SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE:	**MR MARTHINUS GROBLER**
SPORTS FEDERATION:	**SOUTH AFRICA POWERLIFTING FEDERATION ("SAPF")**
DATE:	**TUESDAY 23 FEBRUARY 2012; THURSDAY 31 MAY 2012**
PLACE OF HEARING:	**GARDEN COURT SOUTHERN SUN, KEMPTON PARK; SAIDS OFFICES, CLAREMONT, CAPE TOWN, SOUTH AFRICA**
DISCIPLINARY PANEL ("PANEL"):	**MR ANDREW BREETZKE (CHAIRMAN)** **DR SELLO MOTAUNG (MEDICAL REPRESENTATIVE)** **MR GREG FREDERICKS (SPORTS ADMINISTRATOR)**
PROSECUTOR:	**ADV NIC KOCK**
ATHLETE REPRESENTATIVE:	**MS ALEXANDRA SCHLUEP**
SAPF REPRESENTATIVE:	**MR HELGARD COETZEE**
ANTI-DOPING RULE VIOLATION:	**ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.1 OF THE SAIDS ANTI-DOPING RULES.**

APPLICABLE LAW

SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended). SAIDS has formally accepted the World Anti-Doping Code ("WADC") adopted and implemented by the World Anti-Doping Agency in 2003. In so doing, SAIDS introduced anti-doping rules and regulations to govern all sports under the jurisdiction of South African Sports Confederation and Olympic Committee, as well as any national sports federation.

The SAIDS Anti-Doping Rules ("the Rules") were adopted and implemented in 2009. These proceedings are therefore governed by the Rules. This SAIDS Anti-Doping Disciplinary Panel has been appointed in accordance with Article 8 of the Rules, to adjudicate whether the Athlete has violated the said Rules, and if so the consequences of such a violation.

PROCEDURAL MATTERS

The Athlete was in attendance, and was represented by Ms Alexandra Schleup. Mr Helgard Coetzee was in attendance as the representative of the SAPF.

The matter was initially convened on the 23 February 2012, and later reconvened by way of teleconference, on the 31 May 2012. The matter was postponed to allow for testing of specific supplements.

The rights of the Athlete were explained to him, and he acknowledged that he understood his rights, understood the process and was ready to proceed. The process to be followed was explained in detail to the Athlete.

SUMMARY OF EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents marked "A" to "G" as documentary and corroborative evidence to the oral evidence presented.

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 24 January 2012. The charge against the Athlete read as follows:

You have been charged with an anti-doping violation in terms of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS).

On 27 October 2012, you provided a urine sample (A2633181) during an in-competition test. Upon analysis the South African Doping Control Laboratory at the University of Free State reported the presence of a prohibited substance in your urine sample. The substance identified was Testosterone. Sample A2633181 was sent to the Deutche Sporthichschule Koln Institut fur Biochemie in Cologne, Germany for further analysis. The presence of the Anabolic Agnet Testosterone in your urine sample was confirmed by CIRMS analysis. Testosterone is categorised under Class S1 "Anabolic Agents" in specific Class 1 b) Endogenous, on the World Anti-Doping Code 2012 Prohibited List International Standard.

The Prosecutor set out the evidence relative to the test that took place, and confirmed that the Athlete had not requested that a B-Sample be taken. The Athlete did not dispute the test result.

The Athlete in admitting to the finding of the test did however present argument on a technical point relative to the testing process. The issue was raised as a preliminary point. The salient issues raised were as follows:

1. The Athlete was unfairly indirectly denied the right to have his B-sample analysed, as provided for in the Rules;

2. On being advised by SAIDS of the initial positive test, he was informed that he would be entitled to have his B-sample tested by the Deutsche Sporthochschule Koln Institut fur Biochemie in Cologne, Germany. The cost of such a test would be borne by the Athlete, and would amount to approximately R10000;

3. The Athlete argued that this fee was exorbitant and irrational. It was unreasonable and prejudicial to the Athlete, especially given that he was an amateur athlete.

