SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE:	**MR THAPELO MAIKHI**
SPORTS FEDERATION:	**SOUTH AFRICAN WEIGHTLIFTING FEDERATION ("SAWF")**
DATE:	**THURSDAY, 17 NOVEMBER 2011**
PLACE OF HEARING:	**GARDEN COURT, SOUTHERN SUN HOTEL, KEMPTON PARK, OR THAMBO INTERNATIONAL AIRPORT.**
DISCIPLINARY PANEL ("PANEL"):	**MR ANDREW BREETZKE (CHAIRMAN)** **DR SELLO MOTAUNG (MEDICAL REPRESENTATIVE)** **PROF YOGA COOPOO (SPORTS ADMINISTRATOR)**
PROSECUTOR:	**ADV NIC KOCK**
ANTI-DOPING RULE VIOLATION:	**ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.3 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 assisted by Mr Andrew Anthony ("AA") who stated that he was also present in his capacity as a representative of the SAWF.

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.

SUMMARY OF EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents marked "A" to "F" as documentary and corroborative evidence to the oral evidence presented. Included in this bundle of documents was a series of emails sent by the Athlete to SAIDS prior to the hearing being convened.

The charge against the Athlete was set out in written correspondence emailed to the Athlete on the 27 October 2011 ("A"). The charge against the Athlete read as follows:

> *You have been charged with an anti-doping violation in terms of Article 2.3 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS).*

On 6 August 2011, you failed/refused to submit for sample collection after you were notified of your selection for an in-competition doping control test by a South African Institute for Drug-Free Sport Doping Control Officer..

The Athlete admitted that he was Guilty of the charge. The Panel requested that evidence be led as to the facts of the matter. The Athlete has been weight-lifting competitively for 8 years. During 2010 he stopped competing due to a back injury – however he returned to lift in 2011 and competed at the South African National Championships. He had also represented South Africa at the 2009 African Games in the 77 kg category. During this time he had opened a gym where he trained young athletes.

The Athlete had not received any specific anti-doping education, but his coach had always stated that it must be a "dope free" sport. He had attended a SAIDS workshop at Vodaworld in June 2011 and indicated he wanted more information on anti-doping matters. The Athlete stated that he had been tested approximately 4 times previously, and had at all times presented with a clean test.

The Doping Control Form ("E") was presented as evidence and the Athlete confirmed his signature on the form. It was recorded on the form that he had taken 2 supplements – anabolic creatine, and anabolic fast grow. These were USN supplements. Supplements were often used and were even provided by the coaching staff. His standard foodstuffs were pap, cabbage and meat.

The Athlete gave evidence that he had competed in the South African Senior Weightlifting Championships on the 6 August 2011. After he had competed he was advised by a SAIDS chaperone (Siyabonnga Sithole) that he had been selected for a test. He had participated and won his weight category – albeit he was the only contestant. The Athlete questioned why he had been selected to be tested, as he was primarily a coach and was not a serious competitor. The Athlete denied that he had deceived the officials as to his identity. The control form was completed but he advised that he refused to be tested. At this stage the Lead Doping Control Officer, Walied Bergstedt, was also in attendance. Although the Athlete refused to undertake the test and admitted to his intentional refusal in this regard, his athletes did take the test.

The Athlete was given water (3 bottles) and coke in attempt to assist him to pass urine. He attributed his inability to pass urine to the fact that the previous day he had taken a natural herb that had "cleaned him out" – it was established that this was a common practice amongst the athletes. Other athletes who had taken this herb tested negative at the championships. After approximately 2 hours he refused for a final time to take the test. He confirmed that the Doping Control Officer advised him that there would be serious consequences – although he believed that these consequences did not include him being ineligible to coach.

The Athlete gave extensive evidence as to the difficulties that he experienced in the sport, and specifically in relation to the SAWF. There was a breakdown in this relationship amongst athletes and there were issues of discrimination against previously disadvantaged athletes. This evidence was supported by AA. Given this breakdown, he did not readily comply with SAWF requirements as they were attempting to "get rid of us". As such, in objecting to the test, he believed he was objecting/protesting against the SAWF – he was not aware that SAIDS was a body separate to SAWF. His actions were a protest.

