

**FINDINGS OF THE SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT ACT (“SAIDS”)
DISCIPLINARY HEARING HELD AT JOHANNESBURG ON THE 19TH OF JANUARY 2012**

Introduction

1. Mr Sloane Goosen, a wrestler, was charged with an anti doping violation in terms of Article 2.1 of the 2009 SAIDS Anti-Doping Rules (“the Code”).
2. Put simply SAIDS alleged that a prohibited substance, Furosemide, was identified in Mr Goosen’s urine sample during an in competition test at 13h39 at the South African Wrestling Championships on the 22nd October 2011. (“the SA championships”).
3. The list of prohibited substances is published from time to time and the relevant list here is the WADA prohibited list for 2011 which will be referred as also as “the Code” for convenience unless there is a reason to distinguish list from code.
4. Mr Goosen, through his father, Mr Louw Goosen (“Mr Goosen senior” for convenience) requested that his “B” sample be analysed but then indicated that this request had been due to a misunderstanding
5. Mr Goosen attended the hearing, as did his father and a representative from Wrestling South Africa who had been given the incorrect time to attend and so was late but was taken through what had transpired when he did and confirmed he was not prejudiced and wished to continue.
6. The members of the SAIDS panel were Michael Murphy, Mr Leon Fleiser, and Dr Rob Collins. SAIDS was represented by Advocate Nick Kok while Mr Sloane Goosen was unrepresented although assisted by his father Mr Goosen senior.
7. In addition to Mr Goosen himself, Mr Goosen testified as did a gentleman who Mr Goosen and his brother resides with by the name of (“Kobus” for convenience). Kobus testified telephonically after the panel decided that it would be important to hear from him and the parties agreed that this could be done telephonically by way of a conference type facility which enabled questions to be put to him.

Evidence and finding on the merits

8. Advocate Kok handed in the bundle of documents which had been provided to Mr Goosen and Mr Goosen confirmed that he did not wish to challenge any of the documents or the contents of these.
9. This bundle which he had been provided with and which recorded the analytical findings, dealt with the analytical finding, the chain of custody, and the process followed in general.

10. Mr Goosen confirmed that he accepted that the documents were correct and that he did not take issue with them.
11. In response to questions from the panel, raised in the initial stages and later, Mr Goosen said:
 - 11.1. he understood he was guilty;
 - 11.2. that he had testified positive for taking “Lasix” a water pill;
 - 11.3. the reason he had requested a “B” sample analysis was because he thought it was being suggested he had taken steroids or something like that;
 - 11.4. he had not appreciated that taking a water pill was a problem (he had actually been told it was perfectly in order);
 - 11.5. once he understood this, his understanding coming after his mother “googled” Lasix, he appreciated that he was guilty.
12. Mr Fleiser enquired of Mr Goosen whether he understood the concept of strict liability and in substance he did. He said he wished to plead guilty to the charge against him when asked.
13. Dr Collins asked Mr Goosen a number of questions to establish whether he understood what he was pleading guilty to and it became apparent that he did. He had learned, albeit after the event, that Lasix was a prohibited substance (Dr Collins confirmed that Lasix is in fact Furosemide) and he had taken a tablet that resulted in an adverse finding.
14. Advocate Kok referred the panel to article 2.1 of the Code which provides that it is not necessary for SAIDS to establish fault, negligence, or knowing use. The presence of a prohibited substance is sufficient for a guilty finding and in these circumstances the panel was required to find Mr Goosen guilty.
15. The panel finds Mr Goosen guilty as charged.

The facts and circumstances of importance for sanction

16. In summary, and the evidence in this regard was not only uncontested by SAIDS but probable and satisfactorily given, the background to the adverse finding is as follows-
 - 16.1. Mr Goosen took part in an international event at which he suffered an injury to his knee;
 - 16.2. He attended certain medical practitioners who prescribed medication for his knee which he also rested;

