

A contractual perspective on the strict liability principle in the World Anti-Doping Code*

Annelize du Pisani

LLB LLM

Lecturer, Department of Private Law, University of Pretoria

OPSOMMING

'n Kontraktuele Perspektief op die Beginsel van Streng Aanspreeklikheid in die *World Anti-Doping Code*

Die beginsel van streng aanspreeklikheid in die *World Anti-doping Code* bepaal dat indien die atleet se bloed of urinemonster 'n positiewe resultaat vir verbode middels toon, die atleet outomaties skuldig is aan 'n oortreding ingevolge die kode. Die skuldigbevinding staan ongeag of die atleet op 'n skuldige of onskuldige wyse gehandel het. Die afwesigheid van skuld sal slegs 'n rol speel by die bepaling van die sanksie wat die atleet ontvang. Hierdie beginsel is direk uit die privaatreë oorgeplant om toepassing te vind in dissiplinêre verhoore wat handel oor die gebruik van verbode middels in sport. Sommige skrywers meen dat privaatreëtelike beginsels nie 'n plek in dié soort tugverhoore behoort te hê nie. Hulle verloor egter uit die oog dat die verhouding tussen atleet en sportligaam 'n kontraktuele verhouding is en dat die atleet kontraktueel gebonde is om nie in stryd met die kode te handel nie. Dus, indien die atleet 'n bepaling van die kode oortree, stel dit kontrakbreuk daar in die vorm van positiewe wanprestasie. In die geval van positiewe wanprestasie is dit nie nodig vir die eiser om te bewys dat die verweerder skuld gehad het toe kontrakbreuk plaasgevind het nie. Geen verontskuldiging kan die kontrakbreuk tot niet maak nie. Die afwesigheid van skuld, al dan nie, speel slegs 'n rol by die bepaling van die mate waartoe die verweerder aanspreeklik gehou kan word. Daarom word aangevoer dat die beginsel van streng aanspreeklikheid in tugverhoore rakende die gebruik van verbode middels deur atlete slegs 'n toepassing is van die algemene beginsels van die kontraktereg.

1 Introduction

The strict liability principle has been applied in doping disciplinary rules for decades. This principle is specifically applied where an athlete's blood or urine sample has returned a positive test result for the presence of substances which are prohibited in sport. In various cases the Court of Arbitration for Sport (CAS) has considered the strict liability principle

* This article is based on a paper presented at a Sports Law Colloquium organised by the South African Institute for Drug-Free Sport in Bloemfontein on 2012-05-10. I would like to thank the members of the South African Institute for Drug-Free Sport and Prof Steve Cornelius for their valuable comments and suggestions.

from a private law perspective and in one such case, *Bernhard v ITU*,¹ the CAS indicated that “[t]his is ... a faithful transposition of the civil (tort) law concept of strict liability”.

It has, however, been suggested that private law principles should not be applied when athletes are accused of having committed anti-doping rules violations, especially in respect of allegations where the strict liability principle finds application.² Soek, although admitting that the field of disciplinary doping law is surrounded by private law, specifically asserts that the law of contract should have no influence in the sphere of doping disciplinary law and that solutions offered by the private law will always “fall wide off the mark”.³

It is widely accepted that the relationships between athletes and sports governing bodies are of a contractual nature⁴ and the World Anti-Doping Code⁵ (the Code) itself acknowledges the contractual relationship between athlete and organisation.⁶ In this article it will be argued that due to the fact that athletes are contractually bound not to commit anti-doping offences, the influence of the law of contract cannot be ignored and that the law of contract can provide meaningful insight into the application of the strict liability principle.

2 The Strict Liability Principle in the World Anti-Doping Code⁷

The strict liability principle is one of the cornerstones of anti-doping policies in sport.⁸ This principle is applied when an athlete has been found guilty of using a prohibited substance or prohibited method. An athlete’s guilt in this regard can be established by either the fact that the athlete has returned a blood or urine sample which has tested positive for

1 CAS 98/222, award of 1999-08-09; see also Soek *The strict liability principle and the human rights of athletes in doping cases* (2006) 221.

2 Soek 220.

3 Soek 227. According to Soek, the principles of criminal law should have the upper hand in these type of disciplinary actions and the application of private law concepts may give rise to a misconception.

4 Beloff *et al Sports law* (2012) 35-43; Cloete (ed) *Introduction to sports law in South Africa* (2005) 17.

5 Unless stated otherwise, all references to the Code are to the revised 2009 Code. A new revised Code was adopted at the 2013 WADA Congress in Johannesburg and will come into operation on 2015-01-01.

