**IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT'S ANTI-DOPING TRIBUNAL**

Case NO.: SAIDS/2021/23

In the matter between:

**THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT** SAIDS

and

**ANNAH WATKINSON** THE ATHLETE

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**DETERMINATION OF PANEL**

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Introduction

1. SAIDS referred the matter of an Anti - Doping Rule Violation ("ADRV") of Ms Annah Watkinson ("the Athlete") to this Independent Anti-Doping Hearing Panel ("the panel") for determination in terms of the SAIDS Anti-Doping Rules of 2021 ("the Rules") (read with the World Anti - Doping Agency Rules ("the WADA Rules")).

2. The Athlete is in her early forties and has competed in national and international triathlon and ironman events for many years. She was part of the SAIDS pool of elite Athletes who were regularly tested and were *inter alia* required to inform SAIDS of their whereabouts for purposes of such testing.

3. The Athlete provided an out-of-competition urine sample to SAIDS on 12 November 2021. Some nine days later, during a South African Ironman championship, she was tested again. The test of the first sample returned an Adverse Analytical Finding ("AAF"), which is what gave rise to the present hearing. The in-competition test of the next sample was negative, which is one of many pieces of evidence the Athlete presented to the hearing in support of her claim that there was no intentional or reckless use by her of any prohibited substance which led to the AAF.

4. The SADoCoL reported an AAF for the presence of 17α-methyl-5α-androstan-3α,17β-diol (5α-methyltestosterone) in the tested sample A which was collected on 12 November 2021.

5. The parties and their experts have agreed that the presumed parent substance for the AAF (which has been referred to in these proceedings as Mestanolone) is a Prohibited Substance under category S1.1 of the 2021 World Anti-Doping Code Prohibited List. It is further categorised as a Non-Specified Substance the use of which is prohibited at all times, both in- and out-of-competition.

6. The results of the subsequent test on Sample B confirmed these results and the AAF.

7. Because of the bag containing the samples having been opened by the Doping Control Officer it was contested by the Athlete that it was her sample which had been tested. An interlocutory application for access to the sample in order for DNA testing to be done followed. As a result of the outcome of that test, the fact that it was the Athlete's sample which was tested and which resulted in the AAF is no longer in dispute.

The charge

8. The Athlete was charged with committing the following anti-doping rule violations:-

   a. Article 2.1 of the Rules on the basis that the presence of a Prohibited Substance or its Metabolites was detected in her sample;

      and

   b. Article 2.2 of the Rules - the use of a Prohibited Substance.

The Athlete's defence

9. The Athlete concedes the AAF and with that has accepted that SAIDS has proved the above ADRVs.

10. As a result, and as confirmed in the parties' Joint Minute on the Issues, dated 9 October 2023, and in their respective heads of argument, two issues require determination. They both relate to the sanction to be imposed.

11. The first issue is whether in terms of article 10.2.1, read together with article 10.2.3 of the Rules, the Athlete has proved, on a balance of probabilities, that the ADRVs were not intentional as defined in the article and therefore that the period of ineligibility to be imposed should be reduced from 4 to 2 years in terms of article 10.2.2 of the Rules.

12. The second issue pertains to the appropriate commencement date for the Athlete's period of ineligibility - the date of sample collection or the date of this panel's final decision, or a date in between, with due credit being given for the Athlete's period of Provisional Suspension in terms of article 10.13.2.1 of the Rules.

The relevant parts of the Rules

13. In terms of article 10.2 of the Rules, the period of ineligibility to be imposed on an Athlete may be reduced from 4 to 2 years if the Athlete can establish that the ADRV was not intentional as defined in the Rules.

14. In terms of article 10.2.3 of the Rules:[1]

> "*[T]he term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

15. The Athlete's legal representatives correctly pointed out in their submissions that the term here is to be distinguished from *inter alia* fault and negligence.

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[1] Which mirror the provision in the WADA Code.

16. Given the centrality of these arguments it is considered best to reproduce the Rules in some detail, both the parts which are directly relevant to the Charges and those which deal with fault and negligence in other situations.

17. Article 2 deals with Anti-Doping Rule Violations.

18. The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. It provides that Athletes [2] shall be responsible for knowing what constitutes an anti-doping rule violation and the substances which have been included on the Prohibited List.

19. In terms of Article 2.1 the Presence of a Prohibited Substance or its Metabolites in an Athlete's Sample constitutes an anti-doping rule violation.

20. Article 2.1.1 provides that it is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.6

21. The comment to Article 2.1.1 reads: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10.

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2 "Athletes" with a capital A is used here, as in the relevant Articles, to denote Athletes in general.

22. In terms of 2.1.2: Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample;

23. Article 2.2.2: The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

24. Article 3 deals with Proof Of Doping. Article 3.1 provides, under the heading Burdens and Standards of Proof, that where these Anti-Doping Rules place the burden of proof upon the Athlete alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

25. It is accepted by the parties to this hearing that Article 3.1 applies in the present matter.

26. Article 10.2.1 deals with the period of Ineligibility for Presence of a Prohibited Substance, which, for a violation of Article 2.1, and subject to Article 10.2.4, shall be four (4) years where: 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

27. The comment to Article 10.2.1.1 provides that while it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful

in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.

28. As was pointed out in argument by the Athlete's legal counsel this comment is in a footnote to the article and not part of the article itself. Each case is to be determined on its own facts and with the application of the principles set forth in the articles to the facts of the matter.

29. Article 10.2.3 states: As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

30. It is only where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, reduced below two years depending on the Athlete's or other Person's degree of Fault.

31. In the comment to Article 10 it is stated that this article applies only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are

responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.

32. It is to be noted, and the Athlete's representatives were at pains to ensure that the distinction is appreciated, in the present matter the inquiry (given that the AAF pertains to a Non – Specified Substance) is not as to whether where there was no fault or no negligence or the degree of fault or negligence in order to determine the sanction. The inquiry is purely whether the Athlete has proved on a balance of probabilities that she did not knowingly or recklessly ingest something which led to her AAF, an *onus* of proof which she accepted was on her to discharge.

33. The Comment to Article 10.6.2 provides that: Article 10.6.2 may be applied to any anti-doping rule violation except, those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8,2.9 or 2.11) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.

34. Given the fact that the prohibited substance *in casu* is a Non – Specified Substance and intent is an element of the sanction already the Athlete accepts that under the Rules she is subject to a minimum period of ineligibility of two years and unless she can discharge the *onus,* which is on her, to disprove intentional use as defined the period of ineligibility under the Rules is four years.

35. It is that task which the Athlete has accepted – not the task of proving that she was negligent or even grossly negligent.

36. Part of the argument directed at SAIDS in the hearing is that SAIDS focussed on the wrong enquiry (and, by extension, it is for the panel too to ward against confusing recklessness and intent as defined with negligence).

37. One of the important differences in this regard, it is pointed out, is that the former is an enquiry into a subjective state of mind, the latter is an objective assessment of the standard of care which the Athlete displayed.

38. Mindful of this, we turn to an evaluation of the evidence in the hearing.

The hearing

39. The hearing was conducted with most of the participants attending in person at the offices of SAIDS, Sports Science Building, Cape Town on Tuesday and Wednesday 17 October 2023.

40. The panel was constituted by:
    a. Adv Robert Stelzner SC (chairperson)
    b. Dr Dimakatso Ramagole
    c. Mr Edries Burton

41. SAIDS was represented by;
    a. Mr Matt Kemp
       and
    b. Ms Calli Solik of Attorneys Becker Kemp,

42. Mr Evert de Bruyn (SAIDS Registrar), Mr Shane Wafer (via remote / video link), and Ms Wafeekah Begg - Jassiem of SAIDS and Ms Christina Skhosana, who convened the hearing and was responsible for the logistics and other

arrangements, (in person) also attended the hearing, as did Mr Jan Sterk, chairperson of Triathlon South Africa (via remote / video link), as observers.

43. The Athlete was represented by:
    a. Adv Paul Farlam SC
    b. instructed by Mr Barend Kellerman from attorneys KJH Law.
    c. Ms Anje Deken of KJH Law assisted them.

44. The Athlete and SAIDS were alerted to the fact (reminded) at the commencement of the hearing that Mr Burton had sat on the Committee which had heard an interlocutory application in this matter, in respect of further tests which the Athlete had called for. Their representatives were invited to raise an objection raised to any one of the panel members hearing the matter. No objection was raised.

45. Given that the parties were legally represented and had in fact exchanged not only detailed pleadings, but had also held a pre – hearing meeting of their own in respect of which a minute was filed, and as will appear hereafter more fully had already filed preliminary submissions in respect of the hearing itself, the panel did not consider it necessary to inform the Athlete of her rights, nor ask her to "plead". That she was well aware of her rights, and the basis on which she was contesting the matter, were clear from the documents which had been produced on her behalf.

46. As mentioned, the panel was favoured with preliminary legal submissions at the commencement of the hearing already which identified the issues to be decided by the panel. Although the issues were circumscribed, the evidence which was to be presented in respect thereof would be comprehensive.

47. Extensive documentary evidence was placed before the panel together with two volumes of legal authority in support of the parties' respective submissions.

48. The documentary evidence included:
    a. statements by the three witnesses (including the Athlete) who were to be called,
    b. expert reports from various experts on behalf of both parties, which statements / reports the parties agreed could be introduced into evidence without the authors thereof being called or cross examined,
    c. other witness statements, in respect of whose evidence a similar agreement had been reached.

49. The following witnesses gave *viva voce* evidence before the panel:
    a. The Athlete herself
    b. Mr Craig Brewer
    c. Ms Shannon May Lourens

50. The contents of the statements of the Athlete and those of the witnesses called by her, which are included in the evidence bundle referred to above, were confirmed by the witnesses and included as their direct evidence before the panel. Their evidence was subjected to cross examination by SAIDS.

51. The various documents which served before the panel were collated into the following bundles.

52. A Pleadings Bundle which consisted of:
    a. The Charge against the Athlete (dated 12.10.2022)
    b. The Athlete's Statement of Defence (dated 28.08.2023)
    c. SAIDS' Reply to the Statement of Defence
    d. SAIDS Preliminary Written Submissions (of 10.10.2023)
    e. The Athlete's Preliminary Written Submissions (of 16.10.2023)

53. The Reports Bundle comprised the following:
    a. The Athlete's Doping Control Form Chain of Custody Form 12.11.21

b. The ADAMS test Analysis Report A- Sample 13.12.21
c. The B- Sample Results • ADAMS Test Analysis Report 02.02.22
d. Internal Review document 11.02.22
e. SADoCoL–A and B Sample #138857V – Laboratory Document Package
f. 1st Batch- Supplement Analysis Results 19.03.22
g. 2nd Batch- Supplement Analysis Results 17.05.22
h. Letter From Ray Pillar to SAIDS with:
    i. Forensic Psycho-Physiological Examination Report by: Ben Lombard •
    ii. Hair Analysis Report by: Prof Pascal Kintz •
    iii. ADAMS Test Analysis Report #136494V
    iv. Doping Control Form: M-1579854106 \
    v. Schedule 13.06.22
i. 3rd Batch – Supplement Analysis Results 10.08.22
j. Polygraph Examination Review by Johan Griesel (SAPF) – (dated 19.07.2022) 28.07.22
k. Declaration of Approximate Concentrations 11.08.22
l. Dr. Detlef Thieme Expert Report 01.09.22

54. The Evidence Bundle consisted of various expert reports (some of which were to be added, were not added) and statements:
    a. Dr A McAlpine: Clinical Assessment on Elbow Fracture 14.01.2022
    b. Dr B Lombard: Forensic Psycho-Physiological Examination Report 19.02.2022
    c. Prof P Kintz: Hair Testing for Doping Agents Certificate of Analysis 04.06.2022
    d. Dr J Griessel: Review of Polygraph Examinations 19.07.2022
    e. Dr A Evans: Report on Hair Sample Collection 11.08.2022
    f. Dr S B Loots: Report on Radial Head Fracture 11.08.2022
    g. Dr Thieme’s Report: Low Concentration of Metabolite 01.09.2022

h. Prof P Kintz: Report on Estimated Concentration of Metabolite 26.04.2023
i. Prof M Blockman: Report on Likelihood of Single Exposure 05.2023
j. Prof P Kintz: Report on Possible Sources of the Metabolite 04.09.2023
k. Prof P Van Eenoo: Initial Independent Report dated: 06.09.2023
l. Prof M Blockman: Answering Report (Rebuttal) (to Prof Eenoo's Initial Report dated 6.09.23)
m. Prof P Kintz: Answering Report dated 13.09.2023 (to Prof Eenoo's Initial Report dated 6.09.23)
n. Prof P Van Eenoo: Answering Report: 27.09.2023
o. Prof P Kintz: Replying Report (to Prof Eenoo's Answering Report dated 27.09.23)
p. Prof Eenoo: Replying Report (Profs Kintz and Blockman)
q. Annah Watkinson's (undated and not commissioned) Statement and annexures AW1 – AW29
r. Shannon Lourens' (dated 28.09.2023 and not commissioned) Statement
s. Rafal Medak's (undated and not commissioned) Statement
t. Raynards Tissink's (dated 27.09.2023 and commissioned) Statement
u. Emile Weitz's (undated and not commissioned) Statement and annexures EW1 – EW10
v. Craig Brewer's (undated and commissioned) Statement 394 – 420-+

55. Duly commissioned statements from Emile Weitz and Rafal Medak were supplied to the panel on 1 November 2023.

56. In addition, two bundles of authorities were provided initially, by the Athlete and by SAIDS respectively.

57. At the end of the hearing of oral evidence, the Athlete provided the panel with her further written submissions and presented oral argument. SAIDS was given the opportunity to file a further written note in reply and the Athlete was given

time to respond. The last of the written arguments were provided to the panel on 28 October 2023, with a further bundle of the authorities referred to therein on 30 October 2023.

58. A transcript of the proceedings was made available by SAIDS on 31 October 2023.

59. The panel is indebted to both parties' legal representatives for extremely thorough and most helpful submissions and copies of the various authorities relied on by the parties.

60. The standard of representation was of the highest order and the panel has been greatly assisted in its deliberations by the research, thought and analysis which has been presented on behalf of both parties.

61. Reference cannot be made to everything which was placed before the panel and considered. That which is most pertinent to the panel's finding is recorded herein. A full ventilation of all the material issues in dispute and a thorough and fair exchange of argument has ensued and the panel has had regard to all the arguments presented to it and the evidence which was referred to in the arguments.

*Onus* of proof

62. The further relevant parts of Rule 2 referred to above and which guide the process to be followed by the panel in this hearing read as follows.

63. As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct

might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

64. The Athlete must provide reasons or an explanation for the prohibited substance being detected in her sample, and if unable to do so, must prove that she in any event did not knowingly ingest the substance or was reckless as to the possibility of that happening (from whatever potential source).

65. "*Intentional*" conduct as contemplated in article 10.2 thus explicitly has a subjective element. But it also relates to the Athlete's conduct.

66. The test is not, as with the "*No Fault or Negligence*" or "*No Significant Fault or Negligence*" definitions, an objective one – though objective evidence can be used to support or undermine a declaration regarding intent.

67. Apart from proving on a balance of probabilities that the Athlete did not intentionally commit the ADRV, the Athlete is also required to prove to the panel on balance that she did not do something in the knowledge that there was a significant risk that the conduct might constitute or result in an ADRV and with reckless disregard of that risk.

68. In this regard, SAIDS referred the panel to what has been described as "the classic case of *dolus eventualis"* - where an Athlete uses a contaminated supplement being aware of the risk that the supplement may contain a prohibited ingredient and chooses nonetheless to consume it." [3]

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[3] Taylor and Lewis op cit note **Error! Bookmark not defined.** at 931.