In hindsight, the Athlete testified that he realised he had made a mistake. He had however, undertaken previous tests and had never tested positive. His participation in the sport was now focused on coaching. AA confirmed that the Athlete was a talented coach.

On specific questions from the Panel, the Athlete stated that he had accompanied his athletes to the test as their future was "more important" than his. The Athlete had a grade 12 certificate, and was now studying.

SAIDS called the witness Walied Bergstedt ("WB"). WB was Lead Doping Control Officer at the event in question. He had been acting as a Doping Control Officer since 1999 and had never had an incident such as this. His responsibility is to oversee the chaperones. His evidence focused on the refusal of the Athlete to take the test, and confirmed what was presented in his written statement ("C"). The Athlete had initially denied his identity and this was only confirmed when an official was called. He had explained the entire process to the Athlete who continued to refuse to undertake the test – he had done so on three occasions. He had also warned that Athlete that there would be serious consequences. The Athlete had been given water and coke to assist him to pass urine. After about 2 hours of attempting to get the Athlete to pass urine, the Athlete refused again to pass urine after consulting with his friends.

FINDING ON THE CHARGE

Article 2.3 reads as follows:

> *Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in these Anti-Doping Rules, or otherwise evading Sample collection.*

The evidence relating to the charge is clear and uncontested, the Athlete refused to submit for sample collection after he had been notified of his selection for an in-competition test. There was no compelling justification in refusing to undertake the test. The Panel has therefore determined that the Athlete is Guilty of the offence as set out, and is in violation of Article 2.3 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

Article 10.3.1 of the SAIDS Code reads as follows:

> *For violations of Code Article 2.3 (Refusing or Failing to Submit to Sample Collection)..., the ineligibility period shall be two (2) years unless the conditions provided in Article 10.5, or the conditions provided in Code Article 10.6 are met.*

Article 10.5 concerns the Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstance. Of relevance to this inquiry are Articles 10.5.1. – the issue of No Fault or Negligence, and 10.5.2 – No Significant Fault or Negligence.

> ***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 Markers 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.

The definitions of *"No Fault or Negligence"* or *"No Significant Fault or Negligence"* are drafted in the context of violations involving prohibited substances. It is therefore difficult to apply them to violations relating to a refusal to give a sample. The commentary on the Rules states that "*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases"* and *"*
For purposes of assessing the Athlete or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete or other Person's departure from the expected standard of behaviour."

Article 10.6 relates to aggravating circumstances that may result in an increase in the period of ineligibility.

The Prosecutor stated in argument as to sanction, that the Rules clearly provided for a 24 month period of ineligibility, unless conditions in Article 10.5 were met. The positive role that the Athlete was playing in the community as a coach was admirable, but the Prosecutor stated that had no alternative but to ask for the 24 month sanction.

The Athlete regretted his actions, and was remorseful. He stated that his only desire was to return to the coaching of his athletes, and that he was not concerned with his own participation on competitions. He did not realise that he could be suspended from coaching

and regretted that he did not have greater knowledge of the anti-doping regulations. His actions were meant as a protest against the SAWF. He asked that he be allowed to coach.

In reviewing the evidence and argument, the issue to determine is whether the Athlete has established that he bore "***no Fault or Negligence***" or alternatively "***No Significant Fault or Negligence***". The onus rests on the Athlete in this regard.

The interpretation of the above terms is crucial in making a determination in this regard, as is an interpretation of the phrase "without compelling justification" which is an element of the offence in Article 2.3. Where it is clear that there is no compelling justification for the refusal, it could be argued that it can be an indication that there was fault or negligence on the part of the athlete. In the matter of ***Canadian Centre for Ethics in Sport v Shari Boyle (2007) SDRCC DT 07-0058 (Doping Tribunal)***, the athlete did not provide a sample because she got sick and went home without completing the doping control procedure and without notifying the doping control personnel that she was leaving. The arbitrator concluded that there was no justification for leaving the training centre without telling the relevant personnel what she was doing. For it to be a compelling justification, he said that "*her departure would have to have been unavoidable*" when in fact it was voluntary and intentional. Given this finding that the athlete's departure from the track and field centre was voluntary and intentional, he found he could not conclude that there was no fault or negligence or no significant fault or negligence on the part of the athlete.