6 Introduction to the Code 11.

7 The Codes of 2003 and 2009 both adopt the principle of strict liability, with the only difference being slightly more flexibility in the reduction of sanctions in the 2009 Code. Also see Blumenthal “The punishment of all athletes: The need for a new world anti-doping code in sports” 2010 *Int’l Bus & L* 215 f 113 on the difference between the strict liability principle in the 2003 Code and the 2009 Code.

8 Gray “Doping control: The national governing body perspective” in *Drugs and doping in sport: socio-legal perspectives* (ed O’Leary) (2001) 14. See also Amos “Inadvertent doping and the WADA Code” 2007 *Bond LR* 2.

a prohibited substance,⁹ or other evidence which proves that the athlete has used such substance or a prohibited method.¹⁰ It is not necessary for the sports governing body to show intent, fault, negligence or knowing use on the athlete's part in order to establish an anti-doping rule violation under article 2.1 or 2.2 of the Code.¹¹ Both of these articles provide that it is each athlete's personal duty to ensure that no prohibited substance enters his or her body and athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.¹² When an athlete is accused under any one or both of these articles, the burden of proof is on the sports governing body to prove the presence of the substance in the athlete's sample or the use or attempted use by the athlete of a prohibited substance or method.¹³ The standard of proof required is that the alleged violation must be established to the "comfortable satisfaction" of the tribunal bearing in mind the "seriousness of the allegation which is made".¹⁴ The operation of the strict liability principle entails that once the sports governing body has discharged its burden of proof in respect of the offences in article 2.1 and 2.2, the athlete is automatically found to be guilty of an anti-doping rule violation. The athlete cannot escape a guilty finding on the basis that he or she had acted without intention or negligence.¹⁵

If the athlete is found guilty as a result of an in-competition test in an individual sport, the athlete is automatically disqualified and forfeits any

9 Art 2.1 Code.

10 Art 2.2 Code. Such other evidence include, but is not limited to, admissions made by the athlete and evaluations of the athlete's biological passport. See David A *guide to the World Anti-Doping Code: The fight for the spirit of sport* (2013) 172.

11 Arts 2.1, 2.2 Code. In *Baxter v International Olympic Committee* CAS 2002/A/376, award of 20021015, a British skier with a documented history of nasal congestion was stripped of his bronze medal which he won at the 2002 Winter Olympics in Salt Lake City. The athlete tested positive for a banned substance which he had ingested due to using over-the-counter medication which he purchased in the United States of America. The athlete used the same product in the United Kingdom, and was unaware that the product had a different formulation when sold in the United States of America. Although the panel found that the athlete did not ingest the prohibited substance intentionally, he was nevertheless found guilty of the doping offense and disqualified. See also *Raducan v International Olympic Committee* CAS 2000/011, award of 2000-09-28.

12 Art 21.1.3 Code also emphasises the athlete's responsibility for what they ingest and use. See also Anderson *Modern Sports Law* (2010) 123 in this regard.

13 In respect of art 2.1 Code it is sufficient to present a positive sample test, but in respect of art 2.2 Code the sports governing body may use evidence such as admissions or the evaluation of an athlete's biological passport.

14 In art 3.1 Code this standard is expressed to be higher than the standard of mere balance of probability which applies in civil proceedings, but less than the general criminal standard of proof, namely, proof beyond a reasonable doubt. The standard of proof is comparable to the standard which is applied, in most countries, to cases involving professional misconduct.

15 The most common defence athletes attempt to use is that of "inadvertent doping". This simply means that they had ingested the substance without knowing it and without intending to do so.

medals, points and prizes won in that event.¹⁶ Furthermore, if the athlete has participated in other events at the same competition, subsequent to the event for which he or she returned a positive test,¹⁷ the results obtained in these events will also be invalidated and the athlete will also lose medals, points and prizes for those events.¹⁸ For a first violation in respect of the offences described in article 2.1 and 2.2 of the Code, a two-year ban must be imposed, followed by a ban for life for further violations.¹⁹ However, the imposition of these penalties is not absolute and there is some discretion to have the ban reduced or completely eliminated.