69. The case of SAIDS, in essence, was that the Athlete did not prove that there was no intentional conduct on her part (in the sense referred to in the Rules) which caused her to have the AAF.

70. The case of the Athlete, in essence, was that she was able to prove on a balance of probabilities that the AAF occurred, notwithstanding any intentional or reckless conduct on her part.

The test in summary

71. In summary, therefore, the Athlete must prove, on a balance of probabilities, that the anti-doping rule violation was not "*intentional*".

72. The Athlete must rebut a presumption or establish specified facts or circumstances, on the same test.

73. If the source of the prohibited substance can be identified, the focus of the enquiry will be on whether the Athlete acted intentionally or recklessly with reference to that incident or event which led to the ADRV.

74. If the source of the prohibited substance cannot be identified, the panel will need to consider the full *conspectus* of all the evidence relied on by the Athlete and placed before the panel in order to decide whether the Athlete has proved that she did not intentionally or recklessly take the prohibited substance, or that it did not enter her body in that manner.

75. In the light of the nature of the occurrence, a duty is therefore imposed on the Athlete to present evidence which is sufficient to rebut the presumption.

76. SAIDS acknowledges in its preliminary submissions that the SAIDS Rules do not make proof of the origin of the Prohibited Substance an express requirement for a plea of lack of intent: "*While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete's level of Fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide of a finding that the violation was not intentional is warranted. . . .*"

77. The Athlete in turn accepts that "*Where an Athlete cannot prove the source it leaves the narrowest of corridors through which such Athlete must pass to discharge the burden which lies upon her."*

78. The parties are *ad idem* (as confirmed in the comment to article 10.2.1.1) that "*while it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.*"

79. See also in this regard the following summary from the decision of the Council for Arbitration in Sport on which extensive reliance was placed by the Athlete:

*The establishment of the source of the prohibited substance in an athlete's sample is not mandated in order to prove an absence of intent. In other words, it is possible to prove – albeit with much difficulty – innocent exposure to prohibited substance in the absence of a credible identification of its source. However, as certitude with respect to the source of contamination decreases, so the athlete's chances of prevailing depend on a counterbalancing increase of the implausibility of bad motive and negligence. The doping hypothesis must no longer (on a balance of probability) make sense in all the circumstances, and the charge of recklessness must (on a*

*balance of probability) be overcome. This can be proved by any means. Identification of the source is often important (but not in and of itself sufficient), but it is not indispensable.*

*Speculations, declarations of a clear conscience, and character references are not sufficient proof. It is an unacceptable paradox to posit that the effect of the apparent unavailability of objective and probative evidence is to give an athlete the same benefit as if s/he had found and presented it. However, if uncorroborated speculation is said not to avail an accused athlete; it should not in fairness avail the accuser either.*

*Assessing evidence in a manner that (i) begins with the science and then (ii) considers the totality of the evidence (iii) through the prism of common sense, possibly (iv) "bolstered" by the athlete's credibility, is a process that appears to be legitimate as a way of achieving its intended effect of enforcing the rules without finding comfort in the cynical view that occasional harm done to an innocent athlete is acceptable collateral damage.*

80. It is accepted therefore that the definition of "*Intentional*" does not require the Athlete to establish how the Prohibited Substance entered the Athlete's system. It is further accepted that it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered her system.

77. As a matter of logic, however, it would be a more focussed exercise (in discharging the *onus)* if the source of the AAF was established. In that event the intention of the Athlete could be assessed with reference to a specific occurrence and his or her conduct can be evaluated with reference to that particular event.

78. When the source cannot be proved the Athlete is left with the task of proving that there was no intention or disregard for the risks in question, whatsoever, and *in vacuo.*

79. That requires the Athlete to prove on a balance of probabilities that the source of the AAF is unknown to her and that the Athlete did not wittingly or recklessly ingest or take whatever it may have been which led to the AAF, in any manner.

80. The panel is asked by the Athlete to apply a subjective test, and accept that which what is argued to have been her unchallenged evidence that she was not a cheat, did not intentionally commit the ADRV and was also not reckless – her conduct over the years, and her character, showed that she conducted herself at all material times in a manner which evidenced no reckless disregard for the risks of her unknowingly and unwittingly committing an ADRV.

81. Pursuant to Rule 3.2.1, the standard of proof in this regard, which is on the Athlete, is a balance of probabilities. This standard requires the Athlete to convince the panel that the occurrence of the circumstances on which the Athlete relies (namely that the substance was not taken intentionally or recklessly) is more probable than their non - occurrence (namely that the substance was not taken intentionally or recklessly).

82. If the *onus* cannot be discharged, if the probabilities are evenly balanced, the Athlete accepts that, in the case of a non – specified substance, under the Rules the period of ineligibility will need to be four years.

83. In those circumstances there is no room for reduction of the period on grounds of no significant fault or any mitigatory factors.

Some law on *onus*, probabilities, evaluating evidence and the need to put contrary arguments to a witness

84. When dealing with the question of *onus* and the probabilities, the approach as outlined by Eksteen JP in *National Employers' General v Jagers 1984 (4) SA 437 (E) at 440E - 441A*, finds application in terms of South African law in cases where there are mutually destructive versions on both sides. [4] The Court held "*It seems to me, with respect, that in any civil case, ...., the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff (*in the present case the Athlete*), and where there are two mutually destructive stories, he (or she) can only succeed if he (or she) satisfied the Court on a preponderance of probabilities that his (or her) version is true and accurate and therefore acceptable, and that the other version advanced by the defendant (*SAIDS in this case*) is therefore false or mistaken and falls to be rejected*."

85. In view of the fact that it is common cause (now) that it was her sample and the AAF was correct, a rebuttable presumption arises that such AAF is the result of an intentional / reckless ADRV.

86. The *onus* of achieving this rebuttal lies upon the Athlete.

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[4] Which, given that the AAF, the ADRV and the Athlete are all located in South Africa, the hearing is before a South African panel and the fact that the SAIDS Rules apply in the hearing, is the law which the panel intends applying (in respect of such legal or procedural issues, outside of the SAIDS and WADA rules which may present themselves). These relate mainly to questions of process in evaluating the evidence and deciding whether the onus has been discharged. The panel considers that the application of SA law to that extent will result in a fair outcome for the reasons mentioned at the beginning of this footnote. It understands that also to be the practice generally employed by local tribunals, to rely on their local law in respect of those issues which require determination and for which the local rules (which incorporate the WADA Code) do not make provision.

87. The definition of intention in the Rules covers both direct and indirect intent (*dolus eventualis* as it is termed under South African law).

88. The Athlete argues that the evidence presented by her and on her behalf is impressive, was unchallenged in cross-examination and has not been contradicted by other evidence. SAIDS in fact called no witnesses.

89. The Athlete's case is premised on an argument that given the cogency of the uncontradicted evidence presented by her, her demeanour and credibility, the panel must conclude that she discharged the *onus* which it was accepted was on her.

90. SAIDS was challenged by the Athlete, relying on the decision in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,* [5] which dealt with the general duty to put a version to a witness in cross-examination, for not having put to her specifically that her claims of innocence were untrue. It is submitted that SAIDS' failure in this regard prevents SAIDS from arguing that the Athlete is to be disbelieved in her claim that she did not take the substance intentionally or recklessly. That argument is premised on here not having been given a fair opportunity to defend herself against the accusation and that is unfair, improper and impermissible for SAIDS to now argue that she is not to be believed in this regard.

91. The general principle referred to above, in the panel views, firstly does not apply in the present case. Here the Athlete was well aware of the presumption against her which required her to discharge the reverse onus of rebutting the presumption of dishonesty.

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[5] 2000 (1) SA 1 (CC).

92. There was no need (nor any requirement in fairness) to confront the Athlete by way of cross examination with that which she knew the presumption already suggested and which she was required to rebut.

93. As was held in paragraph 64 of the *SARU* case, *"The rule is .... not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point....."*

94. The difficulty in requiring SAIDS to interrogate the Athlete's subjective intention, without recourse to objective facts and inferences to be drawn from those, is apparent. What the Athlete claims went on in her head is something notoriously difficult to dispute for that very reason.

95. In addition, in assessing whether the *onus* has been discharged, the credibility of the party who bears that *onus* is, as will appear hereafter, not the only consideration.

96. It is therefore accepted that the present matter is such a matter in which the Athlete had prior notice that she was required to prove that there was no intentional or reckless ingestion of the substance.

97. The very fact that she had been called to defend her position in this hearing, and her accepting the opportunity to do so before the panel, made it clear that the Athlete, well represented as she was, was well aware that the truthfulness of any claim that she had not ingested the substance intentionally or recklessly was at the forefront of this hearing.

98. It was in order to prove this, after all, that she had engaged the services of her legal representatives and mounted the thorough defense which was mounted.

99. In any event, even if SAIDS had put the contention to her in as many words, there would have been very little SAIDS could have done which would have impacted positively or at all on the credibility of the Athlete.

100. The Athlete would undoubtedly, or at best for her, have denied any suggestion that she was being dishonest in any disclaimer of her subjective intention or reckless disregard for any risk of ingestion.

101. Given that, on the Athlete's version, the source of the prohibited substance could not be identified with any degree of certainty, it would have been even more difficult for an anti-doping organisation such as SAIDS to challenge the Athlete's subjective intention, the relevant part of which was stated to have been in the most general of terms.

102. That is precisely why the *onus* rests squarely on the Athlete to rebut intention under the Rules and why there is no overall *onus* on SAIDS, only a duty to rebut such evidence as may be produced and which would go some way towards the Athlete's discharging the *onus* which is on her and remains on her at the end of the hearing.

*103.* The Panel in *Songhurst* said the following in this regard: *"[I]n the normal course it is not to be expected that prohibited steroids are found in the body of an Athlete. In any normal case knowledge concerning how the substance came to be in the body is uniquely within the knowledge of the Athlete and UKAD can only go on the scientific evidence of what was found in the body. The scientific evidence of a prohibited substance in the body is itself powerful evidence, and requires explanation. It is easy for an Athlete to deny knowledge and impossible for UKAD to counter that other than with reference to the scientific evidence. Hence the structure of the rule."*[6]

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6 *UKAD v Songhurst* SR/0000120248 at para 29 cited in *UKAD v Bowes* SR/056/2021 at para 24.2.

104. It is also clear then from the case law relied on by SAIDSe, that given its inability to "*crawl inside the mind of the Athlete*", SAIDS is permitted to present its case on the basis of evaluating and testing the Athlete's subjective protestations against the objective evidence available to it and the probabilities, even if the Athlete's evidence of her subjective intent cannot be discredited.

105. In testing the evidence adduced by the Athlete on this basis, no extra burden of proof is placed on SAIDS and the ultimate *onus* never shifts to it.

Evaluating the evidence

The fact that SAIDS called no witnesses to give oral evidence

106. SAIDS was criticized for not calling any witnesses itself in order to rebut the case put up by the Athlete.

107. This firstly presupposes that there was a case which called for contrary (*viva voce* and in rebuttal) evidence.

108. That is one of the things this panel will need to decide on an overall *conspectus* of such evidence as was placed before it – not only orally, but also in terms of agreed statements and other documentary evidence submitted by agreement between the parties without the need for witnesses to be called.

109. SAIDS would in the panel's view be entitled to rely on an analysis of the objective surrounding circumstances and present a criticism thereof, where possible, without calling witnesses of its own to contradict the Athlete's proclaimed innocence, relying on all admissible and agreed evidence in order to do so.

Subjective intent

110. SAIDS accepts, on the case law referred to by it, [7] that the test is a subjective one.

111. It argues that the subjective intent can, and in most instances must, be gleaned or inferred from objective circumstances. [8]

112. By the same token, the claims of a person as to his or her subjective intent can be tested against the probabilities and measured against objective facts in order to test the veracity and probabilities of that version.

113. SAIDS relies on the comments of the Panel in Buttifant [9] in this regard:

> "*[27] Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the Athlete. There must be an objective evidential basis for any explanation for the violation that is put forward. We reject the argument put forward by the Respondent that the Athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the Athlete. The logic of the argument would be that where the only evidence is that of the Athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the Athlete has proved that he did not act intentionally. Article 10.2.3 requires an*

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7 *ITF v Sharapova*, Independent Tribunal decision dated 6 June 2016, para 77, not challenged on appeal, *Sharapova v ITF*, CAS 2016/ A/4643. See too the discussion in 2021 "Basic Period of Ineligibility (1): Applying Code Articles 10.2 and 10.3" in Lewis and Taylor *Sport: Law and Practice* 4ed (Bloomsbury) Chapter C17 pp 915 – 946 at 931.

8 *Scott* op cit note 2 at para 131.

9 *UKAD v Buttifant* (SR/NADP/508/2016).

*assessment of evidence about the conduct which resulted or might have resulted in the violation. A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.*

[28] *In summary, (in) a case to which article 10.2.1.1 applies the burden is on the Athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the Athlete which resulted in the violation was intentional or not intentional. There is no express requirement for an Athlete to prove the means of ingestion but there is an evidential burden to explain how the violation occurred. If the Athlete puts forward a credible explanation then the tribunal will focus on that conduct and determine on the balance of probabilities whether the Athlete has proved the cause of the violation and that he did not act intentionally.*

[29] *There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise*."

114. SAIDS relies on the following further principles:

a. evidence establishing only that it is *possible* that the Athlete's claim as to origin is correct is not enough to discharge the Athlete's burden;[10]

[10] The panel was referred to, for example, *Guerrero v FIFA* CAS 2018/A/5546 at para 65(ii).

b. it is not enough to argue that a possible explanation must be accepted if the anti-doping body cannot identify an alternative explanation that is more likely to be correct; [11]

c. the evidence has to be enough to satisfy the panel that the claim is more likely than not to be true; [12]

d. a mere denial of wrongdoing and the advancement of a "speculative innocent explanation, an unsubstantiated assertion and / or an unverified hypothesis" are insufficient to meet this burden; [13]

e. it is not enough to deny any knowing wrongdoing and say that therefore the explanation "must be" inadvertent contamination, spiking or some other innocent cause.[14]

f. an Athlete is required to "adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the Athlete consumed contained the metabolite";[15]

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11 The panel was referred to, for example, *Guerrero* op cit note 10 at para 65(v) "*If there are two competing explanations for the presence of the prohibited substance in an Athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. There is always available to the hearing body the conclusion that the other is not proven. For the hearing body in such a situation there are three choices, not just two*."

12 The panel was referred to Lewis and Taylor *op cit* note **Error! Bookmark not defined.** at 928 and the authorities cited therein.

13 *Ibid*.

14 Ibid.

15 *Ruffoni v UCI* CAS 2018/A/5518 at para 133. The panel was referred to *WADA v Abdelrahman* CAS 2017/A/5036 at para 125: "*In this context, therefore, it is this Panel's opinion that, in order to disprove intent, an Athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF (such as sabotage, manipulation, contamination, pollution, accidental use, etc.) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. There is in fact a wealth of CAS jurisprudence stating that a*

and

g. in the absence of credible scientific evidence and factual explanations, protestations of innocence and good character evidence will not fill the gap.[16]

115. These are some of the principles which the panel intends applying in this matter.

The resolution of factual disputes

Unchallenged evidence

116. The panel is of the view that SAIDS is entitled to test the Athlete's version against the probabilities and other evidence which served before the panel, without putting it to her directly that she was being dishonest in her denials of having intentionally or recklessly committed the ADRV.

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*protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an Athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268, 1 v. FIA; CAS 2014/A/3820, WADA v. Robinson and JADCO): unverified hypotheses are not sufficient (CAS 99/A/234-235, Meca-Medina v. FINA). Instead, the CAS has been clear that an Athlete has a stringent requirement to offer persuasive evidence that the explanation he (or she) offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions. In short, the panel cannot base its decision on some speculative guess uncorroborated in any manner*."

