

**SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)**

**ANTI DOPING DISCIPLINARY HEARING**

**ATHLETE:** MR RORY KLEINVELDT

**SPORTS FEDERATION:** CRICKET SOUTH AFRICA ("CSA")

**DATE:** TUESDAY 3 APRIL 2012

**PLACE OF HEARING:** SAIDS OFFICES, MONA CRESENT, NEWLANDS, CAPE TOWN

**DISCIPLINARY PANEL ("PANEL"):** MR ANDREW BREETZKE (CHAIRMAN)  
DR NASIR JAFFER (MEDICAL REPRESENTATIVE)  
MR HASNODIEN ISMAIL (SPORTS ADMINISTRATOR)

**PROSECUTOR:** MR CHRIS HATTINGH assisted by MR NIC KOCK

**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 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 Mr Tony Irish and Mr Bryge Wachipa, of the South African Cricketer's Association ("SACA"). Mr Francois Brink (One World of Sport) was in attendance as the agent of the Athlete, whilst Mr Mike Gajjar attended as the representative of CSA.

The Disciplinary panel were provided with a set of documents, which the Prosecutor introduced into evidence as items marked "A" to "F".

## **SUMMARY OF EVIDENCE AND ARGUMENT**

The charge against the Athlete was set out in written correspondence forwarded to the Athlete on the 27 March 2012 ("F"). 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 17 February 2012, you provided a urine sample (A2633926) 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 samples. The substance identified was 11-nor-delta9-tetrahydrocannabinol-9-carboxylic acid (the concentration is 78ng/ml which is above the World Anti-Doping Agency decision limit of 18ng/ml), which is a metabolite of Cannabinoids. Cannabinoids is categorised under **Class S8 "Cannabinoids"** on the World Anti-Doping Code 2012 Prohibited List International Standard.*

The legal representatives of the Athlete and the Prosecutor had reached agreement on facts that were common cause. To this end the Prosecutor presented into evidence e-mail correspondence from the legal representatives of the Athlete to SAIDS ( Document "E") in which it was confirmed that the Athlete waived his right to have his B-sample tested and would be pleading guilty to the anti-doping offence.

It was confirmed by both parties that evidence as set out in documents "A" to "F" were admitted by the Athlete and as such his plea of guilty on the anti-doping charge was confirmed.

Furthermore, on direct questioning by the Panel, the Athlete confirmed his plea of guilty, advising that he understood the nature and consequences of his guilty plea.

In confirming his plea, the Athlete read a statement into evidence. The Athlete confirmed his admission as set out above, and gave evidence as to how the substance entered his body. On the evening of the 3 February 2012, 4 days prior to the match between his team, the Cape Cobras, and the Knights he was at a social function where he was slightly intoxicated. During the evening someone had produced a Cannabis joint and as the joint was passed around, he had taken a few puffs. This was a "once-off" incident and he sincerely regretted it.

In his statement he confirmed that he had admitted his mistake, and that his interim suspension would jeopardise his R15000 bonus payment from his franchise. He was willing to assist SAIDS in the education of school children.

In conclusion the Athlete stated that he believed he may be considered for selection for the Proteas in June 2012, and a suspension beyond the end of May 2012 may end his international career. As a 29 year old he was in the prime of his career.

Under cross examination, the Athlete confirmed that he had drunk 3 to 4 beers on the evening in question. He had not intended to cheat, and admitted he had made a mistake. He confirmed that his positive test was also a breach of his franchise contract as a professional cricketer.

#### **FINDING ON THE CHARGE**

The presence of the substances identified as *11-nor-delta9-tetrahydrocannabinol-9-carboxylic acid* of the Athlete was therefore admitted. 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.

Despite this strict standard, the Panel is however able to eliminate, or reduce the period of ineligibility and may award, at a minimum, a reprimand and, at a maximum, a period of two (2) years ineligibility. The question of whether it is appropriate to decide on a period "no ineligibility" or "some ineligibility" depends on the degree of fault the Panel considers to exist on the part of the Athlete. Article 10.4 is the relevant provision and reads as follows:

***10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances 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, two (2) years' Ineligibility.*

*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 sport 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 of the period of Ineligibility*

The issue before the Panel is therefore whether circumstances exist such that it is able to consider any elimination, or reduction, of the period of ineligibility as provided for under Article 10.4. This entails a consideration of the degree of fault of the individual athlete and the appropriate sanction for the athlete viewed in the light of that degree of fault.

