such as the respondent, 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.”

²⁶⁸ *Cronje v United Cricket Board of South Africa* 1375.

²⁶⁹ *Ibid.*

²⁷⁰ 1983 (3) SA 344 (W).

²⁷¹ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 364.

²⁷² *Ibid.*

²⁷³ The EFL Youth Development Rules 2016/2017.

²⁷⁴ [1993] 2 All ER 833.

²⁷⁵ *R v Football Association* 848.

State would form a public body to exercise its powers strengthened the notion that the Football Association was a private body.²⁷⁶ The Constitution provides that the State must progressively make education available and accessible.²⁷⁷ This provision effectively makes providing an education to people a public function. The Schools Act illustrates this.²⁷⁸ The SAFA Regulations on Football Academies²⁷⁹ provides that academies are, *inter alia*, concerned with providing child athletes with an academic education.²⁸⁰ Considering the above, it is respectfully submitted that since the act of providing an education is a public function, in terms of the Constitution and the Schools Act and the SAFA Regulations on Football Academies²⁸¹ requires academies to provide youth athletes with an education, youth academies are performing a public function despite being a private body.²⁸² As such, despite being regulated in terms of private law, the State should be permitted to interfere in the regulation of these bodies. This approach would promote the ‘best interests of the child’. It would do so as it would ensure that private bodies, performing public functions, are accountable to the State and consequently ensuring that the national government and sport federations work together in developing proactive measures which make certain that a safe playing environment, absent any form of abuse, is guaranteed to children in sport.²⁸³ Perhaps the intervention in this regard would come in the form of youth clubs and academies being brought within the scope and ambit of the Schools Act. This would result in institutions that provide education to children being subject to objective and uniform standards.

3.4 COMPENSATION FOR YOUTH ACADEMY AND CLUB GRADUATES

The Fédération Internationale de Football Association Regulations on the Status and Transfer Players (FIFA Rules)²⁸⁴ provides that on registering a player as a professional, a club must pay training compensation to every club that has contributed to the player’s development since his

²⁷⁶ Ibid.

²⁷⁷ See s 29(1)(b) of the Constitution of the Republic of South Africa, 1996.

²⁷⁸ See s 1 of the Schools Act.

²⁷⁹ 2011.

²⁸⁰ See the preface of the Regulations on Football Academies 2011.

²⁸¹ 2011.

²⁸² *Cronje v United Cricket Board of South Africa* 1375.

²⁸³ Cloete *et al* 170.

²⁸⁴ 2016. Approved by the FIFA Executive Committee on 17 March 2016 and come into force on 1 June 2016.

12th birthday.²⁸⁵ Training compensation will be due to these clubs every time the player transfers between clubs of different associations until their 23rd birthday.²⁸⁶ The NSL Rules²⁸⁷ embodies the FIFA Rules by providing that ‘Training, development and education compensation will be paid by the registering *Member Club* to the *Member Clubs* involved in the training, development and education of that *Player*’.²⁸⁸ The NSL Rules further provide that such compensation will be due when the player signs his first contract as a professional and on each occasion thereafter until his 23rd birthday where the player is transferred to another club.²⁸⁹ The wording of the SAFA Regulations on Football Academies²⁹⁰ confirms the provision in the NSL Rules.²⁹¹ In *McCarthy v Sundowns*²⁹², the court stated that the issue of training compensation is only relevant to players who are under the age of 23, where in terms of the FIFA Rules and the NSL Rules, training compensation fees are payable to clubs who contributed to the training of the player prior to the age of 23.²⁹³ The court went further to say that players who have reached the age of 23 are free to conclude contracts with new clubs and to further their occupation as professional footballers without this restraint.²⁹⁴

It is concerning that the FIFA Rules, the NSL Rules and the SAFA Regulations on Academies do not make provision for minors who have personally incurred costs attached to their training. The natural interpretation of the rules, as indicated in *McCarthy v Sundowns*²⁹⁵, creates a blanket provision for all players who are under the age of 23 to be subject to the training compensation rules.²⁹⁶ The effect of this would be that children who pay training fees at clubs would be subject to this rule, despite the club not incurring any expense in training the player.²⁹⁷ In the event that a

²⁸⁵ See annexure 4 article 1 of the Fédération Internationale de Football Association Regulations on the Status and Transfer Players 2016.

