RECORD OF DECISION

of

THE SOUTH AFRICAN INSTIUTE OF DRUG FREE SPORT "SAIDS"

ANTI-DOPING DISCIPLINARY

HEARING COMMITTEE

comprising of

John Bush lawyer member and chairperson
Sello Motaung doctor member
Beverley Peters sportswoman and administrator member

In the matter between

SAIDS

and

RUSSELL LUND

DECISION OF THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT
ANTI-DOPING DISCIPLINARY COMMITTEE

In the matter of

RUSSELL LUND

LEGISLATIVE & LEGAL BACKGROUND / FRAMEWORK

1. The South African Institute for Drug-Free Sport, "**SAIDS**" is a corporate body established under section 2 of the South African Institute for Drug-Free Sport, Act 14 of 1997, as amended, "the Act".

2. The main objective which **SAIDS** has is to promote and support the elimination of doping practices in sport which are contrary to the principles of fair play and medical ethics in the interests of the health and well being of sportspersons.

3. On 25 November 2005 **SAIDS**, formally accepted the World Anti-Doping Code, "the Code", which the World Anti-Doping Agency, "WADA", had adopted on 5 March 2003.

4. By doing this **SAIDS**, as the National Anti-Doping Organisation for South Africa, introduced anti-doping rules and principles governing participation in sport under the jurisdiction of SASCOC, the South African Sports Confederation and Olympic Committee, or any national sports federation.

5. The Anti-Doping Rules 2009, as published by **SAIDS**, ("the **Rules**"), which are applicable to the present proceedings, incorporate the mandatory provisions of the Code as well as the remaining provisions adapted by **SAIDS** in conformance with the Code.

6. The **Rules** provide, inter alia, that testing conducted by **SAIDS** shall be in substantial conformity with the International Standards for Testing in force at the time of testing.

7. Cycling South Africa, "CSA", as the national federation governing the sport of cycling in South Africa, has adopted and implemented **SAIDS** anti-doping policies and rules which conform to the Code and the **Rules**.

PANEL CONSTITUTION

8. This **SAIDS** Anti-Doping Disciplinary Committee hearing **Panel**, consisting of John Bush - Chairperson and Legal Representative, Sello Motaung - Medical practitioner and Beverley Peters - Sports Administrator, ("the **Panel**"), was appointed by **SAIDS** in accordance with the provisions of Article 8 of the **Rules**, to adjudicate whether the athlete Russell Lund **("Lund")** had violated the **Rules** and if so what the consequences should be.

CHARGE RELATING TO ANTI-DOPING VIOLATION

9. The charge against **Lund** is contained in a letter which was addressed and couriered to him on 2 August 2011. (This letter is referred to as Exhibit "A")

The relevant portion of the letter relating to the charge reads as follows:

"You have been charged with an anti-doping rule violation in terms of article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (**SAIDS**).

On the 13 March 2011 you provided a urine sample (A2530620) during an in-competition test after your event, (the Cape Argus Pick 'n Pay Cycle Tour), as per the normal procedure for drug testing in sport. Upon analysis, the South African Doping Control Laboratory at the University of Free State reported the presence of prohibited substances in your sample.

The substances identified were Methandienone and its metabolites 17-epimethandienone and 6B-hydroxymethandienone. Methandienone falls under the **Class S1, "Anabolic Agents"** on the World Anti-Doping Code 2011 Prohibited List International Standard.

10. Article 2.1 of the Rules reads as follows:

"**2.1 Presence of a *Prohibited Substance* or its *Metabolites or Markers* in an *Athlete's Sample*.**

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 *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.

PROCEEDINGS

The hearing was conducted over two evenings - 25 August 2011 in the Bidvest Premier Conference Centre, OR Tambo Airport and 27 October 2011 at the Garden Court Southern Sun Hotel, Isando.

25 AUGUST 2011

11. The prosecutor for **SAIDS** in this matter was Mr Nic Kock, **"Kock"** assisted by Mr Chris Hattingh, **"Hattingh"**

12. **Lund** was represented by Advocate Attie Heyns, "**Heyns**", instructed and assisted by attorney M R (Mike) Harty, Attorney, "**Harty**".

13. The **Panel** members and all those present, including Mr Jeremy Khaya Maqwatini,"**Maqwatini**", who was to be called as the **SAIDS** witness, having introduced themselves at the invitation of the Chairman, the Chairman then briefly explained the procedure to be followed for the hearing in accordance with the **Rules**.

14. In the absence of a recording device on the first evening of the hearing on 25 August 2011 and indeed also on the second and final evening, and by agreement with the parties the Chairman kept as best a written record of the proceedings that he could have.

15. **Kock** read the charge and then proceeded to identify the documents in the hearing bundle relating to the charge. At the same time agreement was reached between **Lund**'s defence team and the prosecution concerning matters which they were prepared to accept as common cause

and thus not in dispute towards limiting the issues in dispute and curtailing the duration of the hearing.

16. The following is a list of the documents handed in and received as evidentiary exhibits, "the Exhibits". The comment alongside denotes whether or not they were accepted as evidence or any matters referred to therein were disputed.

17. <u>List of Exhibits</u>

A.	**SAIDS** letter dated 2.8.2011 containing the charge	Nothing in dispute
B.	**SAIDS** letter dated 5.4.2011 adverse analytical finding	Nothing in dispute
C.	Laboratory report UOFS dated 25.3.2011	Accepted
D.	Doping Control Form 43065 dated 13.3.2011	Some matters accepted others required to be clarified
E.	Chain of Custody Form dated 14.3.2011	May be referred to nothing in Dispute
F.	Gert Burger letter dated 16.5.2011 with statement	Questioned whether the prosecution would rely on it. No issue with conclusion/ accepted that no conclusion drawn/in short nothing prejudicial except if advised other wise
G.	Sworn affidavit JK **Maqwatini** dated 21.4.2011	Questions would be asked
H.	Report on Rusell **Lund** test JK **Maqwatini** attached	Questions would be asked
I.	Fax 23.6.2011 UOFS Sadocol A & B sample volumes	Issues had been raised and touched upon in corres-pondence/wanted this to be clarified as well
J.	Doping Control Station Register	Some questions about that
K.	Affidavit Darius Geldenhuys	To be 'put on ice' whilst instructions taken
L.	Chain of Custody Form 1	Yes
M.	Chain of Custody Form 2	Yes
N.	Chain of Custody Form 3	Yes
O.	Waybill Tracking Details Waybill 8571649	No issues
P.	Courier IT POD Copy Waybill 8571649	No issues
Q.	E-mail W Hawksworth **SAIDS** Review 10-047 dated 1.4.2011	No issues
R.	Time Line Russell **Lund** Sample 2530620	Accept
S.	Additional Report declaration by Kassiem Adams dated 25.8.2011	Accept

18. Specific areas of dispute and agreement were then outlined by **Heyns**. In doing so he also dealt with some further questions raised by **Kock**, as he sought to avoid a "scattergun approach" in the hearing regarding the following -

    18.1 <u>Selection process for athlete /cyclist:</u> No dispute regarding the fact that **SAIDS** was informed about which positions were to be tested

18.2 Doping Control Form: No dispute on the identification of the athlete based on the affidavit of Darius Geldenhuys - Exhibit D

18.3 The process of sample collection: Dispute on the telephone number, the signatures, comments, the bottom 2/3rds of the Doping Control Form – Exhibit D

19. **Heyns** then concluded in advising that the only disputes centred on the Doping Control Form and the selection and sealing of the sample vessel for collection. The following further matters were then duly noted and accepted or disputed in this regard -

19.4 apart from being willing to admit that the signature on the bottom right hand corner was accepted ("OK") everything else on the Doping Control Form was disputed;

19.5 the process relating to compliance with the International Standards for Testing was in dispute;

19.6 Chain of custody process – there was no dispute regarding any matter relating to

19.6.1 the period during which the lead DCO, Kassiem Adams, was in control of the samples from 10:16 on 13 March 2011 to 10:35 on 14 March 2011 when these were handed over to Courier IT;

19.6.2 the period and 10:35 on 14 March 2011 to 10:22 on 15 March 2011during which the samples were in the custody of Courier IT and being couriered for delivery to the UOFS and accepted and signed for by Mr du Preez;

19.6.3 the period following such receipt of the sample by the laboratory and the testing procedure resulting in the report under sample 2530620 having been issued thereafter.

19.7 no dispute regarding any matter thereafter resulting in the notification of the Adverse Analytical Finding.

