

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

ANTI-DOPING DISCIPLINARY COMMITTEE

HELD AT HOLIDAY INN ROSEBANK

In the matter of: Mr. Jaco van Niekerk

RULING

Composition of the Panel

1. This committee was appointed by the South African Institute for Drug-Free Sport (SAIDS). SAIDS is a statutory body created by section 2 of South African Institute for Drug-Free Sport Act 14 of 1997, as amended in 2005 when SAIDS accepted the World Anti-doping code. The Anti-doping Rules 2009 Published by SAIDS are applicable to the present proceedings.) ("**the Rules**")
2. The SAIDS Anti-doping Disciplinary Committee ("**the Committee**") has been Appointed in terms of Article 8.1 of the Rules. The committee consists of Mandla Tshabalala, Dr Ephraim Nematswerani and Joe Carrim.

3. The pro-forma prosecutor for SAIDS was Mr Kock.
4. The athlete was represented by Adv. GJ Scheepers on Instructions of Willaims van Rooyen Inc

Charges

The charge against the Mr. Van Niekerk is contained in a letter dated 13 June 2012 addressed to the athlete. What is of relevance at this stage and in the letter is a portion relating to the charge, which reads as follows:

"Please be informed that the analytical report received from the South Africa Doping Control Laboratory confirmed the presence of the stimulant Methylhexanamine in your urine sample (sample number 2634839) provided during an in-competition test at 14:37 after the Supersport Series Wheelchair Championship Match between the Blades and Puma on 05 May 2012."

This constitutes a breach of Article 2.1 of the South African Institute for Drug-Free Sports (SAIDS) which states that *"The presence of the prohibited substance or its metabolites or markers in the athlete's samples."*

RIGHT TO HAVE THE "B" SAMPLE TESTED

Article 2.1.2 of the Rules points out the implication of a positive "A" sample where the opportunity for a "B" sample is waived. Article 2.1.2 of the Rules reads as follows:

"Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample."

Mr. Van Niekerk waived the right to have the "B" sample "TESTED".

PLEA TO THE CHARGE

Mr. Van Niekerk pleaded guilty to the charge

MITIGATING CIRCUMSTANCES

Mr. Van Niekerk was offered an opportunity to mitigate the circumstances of his situation in lieu of sanctions. In doing so he had an opportunity to call witnesses in mitigation.

Advocate Scheepers addressed the panel in mitigation and stated, amongst the issues, that what happened with Mr. Van Niekerk was a pure mistake especially to trust the salesman who actually convinced him that the substances do not contain any banned substance, that it was an oversight from the side of the athlete for failing to take further reasonable steps to ensure that the supplements/substance does not contain any banned substance. He further stated that the athlete does not have any previous conviction on doping and that he has never tested positive

to a banned substance, further stated that this was an exceptional circumstance which requires deviation from the normal circumstances. He further stated that they will address us on how the substances got into Mr. Van Niekerk and they will further prove that there was no intention to enhance any performance.

First Witness: Mr. Van Niekerk

Examination in Chief

He gave a background to cause of his disability (which the writer herein will not go into details at this point in time)

He was asked as to why he went and bought the supplement, he said that the intention was to lose weight and was advised by the salesman that BADBOY RAPID LOSS and BADBOY WHEY PROTEIN do not contain any banned substances and that as advised he procured the items after he informed the salesman that he is in fact participating in sport. He further testified that the reason why he wanted to lose weight was because it became difficult to deal with his disability as he needed to move from his wheelchair to another seat, he found it difficult to do so and further that he felt so uncomfortable so he decided to lose some weight so that it could be easier physically. He further testified that, if he knew, he would have not taken the supplements and that he would not wilfully jeopardise his opportunity to represent his country in the upcoming Paralympics event. It also came to our attention that Mr. Van Niekerk is on "ANTI-DEPRESSANT" form the day of his accident.

Cross Examination

He was asked as to whether he consumed nothing else beside the identified supplements, he said he consumed nothing else. He was further asked as to what

does he do when he is at the gym, he stated that he does weights and cardiovascular in the court. As to whether anything or any exercise could have assisted him to reduce or lose weight, he said pushing could assist and swimming as well. As to when was the last time he used the product, he said the previous day prior to the game when he was tested and that after he tested positive, his mother, in a fit rage got rid of all the items. As to whether he has ever come across the doping topic or simply put, whether he has ever been educated about doping issues, he said at school level and not at the club, though at school it was not detailed and no address on prohibited substances. He was asked as to whether there is a team doctor with the national team, he said yes and that they never had any talk with regard to doping issues and he further testified that he attended training in Holland and Australia and even in those two countries he was never subjected to any discussion on doping. He further conceded to the danger of not consulting a sport doctor. He was asked as to whether he has ever been subjected to anti-doping testing before, he said he was tested twice in the past and the results were negative.

Second witness: Mrs van Niekerk (Mr. Van Niekerk's mother)

The witness testified that her son wanted to lose weight as he was becoming chubby and lost self esteem. He was asked as to how many people will carry him; she said about 3 or 4. As to how she reacted after testing positive, she said as a result of anger and depression she removed and threw away everything.