4. The Athlete referred to case law that supported the argument that there was a duty on sporting governing bodies to ensure that reasonable efforts were made to ensure that the athletes' rights to have an analysis of the B-sample were protected. In this regard the following cases were cited:

CAS 2010/A/2161 Wen Tong v IJF where the Panel stated that: "*Moreover, it is now established CAS jurisprudence that the athlete's right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B-sample results must be disregarded."*

A further reference was made to *CAS 2008/A/1607 Varis v IBU* where the Panel concluded that "*athlete's right to be given a reasonable opportunity to observe the opening and testing of a 'B' sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.*"

The Athlete furthermore cited the matter of *CAS 2002/A/385 Tchachina v FIG*, as a precedent in this regard.

5. The above cases were cited as examples where a "reasonableness" requirement is introduced when dealing with the right of the Athlete to have the B-Sample analysed.

6. It was therefore argued that the cost of the B-Sample was excessive and denied that Athlete his fundamental right to have his B-Sample analysed. This breach of his fundamental right rendered the tests result fatally defective and it should therefore be disregarded.

7. In support of the above arguments, the Athlete gave evidence as to his personal circumstances. He is a student, and works as a cane loading supervisor in the Lowveld. He has been competing for 9 months. On receiving notification of the positive test, he was not able to afford the B-Sample. He had spent a considerable amount of money

getting to the SA Bench Press Championship in Stellenbosch (R5000 flights, accommodation). Furthermore, on going to the Commonwealth Championships in England, he had incurred significant travel expenses (R10000 flights, accommodation, food). He had taken out a loan to cover these costs, and would have had the B-Sample tested had he been in a financial position to do so.

On being questioned by the Prosecutor the Athlete stated that the sport is expensive, and that he spends considerable amounts of money on meat and supplements.

In response to questioning from the Panel, the Athlete stated that he had not advised SAIDS as to the fact that he was not able to afford the B-Sample test.

The Athlete proceeded to present evidence and argument on the issue of Sanction, in the event of the Panel finding against the Athlete on the preliminary point.

The Athlete conceded that he used the various supplements, as annexed to the Doping Control Form. He also recognised that is was his duty to monitor what he took, and gave evidence that he conducted extensive research into the products he purchased, looking at the ingredients and referring to the WADC. He stayed up to date with the WADC list, checked labelling changes, consulted with others and attended seminars. His awareness of the issue of doping was evidenced further by the fact that when he contracted bronchitis, he advised his doctor as to the fact that he was a competitive athlete and as such had to be cautious as to what medication he could take. When taking supplements, he adhered strictly to the recommended dosage.

Further arguments of the Athlete focused on the lack of education and awareness on anti-doping matters, as he had undertaken his own research and education to ensure compliance. As there is no regulatory body governing supplements, the Athlete was left to his own means in attempting to ensure that he did not digest a prohibited substance.

Under cross examination the Athlete gave evidence that he had previously worked for Dischem, selling supplements. He had undertaken a 3 day seminar course organised by a supplement manufacturer during this period. He had been using supplements for a period

of 4 years. The Athlete had not consulted his doctor after testing positive, and stated that the positive substance must have "come from the supplements" as it is easy for contamination to take place. He believed the positive test could have come from the TEST RX supplement he had taken. On questioning, he stated that he did not believe it to be from the Solol Nettleroot Extract, as the manufacturer was a reputable company. He had used these products for 18 months and believed that if he did not take these substances he would not be able to compete. This was his first test.

By agreement between the parties, the matter was adjourned for the testing of the two products mentioned in evidence: TEST RX and NETTLE ROOT EXTRACT. The products were tested at the South African Doping Control Laboratory at the University of Free State.

The matter proceeded on the 31 May 2012 via teleconference. Evidence led by the Prosecutor was that the tests of the products TEST RX and NETTLE ROOT EXTRACT did not indicate the presence of Testosterone. They were therefore not the source of the prohibited substance.

In closing, the Prosecutor argued that the Athlete had failed to prove how the prohibited substance had entered his system. As such, the Athlete was not able to rely on Articles 10.5.1 or 10.5.2. The Prosecutor argued that the Athlete had taken a calculated risk by using a "cocktail" of supplements, whilst being fully aware of the risks. It was therefore difficult to justify any reduction in sanction.