16 SAIDS refers in its preliminary heads to the example of *Ruffoni* at para 148 where the following was held: *"The Panel agrees that establishing that a violation is not intentional in the absence of the establishment of the source of the substance requires truly exceptional circumstances, and that protestations of innocence, the lack of a sporting incentive to dope, attempts by the Athlete to discover the origin of the prohibited substance and the Athlete's clean record are not sufficient."*

117. It is accepted that SAIDS left some statements unchallenged specifically and did not put it to the Athlete directly that she was being dishonest. But this does not prevent SAIDS from arguing that which it sought to argue.

118. It is so that where SAIDS intends to discredit the evidence of an Athlete it should cross-examine him or her to that end in order to enable the Athlete to meet the State's attack. But it does not follow in every case that the failure to cross-examine on certain aspects of the case would necessarily be fatal to SAID's case or deprive it of the opportunity of arguing that which it seeks to argue at the end of the inquiry (based on some tacit acceptance of the Athlete's evidence or abandonment / waiver of its own arguments).

119. In the particular circumstances of this case the absence of a specific challenge in cross-examination by SAIDS to the Athlete's denial of intent or recklessness, does not necessarily lead to proof thereof.

120. It is still required of the Athlete to convince the panel on a *conspectus* of all the evidence that she did not intentionally or recklessly commit the ADRV.

121. Once the presumption is brought into play in respect of the ADRV that presumption hardens into proof on a balance of probabilities if the Athlete does not negative it by proving an innocent (non – intentional or not reckless) explanation on a balance of probabilities. This is by reason of the inference which arises by virtue of the presumption.

122. This inquiry is not the same as a process where a conflicting version of a witness who is to be called at a later stage needs to be put to a witness in order for that witness to be afforded a fair opportunity of responding thereto. The Athlete in this matter was supplied with all the evidence that SAIDS would be relying on in the form of written statements in advance of the hearing.

123. Nor is it a matter where the Athlete is unaware of the case which she is called to meet. She was ably represented by experienced legal representatives and was well informed in advance of the hearing what the issues in dispute were.

124. Insofar as SAIDS did not engage the Athlete fully on all its arguments, the Athlete's counsel was in a position to do so in argument with SAIDS and she was able to respond thereto through her legal representatives.

125. In the panel's view, given the nature of the inquiry, the existence of the presumption of which the Athlete was aware, together with her knowledge of the Rules in general, the fact that the Athlete was represented and knew exactly what was required of her in order to discharge the *onus,* the panel is of the view that it would not be procedurally unfair towards the Athlete to permit SAIDS to present argument in support of its contentions (for example that the Athlete did not discharge the *onus* which was on her), even where she was not directly accused of being dishonest in her evidence before the panel.

Credibility, probabilities, reliability and inferential reasoning

126. In deciding whether the evidence of the Athlete is true or not the panel will weigh up and test the Athlete's allegations against the general probabilities.

127. If the reasons are because of inherent probabilities, or because of contradictions in the evidence of the witness, or because of his or her being contradicted by more trustworthy witnesses, these reasons must be provided by the panel

128. In addition to the merits and demerits of the witnesses the probabilities of the case also need to be dealt with if there is a factual finding to be made.

129. An inference of "guilt" can only be drawn from facts which have been objectively established. It must also be the more plausible inference to be drawn, in cases where different inferences can be drawn. Inferential reasoning is permitted, speculative reasoning not.

130. At the end of the process, when the panel has to consider whether or not the *onus* is discharged, it needs to be satisfied that sufficient evidence has been put before the panel to suggest that the presumption of an ADRV is not consistent with all the known facts, or that it is not the most probable inference in the light of all the known facts. It is for the Athlete to prove this.

131. If the probabilities are evenly balanced, at the end of that exercise, upon a full and proper evaluation of all the facts, the Athlete would not have discharged the *onus* which is on her and the presumption prevails.

132. If the Athlete proves that which she is required to prove on a balance of probabilities the *onus* is discharged, and she becomes eligible for a reduction in sanction.

133. In the present matter, aided as it is by the presumption, SAIDS does not need to present evidence in order to put up a "story" in order for there to be a version which is destructive of that of the Athlete.

134. As was decided further in the *National Employers'* case above, albeit in the context of mutually destructive versions of witnesses for both sides "*In deciding whether that evidence is true or not the Court (and in this case the panel) will weigh up and test the plaintiff's (the Athlete's) allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff (the Athlete), then the Court (the panel) will accept his (her) version as being probably true. If however the*

*probabilities are evenly balanced in the sense that they do not favour the plaintiff's case (the Athlete's) any more than they do the defendant's (that of SAIDS aided by the presumption), the plaintiff (the Athlete) can only succeed if the Court (the panel) nevertheless believes him (or her) and is satisfied that his (or her) evidence is true and that the defendant's version is false*."

135. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows.

136. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

137. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

138. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

139. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

140. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

141. And where there is a presumption, as is the case here, when the probabilities are evenly balanced, the presumption prevails.

142. And where there is no direct evidence on a particular issue, the panel may nevertheless make a factual finding pertinence to that issue by drawing an inference.

143. The drawing of an inference requires properly established objective facts. Inference must be carefully distinguished from conjecture or speculation. If there are no positive proved facts from which an inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

144. The inference sought to be drawn must comply with the first rule of logic – it must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

145. Where more than one inference is possible on the objective proved facts, the panel may by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one. In this context plausible has the connotation of acceptable, credible, suitable.

146. Uncontradicted evidence does not necessarily have to be accepted. Whether or not it is accepted will depend upon the quality of the evidence. Evidence which

is vague, contradictory, highly improbable or just plain irrational will not pass muster.

147. The Athlete on the other hand makes the point that minor inconsistencies are not necessarily indicative of dishonesty.

148. With reference to *inter alia* the decision of the SA Supreme Court of Appeal in *S v Mafaladiso and Others* four broad principles that are of assistance when considering whether there were actual contradictions in a witnesses' evidence, and what regard should be paid thereto are identified

> *"The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of explanations*

*– and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely, to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."*

*149.* The Athlete also relied on the following passage from *Schwikkard (Principles of Evidence, pp. 566 to 567)*

*"However, it is also true that the court's duty to evaluate probative material is in many respects similar to the function of any prudent non-judicial finder of fact: credibility is determined, inferences are drawn, and probabilities and improbabilities are considered. In the evaluation of evidence there are a few legal rules — largely stemming from case law — which can assist the court and which can act as a check. But the difficult mental task of sifting truth from falsehood, of determining credibility, of relying on probabilities, and of inferring unknown facts from the known is by and large a matter of common sense, logic and experience. Inferences which are drawn should, for example, be in accordance with the rules of logic and circuitous reasoning is obviously not permissible.*

150. The panel is further referred to the statement of Van den Heever J [in *S v Van Wyk* 1977 (1) SA 412 (NC) 414E-F]: '*In the process of adjudication two factors are constant, namely what must be proved and to what degree of persuasion; but the third factor, namely the quantum and quality of the probative material required so to persuade the court, is subject to great variety*'.

151. The panel will endeavour to apply all these principles in its evaluation of the evidence before it.

Expert opinion evidence

152. Both sides presented reports and commentary and opinions of experts in their fields. In some cases some of the experts commented on the views of the other expert.

153. When dealing with expert evidence regard can be had to that which was held in *Coopers (South Africa) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976* (3) SA 352 (A) 371G – H where the Court said the following… '*An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of his opinion can only be undertaken if the process of reasoning, which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.… The summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i.e. the opinion). Where the process of reasoning is not simply a matter of ordinary logic, but involves, for example the application of scientific principles, it will ordinarily be necessary to set out the reasoning in summarised form.*

Evaluation of the evidence

154. It remains for the panel to now apply these principles to the evidence before it, and, in assessing the cogency of the evidence, to determine whether the *onus* has been discharged.

155. The panel proposes doing so by first assessing the evidence in respect of what was presented as evidence of various investigations which were done in order to identify the source of that which gave rise to the AAF (but which investigations

turned out to be inconclusive) and then considering the relevance of these attempts and the evidence relating thereto.

156. The panel will then consider the further evidence which was presented by the Athlete in order to discharge the *onus* which is on her, and, in conjunction with an evaluation of the evidence and arguments of SAIDS, and the Athlete's own various submissions, determine whether in the panel's assessment of the matter as a whole, that *onus* has been discharged.

Steps taken to identify the source

157. The Athlete, in her statement of defence, first claimed that she did not know how the metabolite of Mestanolone came to be detected in her urine sample.

158. Despite extensive and exhaustive efforts she also explained in her statement that she had not been able to discern how she came to test positive for the metabolite.

159. It is to be noted in this regard that the Athlete herself, at first, accepted that none of these was proved to be a probable source of the AAF.

160. Had the source of the ingestion been identified, the focus of the panel's enquiry could have been, as mentioned above, directed to the circumstances in which the substance was ingested.

161. The Athlete presented evidence before the panel of her attempts to identify the source. Presumably this was done, at first, in order to try and establish the source in order to present the panel with proof that that which resulted in the AAF had not been intentional or reckless.

162. The Athlete went to some lengths to do so, expending it is claimed considerable sums of money on tests, experts and legal representatives, in order to try and find the source of the AAF.

163. That, it is submitted on her behalf, is one of the factors which should count in her favour and should be taken into consideration in determining her lack of intent or recklessness, the argument being that if she had taken the substance intentionally or recklessly, she would not have gone to the lengths to which she went to try and (unsuccessfully) identify the source.

164. It was claimed by the Athlete in her written statement (at paragraph 119 thereof) that it would be "foolish, if not insane", of her to have spent all this time and money disputing the AAF if she knew that she would not thereby have been able to establish her innocence, and if the tests could even be "counterproductive".

165. This may be so, but the extensive investigations could also have been done on legal advice or on the chance of something being established through these tests which could have assisted her with her defence or presented another possible source to the real one. At the end of the day, the work which was done in this regard proved inconclusive, and for the further reasons which follow, that fact is viewed by the panel to be a neutral factor.

166. Equally, it could be argued, that having taken the substance intentionally or recklessly, on an occasion, which then led to the AAF, it would have assisted her in proving that there was another (possible) source, which, had that exercise been successful, would have then deflected the inquiry from the actual source.

167. The panel does not accept that the mere fact that the Athlete investigated various possible (alternative) sources, some of them in depth and at considerable expense, to constitute proof that there was no intent of or reckless disregard for

ingestion. It simply proves that the actual source of the AAF was not established through these investigations. It does not disprove that there was some other source and that source could have been because of intentional or reckless use of some substance which led to the AAF.

168. The fact that these investigations were done is as consistent with an attempt to find an exculpatory ground, for what was the deliberate or reckless ingestion (on a single occasion), as it is consistent with an attempt to identify the source when there was really no knowledge of the origin of the AAF.

169. The further fact that the investigations all proved to be inconclusive simply points to these sources having been identified by the Athlete as possible sources, ultimately proving not to be a source.

170. The question which presents itself in this regard (and which impacts on her credibility, the sincerity with which the view was held that one of the three sources presented to the panel as a possible source, was indeed seen by the Athlete to be such a possibility) is why the Athlete (having acknowledged in her statement and defence that she could not identify the source) still tried in her evidence before the panel, and in that of Mr Brewer, to suggest that one of the three sources which were investigated by her, could still have been the source of the AAF.

171. The fact that the Athlete offered three possible sources, putting these forward as "possibilities", even after having discounted them as being probable sources, and persisting with the argument that they may still have been a possible source, is indicative of someone trying too hard to deflect attention away from the fact that there may have another source – the intentional or reckless use of a substance which led to the AAF.

The three possible causes

172. The evidence of the investigations into the cause / source / origin of the AAF focussed on three theories:

a. Transfer of the substance through kissing

b. Contamination or cross – contamination of a smoothie which the Athlete had drunk

c. Her swimming with others in a pool

173. The three possibilities which were presented as possible sources (even though her own investigations had shown that none of them was a real possibility) were:

a. Contamination or cross contamination of a peanut butter smoothie which she had ingested at Kauai, a health food and beverage outlet;

b. The transfer of the prohibited substance to her by her boyfriend through kissing;

c. The use of a steroid cream by someone who shared the swimming pool with her.

174. These are now considered further separately, not in order to determine whether the Athlete has proved on a balance of probabilities that any one of these sources was the source of the prohibited substance and the reason for her AAF and ADRV, which on her version was not the case, but to test each thesis which has been put forward against her claim that her diligence in investigating these possible sources constitutes proof of her innocence.

175. In that exercise the credibility and reliability of the evidence submitted in support of each thesis and the probabilities will also be considered, since this may impact on the overall assessment of the Athlete's credibility, the probabilities and the discharge of the *onus*.

The Kauai smoothie

176. The evidence of the Athlete in this regard was firstly that which is recorded in her statement at paragraph 142.

177. On 1 November 2021, some 11 days before the sample was taken, she had a peanut butter bomb shake (also referred to as "the smoothie") and an almond coffee at the Kauai outlet at the gym which she attended in Green Point. She had a cappuccino and oats on two other days, 6 and 12 November 2021, from what appears to have been the same Kauai at the same gym.

178. Her counsel corrected her written statement, at the outset, to explain that her investigations had revealed that other smoothies, presumably those with added whey protein, had been made with a protein powder from a manufacturer / distributor called Nutritech by the same Kauai branch, but that this was not the smoothie which she had consumed.

179. This introduced the possibility of cross contamination in that the same equipment may have been used for the preparation of other smoothies, which themselves may have been spiked with the prohibited substance unbeknown to the Athlete, resulting in the possibility that the one which she had on 1 November 2021 could, according to her evidence before the panel, possibly have been the source of the prohibited substance which entered her body and was detected in the AAF.

180. Her evidence was that there was a possibility, and it appears to have been conceded that this was a slight possibility for which there was no evidence, that her drink had been contaminated by virtue of the Kauai store using the same machines to make the different smoothies, and one of the other smoothies made in the same machine with added whey protein could have been contaminated, which contamination caused the cross contamination.

181. No tests were done in this regard at the Kauai store itself, nor was any investigation done as to general levels of care in the preparation of these shakes nor the types of additives, supplements or ingredients which went into the shakes.

182. Similarly there is no medical evidence as to how long the substance in question could have been in her body, had the source between one of the Kauai shakes or smoothies.

183. No investigation was carried out at the health store itself in order to explain the significance of the Nutritech reference, nor was it proven that this product was in fact used, either.

184. The risks associated with the Nutritech (whey protein?) product, which may have assisted in establishing that there was a chance that it had been contaminated with the prohibited substance, were also not proven in evidence.

185. The “smoothie” source was mentioned as a possibility, but no real evidence was submitted in support thereof.

186. The panel accepts that it would have been impossible to test the same smoothie some time after it had been consumed, and that testing similar smoothies and even the equipment after the event may also have been inconclusive.

187. The question remains however, if the Athlete had no faith in the smoothie as a possible explanation for the AAF, why even mention it?

188. In order to divert attention from what could have been the real source and one of which the applicant was aware?

189. The panel would have expected that at least an attempt would have been made by the Athlete to have had equipment at Kauai tested or some other evidence of possible cross contamination being adduced, if she had any faith in her version as to this having been a possible source, but no evidence was produced.

190. The type of smoothie itself was not tested nor was any evidence led as to what went into the making of the smoothie.

191. In short, compared to the kissing theory, very little investigation was done to support the Kauai smoothie as a probable source.

192. Her demeanour, her frown when giving this evidence, was such that it appeared that she had little faith in this possibility herself. That too is supported by her written outline of defence.