On the issue of an athletes' misunderstanding relative to the refusal, the matter of the ***World Yachting Association and Christine Johnson*** (brought under the 2006 Rules of the World Yachting Association) and referenced in the matter of ***Boxing New Zealand Inc and Mark Robertson ST 07/07***, provides guidance. The athlete had refused to undertake the test as she was under the impression that as she had fallen out of the top 20 ranking, and was contemplating retirement, and as such that she was not compelled to take the test. Her misunderstanding was found not to constitute "*compelling justification*". The Tribunal thus observed that the athlete's misunderstanding did not allow a basis for finding "*no significant fault or negligence*".

In the matter of ***WADA v Busch CAS 2008/A/1738*** the athlete refused to submit to a test because he felt disturbed by too frequent doping tests and criticised the way athletes are selected to be submitted to out of competition testing. He did however submit to a test later in the day which was negative. The Court was not satisfied that the athlete had established no significant fault or negligence.

Further jurisprudence on this point was referenced in the matter of ***World Anti-Doping Agency (WADA) v Irish Sport Anti-Doping Disciplinary Panel and Ms. Julie McHale (29 July 2010)***: In ***USADA v Haimline (29th December 2005)*** the Tribunal, in dealing with the refusal to undertake a test, stated:

> *"The respondent's test refusal constitutes a presumptive WADA code violation requiring the respondent, in order to overcome the presumption, to demonstrate by a preponderance of the evidence truly exceptional or compelling circumstances justifying less than the maximum 2 year sanction … Only had he not intentionally refused testing would he be in a position to argue exceptional circumstances or no significant fault."*

Similarly, in ***Australian Water Polo v Heuchen (15th June 2006)*** the Court of Arbitration for Sport stated:

> *"The jurisprudence that has developed in relation to the interpretation of the phrase no significant fault or negligence reveals that the satisfaction of that standard has occurred when the athlete has established that his or her conduct was not intentional or purposeful and/or unique circumstances prevail. The respondent is not able to avail herself of clause 12.5(b). Her conduct [failure to submit to a test] was intentional and she bore significant fault and/or negligence in the circumstances."*

In the ***McHale*** matter, the athlete had declined to furnish the sample because she was on her way out to a meeting with a very important customer of her employer. The disciplinary panel found that she bore no fault or negligence in the refusal. The matter went on Appeal. As an amateur athlete having to work for a living, the court had sympathy for her predicament but ultimately stated that she had not met the burden of proof to show no

fault or negligence, or no significant fault or negligence – as such the sanction of a 2 year period of ineligibility was imposed.

In ***New Zealand Rugby League v Barry Tawera SDT/12/04*** the New Zealand Sport Dispute Tribunal found circumstances which did amount to no significant fault or negligence. The athlete was upset and agitated at having to do the test, and after throwing the initial sample in the toilet stated he "did not care" and left the room. He returned after three minutes and provided the sample which was found to be negative. He was warned by the officials administering the test that his refusal would have serious consequences, even if he later submitted to the test. In reviewing all the facts the tribunal held that his actions were "*a spontaneous overreaction to the circumstances at a time when Mr. Tawera was anxious to get the process over and done with and get on the road to Hawkes Bay"* (where his girlfriend was about to give birth). In imposing a lesser sanction of a one year period of ineligibility, the tribunal stated:

> *"The provision of a second sample which returned a negative result, and our conclusion from that that the first sample would necessarily also have been negative, is a truly exceptional circumstance. In most cases of refusal or failure to provide a sample, it is not possible to say with certainty what the result of the analysis would have been. But we believe we can be certain here.*
>
> *That means that the intentional failure to provide a sample assumes less significance "when viewed in the totality of the circumstances." We feel able to hold, therefore, in the particular and exceptional circumstances of this case, that Mr. Tawera has satisfied us that there was no "significant" fault or negligence on his part."*

In reviewing and applying the above jurisprudence to the arguments and evidence as presented by the Prosecutor and Athlete, there are a number of points to consider:

1. The Athletes refusal to submit for sample collection was intentional, and consistent. This immediately negates the possibility of there being "***no Fault or Negligence***" on the part of the Athlete. He was given every opportunity to provide the sample over a two

hour period. He was warned on a number of occasions as to the serious consequences of failing to provide the sample.