²⁸⁶ *Idem* annexure 4 article 2.

²⁸⁷ 2016.

²⁸⁸ See article 45 of the NSL Handbook 2016.

²⁸⁹ *Ibid.*

²⁹⁰ 2011.

²⁹¹ See s 8 of the SAFA Regulations on Football Academies 2011.

²⁹² 2003 24 ILJ 197 (LC).

²⁹³ *McCarthy v Sundowns* 201. See also *Norodien v Ajax Cape Town Football Club (Pty) Ltd* 476.

²⁹⁴ *McCarthy v Sundowns* 201.

²⁹⁵ 2003 24 ILJ 197 (LC).

²⁹⁶ *McCarthy v Sundowns* 201.

²⁹⁷ See s 6 of the SAFA Regulations on Football Academies 2011 which provides that a club may enter into a scholarship agreement between the club and the player. The rules suggest that a player is not obligated to accept the scholarship agreement.

professional club seeks to employ such a player, the club could be deterred in doing so because of its duty to pay training compensation to the player's previous clubs. Could this constitute a restraint of trade?

The case of *Coetzee v Comitis*²⁹⁸ concerned a professional footballer who applied to the High Court for an order declaring the NSL's constitution, rules and regulations relating to the transfer of professional soccer players whose contracts had been terminated be contrary to public policy and inconsistent with the provisions of the Constitution.²⁹⁹ Mr Coetzee, a former employer of the respondent, sought employment from Hellenic FC.³⁰⁰ Mr Coetzee's transfer to Hellenic FC was subject to a R17 500 compensation fee payable to Mr Coetzee's previous club.³⁰¹ Hellenic were not prepared to pay this amount.³⁰² The court stated, 'It is therefore apparent that while two clubs are bickering about the amount of compensation payable, the player is prevented from taking up his employment with his new employer.'³⁰³ From this, the court acknowledged that a player in these instances would be left at the mercy of the two clubs.³⁰⁴ The court held that a player prevented from joining a club, subject to the payment of compensation, amounts to a restraint of trade.³⁰⁵ The court referred to *Union Royale Belge des Societes de Football Association (ASBL) & others v Jean Marc Bosman*³⁰⁶ where the European Court of Justice struck down rules of sporting associations requiring a training fee be paid to a club upon expiration of a player's contract before a player may be transferred.³⁰⁷

The case of *Coetzee v Comitis*³⁰⁸ illustrates that a player's transfer being subject to training compensation may result in prejudicial effects for the player.³⁰⁹ How much so where the training compensation sought by a club is not justified, as they have not incurred expenses of training the

²⁹⁸ 2001 22 ILJ 331 (C).

²⁹⁹ *Coetzee v Comitis* 332.

³⁰⁰ *Idem* 337.

³⁰¹ *Ibid.*

³⁰² *Idem* 346.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Idem* 347.

³⁰⁶ [1996] 1 CMLR 645.

³⁰⁷ *Union Royale Belge des Societes de Football Association (ASBL) & others v Jean Marc Bosman* 113.

³⁰⁸ 2001 22 ILJ 331 (C).

³⁰⁹ *Coetzee v Comitis* 346. In the case of the minor it infringes their constitutional right to be protected from exploitative labour practices in terms of s 28(1)(e) of the Constitution of the Republic of South Africa.

player? It is submitted that the compensation rules, by not making provision for youth athletes who personally incur training cost, has the effect of economically exploiting child athletes and constitutes as a restraint of trade as indicated in *Coetzee v Comitits*³¹⁰. It is suggested, in line with the judgment in *Coetzee v Comitits*³¹¹, that SAFA intervene to remedy the compensation rules as far as they do not make provision for self-funded athletes.