193. The Kauai contamination or cross – contamination can safely be rejected as a possible source simply on the grounds of the paucity of evidence to support it, if not on the Athlete's own displayed lack of belief therein.

194. It appears simply to have been raised in order to show that the Athlete had considered all possible sources, no matter how improbable.

195. The smoothie it appears was simply mentioned as a possibility in order for the panel to exclude it as a source.

196. Furthermore, the fact that the Athlete still frequented the Kauai outlet, knowing, according to her that there had been a possible risk, is contradictory within itself and not indicative of the extreme care of a top Athlete on which the Athlete claims to have prided herself.

197. At the same time it is argued that Kauai outlets are part of a reputable health store brand / franchise, with an outlet at the Sports Science building itself, with the suggestion that that of its own was sufficient to absolve the Athlete of any culpability (an argument similar to the S3 products being reputable products, vouched for by the fact that other high profile Athletes use them). This too contradicts the claim that the smoothie may have been the source of the prohibited substance, unless it is to be accepted that the reputation of the supplier of its own is not a relevant fact.

198. In a "schedule of her routine" supplied by the Athlete, she indicates that she consumed various foods and beverages from outlets at the gym including a 'Peanut Butter Bomb Shake' (the smoothie) on the date referred to above. She also states, without more, that after enquiries she recently established that "their" (presumably *Kauai's*) smoothies are made with protein powder from "*Nutritech*". Nutritech, the panel is told, is a manufacturer of nutritional and performance supplements.

199. No further evidence is adduced by the Athlete other than this vague suggestion that these may have been the source of the Metabolite. The suggestion is that the protein powders manufactured or supplied by Nutritech are less 'safe', in

general, given the known risks of supplement contamination and that one of the products which the Athlete consumed at Kauai included in it either additional whey protein which was cross-contaminated with a parent steroid or traces thereof or that a machine which had been used for the manufacture of that product, had also been used for the smoothie which she had.

200. If that is so, that supplements are often contaminated, the same risk should notionally exist in respect of the supplements, including the S3 range of supplements the Athlete admits to having used, notwithstanding the fact that the ones tested by her (S3 products from the same batch as those which she claims to have had used) had all proven to be clean.

201. The Athlete relies on comprehensive testing of the nutritional supplements, products and medication which she took in the weeks leading up to the test of 12 November 2021 to counter this possibility. [17]

202. Professor Kintz, the Athlete's expert, indicated that "smoothie contamination" is possible, but has not been "firmly demonstrated" in this case. [18]

203. Professor van Eenoo said that while contamination cannot be excluded, he was not aware of any reported instance in the literature of contaminated coffee or peanut butter. [19]

204. SAIDS submitted that "the seriousness with which the Athlete intended to advance this as a potential source of the metabolite was not clear". Other than simply claiming to have consumed a smoothie, she put up no serious factual

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17 The Athlete's Statement, para. 49 to 59, Evidence Bundle pp. 89 to 95

18 Evidence bundle p 47 (Professor Kintz report dated 4 September 2023).

19 Evidence bundle p 65 (Professor van Eenoo Answering Report).

evidence from which the panel could conclude that the smoothie was contaminated.

205. We were asked to "dismiss this hypothesis out of hand".

206. For the reasons set out above we reject the "hypothesis" as being probable.

207. The panel further finds there is merit in the argument of SAIDS that "far from exculpating the Athlete, her consumption of a smoothie from a restaurant that (has products, which according to her) contains added whey or other protein – a supplement she claims could be contaminated calls into question, in spite of her own evidence, how careful the Athlete is with what she consumes." It is understood that this submission is made in the context of challenging the Athlete's claim that she was not reckless in her use of supplements or that which she consumes generally.

The kissing hypothesis

208. Mr Brewer, the Athlete's partner, gave evidence that he had taken Ligandrol, early on the morning that both he and the Athlete were preparing to go to gym.

209. He claimed that the Ligandrol was stuck in his throat when he kissed the Athlete upon bumping into her in the kitchen of their flat, on the way from his separate bathroom, where he kept his supplements, including the Ligandrol in question.

210. The Panel was asked to conclude that Ligandrol can "contain almost anything, even nothing, and that the manufacturer of this black-market product puts anything, or nothing in it, and the ingredients may vary from sample to sample".

211. The argument proceeded as follows – "Common sense requires that one cannot dismiss this scenario out of hand, and that it is conceivable that the product branded as Ligandrol, which Mr Brewer was taking from November 2021, may have resulted in the AAF for Ms Watkinson. What complicates things further, is that the data on how it may have been transferred, and how long it would have remained detectable, is scarce."

212. Ligandrol is a prohibited substance for which a South African rugby player, Aphiwe Dyantyi, was suspended from rugby in December 2019 after he tested positive for performance enhancing substances in August of that year.

213. Three banned substances – metandienone, methyltestosterone and LGD-4033 (Ligandrol) – were found in his system, all of which are classified S1 substances. Dyantyi was suspended for four years from the sport.

214. He was represented by the same firm of attorneys who are now representing the Athlete.

215. Her evidence (and that of Mr Brewer) was that it was precisely because of the Dyantyi matter that the services of the firm had been engaged to represent her.

216. Mr Brewer's evidence was that approximately a week or so after the services of the firm had been engaged, wracked by guilt, he had met with Mr Kellermann of the firm in private and confessed to him his use of the substance (unbeknown to the Athlete). That then resulted in the further investigations (which ultimately proved inconclusive but which were still presented in evidence to the panel) as to the kissing being a possible source of the Athlete's AAF.

217. The theory was that in the process of kissing the Athlete Mr Brewer had transferred some of the Ligandrol which could have been contaminated with the

metabolite or its parent to the Athlete, and that this resulted in the AAF, based on a sample taken some 8 days later.

218. For the reasons which follow the panel holds that the claim that the kissing was the source lacks credibility, reliability and is in the panel's view highly improbable.

219. The probabilities are that when one has a tablet stuck in one's throat, the first thing one would normally do would be to try, with the aid of a glass of water, to try to swallow the tablet. Or one might try to cough it up and then either discard it or try to swallow it afresh.

220. This would particularly be the case if you (as the boyfriend of a top Athlete) were using a prohibited substance without your partner's knowledge and were concerned about her being exposed thereto.

221. None of that appears to have been done here.

222. Instead, there was the early morning kissing and what is claimed to have been the possible exchange of the substance which resulted in the AAF on the basis that some part of the Ligandrol (which was still stuck in Mr Brewer's throat) was passed through his saliva.

223. There are a number of further problems with this evidence – the least of which is not the evidence of Mr Brewer that the Ligandrol came in a capsule, not a tablet. Whilst a tablet may dissolve in one's mouth, after having lodged in one's throat and then having been regurgitated, or some of it may have found its way into the person's saliva and then be transferred through an exchange of saliva,

gelatine encapsulated medication is not designed to be absorbed by the body in that way.

224. The very purpose of the capsule is to ensure that the drug or substance in the capsule is first swallowed and only once the capsule has dissolved is its contents released into the person's body, usually in that person's gut, or depending on the design of the capsule itself, further down the process of disintegration of the capsule.

225. Gelatine encapsulated medication would not dissolve in the mouth unless the capsule is chewed on or it broke. Mr Brewer confirmed in his evidence that the capsule was whole when it lodged in his throat. This appears from page 220 of the transcript.

226. There is also the evidence of Mr Brewer's hair tests and the tests the Ligandrol capsules themselves (not from the same batch as the original ones though) were subjected to, all of which excluded Mr Brewer and his use of the Ligandrol as being the source of the Athlete's AAF.

227. Notwithstanding all of this Mr Brewer remained adamant that he was the source and claimed responsibility for the Athlete's AAF.

228. He was unable to explain why he was doing so when asked by the panel for an explanation in the light of the fact that all the evidence pointed to his use of the Ligandrol not being the source of the Athlete's AAF.

229. The Athlete herself also did not absolve Mr Brewer of any responsibility, and continued to rely, albeit without much conviction, on his use of the Ligandrol as

being the source of her AAF, notwithstanding there being no objective or plausible evidence supporting this.

230. The Athlete's own expert, Professor Kintz, has indicated that this theory is not supported by the evidence. [20]

231. This sentiment is echoed by Professor van Eenoo. [21]

232. The Athlete's own version of the facts do not support the conclusion sought to be drawn by the Athlete: According to her Mr Brewer had finished the package of Ligandrol tablets that he had taken shortly after the kissing incident. The panel was shown an empty plastic canister by Mr Brewer in which the Ligandrol capsules had come when ordered off the internet by Mr Brewer. He had read about it in a Men's Health magazine and used it (without telling the Athlete) in order to preserve his youthfulness and strength or at least fight off the negative effects of advancing age and remain on course with his Crossfit training.

233. He thereafter sourced three further containers from his supplier and had these tested with the SADoCoL. Each of these tested negative for the Metabolite, at least four of the five possible Parent Steroids, and indeed, also for Ligandrol.

234. The suggestion from the Athlete that the earlier, untested Ligandrol tablets which had been used by Mr Brewer, were contaminated with Mestanolone is speculative / conjecture, not supported by the evidence.

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20 Evidence bundle p 46 (Professor Kintz report dated 4 September 2023).

21 Evidence bundle p 65 (Professor van Eenoo Answering Report).

235. Further, Professor Kintz also performed a hair sample analysis of Mr Brewer's hair. The hair sample analysis was negative for Methyl-testosterone, Mestanolone and Ligandrol.

236. The claim that the kissing was the source was nevertheless still presented, at least by Mr Brewer in his evidence, as having been a real possibility for the source of the AAV.

237. This raises a number of questions in the mind of the panel, a major one being, once again, if the Athlete herself had little faith in this having been a possible source, why persist with the evidence and argument, and why was Mr Brewer prepared to take the blame for the AAV when there was so much evidence to the contrary?

238. Was it in order to try and divert attention from the fact that there must have been some other (unexplained?) source?

The swimming pool as possible source

239. The claim that the swimming pool may have been the source of her AAF, is even less plausible or probable than the smoothie or kissing theories.

240. The Athlete's evidence in this regard was that she had seen a fellow swimmer apply a testosterone cream to her own leg outside of the pool which they had been swimming in. It is not clear whether she observed this being done as they were getting out of the pool or in the changing room. She nevertheless assumed on that ground that the cream had also been used in the pool and that that could have been a possible source for her AAF.

241. At transcript p 49 the following part of her evidence is as follows:

MR FARLAM: In fact, it is at page, internal page 51 of your report and that they seemed to be rubbing themselves with a testosterone cream or hormonal cream. It is at pages 122, 123. Can you just tell us about this and why you thought it was worthy of mention?

MS WATKINSON: So I in public areas a lot. I make use of a public, well a gym pool which is open to the public. I have gotten out of the pool and one of the girls in the squad that was swimming next to my lane got out and she was rubbing her legs with something and I thought it is a new razor that had been advertised on Instagram so I asked her like what is that that you are rubbing on your legs and she said it is testosterone, I am on hormone therapy, I cannot touch it with my hands because it is so strong and I was shocked because I am sharing change rooms and showers and I have just gotten out of the pool next to you and you are rubbing this and knowing the low dosage that was found this just seemed like another possibility which just opens a whole lot more possibilities and in my eyes there is just, it seems almost inevitable. That was the reason that I, that could, it could be a possibility. I do not know what the, what was in the testosterone, I do not know what cream it was, I did not ask that, I was just shocked and spoke to Barend about it thereafter.

242. Later, when cross examined on this, her evidence is as follows:

MR KEMP: That would be the swimming pool defence and just to clarify because you gave some evidence about seeing the application of the cream, etcetera, was that, you had said you were in the pool with this person, then you went into the change room, you saw her applying this, is that correct?

MS WATKINSON: That is correct, yes.

MR KEMP: Okay, and so she was applying the cream after she was in the pool, is that correct?

MS WATKINSON: In the circumstance, correct.

MR KEMP: Yes, okay. Again I would like to take you, well I would like to give you an opportunity to comment. You read the expert notices or reports. Do you have any comment given the way the experts have, or let us take you there and you can comment on them particularly. So … Professor Kintz's report … He says: "In addition concentration and such preparation is generally low." "1.6.2 For example in a

testosterone gel and will be diluted in the water of the swimming pool to a non-measurable concentration. Such limited amount of mestanolone or methyltestosterone if present cannot produce an adverse analytical finding either by probable transfer or by mouth ingestion in a swimming pool. There is nothing in the literature that can support it." …

MS WATKINSON: I mean I cannot really comment on what he has put down here. What I can tell you and why I still believe that it is plausible is unfortunately I have gone down a very deep, dark hole in understanding how testing is done, at what rates it is done and I also understand from certain documentaries that I have watched that you can, it is plausible to test positive with touching and so when I go into a pool and I share water and I drink the water, I swim and I typically swim with my mouth open and I swallow water when people kick next to me, is this a possibility, yes I believe it is a possibility. Can we test the whole pool? Can I test …[indistinct] swam with that morning? Again, the morning of that test I woke up very early, I went and did a swim, I had oats and a coffee at the Kauai, I got onto the bicycle at home and that evening they came and tested me. I was in the pool that day. I have racked my brain and that is why I believe that this is still a possibility.

MR KEMP: Okay, well just sticking to the swimming pool for now, if we go then to page 65 we then see at 4.2 what Professor Eno, Van Eno says in regard thereto and this is about almost two thirds of the way down the paragraph.

"The conclusion is that this hypothesis is hence extremely unlikely, if not impossible even if all factors, an extreme …[indistinct] mestanolone dissolved, no metabolism, lots of intake, etcetera …" That is you kicking with, or you swimming with your mouth open and people kicking next to you, etcetera: "is in favour of the athlete." So I just want to ask you again, so you have now got the SAIDS expert saying this hypothesis is extremely unlikely but you remain convinced that it is plausible.

243. During argument, reference was made to the fact that a similar theory had been relied on in the Shayna Jack case [22] she said she think she got it somewhere in the swimming pool, in the gym Ms Watkinson said well, I was standing next to

[22] Arbitrations CAS 2020/A/7579 World Anti-Doping Agency (WADA) v. Swimming Australia (SA), Sport Integrity Australia (SIA) & Shayna Jack and CAS 2020/A/7580 SIA v. Shayna Jack & SA, award of 16 September 2021 Referred to herein from time to time as the Shayna Jack decision

this person, she is swimming next to me in the lane and this was not disputed. And Professor Van Eenoo he just said well, how big is the swimming pool you know and that seems to me a completely different question.  was swimming in the swimming pool, whether it was, and resulting in a finding against her and having a contamination or the substance ultimately ending up in her body.

244. In either event, and irrespective of the nature of the cream which was used, it was not possible for that to have been the source given that one of the experts, Prof van Eenoo, stated that the Athlete would have had to swallow gallons of the pool water for that to have been a possibility, and still an unlikely one at that.

245. The Athlete's claim (a half - hearted one at best) that the metabolite may have entered her system through her skin when swimming in a swimming pool which was shared with someone who had applied some unspecified hormone cream to her body was also not established.

246. Again, the Athlete's own expert, Professor Kintz, as well as Professor van Eenoo, "called" by SAIDS, are in agreement that this theory is highly unlikely, if not impossible – even assuming all variables in favour of the Athlete [23] – and, further, not supported by the literature. [24]

247. No real facts of with any level of specifics to support this theory are advanced by the Athlete either.

248. The panel is once again left with the fact that this theory was raised, and persisted with, even though on the Athlete's own argument there was no substance to it.

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23 Evidence bundle p 65 (Professor van Eenoo Answering Report).

24 Evidence bundle p 46 (Professor Kintz report dated 4 September 2023).

249. This, once again, raises the question why this was done and what the relevance of the exercise is.

250. If it was simply to prove the extent to which the Athlete went to prove non – existent possibilities, why was this even necessary?