- 16.3. Shortly thereafter he also, somehow, contracted “ring worm” and was told in no uncertain terms by his coach that he had to stay away from his club and colleagues for fear that he would pass the condition on to his fellow wrestlers;
 - 16.4. He did not intend continuing to compete as a result of this (not immediately in any event) but as the SA championships approached his father and then his coach were adamant that he should participate;
 - 16.5. He had continued to do strength training until then and as part of his programme had been using creatine which he understood to be permissible and to assist in building strength and assisting his body to recover from his knee injury;
 - 16.6. However, when he agreed to take part in the SA championships he found that he could not get his weight back to his normal fighting weight despite his best dietary efforts and also different attempts to sweat the weight off;
 - 16.7. Dr Collins pointed out that the reason this was the case was because creatine had the effect of causing unnatural water retention and for this reason the methods he had hitherto used to reduce weight were ineffective;
 - 16.8. Kobus, who Mr Goosen and his brother live with (while Mr Goosen is not a minor Kobus is clearly acting (*de facto* if not as a matter of law) in *loco parentis* (as Advocate Kok put it) while the Goosen boys are away from home)) told Mr Goosen that he could use a water pill to reduce weight and that this was widely used by wrestlers and not a problem;
 - 16.9. Kobus provided Mr Goosen with a water pill, he took it, and the result was that he reduced sufficient weight, on the day of the event, to participate at his normal fighting weight;
 - 16.10. Mr Goosen senior confirmed that Mr Goosen told him of the water pill on the day of the event because he had told him he believed this would get his weight down, and he, Mr Goosen senior, had spoken to Kobus who had assured him it was in order;
 - 16.11. As it turned out the water pill significantly weakened him and affected his performance adversely as both Mr Goosen and his father testified and Dr. Collins confirmed would be the case;
 - 16.12. Sadly, the end result was an adverse finding, and one in respect of which Mr Goosen has now suffered the consequences of suspension, and also now a guilty finding.
17. Mr Goosen and his father gave evidence and despite questioning from Advocate Kok they impressed the panel as honest witnesses. Dr. Collins view was that the explanation not only sounded correct it fitted with the findings and circumstances described.

18. Mr Fleiser asked of Mr Goosen why he had not inserted upon the form he had completed that he had taken a water pill and however that might usually be construed the panel accepted his explanation that he had genuinely not thought of the water pill as something that had to be listed. More of that below.
19. The panel enquired at this stage, of Advocate Kok, which provision of the Code SAIDS contended was relevant as regards sanction and what sanction SAIDS intended seeking. Advocate Kok referred to article 10.4 of the Code which dealt with specified substances but indicated he wished to take instructions prior to indicating the sanction that would be sought.
20. Advocate Kok took instructions and then indicated that SAIDS was of the view that while the circumstances in which Mr Goosen had taken a water pill were not in dispute the fact was that he had taken such a pill and in SAIDS view he had done so to enhance his performance and consequently a two year period of ineligibility should be imposed.
21. The panel asked Advocate Kok whether that meant, consequently, that SAIDS was submitting that the requirement of article 10.4 had not been met and consequently the panel had no discretion to reduce the period of ineligibility from that of two years as prescribed by article 10.2 After considering his position Advocate Kok confirmed this was the situation. This was a specified substance but no reduction in sanction was permissible.
22. In view of the fact that Mr Goosen was unrepresented and to ensure that sufficient evidence was before the panel to enable a decision to be made whether the requirements of article 10.4 had been met or not, in form, as well as substance, and in any event to obtain all the relevant circumstances leading to the taking of the water pill the arrangements referred to take evidence from Kobus were made.
23. Each of the parties and the panelists were afforded an opportunity to question Kobus and the panel were satisfied that Mr Goosen's explanation was confirmed by Kobus. Dr. Collins has expressed concern about Kobus having obtained medication as he did but it was clear that Mr Goosen was not aware of this or that there was anything untoward about the obtaining, or taking, of the water pill.

The rules relevant to the sanction

24. Article 10.2 provides that -

Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

The period of ineligibility imposed for a violation of Code Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Code Article 2.2 (Use or attempted Use of Prohibited Substance or Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period Ineligibility, as provided in Articles 10.4 and 10.5, or the

conditions for Increasing the period of Ineligibility, as provided in Articles 10.6 are met: First violation: Two (2) years-Ineligibility.

25. Article 10.4 is in the following terms -

Elimination or Reduction of the Period of Ineligibility for Specified under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following: First violation: At a minimum, a reprimand and no period of Ineligibility from Future Events and at a maximum 2 years' Ineligibility.

26. Appended to the rules relating to sanction are commentaries which refer to different arguments and approaches to sanction that have sometimes been sport specific, sometimes had regard to the question whether an athlete is a professional or amateur, and so on. The point is validly made, in relation to rule 10.2 that the harmonization is very important if arbitrariness is to be avoided.

27. In relation to rule 10.4 the following is, *inter alia*, recorded -

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing Committee the absence of an intent to enhance sporting performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction in the period of Ineligibility.

28. Before affording the parties an opportunity to present their closing views on what the appropriate sanction should be the Committee had regard to these rules, the commentary, (including the balance of the commentary not fully repeated here) and the parties were then asked to present their arguments regarding the appropriate sanction.

