

**‘SHOW ME THE MONEY!’\***

**A BRIEF NOTE ON SOME DEVELOPMENTS IN PROFESSIONAL SPORTS EMPLOYMENT, INTERNATIONAL SPORTS LAW, AND THEIR IMPACT ON SPORT IN SOUTH AFRICA**

**Dr Andre Louw<sup>1</sup>**

*Senior Lecturer, School of Law, University of KwaZulu-Natal, Howard College*

I write this less than a week after the announcement of the most lucrative transfer deal in the history of football. Welsh superstar, Gareth Bale, moved from Tottenham Hotspur to Real Madrid for a record transfer fee of nearly ZAR1.4 billion. This for a player who has played only 10 Champions League games, has played no international tournament games, and has never won a trophy.<sup>2</sup> To put the cost in context, the amount is nearly 40% more than the projected cost of the Nelson Mandela Children’s Hospital – to be built in Johannesburg.<sup>3</sup> More pertinent to the subject of this piece, the cost represents roughly 40% of the construction costs of the Soccer City (FNB) stadium for the 2010 FIFA World Cup.<sup>4</sup> And, as those construction costs were probably substantially inflated, it is possible that Mr Bale has just been sold for very close to the price of a world-class modern sports stadium.

Our own star athletes earn more modest salaries than their counterparts on the football pitches of Europe, but we have, in recent years, seen a growing exodus of star athletes to foreign clubs and leagues. This includes cricketers playing in the lucrative Indian Premier League competition, and rugby players who are lured to ply their trade at clubs in the UK, France and Japan. International professional sport is the original example of a truly globalised industry, and it is not surprising that South Africa’s star athletes – like their counterparts elsewhere – are now often highly-paid members of a nomadic tribe that constantly tours the globe in pursuit of the almighty dollar.

This background considered, the aim of this note is to provide a brief overview of how legal developments elsewhere have impacted on South Africa’s professional

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\* With apologies to Cuba Gooding’s character, Rod Tidwell, in *Jerry Maguire* (TriStar Pictures, © 1996).

<sup>1</sup> Dr Andre Louw hold an LL.D in Sports Law.

<sup>2</sup> See the report by Brian Reade in the *Mirror*, 7 September 2013 – available online at <http://www.mirror.co.uk/sport/football/news/bonus-brian-rea-de-gareth-bales-2256645>.

<sup>3</sup> The NMCH will be built at a cost of ZAR 1 Billion. See City Press, 18 July 2012 <http://www.citypress.co.za/news/nelson-mandela-childrens-hospital-to-bring-back-doctors-from-overseas-20120718/>.

<sup>4</sup> The stadium was constructed at a cost of ZAR 3.3 Billion. See [http://www.project2010.co.za/2010\\_World\\_Cup\\_stadiums.asp?PN=6](http://www.project2010.co.za/2010_World_Cup_stadiums.asp?PN=6).

sports industry and its athletes – and to briefly reflect on the amounts of money earned by sports stars here and elsewhere. In South Africa, there have been various reasons why the international game (and its commercialisation) have impacted on our sport. One of those reasons, of course, is our ideal time-zone location in the global sports broadcasting schedule – given that most of our major professional sports are so closely linked to European sporting codes. Another reason – more relevant to lawyers – is that some high profile European sports employment disputes, have played a significant role in determining the marketability (and level of remuneration) of our local talent.

With football being the world's most popular sport, it is not surprising that international legal developments (including litigation on sports disputes) have been largely driven by matters arising in this particular sporting code. A case in point – and what is probably world sport's most prominent court judgment to date – has become *de rigueur* as the point of departure in teaching any 'Sports Law 101' course. In the case of *Bosman*,<sup>5</sup> the then European Court of Justice (ECJ) struck down the player transfer rules of the world's most powerful sports governing body, FIFA – for offending the freedom of movement provisions of the European Union Treaty. For the first time, the courts challenged the previously largely unassailable might of FIFA. We South Africans are familiar with FIFA, a controversial organisation (headed by its equally controversial president, whom I recently saw a blogger refer to as 'Septic Bladder'). *Bosman* brought about major changes in the business of European and international football, with the power dynamics between players and their employers swinging significantly in favour of the players and their mobility between clubs. A short five years later, South Africa saw its own '*Bosman* case' when the (then) Cape provincial division of the High Court invalidated the National Soccer League's transfer rules, and found them to be unconstitutional.<sup>6</sup>

The impact of *Bosman* was not directly felt in South Africa, chiefly because some of our major professional sporting codes are not that sizeable in continental Europe (cricket, for example, is hardly played there, unless one counts the Dutch ...). It took two more years – and another case before the ECJ – for these developments in Europe (facilitating greater player mobility between clubs) to reach our shores. Ironically, of all things, it took the legal woes of Maros Kolpak, a Slovakian professional handball

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<sup>5</sup> *ASBL Union Royal Belge des Societes de Football Association & Others v Jean-Marc Bosman* [1996] CMLR 645.