3.5 CONCLUDING REMARKS

From the above it is apparent that the abuse of children is an issue of great concern. Cases involving teachers and coaches abusing minors suggest that youth athletes at academies and clubs are susceptible to experiencing the same fate.³¹² There is a need for the State to involve itself in issues concerning the education of children.³¹³ Despite academies and clubs being private institutions, the government should be permitted to interfere in the conduct of these institutions' business, as their conduct implicates the well-being and educational development of children.³¹⁴ Such governmental intervention will assist in eradicating child abuse by providing accountability and ensuring a safe playing environment for children. Intervention may perhaps come in the form of all these institutions being brought within the ambit of the Schools Act. The compensation rules regarding the transfer of children is also of great concern. Practical application of the rules results in a restraint of trade placed against youth athletes and their economical exploitation.³¹⁵ Pursuant to the rights of children embodied in the Constitution and the Children's Act³¹⁶, intervention that will remedy this prejudicial effect is necessary. Another threat that is of equal concern is the issue of human trafficking of children. Are youth athletes protected from this threat, and if not, are there better mechanisms to ensure their protection?

³¹⁰ 2001 22 ILJ 331 (C).

³¹¹ Ibid.

³¹² See *S v Hewitt* and *S v SM*.

³¹³ See s 28 read with s 29 of the Constitution of the Republic of South Africa, 1996. See also s 1 of the Schools Act.

³¹⁴ *Cronje v United Cricket Board of South Africa* 1375.

³¹⁵ *Coetzee v Comitits* 347.

³¹⁶ Act 38 of 2005.

CHAPTER 4: HUMAN TRAFFICKING

4.1 INTRODUCTION

The trafficking of women and children for the purposes of slave labour, child labour, pornography and forced prostitution has become a modern social problem.³¹⁷ Human trafficking has been referred to as modern day slavery.³¹⁸ Trafficking of persons has become one of the most profitable businesses in the world.³¹⁹ Trafficking is prevalent in countries that struggle with poverty, lack of economic opportunities, war, natural disasters and political instability.³²⁰ The United Nations (UN) has acknowledged the prevalence of trafficking as a global threat.³²¹ A research conducted by the UN indicates that approximately 800 000 people are trafficked across international borders every year and 80% of those people are women and children.³²² This has led the UN to adopt measures to combat this global threat.³²³ The most prominent measure is in the form of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime (Palermo Protocol)³²⁴. The Palermo Protocol is the first instrument created at an international level that provides a definition for global trafficking and is binding on all countries that are parties to it.³²⁵ Article 3 of the Palermo Protocol defines trafficking as:

‘The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of

³¹⁷ Ebbe & Das 3.

³¹⁸ International Labour Organisation *Global Estimate of Forced Labour: Results and Methodology* (2012) 13.

³¹⁹ South African Law Commission (SALC) Discussion Paper 25 (Project 131) 'Trafficking in persons report' (2008) 1.

³²⁰ Ibid.

³²¹ Subramanien “‘Bought at a price’”: Trafficking in human beings – a brief study of the law in South Africa and the United States’ 2011 SACJ 245 247.

³²² Songololo 'The Trafficking of Children for Purposes of Sexual Exploitation' (2000) 25.

³²³ Kreston 'Human trafficking legislation in South Africa: Consent, coercion and consequences' 2014 SACJ 20 21.

³²⁴ 2000.