2. The Athlete has argued that his refusal was in protest against the SAWF, and that he was unaware that there was a distinction between SAIDS and SAWF – believing SAWF were undertaking the testing process. As such, one could draw parallels with the ***Barry Tawera*** case above where the athlete had a spontaneous over-reaction to circumstances. However, there was no evidence presented that his refusal at the time was noted as being in protest against SAWF. He made no mention of this protest during the two hour period that the control officers attempted to convince him to provide the sample. The evidence and written report of the Doping Control Officer makes no mention of the refusal being linked to a protest. It is reasonable to assume that had such a protest been made, that the Doping Control Officer would have explained that the testing process operates independently from the SAWF. Furthermore, in extensive email correspondence of the Athlete directed to SAIDS (subsequent to the notification), he at no time mentions that his actions were in protest against SAWF, but merely acknowledges that he has made an error. The issue of the protest was first raised in the inquiry.

3. The Athlete is an experienced participant in his field. On his own evidence, he had been subjected to 4 doping tests previously. As such he was aware of the process. Furthermore, he had attended a SAIDS seminar a few weeks prior to the South African Senior Weightlifting Championships. His argument as to thinking that the SAWF were the testing entity is not plausible.

4. In his capacity as Coach, the Athlete accompanied his athletes to their tests – stating in evidence that their future was "more important" than his. This in itself is an acknowledgement that the failure to submit to providing a sample would have severe consequences. It also proves that the Athlete trusted the testing process.

5. In much of the case law referred to above, the refusal to submit to sample collection has occurred during an out-of-competition test (***Busch, McHale***), when the sample collection

occurs at an inconvenient time. It is more understandable that the athlete in such circumstances may be irritated and object due to the inconvenience. However, *in casu,* the Athlete participated in an event where he was aware (through his previous experience) that he could be requested to submit to an in-competition sample collection. Furthermore, if an athlete participates in competitive sport he/she must accept that he/she may be subjected to in-competition and out-of-competition testing.

6. The Athlete gave extensive evidence as to his role as a coach in the community. It was evident (as corroborated by the evidence of AA) that he was playing a constructive and positive role in this regard. He had built his club to a high standard and is committed to his athletes – many of whom come from disadvantaged backgrounds. This can be seen as a significant mitigating factor when considering the sanction, but does not provide one with evidence that proves no significant fault or negligence. It could, however, also be argued that as a coach of junior athletes, he has not set a good example to his athletes.

7. There was a dispute on the evidence as to whether or not the athlete misled the Doping Control Officer as to his identity. We are prepared to accept the evidence of the Athlete on this issue that the question of his identity was that he saw no purpose in the test being administered as he was not a serious athlete, but a coach. This interaction may have been misinterpreted by the official concerned. However, the Athlete did participate and having won the event, his arguments in this regard have no merit.

Has the Athlete established that he bore "***no Fault or Negligence***" or alternatively "***No Significant Fault or Negligence***". We submit that on the above analysis, he has failed to discharge this onus. The circumstances as set out by the Athlete are not "*truly exceptional*", and are not specific and relevant to the extent that they explain the Athlete's departure from the expected standard of behaviour. It is regrettable that his actions will impact upon his work as a coach in the community – as it is evident that he has been fulfilling an important social function. However noble his actions in this regard may be, the sanctity of

the Rules and WADA Code must be respected and upheld, despite the unfortunate consequences in respect of this one element of the matter.

In reviewing the above, the sanction on the finding of Guilty is therefore 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 twenty four (24) months which period will be effective as of 16 August 2011 (being the date of notification of the refusal or failure without compelling justification to submit to the sample collection process and implementation of provisional suspension), to terminate on the 15 August 2013. In terms of these provisions, the Athlete is ineligible to perform duties as a coach.

2. The above anti-doping violation occurred during the South African Senior Weightlifting Championships on the 6 August 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 Rule, the Athlete therefore forfeits his performance in the South African Senior Weightlifting Championships 2011 including medals, points and prizes.

This done and signed at Cape Town, November 2011

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Andrew Breetzke (Chair)

Dr Sello Motaung

Prof Yoga Coopoo