<sup>6</sup> *Coetzee v Comitiss* 2001 (1) SA 1254.

player, to provide the impetus for South African cricketers and rugby players to enter employment at foreign clubs on an unprecedented scale.

In *Kolpak*,<sup>7</sup> the court was faced with a legal challenge by the player – on the basis of his alleged discriminatory treatment as a non-EU national by the German professional league in which he played, in terms of a nationality quota. The ECJ held that the principles espoused in *Bosman* also apply to non-EU nationals who are citizens of nations with an association agreement with the European Union. Slovakia, at the time, was just such a country (it only joined the Union a year after the judgment was handed down). The relevance, closer to home, of what would otherwise have remained a rather obscure judgment, is that South Africa was also party to such an agreement (the *Cotonou* association agreement between the European Union and a large number of African, Caribbean and Pacific nations). This meant that South African cricketers and rugby players in lawful employment in an EU nation, could now rely on the non-discrimination provisions of the EU Treaty, and could, in effect, ply their trade at EU-based clubs as EU nationals – free from the effects of national player quotas in the relevant leagues.

The impact of these developments – which occurred so far from our borders – was substantial. Many South African cricketers and rugby players proceeded to flood the UK and European clubs as so-called ‘*Kolpak* players’ (we’ve all heard the term bandied about). At one point it was reported that up to 150 South African rugby players were employed by French clubs, and English county cricket – the traditional nursery for the development of the English Test cricket team – suddenly found itself inundated by foreign players. This, in turn, led to a backlash by the England and Wales Cricket Board (or ECB) – who were fearful of the effects on the development of home-grown English talent. The backlash included feverish lobbying aimed at the UK immigration authorities and the European Commission, in order to plug the ‘*Kolpak* loophole’. The ECB was successful – thanks to changes to the UK immigration policies and a decision by the European Commission that the relevant provisions of the *Cotonou* agreement were to be interpreted to refer to the freedom of movement of goods, rather than the movement of workers. Ultimately, the effects of *Kolpak* on the professional sports employment market were eventually neutralised. However, the simultaneous establishment of professional T20 cricket leagues like the IPL in India, and similar competitions in

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<sup>7</sup> *Deutscher Handballbund e.V. v Maros Kolpak* Case C-438/00 (8 May 2003).

countries such as New Zealand and Australia, has provided new opportunities for our cricketers to ply their trade in foreign lands.

When one considers all these developments and the ever-increasing opportunities for our home-grown athletes to earn good money overseas, it also raises the more fundamental question of the legitimacy of the level of remuneration paid to 'those who play for a living' – in what has until relatively recently been viewed mostly as a 'leisure industry'. Many lay persons in fact often express the sentiment that professional athletes are vastly overpaid. But this view frequently derives from ignorance of the intricacies of the professional sports milieu, and the history of its development.

One of the features of the atypical employment relationship found in the professional sports industry – which makes it so different from the norm elsewhere – is that the labour market for professional athletes has often been described as a monopsony market. No, that is not a typo. This labour market shows characteristics which make it the opposite of a monopoly. Professional athletes on the supply side of the equation for player services, are faced with a market where only a small number of potential employers (e.g. franchises or clubs), on the demand side, are the buyers for the labour power of the athlete. On the other hand, however, these employers also require the services of the best of the best – in a generally very small pool of qualified candidates. This appears to be a case of the classic Mexican stand-off – both parties are extremely motivated to contract, but need to find a common ground (or tipping point) where their interests coincide. Until relatively recently, however, this point was often reached after the shedding of much proverbial blood, sweat and tears – within a system of rules imposed by governing bodies and sports employers, which severely skewed bargaining power in favour of the employer.