If the athlete has tested positive for a specified substance²⁰ and can establish how this specified substance entered his or her body and that such a substance was not intended to enhance his or her sports performance, the two-year period of ineligibility can be eliminated in its entirety or otherwise reduced.²¹ To justify any elimination or reduction under this article, the athlete must, on a balance of probabilities, show both that the substance in question is a “specified” substance and establish how that substance entered his or her body. However, even if an athlete succeeds in proving these two elements, article 10.4 further provides that the athlete’s degree of fault should correlate with the assessment of the reduction, if any, in the period of ineligibility. It appears therefore that only in the most exceptional of cases will the two-year period of ineligibility be eliminated in its entirety.²²

In the case of a positive test for a non-specified substance, if an athlete establishes in a particular case that he or she bears “no fault or negligence”, the otherwise applicable period of ineligibility may be eliminated.²³ In order to avail him or her of this “absolute” defence, the athlete would, on the balance of probabilities, have to provide proof establishing how, notwithstanding the utmost caution, the prohibited

16 Art 9 Code. Art 9 is unaffected by the provisions of art 10 Code, and cannot be removed or mitigated if the athlete establishes the basis for removing or reducing the sanction.

17 Eg FINA swimming championships or IAAF athletics championship where athletes participate in multiple events.

18 Art 10.1 Code.

19 Art 10.2 Code.

20 The WADA recognises certain substances as specified substances because there is a greater likelihood that a credible explanation can be provided for the ingestion of these substances. Specified substances are not necessarily less serious agents for the purpose of doping than other prohibited substances, and nor do they relieve athletes of the strict liability rule that makes them responsible for all substances that enter his or her body. However, tribunals are allowed more flexibility when considering sanctions for the use of specified substances. For more information on specified substances see the Prohibited List at <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Prohibited-List/> (accessed 2013-10-28).

21 Art 10.4 Code.

22 Anderson 136.

23 Art 10.5.1 Code.

substance entered his or her system through no fault or negligence on the part of the athlete. Article 10.5.1 of the Code is an extremely difficult defence to prove and has only been applied under exceptional circumstances.²⁴ Furthermore, if the athlete can establish that there was no significant fault or negligence²⁵ on his or her part in the use of these substances, the ban may be reduced, but the reduced ban may not be less than half that which would otherwise have applied.²⁶ In order to avail himself or herself of this “partial” defence, the athlete would, on the balance of probabilities, have to provide proof establishing how the substance entered their system through no significant fault or negligence on their part. Article 10.5.2 is also a difficult defence to prove and has very rarely been satisfied.²⁷

3 Criticism Against Strict Liability Principle

The strict liability principle has always been the subject of much criticism. Prior to the adoption of the Code,²⁸ the principle was mainly criticised for the fact that the application thereof could lead to unfairness in cases of inadvertent doping or where the athlete had no intention to enhance his or her performance. Critics argued that the approach did not allow for a number of circumstances that might result in a positive test but might not have entailed fault on the part of the athlete. Examples of such circumstances include: Acting on the medical advice of the team doctor;²⁹ a prescription error by a medical adviser; a dispensing error by a pharmacist; an honest and reasonable belief that the substance was not prohibited;³⁰ or even the malicious act of a third party who might have “spiked” the drink of the athlete.³¹ The Court of Arbitration for Sport has itself recognised that the application of the strict liability principle does

24 Anderson 136-137. For an example of a case where this defence was successful see *P v IIHF* CAS 2005/A/990, award of 2005-08-24.

25 No significant fault or negligence can be defined to mean that, while fault is present, it is insignificant when viewed in the totality of circumstances – Le Roux “The World Anti-Doping Code: A South African perspective” 2004 *SAJ Research in Sport, Phys Ed & Rec* 65 71-72.

26 Art 10.5.2 Code.

27 Anderson 137. For instances where athletes have attempted to use this defence see *V v FINA* CAS 2003/A/493, award of 2004-03-22; *IRB v Keyter* CAS 2006/A/106, award of 2006-10-13; *WADA v FAW and James* CAS 2007/A1364, award of 2007-12-21.

28 Prior to the Code, the strict liability was applied in a very absolutist fashion – if an athlete was found to have committed an anti-doping offence, such athlete was automatically suspended for a minimum of two years. In essence, the same rule applies in the 2003 and 2009 Codes, however now an athlete can use the defence of no fault or no significant fault to either eliminate or reduce the applicable sentence.

29 *Raducan v IOC* CAS 2000/011, award of 2000-10-28. In this case, a Romanian gymnast had to forfeit her gold medal at the Sydney Olympics after following the team physician’s advice to take a headache tablet which contained a prohibited substance.