251. A poor theory / explanation is already something which undermines whatever validity there may have been in a better possible explanation, but persisting with this, when it should have been readily abandoned (and to an extent this was at first done) is to simply undermine the credibility of the Athlete, at least as far as these theoretical sources are concerned.

The consequences of not being able to prove the source

252. The consequences of not being able to prove the source and its effect on *onus* is as set out in the introduction.

253. The fact that the Athlete failed to establish how the Prohibited Substance had entered her system "*does not exempt the Panel from examining all the other facts advanced by the Athlete [as to] whether or not she acted intentionally" (*in both the sense of direct and indirect intent).

254. That is the focus of the enquiry to which we must now turn – an evaluation of the Athlete's evidence as to her general conduct – whether the Athlete has proven on a balance of probabilities that her general conduct at the time of the AAF / ADRV was such as to show did not knowingly (did not intentionally / deliberately) commit an ADRV or that she was aware of the risk, and manifestly disregarded that risk (recklessness).

255. It is accepted that if the Athlete is unable to establish how the Prohibited Substance had entered her system this "*does not exempt the Panel from examining all the other facts advanced by the Athlete [as to] whether or not she acted intentionally" (*in both the sense of direct and indirect intent).

256. If the source cannot be identified, the focus of the enquiry must then turn to the Athlete's general conduct and her claim that based on her general conduct she never did anything knowingly or recklessly which could have / would have caused her to ingest something which would then have resulted in the AAF.

257. In the panel's view the ongoing reference to the various theories as to the source, especially when the Athlete in this case had already indicated in her statement of defence that there was no merit in any of them, simply in order to show that the Athlete had tried to identify possible sources, is, at best, for the applicant a neutral factor.

258. Regard can be had in this regard to paragraph 107 of the Shayna Jack decision referred to elsewhere in this finding.

*The eighth question relates to the unacceptable prospect that guilty athletes could spend their way out of trouble by engaging in extensive post-violation investigations. Some disciplinary bodies have given weight to the intensity with which an athlete pursues inquiries of conceivable origins of the offending substance (vendors, restaurant owners, whole-sale meat suppliers, legislative reports on the unlawful use of steroids to stimulate the growth of livestock, statements of friends and relatives about their own use in the proximity of the athlete of supplements and other products – not to mention experts opining on any of the above). As with after-the-fact attempts to reconstitute the intake of*

*nourishment and health products, such supposed evidence of the lack of culpable intent is likely to suffer from an evident deficit of credibility. There is a problem in rewarding athletes for the insistence of their efforts at exculpation, and in other cases observing that the athletes "could have done more". The quality and consistency of records kept prior to the positive test are more indicative of seriousness in seeking to avoid noncompliance with the Code."*

259. The extent to which prior record keeping exists and the extent to which this assists the Athlete with her defense in this matter will be returned to when discussing her evidence under the Log Book heading.

260. An argument could have been presented (and to an extent SAIDS does so) that her persistence with what were at one stage in effect conceded as being hopeless theories is a factor which impacts negatively on her overall credibility and should count against her when evaluating the remainder of her evidence.

261. The issue of overall credibility, reliability and the probabilities will be returned to when deciding on an overall conspectus of all the evidence whether the Athlete has, in the panel's assessment, discharged the *onus.*

262. For the present, the remaining aspects of her evidence and testimony, are evaluated separately, in no particular order.

<u>The remainder of the evidence</u>

263. The athlete must prove in this regard, on a balance of probabilities, that her general conduct at the time of the AAF / ADRV was such as to show did not knowingly (did not intentionally / deliberately) commit an ADRV or that she was aware of the risk, and manifestly disregarded that risk (was reckless).

264. The athlete relies on objective facts, scientific evidence and evidence of her subjective intent, in the form of what is submitted are "compelling denials of intent" and character evidence, that "support the conclusion that she unintentionally, and in fact inadvertently, ingested the parent compound giving rise to the detection of the metabolite in her urine sample".

265. In this regard the athlete relies in part on her written statement, the statement provided by Craig Brewer, and her other witness, her friend Ms Lourens and on both her and their oral evidence as well as "testimonials" from Rafael Medak, her one time trainer, a fellow chartered accountant, and international trainer of elite triathletes with whom she exchanged contemporaneous WhatsApp messages in which she expressed her disbelief at having had an AAF (based on her being "so careful) (Evidence bundle p 359), Raynard Tissink, her local coach for many years with whom she exchanged similar WhatsApp messages subsequent to the AAF (Evidence bundle p 368 - 270) and Emile Weitz, who supplied her with S3 supplements from July 2021 after her sponsorship with Gu had come to an end (Evidence bundle pp 374 - 381).

266. The views expressed by her experts, Prof Marc Blockman and Dr Pascal Kintz, who filed expert reports at her request, are also relied on.

267. The athlete presented evidence of her own and of these witnesses of *inter alia* her:

a. Family history, personal tragedy and resultant abhorrence of all drugs;

b. Professional career as a chartered accountant and senior executive with a leading South African banking institution;

c. Impressive sporting record spanning a career of some decades (the athlete is currently in her early forties) during which she was meticulous in *inter alia* observing her obligations as a member of the elite testing pool;

d. Own performances – there having been no improvement or suspicious spike in her performance over some years

e. Past ignorance of the prohibited substance

f. Current knowledge of its ineffectiveness and outdatedness, the argument being that if she planned to use steroids to enhance her performance she could have used something more modern, more effective and presumably more readily obtainable (how that would gel with her being subjected to regular testing is not clear).

g. The great difficulties she would have experienced in acquiring Mestanolone, had she been minded to do so [25]

h. Confidence in the credentials of the S3 product which she used, and which were all tested (supported by the statement of Mr. Weitz and the fact that other well-known athletes also made use thereof)

i. More recent research which shows that the substance would have had no immediate benefit, would have been counter - productive in that she tried to keep her weight down, not build muscle and would in fact have presented adverse risks to her health

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[25] The Athlete's Statement, para. 115 to 117, Evidence Bundle pp. 114 to 116 – also see annexure "AW18" to the Athlete's Statement, Evidence Bundle pp. 239 to 249 and annexure "AW24" to the Athlete's Statement, Evidence Bundle pp. 261 to 265

j. Polygraph results which indicated she had honestly answered all the questions posed to her during that test

k. Own and Mr Brewer's hair test results

l. Log book

m. Being part of the testing pool

n. Subsequent clean test

o. Contemporaneous Whats App and other communications

p. Her careful use of different apps – ADAMS, SAIDS – over the years to ensure that she does not use a prohibited substance

q. The character evidence of numerous witnesses, both Mr Brewer and Ms Lourens and those who submitted statements (both commissioned and non - commissioned, SAIDS having accepted that all statements can be admitted in evidence as proof of the contents thereof, whilst being able to argue the value and relevance thereof to the specific charge

r. Sizeable investment in tests, investigations, expert reports and legal fees

s. Clear remorse

268. The athlete had the nutritional supplements, products and medication which she took in the weeks leading up to the test of 12 November 2021 all comprehensively tested. The nutritional supplements had been supplied by S3, which she and Mr Brewer pointed out had what was claimed to be "impeccable

credentials" supplying a number of high-profile athletes across the sporting spectrum. That testing all confirmed that the S3 products were 'clean'.

269. The athlete also relied on her professional career as a chartered accountant and certified financial analyst, both careers which require the highest degree of honesty and integrity, along with her high-profile position with ABSA Investment Bank as further proof of her character in order to prove that she did not knowingly ingest the prohibited substance.

270. The athlete gave evidence of how she abhors all forms of doping and cheating; how she has an especially strong detestation of drugs due to her mother having died of a drug overdose when she was young; how she had never even heard of Mestanolone or any related substance prior to learning of the AAF and would also have had no idea as to how to acquire it.

271. Her evidence at p 37 of the transcript is an example of her evidence in this regard. In response to the question 'And what is your response to being faced with such an accusation and such an attitude from SAIDS?' she states the following:

> MS WATKINSON: I just, like I said I believe in what they do. I believe in the principle of clean sport and it actually breaks my heart that anyone in this room can think otherwise. I have been told by friends and family that those that know me know my character and they wish that everyone in this room could know me and so I find it deeply, deeply hurtful that anyone could think anything other than those characteristics that those that know me know me to uphold in my life, never mind in my sport. It is part of who I am and a number of times I have believed we are all here to fight and find for the truth and it certainly does not feel that way.

272. The athlete claims to have been meticulous in complying with her obligations under the Rules in this regard, to the extent that even when in hospital, after

having been badly injured by a taxi which her knocked her over during a training run she made sure that SAIDS was informed of the fact that she was in hospital, and shortly thereafter, when she had to undergo an emergency operation, she enquired of SAIDS whether she needed to apply for a TUE.

273. Her evidence at p 17 of the transcript in this regard reads:

> MS WATKINSON: On the 12th of December 2020 I went out for a run and I was hit by a taxi and I was rushed to ICU. And when I got out of theatre I had asked my partner Craig to please inform SAIDS of my whereabouts because I did not know how long I was going to be in hospital for at that point in time. Subsequent to that I also did not know what they were putting me through the emergency surgery and I got a list from my doctor to send to SAIDS if I needed to request a retrospective TUE.

274. Subsequent to her AAF, and having learned more about Mestanolone, it is clear to her that it would have made no sense for her to have ingested it given its detrimental consequences for women and the lack of benefits for someone in her position. At p 36 of the transcript one sees her having said

> …. this substance is so ridiculous …[indistinct] benefit high toxicity levels for women causing hair loss and sterility I would have to be completely insane to consider it and I did not even consider to be worried or concerned given the times I have been tested and the manner in which I act."

275. She also gave evidence of how she has always taken pride in being part of the Testing Pool and gone out of her way to ensure she was fully compliant with all her testing obligations; how she has always been very careful as to what she consumes; how, had she been in any way concerned about the possibility of an AAF, she could easily have avoided the out-of-competition test; and how she has

exhausted every conceivable possibility (at considerable time and cost) to attempt to establish how the metabolite could have entered her body.

276. She did everything in her power to obtain evidence which would provide further objective evidence as to her innocence. The fact that she was unsuccessful in her endeavours should not be held against her, the argument proceeds. It is proof of her innocence.

277. It was also with a view to discharging this *onus* that the athlete submitted the evidence of witnesses who attested to her character and integrity, the discipline of her training regime and her care with regard to supplements, and her attitude to doping and her response on learning of the AAF, and also explained how it was simply inconceivable that the athlete had ever knowingly taking a prohibited substance.

278. Those witnesses were the athlete's partner, Craig Brewer; her close friend and training companion, Shannon Lourens, both of whom gave oral evidence and her trainer at the time, Rafal Medak; her former trainer, Raynard Tissink; and the supplier of the S3 supplements that she took in the second half of 2021, Emile Weitz, the latter group providing written statements.

279. SAIDS did not ask to cross-examine any of those witnesses, though Mr Brewer and Ms Lourens nevertheless chose to present oral evidence, were thus made available for cross-examination and in the case of Mr Brewer, in particular, was indeed cross – examined.

280. A polygraph test, confirming her protestations of innocence, which test was subjected to review by SAIDS, and found to have been conducted properly, was also relied on by her as proof of the fact that she was telling the truth, both at the time of the test and in this hearing.

281. The sample of 21 November 2021, which did not return an AAF, and the unlikelihood that she could have calculated when to take the banned substance, had she cheated, were further factors to be placed on the scale, according to the athlete, tilting the ultimate finding firmly in her favour, the submissions continued.

282. She further relied on the analysis of her hair samples, which confirmed the absence of any indication that she had taken the substance repeatedly or over any length of time, or that this was done in any pharmacologically beneficial amounts.

283. The low level at which the substance was detected in her urine sample [26] was relied on as proof of her innocence, as well as the lack of benefit for her as an endurance athlete from using a steroid, and the fact that the prohibited substance in question would in fact have been detrimental to her, [27] weight loss, as opposed to any increased bulk, being one of her objectives in training.

284. The absence of significant or inexplicable improvements in her results over the period from 2015 to 2021, as well as the absence of any improvement in performance in the triathlon which followed shortly after the collection of the sample which tested positive;[28]

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[26] The Athlete's Statement, para. 85 to 87, Evidence Bundle pp. 103 to 104, also see Dr Kintz's email, annexure "AW15" to the Athlete's Statement, Evidence Bundle 222 to 223, and Dr Kintz's report, annexure "AW16" to the Athlete's Statement, Evidence Bundle pp. 224 to 223

[27] An issue which has become quite contentious between the parties' respective expert witnesses. Also see the Athlete's Statement, para. 88 to para. 103, Evidence Bundle pp. 104 to 110

[28] The Athlete's Statement, para. 104 to 105, Evidence Bundle pp. 110 to 111, also see annexure "AW21 to the Athlete's Statement, Evidence Bundle pp. 252 to 253

285. The ease with which the Athlete could, with impunity, have evaded the test conducted on 12 November 2021, if she wanted to;[29]

286. She further relied on the absence of significant or inexplicable improvements in her results over the period from 2015 to 2021 to prove her claim that there was no intentional or reckless ingestion of the metabolite.

287. She claims further, as set out above, that the ease with which she could have evaded the test conducted on 12 November 2021, if she wanted to (although it was conducted at 21h00 in the evening when she would have been expected to be at home) also counts in her favour. As does her otherwise clean doping record in many in- and out-of-competition tests and her general compliance with all SAIDS protocols and testing requirements. [30]

288. The steps she has taken, at significant cost to her (and Mr Brewer) (some R1,5 million by the end of the hearing before us), is further relied on as proof her innocence, the argument being that with her near the end of her athletic career, she would have been foolish to incur all these expenses if the outcome thereof, to her knowledge, could have confirmed that which she already knew, namely that she had intentionally or recklessly ingested the prohibited substance.

289. Some of this evidence is evaluated more fully hereafter specifically.

The Athlete's general abhorrence of drugs

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29 The Athlete's Statement, para. 106 to 109, Evidence Bundle pp. 111 to 112 – also see Articles 2.3 and 2.4 of SAIDS's 2021 Anti-Doping Rules

30 The Athlete's Statement, para. 110 to 114, Evidence Bundle pp. 113 to 114 – also see email from Craig Brewer, annexure "AW22" to the Athlete's Statement, Evidence Bundle pp. 254 to 256, and annexure "AW23" to the Athlete's Statement, Evidence Bundle pp. 257 to 260

290. The Athlete came across as being sincere and credible in her account of her personal and professional circumstances.

291. She explained how, because her mother died from a drug overdose when she was young, she has from a young age had an abhorrence of drug taking.

292. She also explained how cheating of any form is repugnant to her, and how both in her professional life (as a chartered accountant and in banking) and in her athletic career, she strives to uphold the highest ethical standards.

293. Her professional career as a chartered accountant and certified financial analyst, which requires the highest degree of honesty and integrity, along with her high-profile position with ABSA Investment Bank were further relief on as proof of her honesty and general integrity. [31]

294. Her claims of having an abhorrence of drug use and cheating in sport generally, as in life, was supported by her own evidence of her personal loss at a young age, the character references of the witnesses called by her and their evidence of her conduct in general and in the specific circumstances to which they had been witness. This is all accepted as being true. The panel finds the Athlete to have been sincere and credible in her evidence with regard to a general abhorrence of drugs.

295. The objective, expert testimony, referred to below is furthermore accepted as proof of there having been no long term or sustained use of any prohibited substance.

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[31] The Athlete's Statement, para. 60 to 62, Evidence Bundle pp. 95 to 96 This fact could also point to the lengths to which she has gone in order to prove her innocence in these proceedings.

296. The question the panel nevertheless needs to decide is whether the Athlete has disproved the probability, on balance, that there may have been a single intentional or reckless use of some substance which resulted in the admitted AAF.