Cross-examination

She was asked as to the state of mind of Mr. Van Niekerk, she said he was devastated and was down and lost self esteem. As to whether she is familiar with anti-doping, she said no it was the first time she had of such.

Third witness: Mr Patrick Fick: (Wheelchair Basketball National Coach)

The witness testified and categorically stated that Mr. Van Niekerk's weight was not a problem to the team and further that he would not have lost his position because of weight and in fact he would have preferred him heavier for the role that he plays within the team. He lastly stated that he never instructed Mr. Van Niekerk to lose weight, in fact he has already made his team.

Cross-examination

The witness was asked whether the losing of weight would in any way enhance performance or has enhance the performance of Mr. Van Niekerk, he said he has no noticed any changes on Mr. Van Niekerk. As to whether as a team they have discussed any doping issues, he said yes on quarterly basis and was discussed substantively. He further noted that Mr. Van Niekerk was not always present due to his absence as a result of him being out of the country.

Closing arguments

Advocate Scheepers stated in closing that there is circumstantial evidence and further that the reasonable inference that the supplement entered the body of Mr. Van Niekerk as a result of the intake of the aforesaid supplements. He further stated that there was no intention to enhance or to improve performance. Mr. Van Niekerk prepared well for the upcoming tournament even his parents spent money by sending him to Holland and Australia to gain more international experience and that there was no way he could jeopardize his opportunity. He prayed that we consider Article 10.4 of the SAID rules, which rules strives to reduce a sentence if the athlete could prove that the specified substance was not intended to enhance

performance and that the sanction must be classified at the lowest scale. He further stated that the purpose of sanction is amongst others, rehabilitation and that the mother has taken steps to ensure that her son rehabilitates from the experience and further that he is willing to educate other athletes about the issue of anti-doping. In the circumstances he prayed for a reprimand alternatively a 30 days suspension.

Closing argument: Prosecution

The pro forma stated that the composition of the substances found in Mr. Van Niekerk contains the banned substance and that the use of such substance was based on emotion. There was fault in this case, time factor also played an essential role, further that he failed to take the necessary care as required, he is to be blamed for such an incident.

APPLICABLE RULES

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 rule violation under Article 2.1"

Sanction

Mr. Van Niekerk pleaded guilty to the charge and as such he is found guilty for the contravention of the SAIDS rule. However we were to deliberate on the possible sanctions.

It is evident from the testimonies of the witnesses that Mr. Van Niekerk had no intention to enhance performance but to lose weight for reasons outside his sport.

Notwithstanding the fact that the substances did enter his body as a consequence of an advise by the salesman, it is however our opinion that he should have taken reasonable steps to ensure that the substances are not banned. The reasonable elite sportsman in his position would have taken reasonable steps to avert such a situation. In the Rugby case of Ralepelle and Basson, the players tested to the same substances as Mr. Van Niekerk, however the difference between these two cases is that in the case of Ralepelle and Basson the substances were provided by the Association to the players, therefore the blameworthiness shifted to the Association, however the Association (I think the association supported the athletes-Doc please advise) argued that and as is contained in these rules "that it is the responsibility of the players to ensure that whatever goes into their bodies is not a banned substance." In the present case the athlete himself went to buy and even ensure that it enters his body. Article 10.4 of the SAIDS Rules deals with elimination and reduction of the period of ineligibility for specific substances under specific circumstances and it specifically states that "*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 substances was not intended to enhance the athlete's sport performance or mask the use of a performance the use of a performance enhancing substance, the period of the 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 maximum, two (2) years ineligibility*"

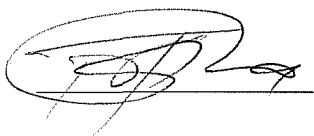
The above provision provides us with a number of options to consider elimination or reducing the period of ineligibility. However one thing that we need to prove is whether the banned substances were used without the intention of enhancing performance. We were satisfied that Mr. Van Niekerk had no intention of enhancing

performance and therefore he qualifies for the reduction or ineligibility under his circumstances.

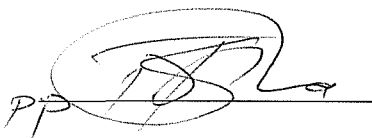
In the circumstances and being guided by the decision in the Ralepelle case and Article 9 of SAID Rules, which deals with commencement of ineligibility and Of interest to us is Article 10.9.4 which states that *"where an athlete promptly admits the anti-doping rules violation after being confronted with the anti-doping rules violation by SAIDS, the period of ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this article applies, the athlete or the other person shall serve at least one half of the period of ineligibility going forward from the date of the athlete or other person accepted the imposition of a sanction or the date of a hearing decision imposing a sanction."* In the circumstances we impose the following sanction

1. That Mr. Van Niekers is suspended for a period of three (3) months from the date of the sample collection.

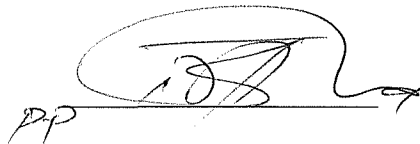
Date: 04 July 2012



Mandla Tshabalala



Dr. Ephraim Nematswerani



Joe Cassim