The Athlete argued that it was a contaminated supplement that caused the positive test and that there was no intention to ingest testosterone. He argued that the supplement was therefore the source of the contamination, and that he had no fault or negligence or alternatively no significant fault or negligence. The Athlete referred to various cases in dealing with the issue of degree of fault and the subjective circumstances of the athlete: *CAS 2008/A/1490 WADA v. USADA & Thompson; USADA v. Brunemann, AAA 77 190 E 00447 08 JENF; CAS 2010/A/2107 Oliviera v USADA.* These cases supported the argument that lack of experience, ignorance of doping matters and lack of intention to enhance performance must carry weight in determining fault. Further reference was made to the matter of *ITF v Robert Kendrick*, where the duty of care on an athlete was discussed. In *Knauss v FIS, CAS 2005/A/847* the athlete was found to have acted with fault and negligence, but the

sentence of the athlete was reduced as he had no intention to benefit and was not obtaining the substance illegally.

Given that the Athlete had done research, consulted other athletes, had made an effort to ensure that no prohibited substances entered his body; along with the fact that he had received no formal anti-doping training – a reduction in sentence should be considered.

FINDING ON THE PRELIMINARY POINT

The preliminary point to determine is whether the Athlete was denied his right to have his B-sample tested. The basis of this argument was that the cost of the B-sample was exorbitant, and that the Athlete not being able to afford the cost, was denied this fundamental right to a B-Sample.

There is no disputing that an athlete has the right to have his B-sample tested. The procedure relative to this right is set out in the Rules, and the notification of the Adverse Analytical Finding to the athlete clearly sets out the right of the Athlete to have the B-Sample analysed. This notification was sent to the Athlete on the 16 January 2012, and Item 4 of the said notification invited the Athlete to notify SAIDS by close of business on the 23 January 2012 as to whether he wished to have his B-Sample tested. Item 5 noted that should the Athlete not take up this request, it will be assumed that he has waived his right in this regard.

The first bullet point dealt with under the request as set out in item 4, is that the athlete must provide written confirmation that he would like to have the B-Sample analysed. The Athlete admitted that he at no stage communicated with SAIDS in respect of wanting his B-Sample analysed. It is clear from the evidence that SAIDS were at no stage advised that cost of the B-Sample was an issue. There was also no evidence presented that the Athlete had raised this issue at any stage prior to the hearing. In arguing the point that the Athlete has been denied his right to the B-Sample due to the exorbitant cost, reference has been made to specific case law (*CAS 2008/A/1607, Varis v IBU CAS 2010/A/2161 Wen Tong v IJF)* in support of the argument presented. However, I do not believe that these cases can be regarded as precedents in support of the argument of the Athlete, based on the facts of the

respective matters. In the *Wen Tong* matter, there were excessive delays in the athlete being informed of the adverse finding and she was also discouraged not to take the B-Sample test by the federation officials. In the *Varis* matter the B-Sample was tested in the absence of the athlete/representative. In *CAS 2002/A/385 Tchachina v FIG* the athlete was not informed of the details of the B-Sample test.

In casu, the Athlete was informed of his right to the B-Sample; he was informed timeously and in accordance with the Rules. Furthermore, he was given a specific date by which to inform SAIDS as to whether he wished to have the B-Sample tested. Had he wanted the B-Sample tested, but been concerned with the cost thereof, he could still have informed SAIDS of this fact. His failure to do so mitigates against his argument. At no stage from date of notification of the adverse analytical finding, to the date of the hearing of this matter was SAIDS advised as to the Athletes concerns. The Athlete had the right, but at no stage attempted to exercise the right by engaging with SAIDS.

On this basis, the Panel finds that the preliminary point has no merit, and is therefore dismissed.

FINDING ON THE CHARGE

The presence of the substances identified as *Testosterone* was proven. The Panel has therefore determined that the Athlete is Guilty of the offence as set out, and is in violation of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

Article 2.1.1 of the Rules reads as follows:

> *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. 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 violation under Article 2.1.

This Article is the foundation of the strict liability principle that is applicable to anti-doping violations. There is a clear and definitive standard of compliance that all athletes are required to adhere to and it is on this basis that they are held accountable. Ignorance of the anti-doping provisions and/or prohibited list cannot be accepted as an excuse. The responsibility that rests on the athlete is therefore clear, and the liability that rests on the Athlete *in casu* has been established.

The Athlete has been found guilty of a doping offence in respect of the substance identified as Testosterone. Testosterone is categorised under Class S1 "Anabolic Agents" in specific Class 1 b) Endogenous, on the World Anti-Doping Code 2012 Prohibited List International Standard. As such, it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. Article 10.5 reads as follows:

10.5 Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances.