The hair tests

297. Both the Athlete's hair and that of Mr Brewer were tested. This revealed no long-term use of any prohibited substance.

298. The Athlete argued that the analysis of her hair samples, confirming the absence of any indication that she had taken the substance, or had taken it repeatedly, or in any pharmacologically beneficial amounts, all supported her claims of innocence. [32]

299. SAIDS suggested that these tests may not have been that reliable as a result of possible damage to the Athlete's hair through hair straightening or because of intervening haircuts of Mr Brewer.

300. In the former case the Athlete gave evidence that the hair samples were taken from other areas to those where she had had hair treatment.

301. In the latter case not only hair from Mr Brewer's head was tested.

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[32] The Athlete's Statement, para. 76 to 84, Evidence Bundle pp. 100 to 103, read with the hair test analysis reports, attached to the Athlete's Statement as annexures AW13 and AW14 to the Athlete's Statement, Evidence Bundle pp. 212 to 221

302. SAIDS' criticisms of the hair sample tests [33] were submitted by the Athlete to have been "inapposite".

303. For example, SAIDS was criticised for repeating Prof van Eenoo's "*inexplicable error*" that "*only a single strand of hair was tested*":[34] when it was clear from Prof Kintz's report that there were more extensive tests. [35]

304. SAIDS had premised its argument in this regard on the submission that as part of the hair sample analysis by Professor Kintz Professor Kintz had tested "a single strand of hair" for both Mestanolone and Methyl-testosterone and found neither substance to have been detected. [36]

305. Whether a single strand was tested or more were tested is not really relevant, the point is neither substance was detected in any of the tests.

306. It was accepted by the Athlete (and her expert, Prof Kintz) furthermore that the hair tests could not and did not "*nullify the urine results*" (hence, the Athlete's acceptance of the ADRV).

307. It is also not disputed that hair tests are not entirely accurate, as they may not detect lower dosages.

308. It was submitted the hair testing was nevertheless of "*some evidential value when the question of whether the Athlete acted intentionally, or with reckless intent, is considered*".

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33 Pleadings Bundle pp 34-36 (SAIDS' Submissions para 3.20).

34 SAIDS' Submissions para 3.20.5, as well as para 3.20.1 [Pleadings Bundle pp 34-35].

35 See e.g,, Kintz's Statement of 26 April 2023 at page 2 [Pleadings Bundle p 26].

36 Evidence bundle pp 6 *et seq* (Professor Kintz Report dated 4 June 2022).

309. For instance, the care that the Athlete took to preserve her hair after being advised of the AAF in order to ensure that a hair test was as accurate as possible is a relevant factor when assessing whether the Athlete is someone who cheated in this instance.

310. The criticism of the quality of the hair sample (provisionally made in the SAIDS' Preliminary Submissions[37]) is accepted not to have been factually correct: the only hair treatment in the relevant period would appear to have been a "Brazilian" involving hair straightening at the front of the Athlete's head, whereas the hair test was done on a clump of hair taken from the back of her head.

311. It is also accepted that the hair samples tested were sufficiently long to comfortably cover a relatively extensive period prior to the test which resulted in the AAF. [38]

312. The Panel accepts further the evidence of the experts that the absence of any trace of the prohibited substance in the hair sample supports, and is consistent with, the conclusion that there was only a small exposure to the prohibited substance which led to the relatively low which was detected in the urine sample.

313. But, in the Panel's view, none of this excludes the once off or irregular use of a substance containing that which was detected in the Athlete's sample and does not *per se* point to unintentional or non – reckless use of a substance which gave rise to the AAF.

[37] Pleadings Bundle p 36 para 3.20.8.
[38] Pleadings Bundle p27 (Prof Kintz statement).

314. Even if, as Prof Kintz stated, the class of drugs for which the Athlete tested positive "*must be consumed repetitively to obtain a pharmacological effect*" [39] given the Athlete's proclaimed lack of knowledge of the exact benefits of the prohibited substance this fact does not exclude the once – off intentional or reckless use of prohibited substance.

315. A small dose is, as Prof Kintz has also stated, consistent with, and "*possible evidence of*" contamination. [40]

316. And although Prof Kintz states: "*Contamination by a 'smoothie' is possible, although not firmly demonstrated*", [41] on the Athlete's own experts' evidence contamination of some other undisclosed or untested supplement, which was intentionally or recklessly used, may also have been a probable cause.

317. The low dosage of the metabolite in the Athlete's sample (as confirmed by Dr Thieme) [42], the Athlete's hair test results, and her subsequent in-competition negative test on 21 November 2021 (nine days after the sample collection which resulted in the positive out-of-competition test) are, according to the Athlete, all consistent with contamination.

318. But if that was so, in the absence of proof of the source, inadvertent ingestion in not the only probable inference to be drawn from these facts.

319. Intentional or reckless ingestion of some undisclosed supplement which was contaminated and which has not been tested by the Applicant, could as readily have been the source of the AAF.

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39 Pleadings Bundle p 47.

40 Pleadings Bundle pp 45 & 47.

41 Pleadings Bundle p 47.

42 See Pleadings Bundle pp 23-24.

320. The point is that none of this evidence nullified the urine results.[43]

321. Similar concessions to those made by Professor Kintz in this matter, in the matter of *Houlihan*, caused the panel there to be circumspect of the hair analysis results.[44]

322. The Athlete, when discussing Mr Brewer's negative results, also admitted that the hair tests were not conclusive when substances are taken in lower dosages.[45]

323. The Athlete's evidence that she would not have intentionally taken the prohibited substance, since she tried to keep her muscle mass down, coupled with the fact that hair would only test positive for the substance if there had been ongoing use thereof, together with the fact that she would be subjected to regular testing as part of the testing pool in which she found herself, all points to there not having been intentional or reckless long term use of the prohibited substance.

324. It still, however, does not exclude once off or short term intentional or reckless use of a substance which gave rise to the AAF.

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43 International Standard for Laboratories as cited by Professor van Eenoo In his Initial Report (Evidence bundle p 52). This is also recognised by the Society for Hair Testing as referred to by Professor van Eenoo in his Answering Report (Evidence bundle p 64) and by Professor Kintz in his Report dated 26 April 2023 (Evidence bundle p 31).

44 *Houlihan* at para 134 *"The Panel finds that neither the hair analysis nor the polygraph results are sufficient for the Athlete to rebut the presumption that the ADRV was intentional. . . . In addition, Dr Kintz admitted that he is not capable of specifying how intense the exposure of the Athlete to 19-NA must have been in order for the latter to be detectable in the context of a hair analysis test."*

45 Evidence bundle p 122 (Athlete's affidavit at para 136). This is how also how Mr Brewer understood the position - Evidence bundle p 403 (Mr Brewer's affidavit at para 35).

325. The Panel concludes that the hair sample analyses results (of both the Athlete and Mr Brewer) proves, on balance of probabilities, no long – or medium - term usage of a prohibited substance by the Athlete or Mr Brewer.

326. The experts however indicated that if small amounts were ingested, or if it was just a once off use, that will only be detected in the urine sample and not in the Athlete's hair.

327. The hair tests therefore do not disprove the possibility of a single use of the prohibited substance for which there was the admitted AAF.

328. Mr Brewer who claimed he had been using Ligandrol 2 - 3 times a week and had consumed the whole canister which he had purchased by the time of the kissing incident, should have returned a positive hair test, if there had been a prohibited substance. Given that Mr Brewer's test suggested he was buying fake capsules with no medicinal or other value (other than possibly that of a placebo), the hair test, on which the Athlete also relied for the kissing theory, was therefore of no assistance whatsoever in her proving that which she needed to prove and can therefore be excluded from an evaluation as to whether she discharged the *onus* which was on her.

329. The Panel is therefore unable to conclude, based on the hair tests, that the Athlete has discharged the *onus* of proving that there was not what may have been a once off incident of intentional or reckless use of a substance which caused the admitted AAF.

<u>The log book</u>

330. The Athlete relied on a log (in the form of a spreadsheet) of her past activity and food and supplement consumption as proof of her having taken every precaution

and not having intentionally or recklessly done something which would have caused the AAF.

331. That log consisted in part of an electronic diary / record of activity downloaded from a Garmin App, the accuracy and authenticity of which could not be (and was not) challenged.

332. Added to that record, on the bottom part of the Excel Spreadsheet, was that which the Athlete was able to reconstruct from memory, credit card slips and other records of past expenses as to her consumption of food and supplements on the various days which corresponded with the electronic diary.

333. The mere fact that the bottom part of the log was a reconstruction, lends itself to possibility that the Excel Spreadsheet as a whole may have been inaccurate or incomplete, as far as the information on the bottom half of the spreadsheet went.

334. The panel holds the view that an Athlete at the level of the Athlete, training as she did, keeping track of her weight and diet as closely as she claimed she was, making use of a range of supplements from a supplier she trusted as being reputable, would have kept a more detailed daily logbook, even if only a contemporaneous handwritten logbook, of more than just her training regime.

335. The activity schedule appears to have been compiled by the Athlete *ex post facto* despite knowing that as a part of the registered testing pool she could be tested at any time and that a contemporaneous record may be of assistance.

336. Further, certain actions, for example, consuming smoothies containing an added protein supplement without doing any prior investigation as to the brand / its reliability and / or reputation indicate that perhaps the pre-ADRV conduct on the part of the Athlete were not as cautious as it appears to be in recollection.

337. Had a contemporaneous log book been kept and had that been provided to the panel, there would have been less room for argument. The list of food and supplements intake which was provided was *ex facie* the log itself not a complete and comprehensive list.

338. The following supplements are recorded in the Athlete's logbook for the date of the test (which led to the AAF) that of 12/11/2021:

S3 Tabs
S3 Energy drink
S3 Recovery shake

339. The supplements recorded on the Doping Control Form for that same date are:

Magnesium S3
S3 Recovery shake
S3 Excel
S3 VA9 Caps

340. It is not clear whether these supplements are all the same.

341. Those reflected on both appear to be a range of different products, intended for daily use, depending on what training the Athlete was doing.

342. Whatever discrepancies there may have been in this regard, cannot be relied on to make any adverse finding against the Athlete as to the reliability and accuracy of these records are concerned.

343. The Athlete claimed that she was meticulous, thorough and fastidious in complying with the anti – doping protocols and keeping an eye on that which she consumed or ingested.

344. The fact that she was required to reconstruct the coffees, smoothies and meals that she may have had, and the fact that the record of the supplements from S3 she took may not have been complete or necessarily entirely accurate (in contrast with her training record), does not support her contention in this regard.

345. It may not of its own serve to disprove her contentions as to her intention or recklessness, but do not support her claims in this regard either.

Reporting her whereabouts

346. The Athlete claims she was "almost obsessive" in reporting her whereabouts to SAIDS and complying with her testing requirements as part of an elite athlete's testing pool (something she was proud to be part of).

347. She relies on her emails at "AW22" and "AW23" [46] as bearing graphic testimony to that, as does her evidence of constantly updating her ADAMS app and her use of the SAIDS app when purchasing medication. [47]

348. The fact of the matter is that when an athlete is part of an elite "Athletes Testing Pool" that is what is expected of the athlete - to keep SAIDS always informed of his or her whereabouts. The fact that the Athlete complied with her obligations in this regard is neutral.

[46] Pleadings Bundle pp 254-259.

[47] Pleadings Bundle p 398 (Brewer statement paras 14 to 16).

349. At the same time as claiming to be proud of being part of the testing pool and stating that she meticulously complied with her obligations in this regard, the Athlete also argues that she been in any doubt as to whether the test results from the out-of-competition test on 12 November 2021 would reveal an AAF, she could simply have missed that test, with apparent impunity.

350. But the fact of the matter is that that test was done out of competition, at her home, at 21h00, in the evening, and presumably unannounced.

351. It was also argued that if she knew she had done something wrong she would have not opened for the DO and would have wait a few more days for the prohibited substance, as little as there may have been, to wash out her system. Instead she "gladly opened" the door to the DO and gave a specimen.

352. These arguments to do not benefit her. That for which she seeks credit, is that which was expected of her in any event.

353. The fact that she could have been dishonest, but was not, does not support the inference that her claims of not having intentionally or recklessly ingested something which led to the AAF are to be accepted without more. It simply raises the spectre of her not having been concerned about what turned out to be a small amount of the prohibited substance still in her body, or her not having been able to avoid the unannounced out of competition test which then led to the AAF.

The Doping Control Forms

354. The panel has doubts as to the Athlete's claim (made on her behalf) that the Doping Control Form which she completed on the day of the test, which gave rise to the AAF, was "ambiguous" in that it did not clearly provide whether all

supplements which had been taken in the previous 7 days needed to be listed (with the date on which each of those supplements were taken to be recorded in the date column) or whether only those which were taken on the date of the test needed to be listed.

355. The Athlete claims she only listed those which were taken on the date of the test.

356. At p 83 of the transcript she explained the position as follows:

> MR KEMP: So when you say supplements taken during the past 7 days is that, would that be, are they asking for a complete list or only the last time that you took it?
> MS WATKINSON: They ask for the last 7 days and then the date that they require is the last time that you took it.

357. When asked at p 84 and following why certain substances which she had used in the preceding 7 days of the test were not included in the form or on an annexure thereto if there was insufficient space to list them all, the answers ranged between gels not being supplements and not needing to be recorded, to a difference between in – competition and out – of – competition testing, to her having been tired on the occasion of the in – competition test (when the gel had been listed), as opposed to the late night out of competition test (when the gel had not been listed on the form). The exchange went as follows:

> MR KEMP: And then, so that has found its way onto the DCF form but not into the schedule. Then there appear to be substances which you had consumed in the preceding 7 days but then that did not make their way onto the DCF form.
> MS WATKINSON: Which were those?
> MR KEMP: On the 10th of November you say the third line, 4 x Maurten gels. On the 6th of November as well, and that is about mid page of the consumption it says S3 Excel tabs, 4 x Maurten gels, 2 x fudge and it is impressive that you can remember the fudge, but it is the

Maurten gels that I am ...[intervenes]. ……

MR KEMP: Asking, referring to. And is it correct to say that those then do not make their way onto the DCF form?

MS WATKINSON: They are not included on the DCF form, no.

MR KEMP: And why did you not include them?

MS WATKINSON: If I have to go to recollection the definition of supplements can be broad or narrow. You know, it is anything that, as I understand it is more powder form than not. So for example you know do you include an Energade as a supplement, do you include Coco-Cola as a supplement. Where does that start or end? Maurten gels are a gel, we have subsequently tested it just to be exhaustive and as comprehensive but I would have considered that nutrition as opposed to a supplement. There is, when they come and test you there is no definition of supplement and so this is to the best of my knowledge the supplements that I was taking. And also ...[intervenes].

MR KEMP: You do not, sorry, just to be clear, you do not consider Maurten gel to be a supplement that needs to be listed on the doping control form?

MS WATKINSON: I clearly did not at that time, no.

MR KEMP: Well, I mean so obviously on the day you did not. I mean do you now?

MS WATKINSON: Since going through this process I feel like I should have included the sugar I have put in my coffee on this list.

MR KEMP: But Ms Watkinson, if you then over the page from 129 to 130 we have got another doping control form. In this case it is from the ironman event where you were tested on the 21st of November. And if you go to the supplements that are listed there, the third one drunk Maurten gel. Why would you have included it there if you did not consider it a supplement?

MS WATKINSON: On this day at this race I included everything I had had that day.

MR KEMP: So notwithstanding how meticulous and careful you are or claim to be, actually what ends up on the doping control form is what you decide to put there on the day, is that

correct?

MS WATKINSON: Not at all. For this race, given it was a race, given that that is the products that is provided on race course I put everything that I consumed on the day to be exhaustive as opposed to be what I believe is a supplement or not.