19.8 what happened in the Doping Control Station between 09:50 to 10:16 on 13 March would be called into question.

20. **Maqwatini** was then called by **Kock** as a **SAIDS** prosecution witness. He committed to tell the truth in all he would state in evidence. **Kock** put questions to **Maqwatini** regarding his involvement as an assistant doping control officer appointed by **SAIDS** for the Cape Argus Cycle Tour leading to the charge against **Lund** being brought by **SAIDS**.

21. It is important to note that during the period in which **Maqwatini** was giving evidence-in-chief, **Heyns** raised objections to some leading questions which both **Kock** and **Hattingh** had put to **Maqwatini**. Some of these objections were upheld by the Chairman and consequently noted by the hearing **Panel** for the purpose of determining what evidentiary weight and thus probative value, if any, ought to the given to the answers provided by **Maqwatini** to any such questions.

22. It should be noted that for the sake of convenience this decision also seeks to provide as complete a record as possible of the hearing proceedings of 25 August 2011 and 27 October. (The written notes which the Chairman took as the agreed record thereof are nevertheless available for consideration by any interested party)

23. Of all the questions raised by the prosecution, answers given and/or other unsolicited evidence provided by **Maqwatini,** as well as any other matter, such as the objections raised and /or questions put by the **Panel** members, the following have as a matter of further convenience

been extracted as the material, as well as noteworthy aspects of **Maqwatini's** evidence-in-chief and matters incidental and/or related thereto.

Maqwatini stated that he

- is a **SAIDS** DCO – Doping Control Officer
- he was a DCO at 50 events....(clarified .. after 15 had been heard incorrectly). Richie Mc Caw, who he stated was very professional, was one of the persons he had tested
- received training as a DCO in Durban through South African.. Drug Free Sport
- had not had any complaints made against him
- was not the only DCO at the event
- knew who to look out for as he was advised by Amanda to look out for V 377
- was helped by Darius who offered to check for his athlete as there were so many cyclists
- was phoned by Darius who told him that he had found Russell (**Lund**) and would wait for him
- introduced himself to **Lund** and showed him his accreditation
- asked **Lund** for any ID, or licence to which **Lund** replied that everything was in the hotel
- wrote in the time of notification as 09:50 on the doping control form (Exhibit D) which was when he (**Lund)** signed it
- asked **Lund** how Cape Town and the race was on the way to the doping control station
- wrote in the time of 09:57 as the arrival time at the doping control station "DCS"
- asked **Lund** if he had ever been tested before and was told 'No' whilst walking to the DCS
- also told **Lund** his rights, that he had 1hr to report to the DCS and could eat had he wished and drink water, whilst walking to the DCS
- **Lund** was in full view at all times and on way to the DCS
- told **Lund** to sign the control station register (Exhibit J) when they got to the DCS
- told **Lund** what to do for a urine sample and that he would wait for him
- advised that they then went to the mobile toilets where he saw **Lund** pull off his trousers and pee in front of him in providing the 125ml sample
- gave toilet paper to **Lund** as he advised that the sample needed to be covered as this was very sensitive matter
- noted the time for the provision of the sample as 10:05
- advised **Lund** to
  - to choose from the sample storage bottles and check if anyone had opened them first (the breaking of the blue stripe (seal) would mean that he would have opened a bottle first)
  - start with the bottle for the B sample and to fill it to the mark which he showed him
  - then close it and make sure that it was sealed
  - thereafter do the same for the A sample bottle and leave a little bit
- noted before recording the SG that there were no bubbles in the two plastic bottles and that if the sample was too diluted ie SG below 1.005 another sample would have to have been provided
- asked **Lund** whether there was any medication which he had taken within the last seven days which he wished to disclose to him to which **Lund** response was no and that he had not taken anything
- then went on to advise how the doping control form was then completed as he
  - dealt with the research option which **Lund** understood and accepted
  - printed his name and signed as the DCO
  - scratched (drew the line through) the boxes under athlete representative, as there had not been any
  - printed his name and signed as the urine sample witness certifying that the sample collection was conducted in accordance with the relevant procedures

- asked **Lund** how he felt about the process and was advised that it went well
- recorded this
- added the time 10:16 in the box for the time of completion
- advised **Lund** that as he (**Lund**) would be the last person to sign the form he should check everything, including address and then if he was happy to sign it, which **Lund** then did

➢ explained how the copies of the signed form were distributed which, based upon their colour, would go to

1. the Federation
2. **SAIDS**
3. Laboratory
4. **Lund** himself

➢ mentioned that **Lund** would be advised within 3 weeks if there was anything **SAIDS** wished to let him know about.

24. In further clarification of **Maqwatini's** opening statement **Kock** then put further questions to **Maqwatini.**

25. The first of which were challenged as leading questions by **Heyns,** who asked that **Kock** not be so leading in his questions. This was because **Kock** had stated that **Lund** had carried his own urine sample from the toilet to the DCS - doping control station and had placed it in front of him in choosing a test kit - when **Kock** sought answers from **Maqwatini** on these very matters especially without any inferences drawn from what is recorded in clause 23 above.

26. Such questions led to **Maqwatini** providing the following which are considered to be of evidentiary value

➢ the DCS – Doping Control Station - was in the vicinity of the large TV screen
➢ it was shared with the paramedics
➢ the mobile toilets were 10 metres from the DCS
➢ the DCS was in a tent
➢ apart from Colleen Hlazo, a DCO and 2 other DCOs the lead DCO Kassiem Adams were also at the DCS (four DCOs and the lead DCO)
➢ had **Maqwatini** made a mistake in the procedure, or on the Doping Control Form – DCF he was permitted, or required to get permission, to tear up the form
➢ **Maqwatini** did not made a mistake in the procedure or form
➢ the mistake in his writing of the tel no on the DCF was due to the information **Lund** gave
➢ there had been no other urine samples in the area
➢ **Maqwatini** and **Lund** had gone straight to the DCS once the urine sample had been obtained
➢ although it was not clear just how many forms there were the green form was given to **Lund** at the same time as when everything was finished

27. Following the supper adjournment, called for once **Maqwatini** had completed his evidence in chief on behalf of the **SAIDS** prosecution, **Heyns** commenced his cross examination of **Maqwatini.**

28. Having obtained assurance from **Maqwatini** that he was still committed to speak the truth **Heyns** asked **Maqwatini** whether there was anything he wanted to change, to which **Maqwatini** responded that there was nothing and he was happy.

29. Such cross-examination resulted in **Maqwatini** providing answers to questions which resulted in the following

- he had done 50 events as a DCO
- he started in 2010
- he went to Durban in September 2010 for the training at around 16/17 ....the dates he could not remember
- the training involved a lot of activities
- he was of course trained in the International Standards for Testing
- a lady from Poland was there
- he realised that it was very important what standard had to be achieved
- such standard was achieved (in this case)
- he had been involved with other tests
- he had drafted the report in Exhibit "H", which he himself had typed from original notes which were scrapped, around about April-May (if he was correct) after he was notified to do so
- the affidavit which was deposed to on the 21 April before the Railway Police was in his own handwriting
- knew that the International Standards for testing were very important
- the toilets were mobile, the DCS was not a mobile station as such but a tent
- although it was unclear whether the DCS area was clearly demarcated and/or identified as a DCS, there was
    - the tent where the DCOs worked
    - fences for the crowds
    - sharing of the tent with the paramedics, who also used it
- because of the media presence and concern about privacy he had given **Lund** toilet paper to cover the urine sample container, (collection vessel) once **Lund** had finished providing the urine sample, which he got from the toilet
- they - **Maqwatini** and **Lund** - did not queue

  Heyns indicated that **Lund**'s evidence would be that there had been concerns about privacy and that they had to queue, as he raised areas of likely dispute
- although the members of the public could have used the mobile toilets this was probably limited
- once the toilet door was closed it was only **Lund** and **Maqwatini** (who were there)
- <u>there was a clear dispute of fact</u> regarding the apparent conflict between the use of the words *"I used toilet paper to cover his urine sample because the media was outside"* and *"I gave him the toilet paper to cover....".*

  As offered by **Heyns** in **Lund**'s defence this was a deliberate change of evidence in an attempt to ensure compliance with what would have been seen as a breach of the International Standards for Testing, had **Maqwatini** himself touched or covered the sample himself.