10.5.1 *No Fault or Negligence*

If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Marker*s or its *Metabolites* is detected in an *Athlete's Sample* in violation of *Code* Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* eliminated. In the event that this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

10.5.2 *No Significant Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of *Code* Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* reduced.

Article 10.5 sets 2 conditions for the reduction of the ineligibility period to be applied on an athlete following a finding of guilty for the anti-doping violation as set out above:

1. The athlete must establish how the Prohibited Substance entered his system;

2. The athlete must establish that he bears No Fault or Negligence, or No Significant Fault or Negligence.

The key question *in casu*, is whether the Athlete has fulfilled the first condition. For the Athlete to be able to establish that he bears No Fault or Negligence, or No Significant Fault or Negligence, he must first establish how the prohibited substance entered his system.

The Athlete has submitted in evidence that the prohibited substance entered his system by way of a contaminated supplement. The Athlete used more than 18 supplements/medications (as listed in the Doping Control Form); his argument that the prohibited substance entered his system through use of a contaminated supplement is therefore plausible. The onus is on the Athlete to prove, to the satisfaction of the Panel, how the prohibited substance entered his system. Two supplements (TEST RX and NETTLE ROOT EXTRACT) were identified by the Athlete as being possible supplements that were contaminated. These supplements were subsequently tested by the South African Doping

Control Laboratory at the University of Free State, but were found not to contain the prohibited substance. Although the Athlete has argued that the prohibited substance must have entered his system by way of one of the numerous supplements he took, is this argument sufficient to fulfil the first condition?

In the matter of *CAS 2011/A/2384 UCI v. Alberto Contador,* the panel confirmed the legal position that the onus was on the athlete to prove how the prohibited substance entered his system. This matter concerned the prohibited substance Clenbuterol. The Athlete argued that the prohibited substance had entered his system by way of a meat product. He also put forward alternative possibilities. CAS could nevertheless not conclude what exactly the cause of the presence of the forbidden substance in Contador's body was, and as such he failed to fulfill the condition as set out.

In reviewing the evidence presented by the Athlete, it is a plausible argument that the prohibited substance entered his system by way of one of the numerous supplements. It does however, not meet the burden of proof required. There is no clear evidence as to the specific source of the prohibited substance, and although the argument is plausible, this is not sufficient. The Panel is therefore not able to conclude exactly how the substance entered his system. The Athlete has not been able to prove to the satisfaction of the Panel how the prohibited substance entered his system. In making this finding, there are a number of important issues to consider:

- The Athlete has adopted a "shot-gun" approach to his defence by stating that it cannot be proven that it was not a contaminated supplement that was the cause of the adverse analytical finding. If this argument were to be accepted, it would be in the best interests of an athlete to use multiple supplements and use this as a basis to argue that the probabilities of one of them being contaminated is high. This cannot be accepted;

- The Athlete is young, but has been exposed to supplements through his sport, and his work. He has knowledge that supplements can be contaminated, and checks ingredients and labels. Although this point is relevant in respect of the second

condition, it is also evidence of the fact that the athlete is acutely aware of the risks of supplements.

In light of the above, the Athlete has failed to fulfil the onus of proving the source of the prohibited substance as set out in the provisions of Article 10.5 (Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances). As such the issue of degree of fault or negligence is irrelevant and there is therefore no justification for a reduction in sanction.

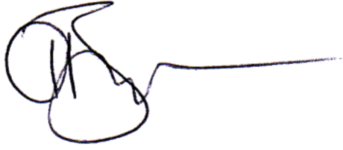
The sanction on the finding of Guilty is as follows:

1. The Athlete is ineligible to participate in any organised sport, club or higher level or as envisaged in Article 10.10 of the Rules, for a period of two years;

2. The period of two years will be effective as of 16 January 2012 (being the date of notification of the adverse finding and implementation of provisional suspension), to terminate on the 15 January 2014; ;

3. The above anti-doping violation occurred during the South African Power-lifting Federation Bench Press Championships on the 22 October 2011. The rule violation is therefore related to an in-competition test. In terms of Article 9 of the Rules an anti-doping violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition, including forfeiture of medals, points and prizes. In accordance with this Article, the Athlete therefore forfeits his performance in the said South African Power-lifting Federation Bench Press Championships.

This done and signed at Cape Town, June 2012



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Andrew Breetzke (Chair)

For and on behalf of the Tribunal Panel

Dr Sello Motaung, Mr Greg Fredericks