30 *Baxter v IOC* CAS 2002/A/376, award of 2002-10-15.

31 Anderson 125.

not always appear to be fair. The panel in *Mariano Puerta v ITF*³² stated that

[t]he problem with a 'one size fits all' solution is that there are inevitably going to be instances in which one size does not fit all ... It is argued that this is the inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim.

Further criticism relates to the justification offered for the application of the strict liability principle.³³ In the matter of *USA Shooting & Quigley v UIT*³⁴ the panel remarked that a requirement of intent would invite costly litigation that may well cripple federations in their fight against doping.³⁵ It has subsequently been suggested that if the strict liability principle was done away with, federations would have to prove the guilt of the athlete and that federations would be overwhelmed by this heavy burden of proof.³⁶ The World Anti-Doping Agency³⁷ (WADA) has been criticised for retaining the strict liability principle in the Code for fear that its fight against doping would be ineffective, at the expense of occasional innocent victims.

Even though the original 2003 Code and the revised 2007 Code now provides for the possibility of sanctions being eliminated or reduced, opponents of the strict liability principle have not been appeased and are still holding fast to their arguments. Additionally, the actual "guilty" finding, rather than the eventual sanction, in instances where the athlete may not have been at fault for the doping infraction have also come under fire. It is now argued that athletes suffer reputational, financial and psychological damage because the athlete is labelled as an offender or a cheat for the rest of his or her life, regardless of whether he or she has received the standard sanction, a reduced sanction or no sanction at all.³⁸ Blumenthal³⁹ is highly critical of the strict liability principle and argues that it has unjustifiably destroyed the careers of many athletes. According to him there is a power imbalance between the WADA and athletes and that the Code and its components were created unilaterally by the WADA in favour of the WADA. He suggests that the Code should be rid of the strict liability principle and the facts of each case should be

32 *Mariano Puerta v ITF* CAS 2006/A/1025, award of 2006-07-12.

33 Anderson 125.

34 CAS 94/129, award of 1995-05-23.

35 *USA Shooting & Quigley v UIT* CAS 94/129, award of 1995-05-23, par 15.

36 Anderson 125.

37 WADA was established in February 1999 under the auspices of the International Olympic Committee. WADA operates as an independent private law organisation whose task it is to produce an anti-doping code with the aim of harmonising anti-doping regulations globally and enforcing these regulations to ensure that all athletes are treated equally by sports bodies and governments regarding anti-doping issues – Trainor "The 2009 WADA Code: A more proportionate deal for athletes? 2010 *ESLJ* par 4; see also the WADA website at <http://www.wada-ama.org/en/About-WADA/> (accessed 2013-09-28).

38 Anderson 125. See also Blumenthal 2010 *Int'l Bus & L* 201 -229.

39 Blumenthal 2010 *Int'l Bus & L* 224.

considered without a negative presumption against the athlete. Instead, he suggests that pharmaceutical experts should testify in each case to help clarify the probability that a doping violation was committed with the intent to enhance the athlete's performance.⁴⁰

Regardless of the criticism against it, the strict liability approach has been consistently upheld in arbitral awards delivered by the CAS. The use of the strict liability principle has been justified on two grounds. First, the principle is said to operate to the benefit of all "clean" athletes or as the comment to article 9 of the Code states simply

[w]hen an athlete wins a gold medal with a prohibited substance in his or her system, that is unfair to the other athletes in that competition regardless of whether the gold medallist was at fault in any way. Only a 'clean' athlete should be allowed to benefit from his or her competitive results.⁴¹

The panel of the CAS in the matter of *USA Shooting & Quigley v UIT* remarked that "it is a laudable policy objective not to repair an accidental unfairness to the whole body of competitors". According to the panel, this is what would happen if banned performance enhancing substances were tolerated when absorbed inadvertently and moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent.⁴²

Secondly, it has been argued that the application of the strict liability principle is counterbalanced by the fact that an athlete has the opportunity to avoid or reduce the applicable sanction. An athlete can do so if they can demonstrate that, pursuant to article 10 of the Code, the substance in question was not taken with the intention to enhance performance or was ingested negligently or through no fault or no significant fault of that athlete.⁴³

Therefore, it has been said that the revised approach to the strict liability principle in the Code achieves a satisfactory balance between the attempt by the WADA to effectively regulate the fight against doping by harmonising the surrounding regulatory and sanctioning framework, and the athletes' legitimate expectation of both a fair process and proportionality in the outcome.⁴⁴ Apart from that fact that the strict liability principle appears to be the fairest way to handle the anti-doping offences described in article 2.1 and 2.2 of the Code, it will be argued below that the application of the strict liability principle is also in line with general contractual principles relating to breach of contract.