³²⁵ Subramanien 2011 SACJ 245 248.

others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.³²⁶

South Africa ratified the Palermo Protocol on 20 February 2004.³²⁷ After the ratification the South African Law Reform Commission sought to draft the Prevention and Combating of Trafficking in Persons Bill to deal with the crime of human trafficking in South Africa.³²⁸

4.2 SOUTH AFRICA COMBATting HUMAN TRAFFICKING

South Africa has become an ideal target for traffickers because it serves as the economic heart of Africa.³²⁹ Due to the direct flights and shipping routes to most countries in the world, South Africa has become a transit point for traffickers.³³⁰ Recent cases of trafficking in South Africa include a woman, originally from Thailand, who was arrested for offering Thai women jobs in massage parlors and then forcing them into prostitution.³³¹ In 2009 two ten-year-old girls were rescued by police from a brothel in Johannesburg.³³² The increase of trafficking in South Africa and the criticism it has suffered due to its piecemeal approach in dealing with human trafficking led to the enactment of the Prevention and Combating of Trafficking in Persons Act^{333,334}

Prior to the Prevention and Combating of Trafficking in Persons Act³³⁵ South Africa did not have in force a comprehensive law that specifically addressed trafficking.³³⁶ When the Prevention and Combating of Trafficking in Persons Act³³⁷ was still a Bill, it was criticized for

³²⁶ See article 3(a) of the Palermo Protocol 2000.

³²⁷ Subramanien 2011 SACJ 245 248.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Barnes-September *et al Child victims of prostitution in the Western Cape* (2000) 43.

³³¹ US Department of State Trafficking in Persons Report (2010) 297, available at <http://www.state.gov/g/tip/rls/tiprpt/2010>, accessed on 14 September 2017.

³³² Ibid.

³³³ 7 of 2013.

³³⁴ Kreston 2014 SACJ 20 24.

³³⁵ 7 of 2013.

³³⁶ Kreston 2014 SACJ 20 24.

³³⁷ 7 of 2013.

not providing specialized training of persons who were to assist victims of trafficking.³³⁸ It was argued that the implementation of the Bill posed a serious challenge to government as it lacked clear implementation strategies that would deal with the complicated and secret nature of human trafficking.³³⁹ The Bill was further criticized for not providing mandatory health care for human trafficking victims.³⁴⁰ Subramanien makes a comparison between the United States of America and the Prevention and Combating of Trafficking in Persons Bill in attempt to improve the Bill.³⁴¹ In this regard the United States of America (hereinafter referred to as USA) is an appropriate country to compare South Africa with, as both countries are attractions in their respective continents of vulnerable people who seek to enter these countries for a better life.³⁴² The Trafficking Victims Protection Act (TPVA)³⁴³ was enacted in the USA to combat human trafficking that was prevalent along American borders.³⁴⁴ The TPVA, which has subsequently been amended, recognizes that law enforcement may not be sufficiently trained to deal with matters involving trafficking.³⁴⁵ The TPVA accordingly provides that law enforcement must be trained adequately to handle such matters.³⁴⁶ The TPVA further extends great protection to children by providing less onerous requirements in proving the trafficking of a minor.³⁴⁷ The TVPA places a great emphasis on the needs of the victims.³⁴⁸ It does so by dealing with issues of poverty and offering employment to victims who are in need of employment.³⁴⁹

It would appear that the Prevention and Combating of Trafficking in Persons Act³⁵⁰ has responded positively to some of the criticism that was faced by the Bill. The Prevention and Combating of Trafficking in Persons Act³⁵¹ currently provides for the training of law

³³⁸ Subramanien 2011 SACJ 245 257.

³³⁹ *Idem* 256.

³⁴⁰ *Idem* 257.

³⁴¹ *Idem* 261.

³⁴² *Idem* 257.

³⁴³ 2000.

³⁴⁴ Subramanien 2011 SACJ 245 259.

³⁴⁵ *Idem* 258.

³⁴⁶ See s 7106(b)(2) of the William Wilberforce Trafficking Victims Reauthorization Protection Act of 2008 (22 U.S.C).

³⁴⁷ Subramanien 2011 SACJ 245 262.

³⁴⁸ *Idem* 264.

³⁴⁹ *Ibid* 264.

³⁵⁰ 7 of 2013.