MR KEMP: But Ms Watkinson, what I am going at is you are exhaustive on the race day but you are not exhaustive outside of it. You sit here and proclaim to be meticulous and careful. You say that in respect of on races you are exhaustive. But the evidence, contemporaneous evidence of the out of competition test suggest that you are not exhaustive and I am simply asking the question which is it, are you exhaustive or are you not?

MS WATKINSON: I believe that I am accurate on this out of control test. I would have to have put in every meal that I ate to be comparable to the in competition test of what I placed here.

MR KEMP: But how does that hurt you to do that?

MS WATKINSON: It does not hurt me to do, to put in a banana or almond, cappuccino.

MR KEMP: Ms Watkinson, I am not, I do not mean to be facetious, I am not talking about a banana and fruits and that. That is not what the document requires of you. The document says, ask you to list medication, nutritional supplements. In one case you have said Maurten gels are supplements which you consumed on the day of the race. In another context previously you have not categorised it as such. I will ask you again, why did you not include the Maurten gel on the day of the out of competition test?

MS WATKINSON: I believe I have answered that in saying that a supplement is what I believe is powder form, for example a coco-cola otherwise or an Energade would also be considered a supplement. To be fair, at this point anything can be a supplement from what I understand. I also believe at the time of taking these tests you need to take them into consideration. The at home competition I was woken up, I did it. In the in competition I have just finished an ironman, I am exhausted, I am just putting down everything I can possibly think of on that day.

358. The form itself, however, is clear – all supplements which had been taken during the preceding 7 days needed to be listed, and if there was not enough place on the form itself, these (with their various dates of consumption) needed to be listed on a separate, additional page.

359. Any Athlete with the experience of the Athlete, performing at the level at which she performed, and being regularly subjected to testing would have known (or at least can be expected to have known) that that is what the protocol and form required – all supplements which were used in the 7 days preceding the test needed to be indicated on the form, and the date(s) on which each of them was used during that period also needed to be indicated. And whether the supplement was in liquid, tablet, powder or gel form made no difference.

360. Her denial that she knew that this was required rings hollow – both in the light of that which the Doping Control Form itself clearly provides for, and in the light of her level of experience as an Athlete.

361. So do the contradictions in her explanations as revealed by the extract from the transcript above.

362. As an Athlete who is part of the SAIDS "Testing Pool" of Athletes the Athlete was clearly experienced in the Doping Process. On her own account, she prided herself on being part of the pool.

363. With reference to the Doping Control Form and specifically where the Athlete had to "List the medication and nutritional supplements taken during the last seven (7) days", the Athlete only listed the supplements she had taken on the day on which the sample was taken (12/11/2021).

364. The same goes for the DCF for the test on the 21/11/2021.

365. The panel cannot accept that on both these occasions the Athlete did not know she was required to list all supplements taken by her in the preceding seven days,

366. As an experienced Athlete and part of the "Testing Pool" the full and correct completion of the DCF should have been second nature to her.

367. The fact that the Athlete did not complete all the medication and supplements taken during the last 7 days prior to the test and her claimed lack of understanding of that which the form required of her, casts doubt as to her credibility in respect of the DCF and its accurate completion.

368. She claimed in her evidence that one of the items which was not listed on the DCF was a "Gel" which she had taken in the week before the sample. \

369. The Athlete's explanation for the omission of this was that she thought only powder form supplements needed to be listed on the DCF.

370. The cross examination at pages 85 and 86 of the transcript deals with this issue.

371. For an experienced Athlete that is part of the "Testing Pool" of Athletes", this, too, the panel finds, is not credible.

372. Additionally, her professional training as a chartered accountant and her expertise as high ranking employee of the bank would have led her, one would have thought, to correctly understand that which the Doping Control Form required of her.

373. She omitted to disclose all the supplements and medication on the DCF and her explanation for not doing so to the best of her ability is unconvincing.

374. The omissions on the DCF and her explanations in this regard are accordingly found to be factors which impact negatively on her credibility.

The 21 November 2023 – in competition test

375. The Athlete relied on her historically clean doping record and included in this the fact that she was tested again, on 21 November 2023, which result came back negative, as further proof of her innocence.

376. She argued that the Sample of 21 November 2021, which did not return an AAF, and the unlikelihood that she could have calculated when to take the banned substance, had she cheated, are, it is submitted, factors which count in her favour.[48]

377. This test was done in competition. The sample collection and result post dated the original one which produced the AAF by some 9 days.

378. The panel points that there is a difference between testing negative based on an earlier sample (before the test which resulted in an AAF), and testing negative in a later test after one which returned an AAF. The former may be indicative of a clean track record. The latter may simply be proof of trying to clean one's tracks.

379. As indicated by Professor van Eenoo, the concentration of the metabolite was already low in the Athlete's sample which led to the AAF. SAIDS argued that

[48] The Athlete's Statement, para. 68 to 675, Evidence Bundle pp. 98 to 10, and the doping control form for the test is annexure "AW2" to the Athlete's statement, Evidence Bundle p. 130, and the test report, containing the results, can be found as annexure "AW3" to the Athlete's Statement, Evidence Bundle p. 131

the metabolite is "short – lived", approximately 7 - 8 days. It is therefore not surprising that there would be no trace 9 days later. The Athlete in any event did not dispute the AAF.

380. This is not a case such as that of *Shayna Jack* where the Athlete's doping record around the time of the AAF contributed, in part, to the panel concluding that the athlete had not acted intentionally or recklessly.

381. There the CAS panel referred at para 114 to CAS 2011/A/2384 & 2386, where a CAS panel considered that negative tests the day before and the day after the positive test "*adequately corroborated the denial of intentional consumption*."

382. We were also referred by SAIDS to *WADA v Schoeman* 2020/A/7083 where the Athlete had undertaken tests preceding and after the doping test that led to the AAF, both of which were negative.

383. The clean testing after the AAF therefore in our view is of no assistance in determining whether the Athlete has discharged her *onus* of proof.

The costs of defending herself

384. The Athlete has also pointed to the huge cost she has incurred and the great lengths she has gone to in defending this case. She referred to the steps she has taken in an attempt to prove her innocence to have been taken at "significant cost (over R1 million; and in fact around R1.5 million in all), and with significant time and effort".[49] She submits that this is irreconcilable with her having acted intentionally in committing the ADRV.

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49 The Athlete's Statement, para. 118 to 122, Evidence Bundle pp. 116 to 118

385. As stated immediately below, the Athlete mounted a thorough defence with the assistance of her legal representatives, benefiting from their expertise, experience of matters such as that of Aphiwe Dyantyi's ADRV for the use of Ligatol (which is what led the Athlete to them) and relying on decisions such as *Shayna Jack* for the framework within which to present her case.

386. Whilst CAS has recognised that this could point to a sincere belief in one's own innocence, [50] the *Shayna Jack* decision dealt with the fact of extensive post-violation investigations in the following terms:

> "*Some disciplinary bodies have given weight to the intensity with which an Athlete pursues inquiries of conceivable origins of the offending substance (vendors, restaurant owners, whole-sale meat suppliers, legislative reports on the unlawful use of steroids to stimulate the growth of livestock, statements of friends and relatives about their own use in the proximity of the Athlete of supplements and other products – not to mention experts opining on any of the above). As with after-the-fact attempts to reconstitute the intake of nourishment and health products, such supposed evidence of the lack of culpable intent is likely to suffer from an evident deficit of credibility. There is a problem in rewarding Athletes for the insistence of their efforts at exculpation, and in other cases observing that the Athletes "could have done more". The quality and consistency of records kept prior to the positive test are more indicative of seriousness in seeking to avoid non-compliance with the Code.*"

387. The lengths that the Athlete has gone to try to clear her name – including the bringing of an interlocutory application in order to obtain the sample which had resulted in the AAF, so that a DNA test could be done in order to confirm that it

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50 *Schoeman* at para 97.

was indeed her sample – is relied on to argue that if she knew all along that she had ingested the prohibited substance, all this trouble and expense would have been completely counter-productive, and absurd, since it would only serve to confirm SAIDS case against her.

388. Ultimately that was the result of this further test.

389. The request had been brought about by a suspicion that SAIDS had not followed the correct chain of custody protocols. The steps which were taken in this regard are equally consistent with an intent to disprove the SAIDS case against her by challenging the authenticity of the sample collection. If it was not her sample, the case against her may have collapsed.

390. The fact of the DNA test, which then confirmed that it was her sample, is in the Panel's view simply consistent with her general conduct of going to great lengths to try and defend herself against the ADRV charge. It did not and does not serve to prove her innocence.

391. It was also argued that proving her innocence had "little upside for the Athlete, who does not earn a living from the sport, and could much more easily and conveniently have agreed a confidential case resolution and quietly stepped back from triathlons with a plausible excuse".

392. That does not address the "upside" for the Athlete in being able to protect and preserve her professional reputation, and that as sport star, if she were able to inform people that her suspension was based on a technical, strict liability, provision of the Rules, and that she was effectively acquitted of any intentional, reckless, dishonest act of cheating, with the result that the period of suspension was reduced by half.

The *Shayne Jack* comparisons

393. The Athlete relied heavily in her own defence on the decision of CAS in the matter of the Australian swimmer Shayna Jack, who, presenting similar evidence to that of the Athlete in this matter, was able to persuade the majority of the appeal panel in the CAS decision of the following.

394. The majority concluded "*that it will never be known how the Athlete came into contact with the Prohibited Substance, but the hypothesis that she did so innocently seems on balance more likely than that she either intended to take this Substance or was recklessly oblivious to the risk of contamination in the course of her activities – although this second conclusion is reached only by a majority of the present Panel.*"

395. The Athlete submitted her case is stronger than that of Shayna Jack, a professional swimmer who was part of Australia's national swimming team.[51]

396. Just like Jack, the Athlete pointed out she too had been unable to trace the source of the prohibited substance.

397. She therefore, like Jack, [52] had to speculate and hypothesise.

398. As the *Jack* decision shows, that is not fatal to her prospects of rebutting the presumption of intent.

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51 Pleadings Bundle pp 73-77 paras 33-36.

52 See e.g., Pleadings Bundle p 70 para 31.

399. All the available evidence has to be weighed in the balance; *and none of the available evidence is consistent with intentional taking of the prohibited substance*: at worst for the Athlete the pieces of evidence are not dispositive on their own or must be treated with some caution.

400. But overall, the submission is, she has shown that there was no intentional or reckless use of a prohibited substance by her.

401. It was argued further on her behalf that in certain respects her case differed from that of *Shayna Jack,* and is, it is submitted, even stronger.

402. The Athlete cannot be criticised for the fact that, in large part, the *Shayna Jack* decision was relied on as a precedent. She cannot be criticised for mounting an in - depth and wide - ranging defence, even if, in part, it was based on that of *Shayna Jack.* Nor is it suggested that any of her own evidence was tailored to meet the *Shayna Jack* "precedent".

403. The only point to be made in this regard, is that ultimately the exercise if a factual one, to be decided on the facts of the matter as presented to the Panel and as evaluated by the Panel. The mere fact that as comprehensive a defence was presented as in *Shayna Jack,* with as much evidence, and maybe even more, cannot, however, in the Panel's view, serve as "proof" of innocence.

404. In our view the fact that a relatively large sum of money was spent on mounting a wide - ranging defence is as indicative of innocent use of the prohibited substance, as it is of a concerted and thorough effort to try and present a case which would assist her in discharging the *onus* of showing that there was no intentional or reckless use of a prohibited substance (on a single occasion).

405. In the Panel's view the fact that she may have conducted extensive and expensive investigations, many of which ultimately were either inconclusive or did not

assist her, is seen to be a neutral factor in evaluating whether the Athlete discharged her *onus* and the similarities with the *Shayna Jack* decision are instructive, but ultimately the Panel has to decide the matter before it on the facts before it.

No long term use of the prohibited substance

406. The Athlete further stated, unchallenged, that she had never heard of the mestanolone metabolite, for which she tested positive, or indeed anything similar prior to the AAF.

407. She also had a lack of knowledge of performance enhancing drugs (PEDs) generally, not even being aware of the term (mistakenly assuming, when asked about PEDs one day, that she was being asked about personal electronic devices).

408. The Athlete's reaction to the AAF at the time in personal WhatsApp messages with her coaches, and their incredulity at the test results, were relied on as being corroborative of her denials.

409. It is accepted that these WhatsApp exchanges provide "a frank and unfiltered picture of the Athlete's and the coaches' thoughts and views" as expressed by them at the time in the exchanges.

410. These proclamations of innocence at that time cannot be given any more weight than that which the Athlete and her witnesses submitted in evidence to this Panel, for to do so would be to suggest that that which is proclaimed later could be an *ex post facto* attempt at fabrication.

411. By the same token, much of that which was stated in evidence during the hearing cannot be afforded any less weight insofar as aspects thereof may not be capable of corroboration with reference to contemporaneous records, unless of course something is to be made of the absence of contemporaneous records, an aspect the Panel will return to when discussing the Athlete's "log book".

412. The contemporaneous expressions of shock, disbelieve and surprise at the AAF are accepted to have been exactly that – they support the evidence of the Athlete before the Panel. As does the character evidence of her witnesses, which is discussed immediately hereafter.

Character evidence

413. What remains is a denial, coupled with the evidence as to the Athlete's good character and historical attitude toward anti-doping given by both the Athlete herself, her partner, as well as her coaches, past and present, and her training partner

414. It is accepted that the various witnesses all hold the Athlete in the highest regard and were as shocked, as she claims to have been, to discover the AAF given that this was totally out of character.

415. The Athlete's partner, Craig Brewer, and a very close friend and training partner, Shannon Lourens, gave evidence in person and were subjected to cross-examination.

416. Mr Brewer testified to the Athlete's character and integrity. He also explained (and gave illustrative examples about) how careful she has always been when it comes to avoiding ingesting potentially contaminated or prohibited substances,

as well as making sure that SAIDS is aware of her whereabouts in case they want to test her.

417. Mr Brewer described how the Athlete had reacted to the notification of the AAF. He confirmed that the Athlete was not only shocked, but inconsolable, as well as that she had no idea about the substance for which she had tested positive.

418. Mr Brewer then recounted how he believed that he could well have been the cause of the AAF, as a result of taking the prohibited substance Ligandrol around the time of, and shortly before, the out-of-competition sample collection on 12 November 2021. He stated that it, to his mind, it seemed more than coincidental that a Springbok rugby player had tested positive for a similar prohibited substance after using the same supplement. His evidence as to this having been a possible cause for the Athlete's AAF is dealt with above where dealing with the kissing hypothesis.

419. Shannon Lourens provided another informed endorsement of the Athlete's integrity; her commitment to honest endeavour and hard work; and her repugnance of cheating of any kind. She also testified as to how careful the Athlete is with regard to what she drinks, eats or ingests, and how devastating the ADRV has been for the Athlete. According to Ms Lourens, it was inconceivable to her that the Athlete had intentionally cheated or recklessly ingested a prohibited substance.

420. Further evidence was adduced by the Athlete through witness statements from her former coach, Raynard Tissink; her coach at the time of the AAF, Rafal Medak; and the founder and owner of the "S3 Fit" brand, which develops nutritional supplements used by the Athlete, Emile Weitz.

421. The WhatsApp exchange with her coach (Rafal Medak) almost immediately after the sample collection of 12 November, [53] as well as the subsequent exchanges with Mr Medak and her former coach, Raynard Tissink, [54] also revealed how they were all supportive of SAIDS and in no way inclined to cheat or conceal.

422. It is accepted that the Athlete was not a habitual or long term user of prohibited substances and that this stand alone AAF was out of the norm, and surprisingly so, for all concerned.