40 Blumenthal 2010 *Int'l Bus & L* 225, 226.

41 See also Le Roux 2004 *SA J Research in Sport, Phys Ed & Rec* 65 70 in this regard.

42 *USA Shooting & Quigley v UIT* CAS 94/129, award of 1995-05-23 par 15.

43 Anderson 125.

44 *Idem* 130.

4 A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping Code

4.1 Contractual Basis of Sport Relationships

While authors criticise the strict liability principle, they lose sight of the fact that participation in sport is based on a contractual relationship. An athlete, by participating in a sport and/or by affiliating to a sports federation, does so by accepting the provisions in the constitution, bye-laws and regulations of that federation, as well as the rules of that sport. The provisions of these constitutions, bye-laws, regulations and the rules of the sport constitute the contract between the athlete and federation and embody the terms and conditions upon which the athlete has agreed to become bound and to remain associated to that body.⁴⁵

The majority of sports federations are now signatories to the Code, including all international federations of Olympic sports. In the fight against doping, the role of international federations is to adopt and implement anti-doping policies and controls which comply with the Code. These international federations are also required to ensure that national federations and individual athletes and coaches comply with the provisions of the Code. Therefore most national and provincial federations have incorporated anti-doping regulations in their constitutions, regulations, bye-laws and rules and thus, these anti-doping regulations form part of the contract between athlete and federation. It follows that an athlete and athlete support personnel are contractually bound to comply with the provisions relating to anti-doping, by virtue of their agreements for membership, accreditation, or participation in sports organisations or sports events subject to the Code.⁴⁶ The Code itself⁴⁷ also confirms the contractual nature of anti-doping regulations by stating in its introduction:

Anti-doping rules, like Competition rules, are sport rules governing the conditions under which sport is played. Athletes or other Persons accept these rules as a condition of participation and shall be bound by these rules. Each Signatory shall establish rules and procedures to ensure that all Athletes or other Persons under the authority of the Signatory and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant Anti-Doping Organisation.

45 Cloete 17; Basson & Loubser *Sport and the law in South Africa* (2000) ch 6-1; Beloff *et al* 35-37; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A). See also Trainor 2010 *ESLJ* par 34: "Essentially, the relationship of the athlete through their membership of bodies such as the ATP Tour is based on the establishment of a legally binding contractual relationship."

46 Basson & Loubser par 10-15. See also the comment on the introduction to the Code 17.

47 Introduction to the Code 17.

By entering into a contract with a local or provincial club, an athlete enters into an indirect contractual relationship with other bodies to which the club or federation itself may be connected. Beloff explains that an athlete may have contracted with a club to submit to the jurisdiction of the governing body within the sport concerned; and the club may in turn have contracted with the governing body that the players will abide by the disciplinary regime established by that body from time to time. In this manner a contractual *nexus* between the members at club level up to the international body is established⁴⁸ and contract is the legal mechanism whereby local and national bodies in sport are obliged to comply with rules and rulings of their international counterparts.⁴⁹

4.2 Breach of Contract and Strict Liability

According to the principle of *pacta sunt servanda*, a party which freely enters into an agreement and assumes obligations under it must perform in terms of that agreement.⁵⁰ Since it has been established that an athlete is contractually bound to comply with anti-doping regulations, be it the Code or a sports club or federation's anti-doping policy which should be in line with the Code, it follows that the athlete commits a breach of contract if he or she contravenes these regulations.⁵¹ More specifically, the athlete commits breach of contract in the form of positive malperformance.

Breach in the form of positive malperformance relates to the content of the performance made. It may take either one of two forms, depending on whether the duty is positive or negative. In the first instance, positive malperformance occurs where a person has the duty to do something and the person duly performs but in an incomplete or defective manner. In the second instance, positive malperformance can also occur if a person does something which he is bound not to do.⁵² It is submitted that an anti-doping rule violation will fall into the second category of positive malperformance, in that an athlete has a duty to refrain from using prohibited substances and methods.

