

# Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?

by Niel du Toit\*

## Introduction

The doping violations by two Springbok rugby players at the 2010 tour to the UK and Ireland made me realise that there is a major lack of knowledge regarding Sports Law and specifically the rules regulating sports doping in South Africa.

The national coach, several other prominent sports personalities and members of the media did not seem to grasp the seriousness of the situation. There seems to be the perception that the players are not guilty of doping violations because they did not know that they were using prohibited substances. The coach even went further to say that if the whole team was tested on that specific day, even more players would have tested positive.

In this case the banned stimulant was in a supplement given to the players in the warm-up before the Test against Ireland and is a product that has been used by the Springboks before - without any adverse analytical findings - and is used by other professional and national teams in both hemispheres. It was manufactured in the UK and was tested at South African Rugby Union's request in order to ensure that it complied with the requirements of the World Anti-Doping Agency (WADA).

At the subsequent disciplinary hearing it was then ruled that there was no fault on the part of the Players and that a reprimand be the appropriate sanction on the facts of this case. The disciplinary committee reasoned that

*"the Players have already suffered the ignominy of being sent home early from the overseas tour, provisionally suspended for nearly three months and having their doping charges made public with the concomitant embarrassment, uncertainty, personal anguish and damage to their reputations. All of this should serve as a deterrent for other players against the indiscriminate and careless use of supplements. Any further punishment for the Players in question would, however, be out of kilter with their lack of fault in the matter".<sup>1</sup>*

It is important to note that the match was an international friendly and thus not of the same importance as for example a World Cup match. The Irish Rugby team subsequently did lodge an appeal or any other complaint regarding the doping violations by the two Springboks.

I am however of the opinion the consequences of the doping violations would have been much more severe had this match been a World Cup match.

The aim of this article is thus to show just what exactly constitutes a doping violation and the consequences that it could have on a team.

In order to examine the above it is important to first understand how sports doping is regulated.

## The IOC

Sports doping is regulated by the World Anti-Doping Agency (WADA), which was established by the International Olympic Committee (IOC) as an independent international doping control body.

The need for such an agency was highlighted by the 1998 Tour de France doping scandal. So in order to ensure a fair playing field and to protect the health of athletes the International Olympic Committee undertook a rigorous programme to combat the doping problem. This started with the World Conference on Doping in Sport in Lausanne in

February 1999. And as it was proposed at the conference, the World Anti-Doping Agency was established in November 1999 as an independent international doping control body. Then in 2003 WADA adopted World Anti-Doping Code (WADC). And it is this Code that now regulates sports doping internationally.<sup>2</sup>

The second question is where WADA derives its status or power to regulate the different sporting codes. The answer lies in the importance of membership to the IOC.

The IOC is arguably the most powerful and prestigious sporting organisation in the world. Almost all the different sporting codes wish to be a member of the IOC, and in order to be a member it is prerequisite to accept the Olympic charter. The Olympic charter is the founding text and fundamental source of the law of the IOC.<sup>3</sup> Thus, we can say that the Olympic Charter is the most important text regulating the sporting world. And it is clearly stated in the charter that a sporting code or country that wish to be part of the IOC must accept the World Anti-Doping Code. Thus, almost all sporting codes in South Africa have made the WADC part of their constitutions and South Africa as a country has even adopted the code by means of legislation with the South African Institute for Drug-free Sport Act 14 of 1997.

In practise this means that sport organisations (in the case of rugby, the International Rugby Board and the South African Rugby Union) will be forced to adopt the WADC in their constitutions. And thus rugby players will have clauses in their player's contract stating that they will be bound by the WADC.

## Violations

Article 2 of the WADC states that the following will constitute an anti-doping rule violation:

2.1.1 *The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.*

2.1.1 *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 bodily Specimens. 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*

The WADC thus creates a position where an athlete would have automatically violated an anti-doping rule when a prohibited substance is found in his sample. The principle of strict liability therefore applies which means that a doping violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was otherwise negligent or otherwise at fault.<sup>4</sup>

The strict liability rule is not something new that was created by the WADC. It is a well know legal rule and is contained in several statutes around the world, especially in statutory offences. The justification for strict liability in regards to statutory offences seems to also be applicable to the WADC. Here follows an explanation on several of the arguments in favour of the strict liability rule.

## Arguments in favour of Strict Liability

When a prohibited substance is present in an athlete's body that athlete will have an unfair advantage against "clean" athletes. The question of how the substance entered the body then becomes irrelevant. In the case *Quigley v UIT CAS 94/129* the Court of Arbitration for Sport gave the following rationale for automatic disqualification when a prohibited substance was found in an athletes sample during competition:<sup>5</sup>

*"It is true that a strict liability test is likely in some sense to be unfair in an individual case... where the athlete may have taken a medication as the result of mislabelling or faulty advice for which he or she is not responsible... but it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will*

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1 Decision of a Saru Judicial Committee in the matter of Mahlatse Chiliboy Ralepelle and Bjorn Basson. Committee: Adv J Lubbe SC, Dr G Van Dugteren, dv R Stelzner SC. date and venue of hearing:

25 January 2011 at SARU Head Office, Newlands, Cape Town

2 Cloete et al Introduction to Sports Law in South Africa (2005) 185.

3 Mestre "The Legal Basis of the Olympic Charter" (2008) ISLJ 100.

4 Cloete et al 187.

5 Gardiner et al Sports law (2006) 3rd edition 242.

*the rules of competition be altered due to the unfairness. Just as the competition will not be postponed to await an athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption...*"

In cases such as anti-doping rule violations it will be very difficult if not impossible to prove that the defendant had acted with fault or negligence. Athletes would simply say that they do not know how the substance got into their bodies. Thus, such athletes will go unpunished rendering the WADC useless.