  If it was not this then it could well have been a result of difficulty with expressing oneself clearly in language which was not one's own mother tongue, as alluded to by the Chairman
- <u>another area of clear dispute arose</u> regarding **Maqwatini** having responded that he had not touched the testing samples, as he had asked **Lund** to choose his own and advised **Lund** to himself check if the paper (seals) had been broken to see if these had been opened by anyone else, before he opened it,

  In opposition to this **Heyns** advised that **Lund**'s evidence would be that **Maqwatini** touched the samples and put them in the bag
- **Maqwatini's** response to this was that **Lund** had put the samples in the bag. To which **Heyns** retorted that this could have been **Maqwatini's** impression but it was not fact, for the evidence which **Lund** would lead was that he (**Maqwitini**) carried and covered

the sample. **Maqwatini** responded to **Heyns** advice that he had received instructions that **Maqwatini** had covered the sample by stating that he (**Lund**) "is lying".

- To **Heyns'** statement that it would have been objectively impossible, ("no way in the world"), for **Lund** to both hold the sample and remove his bib and cycling vest at the same time **Magwatini's** response was that it was made clear to **Lund** that **Lund** would carry his own sample and **Lund** did so in his own hand. He recalled **Lund** taking his trousers off and putting the sample down as he, **Maqwatini,** told **Lund** about the toilet paper.
- **Heyns** went on to question **Maqwatini** why this was not in his report after having stated rhetorically that **Maqwatini** was more concerned about the procedure than with what actually happened. He then rephrased the question as he inquired of **Maqwatini** why it was important that the athlete handle the sample and **Lund** should carry his own sample.
- **Maqwatini** responded by stating that the procedure was that the athlete was the only person to carry the sample.
- **Heyns** then asked **Maqwatini** why if this was part of the International Standards for Testing this was not in his report, to which **Maqwatini's** response was that he did not see to put it into the report.
- In then turning to the highlighted phrase "**explained what is required**" in paragraph 4 of **Maqwatini's** report, **Heyns** asked **Maqwatini** when he had explained this. **Maqwatini** replied that this happened as they walked to the doping control station, ("DCS") whereas **Lund's** evidence would be that this happened when they had arrived at the DCS.
- **Maqwatini** then mentioned that he had told **Lund** that he could go to friends. **Heyns** made it clear that in his view **Maqwatini** had listed matters irrelevant to the proceedings. He stated that it was of utmost importance that the report covered everything that had happened, as the evidence he would lead on **Lund's** behalf would deal with the procedure. **Maqwatini** stated that he (**Heyns**) could not write his report.
- **Heyns** in stating that **Maqwatini** had chosen to use the toilet paper then asked **Maqwatini** where this was to be found in the International Standards for Testing, ("IST"). **Maqwatini** failed to reply to this question which could have simply been answered that he did not know.
- It was then stated by **Heyns** that it would be eventually be argued that the use of toilet paper from a mobile toilet to cover the urine sample was a completely unacceptable breach of the International Standards for Testing.
- **Maqwatini** responded by stating that once a person had peed the sample vessel was closed with a red cover (lid).
- **Heyns** questioned **Maqwatini** regarding why it was necessary for **Lund** to cover the sample. **Maqwatini** replied that this was in case of anything coming up and that he told **Lund** to take the toilet paper when he (**Lund**) was in front of him.
- To the suggestion that **Maqwatini** had carried the sample in front of **Lund**, **Maqwatini** responded that this would not have been okay as **Lund** had to carry the sample.
- On the further question posed by **Heyns** of when **Lund** had finished **Maqwatini** replied he had looked for him for about an hour.
- **Maqwatini** responded that he did not know to **Heyns'** statement that **Lund's** evidence would be that he had spent a considerable amount of time with family and friends.
- **Maqwatini** advised that he was an assistant DCO with Mr Adams the lead DCO when asked whether he was a DCO.
- **Heyns** questioned **Maqwatini** on whether he knew it was a requirement that the athlete was required to wash his hands, to which **Maqwatini** responded in the

affirmative. When asked why this had not been put in his report **Maqawatini** replied that he had maybe forgotten about this.

- **Heyns'** retort was that **Maqwatini** had not asked **Lund** to wash his hands at all.
- **Maqwatini** was questioned on whether he had asked **Lund** if he wanted a representative and if there was anything else which **Maqwatini** hadn't met. **Maqwatini** avoided answering the questions stating in response, when pressed to do so – and by the Chairman - that the statement was a "broad one".
- **Maqwatini** advised that the volume of the sample was 125ml, when questioned regarding what such volume was. He said this was split into the A and B sample ie two bottles, with that little bit which was left over of the diluted sample thrown into the bin.
- It was pointed out by **Heyns** that this was another example of a requirement of the IST not put into the report, namely to split what was required and discussed this. **Maqwatini** replied that this is what he had done.
- In turning to Exhibit D, the Doping Control Form, **Heyns** asked **Maqwatini** whether there was anything that he did not complete and then what was not in his handwriting.
- **Maqwatini** answered that he had not completed the name of the third party and that Kassiem Adams the lead DCO had completed the test mission code, sport, discipline/ team, notification date and date of sample collection.
- Then **Maqwatini** advised in response to **Heyns** question as to who had been in the tent with him that Mr Geldenhuys, Kassiem Adams (lead DCO) and Colleen Hlazo.
- Attention was then drawn to the Doping Control Station Register – Exhibit J with **Maqwatini** describing the process of going along with the athlete to enter his name, being able to sign out and the change from 10:11 to 10:16, a correction ("scratch"- in his words) made to tie in with the Doping Control Form, ("DCF") and not remembering whether he had asked about this.
- He stated that N Gasa was outside of the tent (09h48-10h14) as reflected in the Doping Control Register in response to **Heyns** questioning whether N Gasa was there at that time.

30. At 21h40 it was decided that the proceedings were to be adjourned for continuance at a later date to be agreed.

31. This followed discussion during which **Heyns** advised that -

    31.1 he still wished to deal with the following
    - toilets and water
    - waiting areas
    - the Doping Control Station
    - covering of the containers
    - laboratory integrity - contamination report

    31.2 the hearing process still involved re-examination and argument in summing up;

    31.3 the defence faced another case to the one which they had prepared for;

    31.4 the defence had the opportunity (during the time of the adjournment) without being penalised to consider their position and were willing to liaise with the prosecution about the evidence.

27 OCTOBER 2011

32. The hearing proceedings reconvened at the Garden Court, Isando on the evening of 27 October 2011.

33. **Kock** on behalf of the prosecution submitted the report of Mrs Y Palm, Hands on Forensics, a forensic document and handwriting examiner, dated 21 September 2011, which had been sent to **Lund's** attorneys. This was accepted as Exhibit "T". Other documents, which included the correspondence between **SAIDS** and **Harty,** as are referred to herein were accepted as Exhibits "U" – "W".

34. **Heyns** advised that it would not be necessary to call Mrs Palm as the report contents were accepted as the report did not dispute the signatures on the doping control form.

35. It was emphasised by **Heyns** that he would focus attention further on the **Maqwatini** report - Exhibit "H", the Doping Control Station register – Exhibit "J", as well as the International Standards for Testing and what had happened in the Doping Control Station. He advised that Exhibit "I" – dealing with the sample volumes was accepted as evidence.

36. Whilst the following further documents, being **Maqwatini's** training record and training programme, the record of **Maqwatini's** tests and all correspondence - between **Harty,** as **Lund**'s attoneys and **SAIDS** during the period of adjournment - were put forward and accepted as evidence, **Heyns** objected to the proposed handing in of the layout of the doping control station as evidence by **Kock.**

37. The hearing **Panel** resolved, following submissions made by **Kock** and **Heyns** and a short adjournment for the **Panel** members to deliberate thereon, to uphold the objection and not allow for the lay out plan to be admitted into evidence.

38. The **Panel**'s reasons for not accepting such document into evidence were that

    - although stamped by the police it was not part of any sworn statement
    - it was too late to do so
    - it would have been unfair and caused prejudice to **Lund's** case
    - this was consistent with and would tie into the **Panel**'s earlier ruling not to allow any further delay in the hearing of the matter, when the **Panel** ruled against **Kock's** request that the prosecution be allowed to call Mr Kassiem Adams as a witness, albeit that at that stage the reasoning would have related more to the signatures on the Doping Control Form being in dispute
    - it did not have any impact on the determination of whether the sample had been tampered with within the process of testing in order to establish the integrity of the sample, which lead to the adverse analytical finding having been made.