³⁵¹ *Ibid*.

enforcement and officials to ensure that they are able to deal with issues stemming from human trafficking.³⁵² The Prevention and Combating of Trafficking in Persons Act³⁵³ recognizes the rights of children by providing a comprehensive procedure to be followed when a victim is a minor.³⁵⁴ It is argued however that the Prevention and Combating of Trafficking in Persons Act³⁵⁵, although providing extensive procedures when dealing with a minor who has been trafficked, seems to lack innovative measures in proactively ameliorating human trafficking in children.³⁵⁶ Read together with chapter 18 of the Children's Act³⁵⁷ it would appear that there are no real innovative measures implemented by both Acts to curb trafficking.³⁵⁸ Both Acts seem to react to the threat of trafficking as opposed to anticipating it. An example of a proactive measure can be found in the American context, through the prism of the TPVA. The TPVA appreciates the effectiveness of education in combatting human trafficking.³⁵⁹ The TPVA further offers employment opportunities for human trafficking victims in an attempt to empower them and ensure that they do not fall prey to trafficking again.³⁶⁰ South Africa's fight against human trafficking is closely linked with poverty and if people find themselves living in poverty and unemployed conditions, the number of people being trafficked in South Africa will continue to grow.³⁶¹ The education of children and the employment of victims, as provided for in the TPVA, will go a long way in combating human trafficking in South Africa.³⁶²

³⁵² See s 44(10(b)) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

³⁵³ 7 of 2013.

³⁵⁴ See s 18 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

³⁵⁵ 7 of 2013.

³⁵⁶ Subramanien 2011 SACJ 245 264.

³⁵⁷ Act 38 of 2005.

³⁵⁸ Subramanien 2011 SACJ 245 265. Subramanien does not expressly refer to the the Children's Act, however he suggests that there is no legislative measure in South Africa which attempts to proactively prevent the trafficking of children. See also chapter 18 of the Children Act 38 of 2005. The wording of the chapter suggests that protection is provided for children who are victims of human trafficking, however there appears to be no provision in the chapter which provides for proactive measures to prevent children from being trafficked.

³⁵⁹ Subramanien 2011 SACJ 245 264.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

4.3 HUMAN TRAFFICKING IN FOOTBALL

A recent report by the The Fédération Internationale des Associations de Footballeurs Professionnels (FIFPRO) reveals a rising number of young athletes being trafficked around the world.³⁶³ According to these reports, agents approach young players and mislead them into thinking that they have opportunities set up for them in different countries.³⁶⁴ These players often belong to disadvantaged communities where opportunities for them to be successful are few and far in between.³⁶⁵ The purported agents take advantage of this and require the players to pay large amounts of money to them, which the player believes will cover his expenses upon arriving in the destination country³⁶⁶. Upon arrival, players are often abandoned at the airport or later learn that the opportunities offered to them were under false pretenses.³⁶⁷ This practice has created a syndicate among those concerned who are inevitably guaranteed to profit from the athlete either by sharing profits upon a successful trial at a club or abandoning the player after being paid their fee.³⁶⁸ According to a study done by FIFPRO, it appears that human trafficking is affecting Africa the most.³⁶⁹ The presence of a number of young African athletes has been reported to be illegitimate in several countries around the world.³⁷⁰ There appears to be a clear market for the trafficking of players both in and out of Africa.³⁷¹

As signatory of the United Nations Convention on the Rights of the Child³⁷² South Africa is required, together with the international community, to combat the illicit transfer and non-return

³⁶³ The Fédération Internationale des Associations de Footballeurs Professionnels Trafficking football players in Portugal' 2015 last accessed from <https://www.fifpro.org/news/trafficking-football-players-in-portugal/en/> on 17 September 2017.

³⁶⁴ Ibid.

³⁶⁵ Parmar 'Shattered Dreams- The Predicament of human trafficking in the football universe' last accessed from <http://www.kridalegal.com/post.php?id=32> on 21 September 2017.

³⁶⁶ Ibid.