48 In 1992 Katrin Krabbe, the world 100 and 200m champion, and two other German athletes, were suspended for 4 years as a result of irregularities arising from out-of-competition testing conducted on them during training in South Africa. These athletes were found guilty of tampering with their urine samples, as all three samples were from the urine of one and the same female. Krabbe and her colleagues successfully appealed against their suspension on the basis that South Africa was (at the time) not a member of the IAAF, there had been delays in getting the urine sample to an accredited laboratory, and that there was no provision for out-of-competition testing in the German Athletics Association Rules.

49 Beloff *et al* 171-172, 206. See also Basson & Loubser par 6-1, 6-2.

50 Beloff *et al* 14.

51 Cloete 25.

52 De Wet & Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 177. See also Van Rensburg *et al* LAWSA (ed Joubert) 5(1) (1981) par 479; Hutchison & Pretorius (eds) *Law of contract in South Africa* (2012) 294; Van Jaarsveld, Boraïne & Oosthuizen *Suid-Afrikaanse Handelsreg* (1988) 143.

Only two requirements must be proven for this form of breach of contract. Firstly, it must be proven that there was a duty to refrain from doing something, and secondly, that this duty was breached. It is not necessary to prove fault in the form of intention or negligence to establish this type of breach of contract.⁵³ Thus, if the two requirements have been satisfied, the person is automatically guilty of breach of contract. A good excuse for breach of contract does not take away the fact that there has been a breach of contract. In essence this means that committing breach of contract in the form of positive malperformance, leads to the principle of strict liability being applied. Similarly, when an anti-doping rule violation has been committed, the athlete is automatically found to be guilty regardless of the excuse that they athlete may present for committing the violation.

However, in respect of positive malperformance, the debtor may produce evidence, to reduce or avoid liability in respect of the breach. Evidence which may be produced here, can relate to the fact that the malperformance was caused by factors beyond the debtor's control and that the debtor acted without intention or negligence.⁵⁴ Similarly, with an anti-doping rule violation, the reasons behind the presence of the prohibited substance or method cannot provide a defence to the infraction but the athlete may produce evidence to show that he or she had no fault or negligence, or no significant fault or negligence in respect of the violation and can receive a reduced sanction or avoid any sanction.⁵⁵

Another fact worth noting here is that, while the law provides certain remedies for breach of contract such as termination of the contractual relationship, the parties may also agree on the remedies that will be available in the case of breach.⁵⁶ Therefore, it is completely consistent with the principles of the law of contract that the parties may agree on disciplinary hearings and applicable sanctions, should a party breach the

53 Zimmerman & Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 312; Van der Merwe *et al Contract: General principles* (2012) 301. There are authors who are of the opinion that fault is a requirement for positive malperformance in South African law – see Van Rensburg *et al LAWSA* 5(1) par 481; Nienaber “Kontraktbreuk in anticipando in retrospek” (1989) *TSAR* 6; Van der Merwe *et al* 237-238. It has, however, been argued by Cornelius that authority suggesting fault to be an element for malperformance is wrong. In Cornelius “*Mora debitoris* and the principle of strict liability: *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA) 2012 *PER* 620 he argues that no support for such requirement can be found in the Roman law or Roman-Dutch law. Furthermore, there are Appellate Division and Supreme Court of Appeal cases supporting the notion that fault is not a requirement that needs to be proven – see *Administrator Natal v Edouard* 1990 3 SA 581 (A) 597E-F (“fault is not a requirement for a claim of damages based upon a breach of contract”); *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA); Van der Merwe *et al* 354; *Gengan v Pathur* 1977 1 SA 826 (D) 830G.

54 Van Jaarsveld 143-144.

55 Beloff *et al* 255.

56 Cloete 27.

provisions of the contract, instead of aiming at the fulfilment of the contract or the termination of the contractual relationship.

5 Conclusion

In this article the strict liability principle, which is applied in doping law, was evaluated from a contractual perspective. Because it is generally accepted that the athlete's relationships with the various sports federations and sports regulating bodies are of a contractual nature, it is submitted that the general principles of the law of contract cannot be ignored. Specifically, the principles of contract relating to breach of contract become relevant where anti-doping rule violations are concerned. When a debtor does not perform properly in terms of a contract, it automatically leads to breach of contract. Evidence in respect of fault of the debtor only becomes relevant when the extent of his or her liability is determined. Similarly, when an athlete breaches an anti-doping rule, that athlete is automatically guilty of an offense. Evidence in respect of the athlete's fault is, however, taken into consideration to determine what the extent of his or her sanction will be. When comparing the strict liability principle with the general contractual principles pertaining to breach of contract, it is clear that these principles operate in exactly the same fashion.