39. Thereafter, upon the invitation of the Chairman and after ensuring that **Maqwatini** was still willing to tell the truth **Heyns** then proceeded to cross-examine **Maqwatini** further by inquiring whether he had had an opportunity to consult with and/or speak to **Kock** or **Hattingh.**

40. **Maqwatini** advised that he had not but spoke generally with **Kock** on the way to the hearing. He mentioned that this was not about the evidence he was lead but about the fact that Mr Fahmy Galant of the **SAIDS** office had asked him to write a report. He also responded to further questions by saying that he had not spoken to **Kock** about the International Standards for Testing or to anyone about his evidence.

41. At that stage **Heyns** asked **Maqwatini** about whether he remembered being questioned about being trained in the IST. He raised questions specifically concerning such training with reference to the training programme which was then placed before **Maqwatini** and generally regarding his understanding of what the IST were.

42. These resulted in -

- **Maqwatini** stating that
  - the standards that they were trained in lined up with the IST
  - he was not the person who formulated the training
  - what was done as South Africans and the IST were the same, providing examples such as the way to identify the athlete and sealing of sample

- **Hattingh** at this point, with **Maqwatini** having difficulty answering the questions posed regarding how the subject matter of the training programme aligned with training in the IST, provided some further assistance. He referred, without objection, to the right hand side of the programme and identified the sample collection procedure and witnessing sample collection. He mentioned that this would be part of the IST and that the South African standard was greater than the IST and lined up with other Federations.

43. In retort **Heyns** challenged whether the training programme had anything to do with the IST, to which **Hattingh's** response was that he (**Hattingh**) was the consultant who had prepared the original manual. (Doping Control Manual) He had worked with a lady from Finland. It was pointed out that it mattered not whether the lady who prepared the document for the course was from Poland or Finland as **Maqwatini** had not been trained by her.

44. **Heyns** then asked **Maqwatini** to refer to the programme to show where he had been trained in the IST. **Maqwatini** did not answer this question and chose furthermore not to do so even when the Chairman asked him to do so. **Maqwatini** then suggested that this question be put to **SAIDS**

45. It was then that **Heyns** turned his attention to the Doping Control Form , Exhibit "D", as he asked **Maqwatini** to remind everyone why he had not completed some places and where these were. **Maqwatini** replied that this was because the lead DCO had the choice to do so if he (the lead DCO) had the time. He mentioned the places which he had not completed, as the test mission code, sport, discipline/team, notification date and date of sample collection.

47. Regarding the evidence about the toilet paper which **Maqwatini** had earlier given, **Heyns** reminded **Maqwatini** that there was substantial dispute, as **Heyns** thereafter posed questions relating to the mobile toilets, number of media (representatives) outside and **Maqwatini's** request that the sample be covered by **Lund**.

48. In dealing with whether the toilets were public or private **Heyns** conceded that although it was clear that there were members of the media outside of the mobile toilets, which were thus open to the public, it was not in dispute that once inside the mobile toilet which had been chosen this was "private".

49. In questioning the need for the sample being covered outside of the toilet **Heyns** asked **Maqwatini** what the distance from the room / the doping control station to the toilets was. **Maqwatini** said this was 2-3 metres and that is was necessary to cover the sample because of members of the media being around.

50. **Maqwatini** confirmed this distance as correct. As he did so he chose not to comment to **Heyns** response that this was incredible and not such distance, but (rather) between 50/80 metres, as it was more probable that one would have used the toilet paper over such longer distance. When asked whether he understood the question **Maqwatini** chose not to reply and declined to answer this question, posed in statement form, when invited to do so.

51. **Heyns** asked **Maqwatini** about the Doping Control Station, ("DCS"). This resulted in him answering that it was

    - covered on both sides
    - shared with the paramedics
    - open in the front
    - had a door facing the toilets
    - not possible for one to see what was inside when the door was closed
    - like a tent, as it had a sail cover
    - a big tent.

52. Questions then followed on **Maqwatini's** report – Exhibit "H". **Heyns** asked **Maqwatini** to look at the middle of the page, which **Maqwatini** said he had himself typed, when asked if this was so, as **Heyns** sought reasons for the statement **"explained what is required"** in the context of the report and by virtue of further questions, in relation to compliance with the IST.

    (He advised that he had not kept his notes relating to the preparation of the report.)

    These questions resulted in **Maqwatini's** response to the former being that the statement

    - stood alone - because that is what was told to **Lund**
    - was in bold print form - because it was important

    and that he also told **Lund** that

    - From the time I notify him, his got one hour to report to the Doping Control Office
    - He should not drink any unsealed water, drink etc.
    - If he want to eat, he can, but on his own risk as long as he (sic) wouldn't been given by me.

53. Referring to the report **Heyns** challengingly questioned whether **Maqwatini** had met with the procedural requirements relating to the collection of urine samples and if this was so why mention of these and other matters relating to the IST were not made in **Maqwatini's** report.

54. **Heyns'** further challenge to **Maqwatini** was such that **Lund**'s evidence would be that he (**Maqwatini**) had covered the sample with toilet paper and taken control of the sample for such purpose.

55. **Maqwatini,** who wrote "I used toilet paper to cover his urine sample because the media was outside" in his report, was quite adamant that he gave **Lund** the toilet paper to cover the sample. He was also sure that **Lund** had the sample under his own (**Lund**'s) personal control, even when it appeared, as pointed out by **Heyns** that when undressing **Lund** would not have been able to hold the sample himself.

56. **Heyns** concluded his cross-examination with an indicative statement that **Lund** would establish at least 10 (ten) aspects of non-compliance with the IST in his evidence. In his view despite what **Maqwatini** had said about meeting the IST this was just not good enough !

Re-examination

57. At this stage **Hattingh** requested that he put a few questions, before **Kock** continued with the re-examination.

58. These resulted in the **Maqwatini** providing the following initial answers (some of which were in response to leading questions, such as the media presence in dealing with the reason for the covering and handling of the sample, which were noted as such)

    - the covering of the sample was because he did not want the media to see it
    - the media were not watching but taking photographs
    - **Lund** had put the sample in front of him when he had finished "peeing" in order to close the cap
    - the sample could not be closed with the toilet paper
    - in a situation where an athlete could not handle his own sample then the DCO would put this in front of the athlete

59. In response to a question regarding what had then happened **Maqwatini** provided that he had told **Lund** what to do: to check for whether the vessel had a crack; to wash his hands; to put the vessel in front of him; close it and that he was in control of the sample.

    He advised that he (**Maqwatini)** was furthermore not allowed to touch the sample even if an athlete asked him to do so or to help divide it and that he did not touch the sample.

60. The **Panel** was requested to ignore the leading question as to whether anyone could have looked into the tent opening. **Hattingh** then asked **Maqwatini** what he knew about the IST - dealing with what was required to handle the athlete – to which **Maqwatini** responded that he had the **SAIDS** document. (Doping Control Manual)

61. Further responses by **Maqwatini** provided that

    - the tent had a single door
    - the paramedics occupied one half of the tent
    - two athletes could be dealt with at the same time
    - the tent was not congested
    - the DCO had own privacy and table to deal with the athlete

62. To questions, relating to what had happened at the doping control area after **Lund** went to the toilet, which were then posed for clarification purposes by **Kock**, **Maqwatini** responded that the register was signed and name entered, **Lund** was asked about what he had drunk and medication taken. There was a waiting area with four chairs.

Lund's evidence-in-chief

63. After committing to tell the truth and the whole truth in what he said **Lund's** opening evidence was that he

    - had a canoeing background of around 10 years, competed at national level and achieved a number of top ten finishes and two top 5 finishes
    - knew how to train which made it easy to translate these skills into cycling

- was introduced into and took to cycling through the 94.7 whilst working on the Jurgemeister account and then joined Cycle Lab
- initially cycled socially but then more competitively, having put together a strict training schedule, resulting in his potential being recognised by Cycle Lab, as time and energy was invested in him towards setting specific goals to race what he wanted to achieve
- took supplements, running a full time business and training 10 -12 hours per week
- was involved with hill training, team tactics, long slow rides with the emphasis of cardiovascular and being as light as one could
- realised that nutrition was important because of coming from a sport with a heavy upper body focus as he looked for a strict diet supplement
- asked Dr Wian Stander to help him to get to his goal natural body weight, with an eating programme to achieve those goals
- was very cautious, using supplements to aid recovery and deal with lactic acid, aware that drug testing would be "part and parcel" of the cycling drug space with tests continuously
- was satisfied with his supplement programme, as he had spoken to Andre McLean, being extremely cautious and alert all the time with regard to what one had eaten and drank.