³⁶⁷ Ebbe & Das 22. See also Parmar 'Shattered Dreams- The Predicament of human trafficking in the football universe' last accessed from <http://www.kridalegal.com/post.php?id=32> on 21 September 2017.

³⁶⁸ Parmar 'Shattered Dreams- The Predicament of human trafficking in the football universe' last accessed from <http://www.kridalegal.com/post.php?id=32> on 21 September 2017.

³⁶⁹ The Fédération Internationale des Associations de Footballeurs Professionnels Trafficking football players in Portugal' 2015 last accessed from <https://www.fifpro.org/news/trafficking-football-players-in-portugal/en/> on 17 September 2017.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² 1990. South Africa Ratified the treaty on 6 June 1995.

of children abroad.³⁷³ As mentioned above, FIFA is the head governing body of international football.³⁷⁴ Footballing associations under its auspices must implement FIFA's rules in their respective associations.³⁷⁵ The FIFA Rules provide for the regulation of local and international movement of athletes.³⁷⁶ The FIFA Rules provide that the only exception, in which a minor may be transferred to another country for footballing purposes, is if the minor's parents have moved to that country for reasons unrelated to football.³⁷⁷ Upon quick inspection of the NSL Rules one would identify the significant attention offered to the transfer and movement of professional athletes, but very little is said about the movement of youth-athletes.³⁷⁸ Be that as it may, article 36 of the NSL Rules echo the same sentiments as the FIFA Rules however the wording in the NSL Rules differs.³⁷⁹ The NSL Rules provides that the 'family' of the child must relocate to the country whereas the FIFA Rules provides that the 'parents' of the child must relocate. The differing of terminology in the corresponding policies may, on face value, appear to be no more than an inconsequential technicality. However, upon proper inspection, it would appear that the threshold in South Africa to successfully transfer a minor is substantially lower than the FIFA Rules as it is less onerous to prove membership in a child's family as opposed to proving that one is a parent.³⁸⁰ As indicated above, traffickers are creative in their methods of trafficking children and proving that they are a member of a child's family does not appear to be a stringent obstacle in their way.³⁸¹

³⁷³ See article 11 of the Convention on the Rights of the Child 1577 UNTS 1990.

³⁷⁴ *McCarthy v Sundowns Football Club* 200.

³⁷⁵ *Ibid.*

³⁷⁶ See article 1 of the Fédération Internationale de Football Association Regulations on the Status and Transfer Players 2016.

³⁷⁷ *Idem* article 19(2)(a).

³⁷⁸ See article 38 and article 40 of the National Soccer League Handbook 2016.

³⁷⁹ *Idem* article 36.

³⁸⁰ See s 1 of the Children's Act 38 Of 2005 provides the following definition of a 'parent': 'includes the adoptive parent of a child, but excludes (a) the biological father of a child conceived through the rape of or incest with the child's mother; (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilization; and (c) a parent whose parental responsibilities and rights in respect of a child have been terminated. Section 1 of the Children's Act further provides that the definition of a 'family member' as: '(a) a parent of the child; (b) any other person who has parental responsibilities and rights in respect of the child; (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship'.

³⁸¹ *Ebbe & Das* 23.

The lack of cohesion between FIFA and SAFA in this regard must be remedied if the trafficking of athletes is to be effectively combated. Perhaps FIFA, as the regulatory body of world football, should liaise more effectively with national associations to ensure that their aims are consistent with one another.³⁸² Human trafficking is strife in disadvantaged areas where opportunities are few and far in between.³⁸³ It would appear that the common factor of human trafficking in the different facets of life is the issue of poverty.³⁸⁴ It is submitted that FIFA should adopt mechanisms that seek to eradicate poverty in communities around the world.³⁸⁵ By doing so, it would incentivize talented youth athletes to stay in their countries and not pursue their dreams elsewhere. This would further add value in world football, as smaller footballing countries would retain their talented athletes and thus compete more effectively on an international stage.