29. In summary Advocate Kok argued as follows -

29.1. The requirements of rule 10.4 had not been met because the specified substance here had been taken to reduce weight and so allow Mr Goosen to compete at a weight he would otherwise not have been able to make;

29.2. In a sport such as wrestling where weight is very important (an athlete has to make a particular weight category to participate and if he or she takes part against lighter athletes there is a significant advantage gained);

29.3. Consequently the sanction the Committee was required to impose was that contemplated in Article 10.2 being a two year period of ineligibility;

- 29.4. Advocate Kok very fairly accepted that it appeared that Mr Goosen had not taken the water pill understanding that this was a prohibited substance, it was clear from the evidence including that of Kobus (who had acted in loco parentis) that he had been told there was nothing untoward about this, and the water pill had not enhanced his performance at all but rather, if anything, harmed it;
- 29.5. Dr Collins put to Advocate Kok whether it was not the case that water pills were banned because of their potential for masking other prohibited substances. Was that not what the rules aimed at prohibiting insofar as water pills were certainly not performance enhancing? Advocate Kok said that was an interesting point he would consider but he did not alter his submission.
30. Mr Goosen argued in accordance with the evidence given. He repeated that -
- 30.1. he now understood he was guilty, he had not taken the water pill to enhance his performance but rather because, in particular circumstances (the injury and infection) he had not been able to train as normal and could not get back to his fighting weight.
- 30.2. he had not had any idea there was anything wrong with taking a water pill and there had been no talk about the subject within wrestling to alert him to the danger of such a substance.
- 30.3. when he learned (his mother established this on the internet) that water pills were prohibited he accepted fault and also the result of the test. He had initially required a "B" sample because he thought it was being suggested he had taken an enhancing substances such as a steroid which was not true;
- 30.4. the water pill had not in fact enhanced his performance nor had he thought it would, and in fact he had felt particularly weak at the event as a result;
- 30.5. in summary he did not intend to enhance his performance and he did not intend masking another substance.
31. Firstly, in assessing the evidence, it is necessary to say that Mr Goosen, and his father, impressed the Committee as honest witnesses. There is little doubt that the facts related are correct and that, consequently, the circumstances in which Mr Goosen came to take the water pill are as he said they were.
32. Kobus, who testified, made plain that he had procured the water pill and he told Mr Goosen there was no problem with that. The Committee has some difficulty with how Kobus went about this and this may be an issue for further consideration as Dr Collins indicates that he should not have been able to obtain a water pill without a prescription. It is important to say though that whatever

shortcomings there may as regards Kobus the Committee was satisfied that in relation to Mr Goosen this did not detract from the clarity and acceptability of his evidence.

33. So, at face value, and leaving aside Advocate Kok's argument for a moment the requirements of Rule 10.4 seem to be met. There is no question but that Mr Goosen did not, in the usual sense, take a water pill to improve his performance at the event, nor did he take it to mask something else. He took it in peculiar circumstances that meant he was struggling to get to his fighting or normal weight and where he believed there was nothing wrong with taking it.
34. Dr Collins explained the reasons that Mr Goosen could not lose weight as he normally would. The combination of the injury, the time away from training, and the creatine he took when he realized he was to participate, together meant a significant level of water retention and inability to lose weight. The water pill, while harming his performance as a fact, allowed his body to release sufficient water for him to make his weight.
35. While Advocate Kok's argument is an interesting one, the question is whether in these circumstances it can be said that Mr Goosen "intended" to obtain an advantage. In other words on the argument of Advocate Kok did he use the water pill so that he could reach a weight that would give him an advantage over other athletes?
36. The Committee does not believe that to have been so. An unfortunate set of circumstances culminated in Mr Goosen not being able to get to his usual fighting weight. To attain that weight he took a water pill he did not realize was prohibited (albeit for the reason that it has masking and not enhancing characteristics) and he has tested positive and must carry the consequences of such a finding with him for the rest of his life.
37. But he intended no more than that and the Committee is comfortably satisfied that he did not not take the water pill intending to enhance his performance or mask the use of another substance. That is not to say, of course, that in appropriate circumstances another Committee might not have regard to Advocate Kok's contention. In other words it could be that an athlete intentionally went about things as Advocate Kok suggests could be the case. The fact is that did not happen here though.
38. The commentary to Rule 10.4 deals with the objective circumstances that a Committee might take into account in reaching such a conclusion. These could include, it is said -
 - 38.1. The fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete. Here, unless Mr Goosen had intentionally planned to gain weight and then lose it by taking a water pill at the crucial moment – which is clearly not the case – there is little doubt that the facts here show this was not so;