The logical result of the monopsonistic nature of the player labour market, of course, is that the skewed power dynamics between employer and employee – which also characterises employment in 'normal' industries – are even further exacerbated. In recent years, this has led to specific initiatives aimed at protecting the players against exploitation by the employers, which is reminiscent of developments in other industries. This includes the unionisation of players (which started in the American major league sports, but has become the norm in South Africa and elsewhere) and the rise of collective bargaining in professional sport. Before these developments, however, this skewed relationship meant that professional athletes were often de-humanised to a

significant extent, and treated as little more than 'goods' or assets of their employing clubs. In England, as far back as the mid-1960s, this was recognised by the courts. Wilberforce J, in *Eastham v Newcastle United Football Club Ltd*,<sup>8</sup> had the following to say about the transfer system in place in English football at the time:

'The transfer system has been stigmatised ... as a relic from the Middle Ages, involving the buying and selling of human beings as chattels; and indeed, to anyone not hardened to acceptance of the practice it would seem incongruous to the spirit of a national sport. One must not forget that the consent of a player to the transfer is necessary, but, on the other hand, the player has little security since he cannot get a long term contract and, while he is on the transfer list awaiting an offer, his feelings and anxieties as to who his next employer is to be may not be very pleasant.'<sup>9</sup>

Players were often treated as little more than the stock-in-trade of sports employers. In *Coetzee v Comitis*,<sup>10</sup> Traverso J compared the National Soccer League's system for the calculation of a professional footballer's transfer fee – to the system for the calculation of the value of a second-hand motor vehicle. Furthermore, in the 1990s, many observers criticised the virtual 'slave trade' of young players from African countries, moving to rich football clubs in Europe. Ken Foster highlights the disparities in the bargaining power between the athlete and those governing the game (and those who employ the athlete):

'Although the relationship between an international sporting federation and an athlete is nominally said to be contractual, the sociological analysis is entirely different. The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical relationship.'<sup>11</sup>

Many of the inequities of the traditional employment relationship in professional sport have nowadays been significantly assuaged (particularly in light of *Bosman* and other high profile sports employment cases – increased player mobility has led to increased player salaries). My point, however, is simply that for every highly-paid star athlete,

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<sup>8</sup> [1963] 3 All ER 139.

<sup>9</sup> At 145 of the judgment.

<sup>10</sup> *Supra*.

<sup>11</sup> Foster, K 'Is there a global sports law?' Vol. 2 Issue 1 *Entertainment Law* (2003) 1-18 - available online at <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf>.

there are still hundreds of 'journeymen' players who toil in the minor leagues for much lower salaries, with very little job security when faced with the realities of short playing careers, the risk of injury or loss of form, and the vagaries of selection.<sup>12</sup> In fact, the unfortunate Jean-Marc Bosman may have triumphed in the European Court of Justice, but he ended up a destitute alcoholic suffering from depression; a 2011 report in *The Sun* on Bosman's plight was titled 'Wayne Rooney earns £200,000 a week because of me... but I'm living on benefits'.<sup>13</sup>

When viewed in the light of Bosman's experience and that of so many others, the star athletes' hefty salaries may seem especially offensive, even obscene. On the other hand, however, one could also view them as appropriate when considering the above-mentioned disparities in bargaining power, in a traditionally pro-employer system. If a few athletes can make it to the top, against all the odds, why should they not earn the big bucks?

There is another reason, however, why one should not be overly critical of the levels of remuneration of top athletes. We need to bear in mind that sport is huge entertainment; in fact, it could be argued that it is the world's single largest entertainment industry. Within this industry, the sporting competition, league, event or team, provides one of the world's most lucrative and viable marketing platforms for corporate sponsors to market their brands to a global audience in our modern age of consumerism. Sports broadcasting rights are sold for billions of dollars, and are the main source of revenues for most sporting organisations. The reason for the phenomenal value of these rights is two-fold; firstly, pay-TV broadcasters (like Supersport) use premium live sports coverage as the main attraction in selling subscriptions, and, secondly, these sports broadcasts provide another very lucrative marketing platform for broadcast sponsors and advertisers. In this way – through shrewd exploitation of broadcasting rights and corporate sponsorships – FIFA managed to leave our shores after the 2010 FIFA World Cup, having reportedly earned more than ZAR25 billion from the event<sup>14</sup> (tax-free – but that's an interesting story for another day).

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<sup>12</sup> For judicial recognition of these factors, which distinguish professional sports employment from employment in other industries, see *McCarthy v Sundowns Football Club* [2003] 2 BLLR 193 (LC).

<sup>13</sup> From a report by Martin Phillips, 21 March 2011 – available online at <http://www.thesun.co.uk/sol/homepage/features/3480363/Jean-Marc-Bosmans-fight-against-depression-and-alcoholism.html>.

<sup>14</sup> According to FIFA, the 2010 FIFA World Cup South Africa™ made USD 2,408 million. These figures are available at <http://www.fifa.com/aboutfifa/finances/income.html>.