64. In response to **Heyns'** question as to how he ensured everything was above board, **Lund** said he trusted Dr Stander, as a professional, to ensure that everything was within legal bounds and consulted with other athletes.

65. **Lund** went on to describe how he had progressed from starting cycling to his first big win. Beginning in the open groups to being invited to join the Cycle Lab Vets Team by Andre McLean in a very competitive group he moved from top 50s, top 30s, top 20s slowly progressing to a top 5 position and his being lucky enough to take a win this year.

66. In answers to other questions then put to him **Lund** testified that he

    - was aware of testing at the Argus and certainly at big races
    - took amino acids for recovery with Glutamine
    - also used USN products called CLA and ZMA, within a range of products all of which he could not remember, which included Arginine, a protein – to aid his recovery at best
    - was incredibly excited about the result as he then described the race involving the pro ladies, who raced as a career and not as a hobby, closing the gap following the two big hills, not being a time trailer, the lead out following the big accident at the end, with the sprint and final kick to win
    - was incredibly exhausted after the race
    - moved through the refreshment channel to backslapping and congratulations from his wife and friends, who had come to watch the race and had spent about 40 minutes having coffee with them
    - then went to drop off the bikes as these had been booked to be taken up to Johannesburg.

67. It was then that **Lund** testified he had met **Maqwatini,** who had approached him and introduced himself. **Lund's** further evidence, which followed this introduction, was that **Maqwatini** asked him to follow him as he (**Lund**) had to give urine for a doping test.

68. **Lund's** testimony continued with him stating that

    - he followed **Maqwatini,** who was a very friendly likeable guy, for about 1km to the tent, as they chatted (on the way)
    - at no point had he felt that he was in a demarcated area when they arrived at the tent (Doping Control Station)

- he could not tell the difference as there were a couple of tents with the (DCS) tent in one corner, numerous people walking about
- the tent was classic white pvc marquee with four sides, three of which were completely closed off, with one side completely removed, which he estimated was 9m x 6m
- there was a hive of activity in the tent, which had testing tables on both sides and chairs, with what looked cyclists, people and coaches and **SAIDS** persons not in uniform
- there was a row of pvc chairs and an umbrella, with people sitting there , the tent opened up to the whole public area... to the porta-loos, which he had the impression were 50 metres past the tent
- whilst in the office he chose one of various sample collection vessels, which he took and had in his hand
- had to take off two layers and drop shorts to provide the sample. Whilst **Maqwatini** was chatting and friendly he asked for the sample.He did not remember there being any cap on the vessel which **Maqwatini** wrapped toilet paper around
- having arrived at the porta-loos, the area was not guarded, it was a confined space for 2 persons to be in....they had to queue to go in ....there were 2/3 porta-loos...he was sorry he could not recall everything, which were all new to him, being excited about the race.

69. **Heyns** turned to the IST and asked **Lund,** to the extent he could remember, whether **Maqwatini** had referred to the IST requirements.

70. **Lund 's** testimony concerning this was that

    - there had been social discussion
    - **Maqwatini** had told him he needed to do a drug test
    - the paperwork at the tent must have been the signing of the register
    - the sample had been taken
    - when they got back to the tent the urine sample was split
    - he had not recalled being told that he had one hour to report to the DCS

71. At that point **Lund** stated in response to **Heyns's** opening statement regarding **Lund** initial position as having denied that two of the signatures (on the doping control form) were his, that he (**Lund**) still didn't agree that the one signature was his as the evidence had not been conclusive.

72. **Kock** on behalf of the prosecution immediately responded to this as he questioned whether this was not an attempt to being ambushed as **Lund** had clearly accepted the report.

73. Following a request by the Chairman that **Lund's** defence team take instructions from **Lund** regarding this sudden and surprising change in position and the brief adjournment which was allowed for this purpose, **Heyns** advised that

    - **Lund** did not dispute anything in the report (Palm report)
    - if it would be of assistance to the tribunal (**Panel**) and **Kock ,** evidence to the contrary was to be disregarded
    - whatever was heard that was prejudicial to the prosecution was similarly to be disregarded
    - the purpose of the question (which had been posed) was to clarify the change in **Lund's** position, in order to get evidence on record of probative value that **Lund** was not dishonest when he disputed the signatures
    - it was to be understood that no adverse finding should be made against the prosecution
    - **Lund** did not have the time and money to contest the matter of the signatures further

- He, **Heyns,** was aware of his professional and ethical obligations regarding the leading of evidence and knew what not to lead, as the correct evidence should be served
- **Lund** took a view as a layman when confronted with the Doping Control Form at that time, which changed following the evidence of a professional
- it was in any event not disputed that **Maqwatini** was in the tent with **Lund** when **Lund** was tested.

74. **Lund** added that he definitely had to accept that the signatures could be his, not denying that these were, as he had then denied, as he changed his stance. He then stated that although the signatures did not look like his it had been shown that one was genuine and the other was in all probability a genuine one.

75. **Heyns** returned to leading **Lund's** further evidence-in-chief as **Lund** provided the following further testimony -

    - he accepted that he was asked to select a vessel when around at the table
    - he did not remember whether he was asked to check if the seals had not been tampered with
    - whilst in the toilet **Maqwatini** covered the vessel in toilet paper, placed it on the table and handed it back to **Lund** after he had covered it
    - he definitely did not put the lid on the vessel
    - he could only presume that **Maqwatini** put the lid on the vessel, although he did not see this
    - **Maqwatini** did not ask him to wash his hands
    - he did not feel that the doping control area was private, and it was particularly uncomfortable in that area and the walk to the toilet
    - the area was messy with tables and a whole bunch of bottles on them
    - he did not choose the bottles (sample kit)
    - he was not ever asked to discard the rest of the urine

76. **Lund's** testimony about being informed about the test results was that

    - this was a gigantic shock
    - he was conscious of it being read in the newspaper
    - he was mortified personally, socially and in the business context
    - all that he had ever achieved in sport became negated, which he explained to mean that with the knowledge out there people made presumptions and he had not expected that this would have happened to him
    - this was why it was negative

77. **Lund** demonstrated how it was impossible for him to take of his cycling bib and vest when he had something in his hand. He testified further that he did not question **Maqwatini's** writing of "it all went well" with the test on the DCF, as he had not been tested before and would not have known a good test from a bad one.

78. In closure regarding further evidence of and substantiation of earlier evidence of the sample collection procedure **Lund** added that

    - **Maqwatini** had taken the sample from him as there was no place to put a cup down or rest a cup (in the toilet) whatsoever
    - he did not divide the sample into A and B samples
    - he had not seen whether the sample was exposed or if **Maqwatini** had put a lid on it
    - the sample was not in his view at all times

- he did not know why he had suffered the problem of showing how – (the sample had contained the banned substance)

Cross-examination

79. Having established **Lund** was aware of and accepted that testing for substance abuse would have taken place at the Argus **Lund** provided the following responses to questions put to him by **Kock,** namely that

    i. the sample volumes were contested because they were strangely different and were no longer in issue
    ii. concerns about verification and some of the documentation had been satisfied
    iii. he was generally happy but unhappy that procedure had not been followed
    iv. although **Maqwatini** appeared to be a gentleman and introduced himself **Lund** denied that **Maqwatini** had positively identified himself
    v. he had signed the bottom signature but did not read the small print, concerning his acceptance of the fact that the sample collection etc was conducted in accordance with the relevant procedures, taking this to mean,(as this was not explained to him) to mean a summary of the procedure as he understood it
    vi. he took this procedure to mean the completion of the paperwork and was shocked when he realised what this meant
    vii. he did not look at the signatures which he had subsequently contested as his
    viii. the reason for this was that they did not look like his
    ix. he had to accept that QIB under the evidence of a professional was genuine authentic signature and was prepared to accept the other contested signature, as, although himself unsure about it, he had to accept it
    x. had not raised any concerns in commenting " it went well" as **Maqwatini** had not asked him if there were, (it being noted by **Kock** that he was not sure why **Maqwatini** would ask this)
    xi. in any event he had never been in this position and would not have known the difference between good and bad.