4.4 CONCLUDING REMARKS

Human trafficking is an issue, which not only affects South Africa, but also the entire world. It appears that poverty and lack of education appear to be catalysts for this phenomenon.³⁸⁶ In the South African context it would appear that there are legislative measures in place that seek to protect victims of trafficking, specifically children.³⁸⁷ It is submitted that in order for the current law to be more effective it must adopt proactive measures in its approach to combatting human trafficking. The TPVA, as applicable to the law within the US, is a possible example South Africa may learn from in the manner in which it provides for education and employment as a measure to combat trafficking. In the context of sport, SAFA must ensure that their policies are in line with those of FIFA's. Such policies must continue to promote the best interests of minor athletes in relation to any transfer they may be involved in.

³⁸² Ebbe & Das 45.

³⁸³ Du Toit "Not 'Work Like Any Other': Towards a framework for the reformulation of domestic workers' rights" 2011 32 ILJ 1 2.

³⁸⁴ Smith 'A review of African states in the first cycle of the UN Human Rights Council's Universal Periodic Review' 2014 AHRLJ 346 354.

³⁸⁵ Ebbe & Das 45.

³⁸⁶ Smith 2014 AHRLJ 354.

³⁸⁷ See the Children's Act 38 of 2005 and the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

CHAPTER 5: CONCLUSION

The primary question posed by this dissertation is whether youth athletes are subject to economical exploitation. In making this determination, the position high school athletes and professional athletes are in was considered. The law within the US was considered due to the strong high school system it has and its prominent collegiate athletic program.³⁸⁸ With the assistance of the American context, it was noted that youth athletes appear to be in similar positions to professional athletes when one considers the commercial value of their performances. Despite this, sport associations' rules would define a youth athlete as an amateur owing to the absence of a contract with an institution affiliated with the sport association.³⁸⁹ As noted above, this formulation would yield prejudicial results for youth athletes. English law was considered due to its historic influence in South Africa and the fact that it has already established employment law principles as they relate to sport. The English approach would indicate that South African law would need to consider pre-existing employment law principles in determining whether an athlete is an employee.³⁹⁰ This approach suggested that a youth athlete may be an employee of a school. Consistent and equal application of the law would suggest that both sets of athletes should be considered professionals and consequently employees. Such an interpretation would entitle youth athlete the protection and benefits provided for by labour law. It has also been suggested however that this approach may undermine the objects of the Schools Act and certainly affect the integrity of amateurism in high school sport.³⁹¹ It is therefore submitted that the law must be clear as to what the position concerning these athletes is. If schools are permitted to continue with their professional approach towards school sport, youth athlete should be considered their employees. If the education of learners is indeed the objective of schools, as provided for in the Schools Act, schools should be prohibited from conducting themselves as sport business enterprises and continue with their mandate of educating learners. Due to the established nature of sports law in Italy, South Africa could perhaps consider their approach in codifying employment law as it applies to sport so as to avoid anymore uncertainty moving forward.

³⁸⁸ Weiler *et al* 775.

³⁸⁹ See discussion on *Coetzee v Comitiss*; *McCarthy v Sundowns*; and *Vrystaat Cheetahs (Edms) Beperk v Mapoe*.

³⁹⁰ See discussion on *Walker v Crystal Palace Football Club*.

³⁹¹ See discussion on the Schools Act and *O'bannon v National Collegiate Athletic Association*.