The value of star athletes as modern-day celebrities – akin to their counterparts in Hollywood and other branches of the entertainment industries – is well illustrated by the secondary source of income, which is derived from the licensing of image rights (or ‘player attributes’) in the marketing and endorsement industry. The high-profile players are now brand ambassadors who cater to the whims of the ‘bling generation’, and the value of their remuneration for use of a name or likeness (selling anything from cologne to SUVs), may in many cases eclipse the player’s salary. In respect of players’ income from image rights, I do not have recent figures to hand – for stars like Gareth Bale or Cristiano Ronaldo. At the time of David Beckham’s departure from Manchester United in 2003, however, it was reported that he was being paid GBP33 000 *per week* by the club – this *just for the use of his image in marketing and on club merchandise*, and over and above his substantial salary for kicking a ball around (bending it like, well, Beckham). One can only imagine the extent of the endorsement fees that Brazil’s latest up-and-coming young star, Neymar, Jr, will be able to command in the next few years. Tiger Woods recently became the first athlete in history to earn more than a billion US dollars – solely from his ‘off-the-field’ earnings (sponsorship and endorsement deals). And then there’s the story (which reflects less on Tiger than on shady corporate social responsibility and rampant commercialism in sport) of Nike workers in Thailand, who wrote to Woods – expressing their ‘utmost respect for your skill and perseverance as an athlete’, but pointing out that they would need to work 72 000 years ‘to receive what you will earn from [your Nike] contract’.<sup>15</sup> Of course, recent events appear to have overtaken the world’s best-known golfer, as sponsors dropped him like a hot potato following his marital infidelity scandal, and it also appears that ‘Tigergate’ may forever change the way sports sponsors approach the athlete-endorsement brand. When Woods signed an endorsement deal with Rolex in late 2011, it was reported that he had slumped to a ranking of 2 775<sup>th</sup> ‘most effective product spokesperson’ – according to online consumer polls. However, I am sure that Tiger is still laughing all the way to the bank (while working on regaining his swing).

To get back to the point: The players and athletes are the oil that greases the inner mechanics of this commercial juggernaut. It is their on-field performances which form the core basis for all the commercial spin-offs of this industry – including sponsorship, merchandising, endorsement and even the nowadays very lucrative

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<sup>15</sup> Taken from Pilger, J ‘Why sharks should not own sport’ – on the *truth-out* website at <http://www.truth-out.org/why-sharks-should-not-own-sport58820>

sports betting industry. When viewed against this backdrop, why should the athletes not be paid well for the role they play in generating the revenues which can be trickled down for grassroots development of the game (or to enrich the administrators)?

In conclusion, I wish to highlight the point that the phenomenal growth in the influx of money into professional sports employment – all over the world – has been driven, to a significant extent, by changes brought about in the industry through the application of the law. It is true that many of the changes have come through the growth industry of new privately-sponsored sports leagues and competitions (a prime example being the IPL cricket league, which was such a natural extension of the introduction of the T20 cricket format), but it is also true that the proliferation of sports employment cases before the domestic courts in various jurisdictions – have changed the landscape of international sport. These sports employment cases have provided a significant driver for the development of an international body of ‘sports law’, and, as mentioned above, their effects have also been felt, significantly, here in South Africa.

Long may our talented athletes continue to ‘strut their stuff’ on the world stage and be paid handsomely for the entertainment they provide. And long may the legal fraternity keep a close watch on developments in this atypical – and truly fascinating – industry. But lawyers take note: We should always remember that, regardless of their central importance in the industry, it’s not only about the players. It is also, very fundamentally, about the fans; and the fans are affected by how sport is governed. At present, our Premier Soccer League is rated as one of the top 10 professional football leagues in the world – based on the level of broadcasting rights money invested in it. But we are also often reminded of the very poor level of corporate governance, which is so frequently displayed in South African football. This, sadly, is true for most of the sports federations in the country. At the time of writing, members of the board of SASCO – our national Olympic Committee – have just sued a prominent sports journalist, Graeme Joffe, for ZAR20 million, for defamation – based on his frequent exposures of their (*alleged* – don’t want to get sued here!) transgressions.<sup>16</sup> The standard of governance of a sporting code has a significant impact on its success, and on the interests of its supporters. In South Africa, currently, this is one aspect that has the potential to retard the growth of sports commercialisation (and the positive effects of this) as experienced elsewhere. When frequent boardroom spats dominate media

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<sup>16</sup> The interested reader will find some of Graeme’s views on developments in South African sports governance on his website at [www.sportsfire.co.za](http://www.sportsfire.co.za)

reports, the fans may be alienated. And when the fans go the sponsors will soon follow (the fans are, after all, their consumer audience). Ultimately, it is the fans who generate those fat player pay-cheques.