

INTERNATIONAL RUGBY BOARD

IN THE MATTER of the Regulations Relating
to the Game

A N D

IN THE MATTER of an alleged doping offence
by **ANDRE DE KLERK** ("the
Player")

Judicial Committee

T M Gresson (New Zealand) (Chairman)
Doctor George Van Dugteren (South Africa)
Professor Yoshi Hayakawa (Japan)

Appearances and Attendances

For the Board

Ben Rutherford (RWC Legal Counsel)
Tim Ricketts (IRB Anti-Doping Manager)

Player

Andre De Klerk (Player)

Hearing

Written submissions and thereafter 1 March 2012 by way of telephone conference

REASONS FOR DECISION OF THE BOARD JUDICIAL COMMITTEE

1. This is the first occasion when an IRB Board Judicial Committee ("BJC") is required to consider a second anti-doping violation by the same Player. As will become apparent the second infraction has very serious consequences for a young player.
2. As noted in the BJC's decision¹ dated 23rd February 2010 the Player had considerable promise having at the age of 19 represented Namibia at the IRB Junior World Rugby Trophy Tournament in Kenya in 2009 and having been selected to make his test debut in a RWC qualifying match at senior level. His ambition was to become a professional rugby player and in 2010 had agreed terms with Natal. The terms included the requirement that he

¹ <http://www.keeperclean.com/downloads/cases/34/DeKlerk.pdf>

(the Player) meet certain strength and fitness standards, including bench pressing in excess of his body weight.

3. The first anti-doping rule violation occurred because the Player decided he needed to resort to chemical assistance to increase his strength. However, following an Out of Competition Test, the Player tested positive for the prohibited substance epimetendiol and 17-epimethandienone (metabolites of methandienone), an anabolic androgenic steroid prohibited under Section 1 of the WADA Prohibited List 2009. As a result, on 15th March 2010, the Player received a two year period of ineligibility from a Board Judicial Committee. The Player's period of ineligibility in relation to that anti-doping rule violation expired on 27th November 2011.
4. During the period of ineligibility the Player stated he kept himself in "*top physical condition*" as he still had the ambition of playing rugby in South Africa after he became eligible to resume playing rugby.
5. On 14th August 2011 the Player provided a urine sample (number 2632230) during further Out of Competition Testing. The A sample was analysed by the World Anti-Doping Agency ("WADA") Accredited Laboratory at Bloemfontein, South Africa. The laboratory reported that the sample had a testosterone to epitestosterone ratio of 6.5; this being higher than the WADA cut-off of 4. The sample was then transferred to the WADA Accredited Laboratory at Cologne, Germany to be analysed by isotope-ratio mass spectrometry to determine whether the elevated ratio was due to a natural level of testosterone or the consumption of exogenous testosterone or testosterone pro-hormones. The Cologne laboratory reported that its analysis indicated an application of testosterone or testosterone pro-hormones.
6. Testosterone is listed in Section 1 Anabolic Agents on the WADA Prohibited List 2011. The WADA Prohibited List is incorporated into IRB Regulation 21 (Anti-Doping) as Schedule 2.
7. A preliminary review of the case was undertaken by Doctor Barry O'Driscoll (Ireland) in accordance with IRB Regulation 21.20. He determined that an

anti-doping rule violation may have been committed in contravention of IRB Regulation 21.2.1.

8. The Player was notified by the IRB of his Adverse Analytical Finding on 21st November 2011. The Player confirmed receipt of the notification from the IRB by way of a letter dated 24th November 2011 and did not request an analysis of his B sample. In his letter, the Player identified a supplement he had been taking, known as "*Animal Stak*", which he indicated contained (according to its marketing) "*the powerful 1-2 punch of testosterone and growth hormone in one formula*". The IRB provisionally suspended the Player, pursuant to IRB Regulation 21.19.1, from the date of the expiry of the existing period of ineligibility; ie. 27th November 2011.
9. IRB Regulation 21.22.15 provides it is "*a condition to regaining eligibility at the end of a specified period of ineligibility [that the] Player must, during any period of Provisional Suspension or Ineligibility, make himself available for Out of Competition Testing by the Board ... and must comply with all whereabouts requirements set out in Regulation 21.10*". When the IRB attempted to test the Player during his period of ineligibility it became apparent the Player's whereabouts information did not comply with the requirements of Regulation 21.10. As a result, the IRB was forced to make further enquiries before eventually the Player was located prior to the further testing. The Player received a Filing Failure on 27th July 2011 and the IRB has indicated it reserves its rights in relation to bringing a further charge in relation to that matter.
10. Since 2007 the Player had received anti-doping education and was familiar with the IRB anti-doping regime.
11. This BJC has been appointed to consider the Player's case. The hearing took place by way of a telephone conference on 1st March 2012.