Strict liability thus creates the situation whereby athletes will do everything possible to make sure they are in accordance to the rules of the WADC. An athlete is supposed to know the rules of the WADC. He or she must accordingly implement extra measures to make sure that he or she does not get prohibited substances in their bodies.

Lastly it is important to understand that a doping rule violation does not automatically lead to a punishment or sanction. Article 10 of the WADC states that the athlete will have the possibility to avoid or reduce sanctions if he or she can establish to the satisfaction of a tribunal how the substance entered his or her system, demonstrate that he or she was not at fault or significant fault or in certain circumstances did not intend to enhance his or her sport performance.

Although the concept of strict liability seems harsh, I still believe it is the only viable option to combat doping. Doping is an extreme problem and thus extreme measures must be taken to overcome this problem. It is thus extremely important that all involved in sport understand the WADC and the consequences of doping violations.

With the above in mind it is thus clear to see why the disciplinary committee decided that to reprimand the players would be the appropriate sanction in the case of the two Springbok rugby case. It does however, contrary to popular belief, still mean that they were guilty of a doping offence.

The situation however becomes more complicated when two or more players from the same team are tested positive for a prohibited substance, which was the case in the above situation.

### Consequences of doping violations on team sports.

Article 11.2 of the WADC state that *if more than two members of a team in a team sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any consequences imposed upon the individual athletes committing the anti-doping rule violation.*

The IRB Regulation 21.23.2 similarly states that *If more than two members of a Team are found to have committed an anti-doping rule violation during the Match, or Tournament or International Tour, the entity with jurisdiction over the Match, Tournament or International Tour shall impose an appropriate sanction on the Team (e.g. loss of points, Disqualification from a Match, or Tournament or International Tour and/or other sanction) in addition to any Consequences imposed upon the individual Player(s) committing the anti-doping rule violations.*

Although a severe sanction such as disqualification will not easily be imposed, there have been cases which were heard by the CAS in which there were argued that a team be disqualified because of doping violations by some of its players or members.

An example would be the case of Arbitration CAS ad hoc Division (OG Beijing) 08/001 Azerbaijan National Olympic Committee (ANOC), Azerbaijan Field Hockey Federation (AFHF), Hidayatova Nazira and others (the Players) v. Fédération Internationale de Hockey (FIH), award of 2 August 2008. At the 2008 Women's World Hockey Qualifier for the Olympic Games the final was contested between the teams of Azerbaijan and Spain, which Spain subsequently won. However, after the event it was confirmed that two Spanish players tested positive

for a prohibited substance. Because two players tested positive, Spain could have been disqualified, however the disciplinary commission found that only one player was guilty of a doping violation. Azerbaijan appealed to CAS, but Spain won the case on a technical point. This case however shows that teams will make use of Article 11 in order to disqualify other teams whose players violated the WADC, and that CAS will be willing to entertain such matters.

Another example is the case of Wales vs. UEFA where the Welsh football team lost out to Russia in a play off for the European Championships of 2004. After the play off matches one of the Russian players failed a doping test subsequently the Welsh argued that not only should the player be banned but Russia should also be disqualified from the tournament meaning that Wales would take their place. UEFA however dismissed the claim saying that the UEFA doping regulations did not make provision for the sanctioning of a team because of the conduct of the player.

The case was subsequently taken before the CAS<sup>6</sup>. UEFA argued that CAS had no jurisdiction to adjudicate the matter, but CAS decided that it did indeed have authority. However in the end the CAS held that Russia would keep its place in the tournament.<sup>7</sup> Like the "Hockey case" this case just further shows the willingness of the CAS to entertain these matters.

Examples of teams, which were indeed disqualified because of doping offences, would be:

- The 2008 USA Olympic equestrian teams horses tested positive for a prohibited substance;
- The 2003 British men's 4 x 100m relay squad lost their silver medals following Dwain Chambers positive drugs test at the recent World Athletics Championships;
- The 2000 USA Olympic women's 4 x 100 and 4 x 400 relay teams.

It is however important to note that while WADC provided specific rules concerning sports which are not Team Sports but where Awards are given to teams (such as track and field relays), the WADC provides no express rule for team competitions within such sports. Thus, the WADC-leaves each International Federation total discretion as to the rules to adopt for its own sport. The International Association of Athletics Federations (IAAF) for example imposes an automatic disqualification for relay teams if one of its members is found guilty of a doping offence (Article 42)

Although there is no example of a disqualification in a team sport the above examples shows that action can and will be taken against teams whose members violated the WADC and that teams may indeed in the future be disqualified.

It is thus clear that if two or more Springbok rugby players test positive at the Rugby World Cup 2011, it can cost the Springboks their whole campaign. We can now only hope that the Springbok management, and for that matter all sports in South Africa, have learnt their lesson and in the future will make sure that they are up to date with the WADC and understand the working and consequences thereof.

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<sup>6</sup> CAS 2004/A/593 - Football Association of Wales v. UEFA.

<sup>7</sup> Charlish: Football Association of Wales v. UEFA: [2004] I.S.L.R. 73.