80. In response to questions raised by **Kock** relating to the sample collection procedure **Lund** advised that

    - he handed the sample to **Maqwatini**
    - **Maqwatini** carried the sample to the DCS
    - there was no option to put it down
    - the sample was completely wrapped (in toilet paper)
    - he did not put the red lid on
    - it was not in his sight when he was getting changed, as he did not focus on **Maqwatini's** hands when he was changing and **Maqwatini** was to his (**Lund's**) right, not entirely within vision
    - the distance of the walk from the toilets to the DCS felt like 50-80 metres, definitely not 3 metres, as he stood by what he said
    - the vessel was put on the table and the toilet paper removed
    - **Maqwatini** then opened the kit and divided the sample
    - he saw quite a few people walking in and out of the tent,
    - with his attention not focused on what was happening around him - from voices and what he saw - he estimated there to have been about 10-20 people walking in and out.

81. **Hattingh** put questions to **Lund** about his taking of supplements / nutrition which resulted in **Lund** responding that he

- took vitamin C and vitamin B complex in addition to the four listed supplements, unsure about any others when asked about other USN/CSN possibilities
- was vague as to when vitamins became supplements
- was extremely cautious as he knew testing was happening around him all the time and aware of the importance of what he was taking due to riders being tested at events
- he exercised caution through advice from Dr Wian Stander, who wrote out (prescribed) what was legal and who he trusted as a professional regarding the ingredients.

82. **Hattingh** inquired whether **Lund** was aware that 25% of supplements contained banned substances or had knowledge of the legal bounds and constraints regarding these and how amino acids increased strength within such a legal context.

83. **Lund's** response was that he trusted what was written on the label as best advised by Dr Stander as he would not advise anything illegal.

84. **Lund** was then asked whether he was aware that legal products could be contaminated and if he ever felt at risk....to which his reply was that he had heard of cases and cyclists and other sportspeople must be cautious.

85. **Hattingh** then queried why if **Lund** was very cautious and trusting in someone who he had paid a consultancy fee to, having realised how long the hearing would take, he had seemingly not

    i. had his supplements analysed;
    ii. had a consultation towards seeking advice for such purpose;
    iii. asked for an extension of time confident that this would be the result for this purpose.

86. **Lund's** response was that he couldn't afford this and that the procedure (testing) needed to be challenged as he still did not believe how the test result was possible and would not have helped his argument.

87. This was challenged by **Hattingh,** who suggested that as there was a whole range of compounded USN products, which one was unable to receive the details of every ingredient of, **Lund** ought to have considered that these be sent away for analyses in the light of the adverse analytical finding.

88. **Lund** advised that he had handed the supplements to Wian Stander and asked him if there was anything illegal in them and to provide an opinion. He stated that he did not have such supplements with him and that as he had basically abandoned/ stopped cycling he had no need for them as he was banned.

89. He advised further that because of the testing atmosphere at races he was always cautious, taking Medisac when for flu when not racing, and Corenza C when racing. He had never been tested out-of-competition, nor had any of his team.

90. **Kock** brought it to the attention of everyone that of **Lund**'s team members Andrew McLean and Bruce Diesel(?) had had in-competition tests.

<u>Re-examination</u>

91. There was no re-examination by **Heyns**.

<u>Questions /observations from the **Panel**</u>

92. **Dr Motaung** asked **Lund** whether he had any knowledge just before he was tested that

- supplements could be contaminated with banned substances
- some substances, such as flu medication, have banned substances

93. **Dr Motaung** also queried **Lund's** level of knowledge concerning the Doping Control Procedures for testing before he was tested.

<u>Closure of proceedings and Heads of argument</u>

94. The hearing proceedings were brought to a close following agreement that the parties would submit their respective Heads of Argument, by Friday 14 November 2011, for consideration by the **Panel** in reaching a decision on the matter.

RECORD RELATING TO HEADS OF ARGUMENT

SAIDS <u>Prosecution- Heads of Argument</u>

95. The prosecution's case is as set out in its heads of argument dated 8 December 2011.

96. This lists matters agreed as common cause and thus <u>not disputed</u> as

- the Selection of Athlete
- the Identification of the Doping Control Officer
- the complete Chain of Custody process - from the sealing of **Lunds** urine sample in the Doping Control Station (**"DCS"**) until its arrival at the South African Doping Control Laboratory (**"SADCOL"**) in Bloemfontein, including the transportation of the sample by the Courier Company
- the Laboratory Procedures
- the Sample Analysis Result of the Urine Sample

97. The following matters were originally noted as <u>disputed</u>

- the Identity of Athlete was not properly verified (Letter dated 12th April 2011)
- the volume of the sample collected (Letter dated 12th April 2011)
- the Signatures on the Doping Control Form were disputed as not being provided by Mr Russell **Lund** and that the "Doping Control Form has been tampered with by the insertion of false signatures."(Letter dated 12 April 2011)
- the Sealing of the Urine Sample
- the Sample Collection Procedure

98. **SAIDS** acknowledged that after correspondence and explanation the following were subsequently accepted as common cause and no longer in dispute

- the Identity of Athlete
- the volume of the sample collected

99. The dispute concerning the signatures was dealt with by **SAIDS** as follows

    i. In the letter dated 12 April 2011 from **Lund's** attorneys **Harty** /michelle / L029, **Harty** asserted that

"4. With regard to the Doping Control Form attached to your notification, our client wishes to record the following:-

4.1 ....

4.2 the **signature** alongside the heading 'Athlete's Signature' under the box headed 'Notification Date', is not that of our client. Our client has no knowledge as to whose signature is on the form, but it is definitely not his;

4.3 similarly, the signature alongside the box headed 'Consent for Research', is not that of our client;"

ii. The Burger Report – Exhibit F, obtained at **SAIDS** expense, which both the prosecution and defence felt did not adequately answer the relevant questions as to the signatures in dispute.

iii. The Palm Report – Exhibit T, also obtained at **SAIDS** expense, to provide some clarity as to the assertions made by **Lund** relating to the alleged tampering of the DCF, which **SAIDS** dealt with as follows.

"Upon presentation of the scientifically based forensic Palm Report to all parties concerned the defence team approached the prosecution and communicated that they concede on the matter re the authenticity of the signatures. Therefore, the Palm Report will not be contested and that the signatures on the DCF are no longer in dispute. The defence team insisted there is no need for **SAIDS**, who at their own expense would cover all costs pertaining to Palm's testimony at the hearing, to fly Palm up from Cape Town to testify at the hearing. The defence team assured the prosecution that they accepted the substance of the Palm Report in its totality."

(This assertion regarding tampering was covered in the letter dated 12 April 2011 from **Lund's** attorneys **Harty** /michelle / L029, as follows

"4.4 ....

5. It accordingly appears that the doping control form has been tampered with by the insertion of false signatures.").

Lund's defence acceptance of the Palm Report was covered in the letter from **Harty** / michelle/ L029, dated 20 October, in which **Harty** stated that

" We have perused Mrs Palm's report and confirm that we don't take issue with the contents thereof. In the circumstances it would not be necessary for Palm to attend the hearing. For the avoidance of doubt we place on record that we accept the contents of Mrs Palm's report and that Mr **Lund** doesn't dispute the signatures on the Doping Control Form. Please do not hesitate to contact our counsel in this regard."

100. In addition to referring to the Doping Control Form for the purpose of dealing with the authenticity of the originally disputed signatures in the light of the Palm Report, **SAIDS** prosecution also did so for the purpose of corroborating the evidence of and thus the credibility of **Maqwatini** as the only witness called by **SAIDS**.

The salient parts of the heads of argument which dealt with this are

i. "Very importantly the Palm Report was consistent on various counts with the evidence presented to the **SAIDS** Disciplinary Committee by the DCO - Mr Khaya **Maqwatini** (**"Maqwatini"**) - para graph 13

ii. Firstly, it was Mr **Maqwatini**'s submission that Mr Kassiem Adams (**"Adams"**) completed section of the DCF under the following headings: Test Mission Code, Sport, Discipline/Team, Notification Date and Date of Sample Collection.

The Palm Report on p 12 -13, paragraphs 48 and 50 confirms **Maqwatini**'s assertions:

> "With the exception of the signatures, the writing on the document was produced by two authors. For an illustration of the writing, refer to the attached 'Annexure B'. The writing indicated in the red blocks was produced by an author different to that of the remainder of the writing on the document (not blocked)."
>
> "Strong corresponding characteristics were identified between the writing in the red blocks on the document in question and the specimen writing of Kassiem Adams, indicating that it was in all probability written by the same author"

iii. Secondly, it was Mr **Maqwatini**'s submission that he filled out the DCF apart from the areas as indicated in his testimony that Adams completed on the DCF and the areas where **Lund** signed three times.