The Prosecutor presented argument on specific issues that were aggravating factors, as well as issues that were in mitigation:

- The Athlete had co-operated fully with SAIDS, and had admitted his guilt as to the anti-doping violation;
- Furthermore, his explanation as to how the substance had entered his body had been presented to the Prosecutor and was accepted;
- However, the offence is a serious offence, the nature of which has become more prevalent in South African sport. Although the substance was not performance enhancing, it brought the sport into disrepute;
- The Athlete is a high profile athlete and is expected to set an example;
- The matter is one in which Section 10.4 of the SAIDS Rules was applicable as the Athlete had provided a reasonable explanation as to how the substance entered his body. In this regard the Prosecutor referred to the standards as set in South Africa and Internationally in respect of similar cases. The standards provided for periods of ineligibility of between 2 and 4 months.
- In response to the evidence of the Athlete that a suspension of more than 2 months would severely impact his international career, the Prosecutor argued that this could not be a factor in mitigation.
- It was argued that an acceptable period of ineligibility would therefore be a period of 3 months, as well as a public reprimand of the Athlete.

In response Mr Irish presented submissions on behalf of the Athlete.

- The Athlete had pleaded guilty, had co-operated and been open and honest as to his mistake. He had shown remorse. He had also publicly apologised by way of a press release.
- The Athlete had confirmed how the substances had entered his body, and he had no intention of enhancing his performance. As such it was argued that Section 10.4 applied to this case. In terms of this section the Athlete must produce corroborating evidence to prove absence of intent to enhance sports performance. Mr Irish argued

that it was not possible to do so in a case of a prohibited substance that did not enhance performance, as there would be no intention that required corroboration. He argued further that this element of Section 10.4 was relevant in cases where the substance was performance-enhancing.

- The level of cannabinoids present in his sample was consistent with the explanation provided that he had smoked the substance four days before being tested – he was not a habitual smoker.
- The Athlete has offered to participate in SAIDS anti-doping education in schools.
- The Panel was referred to case law by Mr Irish, specifically *CAS 98/208 N,J,Y,W vs FINA* (3 month suspension); *Nicolas Coutelat* (Tennis), 2 month Suspension; *Shange Philane* (Football), suspended sentence and a fine.
- Mr Irish argued that the benchmark sanction for Cannabinoids is up to three months period of ineligibility.
- Cannabinoids is not performance enhancing and it is debatable as to whether it should be on the WADA prohibited list.
- During the period of interim suspension (to date of the hearing) the Athlete had missed a number of cricket matches, placing in jeopardy his Franchise bonus payment of R15000.
- If the Athlete were to receive a sanction in excess of an effective 2 months, period of ineligibility, it would have a drastic impact upon his international career, and possibly result in an end to this career.
- In light of these arguments, Mr Irish argued that a sanction of 2 months would be appropriate.

## REVIEW OF EVIDENCE AND ARGUMENT AS TO SANCTION

In reviewing the above arguments in considering the degree of fault attributable to the Athlete and the appropriate sanction for the athlete, the following:

1. The Athlete has pleaded guilty, co-operated with SAIDS, and established how the prohibited substance entered his body;
2. This is the first positive test of the Athlete;
3. The Athlete has shown remorse and made a public apology;
4. It is common cause that there is no performance-enhancing benefit to be gained from the prohibited substance;
5. The period of ineligibility may have an impact upon his international career.

The above factors are mitigating factors relevant to the degree of fault. There are various issues in this matter however, that indicate a material degree of fault on the part of the Athlete:

6. The Athlete intentionally took the substance for recreational purposes;
7. The Athlete is a professional sportsman with a number of years of experience;
8. He has represented his country and is a role model to many young South Africans;
9. No evidence was presented that he was ignorant of anti-doping procedures/issues, and as such it must be accepted that he was aware that his actions were in breach of anti-doping regulations, as well as his contractual obligations;
10. The substance Cannabinoids is an illegal substance.