423. The evidence of the Athlete's good character, absent any further concrete evidence rebutting the presumption of intention or recklessness, of its own cannot, however, be determinative of the matter and is but one factor to be considered.

424. CAS Panels have treated an Athlete's denials and character evidence with circumspection. The Panel in *Shayne Jack* for example held: "*Arbitrators have repeatedly stated that protestations of innocence are the "common coin" of appellants irrespective of their actual guilt or innocence. In other words, the guilty are just as likely as the innocent to express surprise, disbelief, and a profound sense of injustice. Therefore bodies that adjudicate such disputes can expect to hear adamant denials of guilt, affirmations of a life-long commitment to fair play and a loathing of doping, and the expression of consternation at a positive test. This "common coin" should not, it is rightly said, necessarily be taken at face value.*"[55]

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53 Pleadings Bundle p 357 para 21.

54 Pleadings Bundle pp 358-360 and pp 367-370.

55 *Jack* op cit note **Error! Bookmark not defined.** at para 101.

425. The NADP in *Kaye*, [56] further criticised the extent to which some Panels, including those in *Jack*, had relied on the demeanour of a witness stating that it was, ultimately, an unreliable tool. [57]

426. Although the Athlete came across in giving her evidence as being sincerely remorseful, this is to be weighed together with the other evidence adduced by the Athlete.

Concentration of the metabolite in the sample

427. The Athlete's experts, Professors Blockman and Kintz, are of the view that given the low concentration of the metabolite in the Athlete's urine, its presence is likely due to contamination. [58] Professor Kintz, further, relies on the negative hair sample tests to reiterate this conclusion. [59]

428. SAIDS' expert, Professor van Eenoo, has cautioned against using this low concentration to draw any conclusion regarding the use of the Prohibited Substance. [60]

429. In his Initial Report, he indicated that "*Concentrations found depend on multiple factors, whereby dose taken, time between administration and collection, as well as urinary flow and other environmental effects make it fully impossible to make a scientific valid statement as too many parameters are unknown*."

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[56] *UKAD v Kaye* SR056/2022.

[57] Ibid at para 35.

[58] This argument echoes the arguments made in *Jack*

[59] Evidence bundle p 61 (Professor Kintz Answering Report). We have dealt with the hair sample analysis elsewhere in this finding.

[60] Evidence bundle p 51 (Professor van Eenoo Initial Report).

430. Professor van Eenoo goes on to examine the impact of all these various factors on the urinary concentration of the metabolite, ultimately concluding that "*a small amount detected may be caused by a large dose or a small dose depending on the period between administration and sample collection and volume of urine excreted. So drawing conclusions from the concentration itself is highly speculative and not befitting an objective scientific expert*."

431. Professor van Eenoo has also highlighted that in the reported instances in which AAS have been detected in the urine of endurance athletes, generally both (i) the number of steroids detected; and (ii) the concentration thereof are much lower than in strength sports.

432. In the circumstances the panel is unable to draw any inference regarding the parent steroid and/or the Athlete's use thereof, nor as to whether she intentionally made use thereof on a single occasion or was reckless as to the risk of such use.

433. In addition, and as explained by Dr Thieme, although mestanolone may appear the most likely parent steroid of the metabolite, it is not the only potential parent, and accordingly its apparent scarcity is also not conclusive support for that which the Athlete contends. [61]

434. In the absence of proof as to the source of the metabolite, the Panel agrees with the submission of SAIDS that the "totality of the evidence adduced by the Athlete in respect of the metabolite itself, its availability, its metabolism, and its detected concentration, take the matter no further".

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[61] As Dr Thieme's Report records (Evidence bundle pp 22 – 23) "*Methyltestosterone is the most common (of the relevant) candidates to qualitatively comply with the urine analysis. M1 is assumed to be the longest marker of its intake, next to its 5-B isomer (Parr, 2010). It is easily available on the steroid black market as demonstrated by 303 cases of confiscated methyltestosterone. 36 adverse analytical findings were reported by WADA between 2018 and 2020. **"

The science

435. As was decided in *Shayna Jack* an important consideration is whether "the science" supports the Athlete's contentions.

436. The scientific evidence which was placed before the Panel was presented in order to:

a. Firstly, prove that the Athlete had done extensive investigations in trying to present "a viable hypothesis" as to how the substance came to be in her system. As set out elsewhere in this determination, she failed to do so, at one point admitted this, yet persisted in trying to defend some of the theses.

b. Secondly, support the Athlete's claim that the substance would not have benefited her in an endurance sport, and therefore it would have served little purpose for her to have intentionally or recklessly ingested same.

c. Thirdly, and generally, support the credibility of the Athlete's claim that she did not ingest the banned substance intentionally.

437. Some of the scientific evidence which was placed before the Panel for the latter two purposes was the following.

438. That of Dr Thieme who suggested that the 6-month period that elapsed between the supposed ingestion of the mestanolone, which she regards as the most likely parent compound for the metabolite detected in Ms Watkinson urine sample, would have resulted in the elimination of remnants of the metabolite in the hair samples analysed by Prof Kintz, because of the gradual wash-out of the steroid hormones from the hair.

439. Dr Thieme's opinion would therefore simply indicate that the Athlete had at one stage in the 6 month period referred to by her, on possibly a singular occasion, ingested the substance. That does not prove that the ingestion, on that occasion, was not intentional or reckless. It simply proves that there was no long term use of the substance, and that the ingestion could have occurred some time before the out of competition test at the beginning of November. That then would account for the co-operation of the Athlete on the occasion of that test, and her shock and surprise at the AAF which revealed that traces of the substance were (still) present. It also then, disproves, all of the three hypotheses proffered by the Athlete as to the cause, each one of which related to a more recent alleged ingestion or transfer.

440. Prof Kintz was of the view that, for the mestanolone to have had any significant performance-enhancing effects, it would have had to have been taken on a long-basis. He concedes that there are many unknown variables in determining how long the metabolite would have remained detectable in the Athlete's hair samples, but expresses the view that if she had taken it for any significant period of time, his testing methods would have been sufficiently sensitive for it to have detected the metabolite in the hair. He also remarks that the negative test from the urine sample collected 9 days after the one that resulted in the AAF, suggests a singular ingestion.

441. Once again, that simply disproves long term usage. It does not disprove a singular ingestion, and even if a singular ingestion would not have had any benefit, given the Athlete's proclaimed ignorance as to the nature of the prohibited substance, she would not have known that

442. Prof Kintz confirms that the hair sample that was provided to him by the Athlete, which was 12 cm long, covered a period of 12 months before it was taken, and covered the period of urine collection. That sample then disproved long term use.

443. Prof Blockman confirms that the negative test 9 days after the AAF, the absence of the longer-term metabolites of the substance, along with the results on of the tests performed on the Athlete's hair, can only be explained by a single inadvertent ingestion of a small dose of mestanolone.

444. He comments further that it would have been inconceivable for the Athlete to have determined what dosage to take, and when to take it, to ensure that she did not render a possible positive test on 21 November 2021.

445. Once again, all this proves, is that in all probability there was a single ingestion of the substance.

446. Prof Blockman and Dr Eenoo are at odds over whether mestanolone would have benefited the Athlete.

447. Dr van Eenoo contends that "*anabolic steroids are often used in endurance sports to enhance recovery*". And even if there is little research on humans to support this, and the only research available on the subject and the data on which Dr van Eenoo relies is based on research conducted on animals, which Prof Blockman asserts cannot be applied to humans, the substance could still have been used – for whatever purpose.

448. The Athlete's argument was that if the experts cannot conclusively state whether it would have benefited the Athlete, then why would she have taken a substance about which even experts disagree over its benefits, and on which there is no consensus as to whether it would have had any performance enhancing effects for her?

449. The simple answer here is that it is not required of SAIDS to prove that the use thereof was beneficial for the Athlete or gave her an unfair advantage. It is for

the Athlete to prove that she did not use the substance intentionally or recklessly, irrespective of its benefits or demerits.

450. And as is discussed above when dealing with the possible sources, none of the experts were able to identify the source.

451. And if, as is argued at paragraphs 58 to 68 of the Athlete's Preliminary Submissions,[62] the science is, at worst for the Athlete, not inconsistent with her version, that does not assist her in discharging the *onus* which is on her. The scientific evidence produced by her is largely inconclusive in this regard, and if that is so overall, the presumption remains.

452. The scientific evidence shows that the dosage of the metabolite which was detected was low, which could be consistent with contamination, and also inconsistent with the repetitive use required to produce a pharmacological effect.[63] But it still does not prove that the Athlete did not knowingly or recklessly ingest something on a single occasion which caused the AAF.

453. The science on which the Athlete relies does not, on a balance of probabilities, favour the Athlete's proffered explanations sufficiently to disturb the presumption against her.

Use of mestanolone by an endurance athlete

454. The Athlete claims that mestanolone would be of little use to her as an endurance athlete when her performance would ultimately be enhanced by weighing as little as possible and not by developing further muscle. These claims by the athlete are

62 Pleadings Bundle pp 90-94.

63 See e.g., Kintz at Pleadings Bundle p 61.

limited to mestanolone and do not address any of the other potential parent steroids identified by Dr Thieme.

455. In addition lack of a sporting incentive to dope or lack of some benefit or lack of intention to cheat / gain an unfair advantage through the use of a prohibited substance are not sufficient factors which could overturn the presumption of intention. [64]

456. Professor van Eenoo cites studies in which many athletes report that AAS administration enhances recovery time after strenuous training. .[65] [66]

457. It is accepted that the data in respect of the rate of recovery in humans is limited, making it difficult to draw definitive conclusions. It appears to be established in respect of animals and reflected in the subjective reports of Athletes [67] as well as the several reported instances of the use of AAS by endurance Athletes. [68]

458. Based on this expert evidence the Athlete's contentions do not advance her case.

The polygraph results

459. The Athlete also underwent a polygraph test in order to confirm that her protestations of innocence were truthful. This test was found by SAIDS to have been conducted in accordance with the Southern African Polygraph Federation

64 We were referred to *Ruffoni* note 16.

65 In both his Initial Report (Evidence bundle pp 50 – 51) and his Replying Report (Evidence bundle pp 70 – 71).

66 Initial Report (Evidence bundle pp 50 – 51).

67 Replying Report (Evidence bundle pp 70 – 71).

68 As discussed in the Initial Report (Evidence bundle p 51).

standards and the American Polygraph Association's Model Policy for Quality Assurance.[69]

460. It is accepted by the Athlete that the polygraph test that the Athlete voluntarily undertook (and passed) is not dispositive on its own. It is submitted as having "some probative value".

461. The Athlete referred the Panel to the decision of a CAS panel in Jarrion Lawson v IAAF,[70] where the ruling was as follows - *The Panel does not accept that this evidence must necessarily be considered inadmissible, or otherwise ignored, on principle, such as to deprive the Athlete of a potentially relevant additional means of discharging the very heavy burden on him. More to the point, the Panel finds that the polygraph evidence before it here – explained in the expert evidence provided by Mr. Shull in his affidavit, on which he was examined at the hearing – is at the very least sufficiently credible to warrant that it be taken into consideration, as supporting the Panel's assessment of his credibility in denying any intentionally doping*." [71]

462. It is noted that CAS panels have historically treated polygraph evidence differently. In some matters, panels have ruled it entirely inadmissible, [72] in others the evidence has been admitted, but treated with circumspection [73] and has not weighed heavily in the analysis.

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69 The Athlete's Statement, para. 63 to 67, Evidence Bundle pp.97 to 98. The polygraph report is Annexure "AW8" to the Athlete's statement, Evidence Bundle pp 179 to 182. The review of the report by SAIDS is Annexure "AW9" to the Athlete's Statement, pp. 183 to 186

70 CAS 2019/A/6313

71 We were also referred to the cases of *Villaneuva* and *Contador*.

72 *Romero v IAAF* CAS 2019/A/6319.

73 *Villanueva v FINA* CAS 2016/A/4534 at para 46: "*In the Panel's view, while CAS Panels may have previously found polygraph evidence to be admissible, such evidence is of limited value. Moreover, the cost involved is disproportionate to any probative value of*

463. In assessing the probative value of the polygraph submitted by the Athlete, SAIDS relied on the following comments in Dorcil: *In Villanueva the Panel held (at [46]) that "while CAS Panels may have previously found polygraph evidence to be admissible, such evidence is of limited value" and CAS 99/A/246, the Panel noted (at [5]) that, "A lie detector test presents a margin of error, however small, and this impairs its reliability as a "detector of lies." We also note that while in some states in the USA. polygraph transcripts are routinely admitted into evidence . . . . They are inadmissible in a large number of other jurisdictions worldwide due to concerns as to their reliability. Mr Jacobs correctly cautioned us that no form of evidence is ever 100% reliable . . .".*

464. The probative value of the polygraph needs to be weighed against the narrowness of the questions that were put to the Athlete. [74] The timeline in the questions proposed to the Athlete in this case, SAIDS argued, was "very narrow". [75] Further, the question put to the Athlete were only directed at the Athlete's direct intent, and did not include recklessness.

465. Be that as it may, the results of the polygraph test is a factor which the Panel includes in its overall assessment of the evidence. It serves as further proof of the determined and extensive steps which the Athlete has taken in order to prove her innocence. The results of the test are accepted to be supportive of her contentions in this regard.

Conclusion

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*such test. If, in the future, it were not, as a matter of practice to be entertained by CAS panels, this would have the beneficial consequence that an Athlete could not be criticized for failure to submit to such tests as a means of seeking to show lack of intent."*

74 *Nemec v CITA and IAAF* CAS 2016/A/4458 at paras 99 – 100 and *World Athletics v Houlihan* CAS 2021/O/7977 at para 134.

75 Evidence bundle p 4.

466. The Panel therefore finds, on an overall *conspectus* of all the evidence, in accordance with Article 2.1, 2.2 and 10.2.1 of the Rules, that the Athlete has not discharged the *onus* which is on her of proving that she did not commit an intentional ADRV (as defined).

467. The Athlete is therefore subjected to a period of Ineligibility of 4 (four) years.

468. The Athlete will need to serve a period of Ineligibility of four (4) years in accordance with Article 10.2.1 of the Rules.

469. The Athlete's results at the Ironman Competition of 21 November 2021 are therefore set aside, and she is directed to return any medals or prize money awarded for that event in accordance with Articles 10.1 and 10.10 of the Rules insofar as this may be required.

Commencement date

470. Pursuant to Article 10.13, the period of Ineligibility shall start from the date of the decision of this Panel, which is the date on which the determination is handed down by the members, being 21 November 2023, with the Athlete receiving a credit for the period served under Provisional Suspension, which the parties are agreed has been since 11 January 2022.

471. It is accepted for purposes of this determination that the Athlete complied with the terms of her suspension and is entitled to a credit for the period of such suspension, being from 11 January 2022 to the date of this finding, being 21 November 2023.

472. A four year period from the date of her suspension would accordingly expire on 10 January 2026.

473. For the reasons as set out above, the Panel therefore finds:

a. An ADRV under Article 2.1 of the Code has been established.

b. The Athlete has failed to satisfy the burden to establish that the ADRV was not intentional, as defined.

c. Pursuant to Article 10.2.1 of the Code the standard sanction of four years ineligibility shall apply to the Athlete.

d. The period of ineligibility is recorded to have commenced on 11 January 2022, the day on which the Athlete was provisionally suspended, and shall therefore end on 10 January 2026.

e. The Athlete shall not be permitted to participate in any capacity in a competition or other activity organised, convened or authorised by Triathlon South Africa or Ironman South Africa during the period of ineligibility.

f. The Athlete has the right of appeal in accordance with Article 13 of the Code.

g. There shall be no order as to costs.

R G L STELZNER SC
DR DIMAKATSO RAMAGOLE
MR EDRIES BURTON
Cape Town, 21 November 2023