Anti-Doping Rule Violation Established

12. In his letter dated 24th November 2011, and at the commencement of the hearing, the Player accepted the analytical findings of the laboratory. Accordingly the BJC finds the Board has established to the required

standard² the anti-doping rule violation; that is the presence of exogenously administered testosterone or its prohormones in the Player's bodily sample.

Sanction

Regulatory Framework

13. The IRB's regulatory framework stipulates that in imposing the appropriate sanction the BJC is required to apply the relevant provisions of Regulation 21 (which are based on the World Anti-Doping Code).
14. Regulation 21.22.10 prescribes the applicable sanctions for multiple violations:

Multiple Violations

A. Second Anti-Doping Rule Violation

For a Player's or other Person's first anti-doping rule violation, the period of Ineligibility is set forth in Regulation 21.22.1 and 21.22.2 (subject to elimination, reduction or suspension under Regulation 21.22.3 or 21.22.4, 21.22.5, 21.22.6, 21.22.7 and/or 21.22.8, or to an increase under Regulation 21.22.9). For a second anti-doping rule violation the period of Ineligibility shall be within the range set forth in the table below.

<i>Second Violation</i>	<i>RS</i>	<i>FFMT</i>	<i>NSF</i>	<i>St</i>	<i>AS</i>	<i>TRA</i>
<i>First Violation</i>						
<i>RS</i>	1-4	2-4	2-4	4-6	8-10	10-life
<i>FFMT</i>	1-4	4-8	4-8	6-8	10-life	life
<i>NSF</i>	1-4	4-8	4-8	6-8	10-life	life
<i>St</i>	2-4	6-8	6-8	8-life	life	life
<i>AS</i>	4-5	10-life	10-life	life	life	life
<i>TRA</i>	8-life	life	life	life	life	life

Definitions for the purposes of the second anti-doping rule violation table:

RS *(Reduced sanction for Specified Substance under Regulation 21.22.3): The anti-doping rule violation was or should be sanctioned by a reduced sanction under Regulation 21.22.3 because it involved a Specified Substance and the other conditions under Regulation 21.22.3 were met.*

² Regulation 21.3.1 – Comfortable satisfaction

FFMT (*Filing Failure and/or Missed Tests*): The anti-doping rule violation was or should be sanctioned under Regulation 21.22.2(c).

NSF (*Reduced sanction for No Significant Fault or Negligence*): The anti-doping rule violation was or should be sanctioned by a reduced sanction under Regulation 21.22.5 because No Significant Fault or Negligence under Regulation 21.22.5 was proved by the Player.

St (*Standard sanction under Regulation 21.22.1 or 21.22.2(a)*): The anti-doping rule violation was or should be sanctioned by the standard sanction or two years under Regulation 21.22.1 or 21.22.2(a).

AS (*Aggravated sanction*): The anti-doping rule violation was or should be sanctioned by an aggravated sanction under Regulation 21.22.9 because the Anti-Doping Organisation established the conditions set forth under Regulation 21.22.9.

TRA (*Trafficking or Attempted Trafficking and Administration or Attempted Administration*): The anti-doping rule violation was or should be sanctioned by a sanction under Regulation 21.22.2(b)."

15. In the context of this case it can be seen that the following sanctions potentially are applicable:
- The prescribed reduced sanction for a No Significant Fault or Negligence (NSF) violation - a period of ineligibility of between six to eight years.
 - The prescribed sanction for a Standard sanction (St) violation - a period of ineligibility between eight years to life.
 - The prescribed sanction for an Aggravated sanction (AS) violation - a period of ineligibility for life.