Child abuse is prominent all over the country. The Children's Act³⁹² provides for certain measures and protection for children who have been abused.³⁹³ The cases that were considered suggest that teachers and sport coaches are abusing children.³⁹⁴ It would appear that children in youth academies and clubs would be susceptible to child abuse. Although there are policies in place in the form of the SAFA Regulation on Football Academies³⁹⁵, to ensure that children are not abused in these institutions, it is submitted that this is not sufficient. The SAFA Regulations on Football Academies³⁹⁶ presently lacks sufficient protective measures for youth-athletes. Such a measure that could be considered by the SAFA Regulations on Football Academies³⁹⁷ is periodical child assessments. Periodical assessments of children in these institutions would serve as platforms for youth athletes to report abuse and further ensure that there is ongoing accountability of youth academies and clubs. It was further considered that the primary objective of youth academies and clubs is, *inter alia*, to provide youth athletes with an education.³⁹⁸ This objective is similar to that of schools.³⁹⁹ Considering that the Constitution⁴⁰⁰ places a duty to make education accessible on the State, it is submitted that the State should therefore involve itself in any institution, private or public, that conducts business in the educating of children.⁴⁰¹ State intervention would ensure that these institutions have adequate accountability and would assist in creating a safe playing environment for children in youth clubs and academies. As suggested above intervention could come in the form of the Schools Act regulating these institutions. The NSL Rules, by requiring that training compensation rules apply to all youth-athletes, appear to amount to a restraint of trade and possibly the economical exploitation of athletes. The prejudicial effects of the rules pertaining to training compensation are illustrated in the case of *Coetzee v Comitis*. It is submitted that SAFA should remedy the NSL Rules to the extent that they do not cater for self-funded athletes.

³⁹² Act 38 of 2005.

³⁹³ See discussion on the Children's Act 38 of 2005.

³⁹⁴ See discussion on the abuse of children above.

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ See discussion on Schools Act and the SAFA Regulations on Football Academies 2011.

³⁹⁹ See the Schools Act.

⁴⁰⁰ 1996.

⁴⁰¹ See discussion of the Constitution of the Republic of South Africa, 1996 placing a duty on the state to make education accessible.

The lack of legislation specifically applicable to human trafficking has resulted in South Africa receiving criticism in recent times.⁴⁰² The adoption of the Prevention and Combating of Trafficking in Persons Act⁴⁰³ sought to fill this void.⁴⁰⁴ Human trafficking victims are now offered various forms of protection as prescribed by the Prevention and Combating of Trafficking in Persons Act⁴⁰⁵. Although the objects of the Act are to be commended, it would appear that there are still some improvements that may add value to the effectiveness of the Act. The TPVA, in the American context, may perhaps be an appropriate standard South Africa may learn from. The TPVA recognizes that education and poverty play a major factor in the prominence of human trafficking. The TPVA thus attempts to combat poverty by providing education for women and children and ensuring that victims are offered employment opportunities.⁴⁰⁶ As mentioned above, the law within the US is referred to in this regard due to the fact that both South Africa and America are ideal targets for human traffickers owing to their geographical positioning and the opportunities available for foreign immigrants in the respective countries. Due to the nature of football, players often are involved in local and international transfers. Given the threat of human trafficking, these transfers may serve as opportunities for traffickers seeking to abduct minors into a foreign country.⁴⁰⁷ The NSL Rules, as they relate to trafficking, appear not to be corresponding effectively with the FIFA Rules. This must be remedied to ensure that the international community as well as local communities are in sync with one another. A combined effort in tackling human trafficking will go a long way not only for ensuring that the rights of child athletes are protected but also for ensuring that local communities are empowered to compete more effectively in international sport.

Considering the above, it would appear that there are mechanisms in place that intend to protect the rights of children. Given the *sui generis* nature of sport, it would appear that these mechanisms must however be tailored so as to apply to the uncertain position youth athletes are

⁴⁰² See discussion on South Africa combatting human trafficking.

⁴⁰³ Act 7 of 2013.

⁴⁰⁴ See discussion on South Africa combatting human trafficking.

⁴⁰⁵ Act 7 of 2013.

⁴⁰⁶ See discussion on the TPVA.

⁴⁰⁷ See discussion on human trafficking and football.

presently in. It is submitted that, in the present position, youth athletes are susceptible not only to economical exploitation but many other forms of abuse in South Africa. The law is required to be developed and tailored in a manner that ensures that they are better protected.

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