The Palm Report on p 13, paragraph 51 once again corroborates **Maqwatini**'s testimony:

> "Strong corresponding characteristics were identified between the writing not in the red blocks on the document in question and the specimen writing of Khaya **Maqwatini**. I found that it was written by the same author"

iv. Thirdly, it was Mr **Maqwatini**'s submission that **Lund** signed at the three areas designated for the athlete's signature. A claim that **Lund** vehemently denied through his lawyers. A claim that **Lund** denied when he looked straight into **Maqwatini**'s eyes and without blinking intimated that **Maqwatini** is lying.

The Palm Report for a third time vindicated Mr **Maqwatini** when he asserted that the signature (Q1b) on the DCF under the heading 'Consent for Research' was made by **Lund** when the forensic handwriting expert simply concluded on p 13, paragraph 52:

"The evidence is **conclusive** that the **signature** in question Q1b is a **genuine/authentic** signature."

v. The Palm Report vindicated Mr **Maqwatini** for a fourth time when he asserted that the signature (Q1a) on the DCF under the headings 'Notification Date' and 'Athlete's Signature' was made by **Lund** when the athlete signed the DCF on a clipboard standing up when he first indentified the athlete before proceeding to the Doping N Control Station.

The Palm Report from the forensic handwriting expert concluded on p 12-13, paragraphs 47 and 53:

> "The only logical conclusion that can be drawn when weighing up the reason for this signature to be pictorially different is that it is NOT a forgery, but rather a signature produced under unnatural conditions. Unfortunately the circumstances of the signing (i.e. position, emotional, and physical state of author) are so different from everyday (or even on occasion) signing such specimens would be limited, if not, unavailable for comparison purposes.
>
> The evidence is, further **indicating strongly** that the **signature** in question Q1a is **in all probability** a **genuine/authentic** signature."

101. **SAIDS** prosecution attacked **Lund**'s testimony that **Lund** did not have the finances to contest the Palm report as simply not holding water and a ploy more revealing of **Lund**'s credibility.

102. **SAIDS** prosecution argued further that

i. By indicating on the first day that **Lund**'s evidence would be that **Maqwatini** carried an unsealed urine sample, **Lund**'s defence team sought to argue that such sample may have been contaminated. This line was eventually dropped on the second day. This occurred quietly once **Maqwatini** pointed out the sample collection vessel had been covered with a red lid and not with toilet paper on top and that Kassiem Adams, who was not called as a witness, could probably verify this.

ii. The evidence provided by both the **Maqwatini** and **Lund** focussed almost exclusively on their interaction during the **sampling process**, from identification and notification to the sealing and signing of the Doping Control Station Register on departure

iii. It was significant that apart from **Heyns**' statement that **Maqwatini** divided the sample and not **Lund** and that the latter will testify to this effect, which he did and was extremely unlikely, no aspects where a third person could testify and support **Maqwatini**'s evidence were disputed.

iv. **Lund** and his defence team attempted to place focus on Mr **Maqwatini**'s conduct and competence by disputing every single facet of the sample collection and sealing procedure.

v. It should have been born in mind that doping control officers (DCO's) used the **SAIDS** Doping Control Manual ("DCM"), based on the IST and WADA Code and did not use the IST.

vi. **Maqwatini**'s concerns about privacy are consistent with Doping Control Stations set up in a tented environment as covered in the DCM.

vii. **Lund**'s illustration of how it was impossible for him to have held the sample vessel whilst removing his cycling bib during the sample collection process was theatrics, when seen in the light of **Maqwatini**'s testimony that **Lund** had placed the container in front of him on a sill in the lavatory cubicle.

viii. It was extremely unlikely that **Maqwatini** divided the sample and offered the reasons for this being that
- the sample division procedure was drilled into the DCOs
- any deviation from procedure required that a non-conformity report be filled in
- this would have happened in the presence of the lead DCO and two other DCOs.

ix. Assertions made by **Lund** regarding **Maqwatini**'s conduct at the time of their interaction during the sample collection process must be seen in the light of the DCM and especially the training DCO get ito the DCM.

x. The transgressions (from the IST) which were alleged to have taken place in these one to one situations were highly improbable, having regard to
- the type of training DCOs receive in the context of the DCM
- the lengthy test record of **Maqwatini** that reflects his vast experience as a DCO
- the clean test/conduct record of **Maqwatini** before the **Lund** case
- the clean test/conduct record of **Maqwatini** subsequent to the **Lund** case
- the vindication of **Maqwatini**'s testimony by the Palm Report on all counts relating to the DCF.

xi. It is significant that **Lund**, apart from indicating that "nutritional supplements" were being analysed (letter 30th August 2011), never attempted to provide any explanation for the presence of Methandienone and its metabolites in his urine sample.

xii. The notion to have the supplements analysed disappeared along the way and during the hearing **Lund** did not reveal the trade names of the supplements but preferred, even under cross-examination, to refer to (some) ingredients (Glutamine, Glutamine, ZMA and CLA) rather than the trade names. All of these substances are being produced by a whole range of manufacturers (of varying reputations) and are being sold under different trade names and in different combinations and concentrations of a whole range of other substances. It is reasonable to expect of any athlete to present supplements consumed prior to an Adverse Analytical Finding (**"AAF"**) to the tribunal - this was not the case here – this was forfeited in favour on an attack on the competence of the DCO.

xiii. **Lund**'s reaction – as per his own testimony - to immediately stop the consumption of the supplements after being notified of the AAF is significant. Just as his handing over of the supplements to his advisor Dr Wian Stander and his initial indication to have it analysed. It is clear that he accepts that the only possible source for the prohibited substances in his urine sample is the consumption of his supplements.

xiv. **Maqwatini** showed himself to be truthful, modest and perhaps obstinate at times. However, very importantly the Palm Report vindicated **Maqwatini**'s evidence on various fronts specifically his evidence relating the DCF. If Adams's affidavit was allowed to be entered into evidence **Maqwatini**'s credibility would have even been further enhanced. **SAIDS** prosecution argued it was no wonder then that the defence team so vehemently protested that the affidavit (that of Kassiem Adams) not to be allowed to be entered into evidence.

xv. **Heyns** had argued that the DCO committed the very basic of mistakes that form part of the essential elements drilled into DCO's during training that are critical to a successful mission. The likelihood of those types of errors having occurred in this instance having regard for **Maqwatini**'s experience and flawless test record was highly improbable.

103. In closure the **SAIDS** prosecution argued within its final submissions that

- **Lund** had to prove that a transgression or transgressions had taken place that could have caused an Adverse Analytical Finding - AAF.

- In order to do so **Lund** and his defence team had thus sought to adduce evidence which would discredit **Maqwatini** as a witness. They then argued that this was done through far-fetched assertions as to the sample collection process that could only have been disproven by **Maqwatini**.

- Article 3.2.2 of **SAIDS** Anti-Doping Rules 2009 that 'a departure from the International Standard for Testing which does not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate the analytical results.'

- All evidence presented by **Lund** relating to such possible transgressions as referred to in Article 3.2.2 of the **SAIDS** Anti-Doping Rules 2009 solely relied on **Lund**'s testimony. None of his defence team's assertions could be corroborated by a third party or any other form of documentary- or other evidence.

104. The **SAIDS** prosecution then requested that the **SAIDS** Anti Doping Disciplinary Committee

1. find **Lund** guilty of an anti-doping violation in terms of Article 2.1 of the 2009 Anti-Doping Rules of the Institute of Drug Free Sport

2. impose a sanction of no less than two (2) years of ineligibility having regard for any period of provisional sanction already served.

__**Lund's** Defence - Heads of Argument__

105. The Heads of Argument submitted by **Heyns,** dated 11 November 2011, provided for

• an introduction	paragraphs 1-2
• the relevant regulatory framework	paragraphs 3-10
• **Lund**'s case	paragraph 11
• the evidence	paragraphs 12-33
• assessment of the evidence	paragraphs 34-44
• application of the evidence on the rules	paragraphs 45-55
• conclusion	paragraphs 56

106. The charge and the prohibited substance identified in **Lund**'s urine sample, are set out under Paragraphs 1 and 2 respectively.