It can be seen, because of the need to strongly denounce conduct of this kind, all the potential sanctions for a player who commits multiple violations are severe and have serious long-term consequences.

16. During the hearing the Player accepted he was unable to advance the proposition there was No Significant Fault or Negligence on his part. Therefore, this would not permit the BJC to impose a sanction of between six to eight years. On the other hand, Counsel for the IRB did not contend this was a case where there were aggravating circumstances which warranted an increase in the period of suspension. Mr Rutherford submitted in the

circumstances the minimum Standard sanction (eight years) should be imposed.

17. The BJC is satisfied that in the circumstances both the Player and Counsel for the IRB made appropriate concessions.

18. In relation to the Player's degree of fault, the marketing of the supplement should have put him on notice with regard to the dangers of using "Animal Stak". Parts of the written material accompanying the product stated:

"Animal Stak is complete. It's got everything you need. For starters, each individual pak contains 250 mg of the most comprehensive prohormone complex available.

If these prohormones weren't enough, we've also added nearly 5 full grams of growth-hormone releasing secretagogues and substrates. In other words, Animal Stak can also boost growth hormone (GH) release; increase protein synthesis further; exert anti-catabolic effects; and promote new growth. There's nothing else in the world that combines the powerful 1-2 punch of testosterone and growth hormone in one formula. These GH secretagogues have been shown in studies to boost GH levels by up to eight times over baseline values 30-90 minutes after oral administration.

Not stopping there, we've also added luteinizing hormone (LH) boosters. The LH component to Animal Stak can increase LH release in the pituitary by up to 72%. In Eastern Europe, nutrients which promote LH release (and found in Animal Stak) have been used by strength athletes to great success for decades. LH is a pituitary hormone which signals to the body to make more testosterone."

19. Further, the Player was already the subject of a two year period of ineligibility at the relevant time. He was familiar with the IRB anti-doping programmes and had received Notice (from the IRB following the first sanction) of his obligations. Given these factors he must have been aware of the perils of illegitimately using banned substances to increase his body strength during the period of his suspension, particularly when the notice stipulated he would be required to undergo further out of competition testing prior to his return to rugby.

20. Indeed, in this regard Counsel for the IRB submitted this was not a case of no significant fault but a further occasion when the Player in pursuing his ambition of becoming a professional rugby player in South Africa had again

attempted to cheat by using a banned substance. In support of this submission Mr Rutherford referred to the Player's failure to declare "*Animal Stak*" on the Doping Control Form and the steps the Player took to avoid testing. Whether, the Player deliberately attempted to miss, out of competition testing, to avoid detection prior to re-entering rugby would have required the BJC to determine whether the Player's explanations relating to his failure to comply with his whereabouts obligations were credible.

21. If the BJC was not satisfied as to the credibility of the Player's explanations, the Player's conduct in relation to his whereabouts obligations clearly would have amounted to an aggravating factor. In turn, this would have warranted an increase in the period of ineligibility. However, given the IRB did not seek an increase beyond an eight year period of suspension, and because it has reserved its position with regard to bringing a charge in respect of the alleged breach of the whereabouts regulations, Counsel for the IRB accepted it was not necessary for the BJC to make a determination in relation to this collateral issue.
22. Accordingly the BJC is satisfied in the circumstances of the case the minimum period of eight years ineligibility is appropriate.

Decision

23. For the reasons outlined, the sanction imposed for this second anti-doping rule violation is a period of ineligibility of eight years commencing from 27th November 2011 (being the date upon which the Player's provisional suspension commenced) and concluding (but inclusive of) the 27th November 2019.

Costs

24. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr Ricketts by 17:00 Dublin time on 12th April 2012, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 27th April 2012.

Review

25. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit to the Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is also directed to Regulation 21.24.2, which sets out the process for referral to a Post Hearing Review Body, including the time within which the process must be initiated.



T.M Gresson
Chairman

4 April 2012