Although the Panel is prepared to accept the evidence of the Athlete that he did not smoke the Cannabis with an intention to enhance his sports performance, consideration must however be given to the provision of Article 10.4 which requires the Athlete to produce



corroborative evidence as to the absence of this intent. Corroborating evidence must emanate from a source other than the Athlete. Mr Irish argued that this provision in Article 10.4 could not be regarded relevant in a situation where the prohibited substance had no performance enhancing quality. This issue was canvassed in the matter of *IRB v Iraki Chvihvivadze 2 June 2009*, where the facts mirrored those *in casu*. The tribunal stated that in assessing whether there is corroborating evidence, the overall context of the events relating to the Athlete can be considered. In this regard the date which the substance was used relative to the date of testing and the clean record of the Athlete were considered. Taking into consideration all the facts as presented *in casu*, the fact that the Prosecution has not disputed the evidence as presented by the Athlete, his remorse and apology, and applying common sense to the situation, we believe that it is evident that the Athlete did not intend to enhance performance, despite the lack of independent corroborative evidence on this point.

#### **DEGREE OF FAULT**

The use of Cannabis as a recreational drug is common-place in society, but it remains illegal in South Africa. Although Mr Irish raised the issue of the relevance of Cannabis being a prohibited substance, it remains that its use is inconsistent with the spirit of sport. This spirit of sport is fundamental to the rationale for the World Anti-Doping Code ("WADA Code"), and the introductory comments to the WADA Code read as follows:

*Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterised by the following values:*

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*

- *Fun and joy*
- *Teamwork*
- *Dedication and commitment*
- *Respect for rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity*

*Doping is fundamentally contrary to the spirit of sport.*

As such, when an athlete knowingly uses Cannabis there will rarely be circumstances where the adverse analytical finding does not attract a sanction which includes a period of ineligibility.

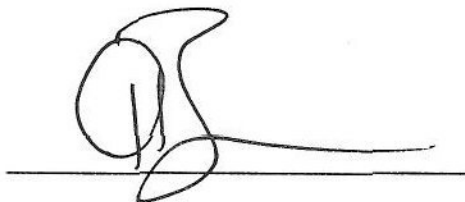
In the matter of *FINA v Cesar (Court of Arbitration for Sport 2011/A/2495)*, the Court in reviewing and assessing the degree of fault of an athlete in respect of the equivalent “special circumstances” clause focused on whether the athlete could have initiated any action to avoid the positive test results. *In casu*, the Athlete utilised Cannabis as a recreational drug – as a professional athlete he should have been more prudent in this regard – his evidence as to being slightly under the influence is no defence in this regard. The Athlete could have, and should have, refused the drug and as such taken action to avoid the positive test. The Athlete could furthermore have advised management as to the fact that he had smoked Cannabis, and as such withdrawn from the team. By playing the game, he took a risk that if tested, an adverse analytical finding may be made. He is an experienced professional Athlete, has represented his country, and has been subjected to testing before. The Athlete did not act within the expected standard of behaviour of a professional athlete and his failings in this regard mitigate against the argument that he may suffer financial prejudice as a consequence of the interim suspension, and that a suspension in excess of 2 months may jeopardise his international career. These consequences are as a

direct result of his actions. Furthermore, the Athlete, as a role model has a responsibility to act in a manner that sets an example to minor children, especially given the widespread use of recreational drugs amongst these children in South Africa. There is material fault on the part of the Athlete.

In reviewing the above, 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 three(3) months which period will be effective as of 14 March 2012 (being the date of notification of the adverse finding and implementation of provisional suspension), to terminate on the 14 June 2012;
2. The Athlete is to avail himself to SAIDS for purposes of participating in SAIDS anti-doping education programs for the 12 month period as of date hereof.
3. SAIDS is to issue a public statement in respect of this matter, where the issue of recreational drug use relative to competitive sport and the consequences of such doping rule violations are highlighted.

In conclusion, the Panel would like to thank all parties for the professional manner in which the inquiry was conducted, and the assistance that was given to the Panel in the presentation of comprehensive arguments.

A handwritten signature in black ink, appearing to read 'A. Breetzke', is written over a horizontal line. The signature is stylized and cursive.

Andrew Breetzke (Chair)

*Mr Jaffer*

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Dr Nasir Jaffer

*Mr Hasnodien Ismail*

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Mr Mr Hasnodien Ismail