- 38.2. The Athlete's open Use or disclosure of his or her Use of the Specified Substance. Apart from not adding the water pill to the form he completed prior to the Event – which he explained – Mr Goosen was entirely open about what he had taken, when he took it, and the reasons. His request for a "B" sample was based on a misunderstanding which if anything demonstrated his naivete about water pills and their prohibited nature. As soon as he understood that to be something that was prohibited was entirely open.
39. The Committee is consequently entitled to reduce the period of Ineligibility and to impose a sanction that is in keeping with the circumstances of this case. The sanction can range from a reprimand and no period of Ineligibility to a maximum of two years Ineligibility.
40. It is no easy matter to determine what an appropriate sanction should be. While this is not a criminal case the test applied by the courts will usually take into account the need for deterrence, the need for punishment for wrongdoing, and the personal circumstances of the offence and individual.
41. The commentary to Rule 10.4 makes the point that *"the Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction in the period of Ineligibility"*. The point being, it seems, that while there may not be any intentional wrongdoing, there is a responsibility on an Athlete to take steps to establish what the Code provides for and what is and is not prohibited.
42. If an Athlete does not do that then doping control becomes very difficult insofar as in many instances an Athlete may be able to show that they did not intend any wrongdoing. The question is what did they do to establish whether the substance they imbibed was prohibited though? If they can show they were not negligent at all then article 10.5 could come to their assistance and remove any ineligibility. If there was some fault then the question is how much fault.
43. Mr Goosen himself made the point that more, and better, testing was something he and other Athletes wanted. They too do not want a sporting environment filled with cheating and prohibited substances. They want a healthy environment where the only substances that are taken are acceptable. For that to happen, some responsibility has to pass to Athletes to check what the rules are, to check what the Codes say, and to assess what they take and where they get it from.
44. In this regard it became clear that Mr Goosen did not take all the steps he could have to establish the facts relative to water pills. When his mother focused on the substance in question and used only the internet she was able to establish that it was a prohibited substance.
45. While accepting Mr Goosen's bona fides the fact is that he should have taken more care here. It was concerning, although not taken into account in this finding but perhaps something for Mr Goosen to have regard to in future, that when he described his use of creatine to Dr Collins it was apparent that there too he is entirely trusting and he does not know, in fact, whether the supplements he is taking are what he is told they are.

46. It seems clear that sporting federations have a responsibility to ensure that Athletes become more aware, that they appreciate the risks to them of taking substances that they may be told are in order and then turn out not to be, and also that somehow this message needs to be spread among Athletes themselves whatever the shortcomings of the federations may be.
47. The wrestling federation were present at the hearing and that is a positive development and to be welcomed. Mr Goosen's unchallenged evidence was however that there had not been adequate communication about prohibited substances and in particular about water pills and the danger of using these.
48. In any event when it comes to fault it has to be said that considered objectively Mr Goosen could and should have done more to establish what was and was not prohibited. While he clearly did not intend to transgress he was negligent in the view of the Committee in simply accepting the say so of Kobus. Yes Kobus acted in *loco parentis* (in fact if not in law) but Mr Goosen should have insisted upon some verification before simply accepting his say so.
49. In assessing the criteria that courts take into account, and as is often the case, these pull in different directions and while the specificity of sport and the need to deal with prohibited substance mean these aspects must be considered in the particular circumstances here present one cannot overemphasise one aspect over another. All must be taken into account.
50. On the question of deterrence it is clear that the message that must be sent is that doping is unacceptable in any circumstances. And also that there is a duty to go further than just accepting the say so of others when it comes to substances that are used. This factor will almost always suggest a sanction that might otherwise seem on the harsh side in particular circumstances.
51. When it comes to punishment and personal circumstances these questions redound to Mr Goosen's benefit due to the circumstances of the offence here present. Consequently these factors would tend to indicate a sanction somewhat lower than the maximum sanction that might otherwise be called for. And of course Mr Goosen has already been punished and will be seen as someone who has transgressed from now on, and as he pointed out he is not an individual who is able to afford the sort of sports medical advice he should be receiving.

The sanction

Taking all these facts and circumstances into account, the unanimous recommendation of the Committee is that the sanction to be imposed be that a period of Ineligibility of one year, which period commenced on the date of the SA Championship being 22 October 2011, and which will expire at midnight on 21 October 2012.