107. In setting out the relevant regulatory framework, under paragraphs 3-10, **Heyns** has drawn attention to the requirements (more important) for testing for possible doping violations in sport under

- ***article 5 of the SAIDS Anti-Doping rules 2009***
  as being in substantial conformity with the International Standards for Testing in force at the time of testing

- ***the World Anti-Doping Code International Standard for Testing January 2009 ('the International Standard for Testing"*** or ***"IST",*** *(as it is more specifically referred to herein), with particular reference to*
  - ***Annex D*** *headed* **Collection of urine Samples**

108. In doing so **Heyns** has specifically referred to the following relevant clauses in **Annex D, Part Two of the IST and World Anti Doping Rules / SAIDS Anti-Doping rules 2009**

i. D.1(c) – where one of the stated objective (inter alia) of the collection of an Athlete's urine sample procedure is to ensure that ... "**The *Sample* has not been manipulated, substituted, contaminated or otherwise tampered with in any way.**"

ii. D.3 – dealing with Responsibility: **"The Doping Control Officer has the responsibility for ensuring that each *Sample* is properly collected, identified and sealed."**

iii. Clause 6 of the **IST** – dealing the requirements for preparing for the *Sample* Collection *Session*, with one of the main activities for this described in clause 6.2 (c) as **"Ensuring**

that the Doping Control Station meets the minimum criteria prescribed in Clause 6.3.2"

iv. Clause 6.3.2 of the **IST** – "**the Doping Control Officer shall use a doping control station, which at its minimum ensures the athlete's <u>privacy</u> and where possible <u>is used only as a doping control station</u> for the duration of the Sample Collection Session. <u>The DCO shall record any significant deviations from these criteria.</u>**
(**Heyns**' emphasis in the underlining)

v. Article 3 of the **World Anti-Doping Rules** (***SAIDS Anti-Doping rules 2009)*** for the burdens and standards of proof, which are covered in Article 3.1 where "**SAIDS has the burden of establishing that an anti doping rule violation had occurred."**

vi. Article 3.2.2 of the **SAIDS Anti-Doping rules 2009** *(*which is also incorporated within the **IST** under *2.0 Code* Provisions *as Clause 3.2.2 on page 8 of 91)* dealing with departures provides

> **"Departures from any other *International Standard* or other anti-doping rule or policy which did not cause an *Adverse Analytical Finding* or other anti-doping rule violation shall not invalidate the results. <u>If the *Athlete* or other *Person* establishes that a departure from another *International Standard* or anti-doping rule or policy which could reasonably have caused an *Adverse Analytical Finding* or other anti-doping rule violation occurred then SAIDS shall have the burden to establish that such a departure did not cause the *Adverse Analytical Finding* or the factual basis for the anti-doping rule violation.</u>**

(Note: the I and S in the International Standard is in upper case as it is defined in both the **World Anti-Doping Rules** (WADA Code) and **SAIDS Anti-Doping rules *2009***)

109. **Lund's** case as put forward by **Heyns** (refer HoA paragraph 11) is such that

1. **SAIDS** through its DCO did not comply with the IST
2. these departures could reasonably have caused the Adverse Analytical Finding.

110. These departures from the IST have been listed by **Heyns** (refer HoA 10.1-10.3 / 11.1-11.3) as

- the Doping Control Station did not comply with the requirements set out in clause 6.3.2.
- the collection of the sample did not comply with the requirements set out in Annex D
- the official who was responsible for the sample collection did not meet the requirements for a DCO set out in Annex H.

111. The matters of evidence (paragraphs 12-33) were recorded as the documentary evidence received by the hearing **Panel** as Exhibits "A" to "Y", as well as the oral evidence presented by

Maqwatini , who was referred to as an Assistant Doping Control Officer, having regard to the content of the **SAIDS** letter dated 19 August 2011 and **Lund.**

112. Maqwatini's evidence

Heyns then covered **Maqwatini's** evidence as he raised the following matters.

(Please note that have been extrapolations, simply for ease of understanding and reference, with reliance for decision making placed on the original Heads of Argument for the **Panel**'s decision purposes.)

1. the contradiction between **Maqwatini's** report, attached to his affidavit dated 21 April, and his oral evidence relating to whether "...... I used a(sic) toilet paper to cover his urine sample...." or that he had given the toilet paper to **Lund** to cover the sample

2. **Maqwatini** having accepted that had he covered the sample with toilet paper it would have amounted to a breach of the IST. When it was pointed out to him that his evidence had changed from non-compliance to compliance of the IST he pretended not to understand. He then failed to give a straight answer to this statement when the Chairman took issue about this.

3. the adjustment of **Maqwatini's** testimony regarding the timing of the IST requirement for washing of hands. This moved from **Maqwatini** having testified that following the washing of his hands **Lund** carried his own sample, to **Lund** having washed his hands prior to the provision of his urine sample, when **Maqwatini** was confronted with the requirement that the DCO should where practicable ensure that the athlete washes his hands prior to provision of his urine sample.

4. why the washing of the hands had not been in his report, to which **Maqwatini** had responded that he may have forgotten about this.

5. **Maqwatini**'s failure to answer the question as to whether there were any regulations which he had not complied with, which he had not mentioned in his report. Following **Hattingh**'s explanation that this was an unfair question as the IST ran into 91 pages, the Chairman insisted that this question be answered. It was rephrased and **Maqwatini** stated that this was a "broad question". He provided no further answer.

6. **Maqwatini** having insisted throughout his evidence that he never touched the urine samples in contrast to what would be **Lund**'s evidence that he (**Lund**) would have been unable to keep hold of the sample throughout the process, given his cycling outfit.

9. the significance of **Maqwatini** not having testified that **Lund** had placed the sample somewhere else when he had undressed and dressed himself. Although **Hattingh** had alluded to this during cross-examination when he pointed out that there was place for **Lund** to have placed the sample somewhere in the mobile toilet this had not been part of **Maqwatini**'s evidence.

10. the training which **Maqwatini** had received in September 2010 in Durban, as corroborated by Exhibits "X" and "Y", being the training attendance register and Doping Control Officer Workshop - programme.

    With regard to such training **Maqwatini** had replied that

    i. he had of course been trained in the IST
    ii. he recalled that this training was given by a woman from Poland.
    iii. he was unable to provide an answer as to why there had been no reference to the IST in the workshop program.

    It was then pointed out to him by reference to the Programme that what could be regarded as training in the IST was the training under Sample Collection Procedure which was given by **Hattingh**, not by a lady from "Poland" (Finland")

    Unable to explain this anomaly when pushed on his earlier evidence (in order to show whether he had in fact been trained in the IST) **Maqwatini** answered that the question should be directed to **SAIDS**.

11. **Maqwatini** had testified that the DCS was also used by paramedics and that the urine sample had to be covered because the media could take photographs of the sample.

113. Lund's evidence

1. **Lund** gave evidence about his sporting background and prior successes at a national level and top 10 / top 5 finishes as a canoeist.

2. He mentioned how he had become involved in cycling socially and how he had progressed from this into the veteran's category of racing and being invited to join the Cycle Lab team when his potential had been recognised.

3. He gave further evidence that

    - they had invested time and effort in him
    - his training had become quite scientific, with a focus on a strict diet and supplement program
    - he had moved from placing in the top 50s, to top 30's and top 20's until he eventually achieved a win this year.

4. He advised that he used amino acids to aid his recovery together with Glutamine. He also used USN products called CLA and ZMA and a range of products like Argine. All of these products were within legal constraints and were merely to aid recovery in training and competition.

5. His evidence about race day was that after the race he was met by his wife and friends, had coffee with them, with the usual backslapping and congratulations, and after about 40 minutes with them, he then went back to arrange for his bike to be booked onto one of the trucks.

6. It was then that he was approached by **Maqwatini**. Following this they walked for about a kilometre to the testing station. The testing station was – not in a demarcated area, he couldn't tell the difference between the tents and he perceived it to be a public area.

7. He described the DCS as a classic marquis (marquee) of about 9m x 6m, there were a number of persons in it and he gained the impression that coaches, family and friends linked to the cyclists were allowed into the tent.

8. The toilets used for sample collection were about 50-80 metres from the tent. There were about 2 to 3 porta-loos nest to each other and they had to wait to go in and out of the toilets. He stated that it was a novel experience to him, he was very excited just having won a race and that there were a few details which he could not remember.

9. When asked about whether Mr **Maqwatini** had informed him of the requirements ito the IST **Lund** replied that they had a social conversation in which he was told that he needed to do a drug test. He recalled doing some paperwork in the tent, filling in the register and when he returned from the sample collection, the process of splitting the urine sample. He certainly couldn't recall being told that he had one hour to report to the testing station.

10. It is recorded in clause 27 that **Lund** was prepared to accept the evidence of Ms Yvette Palm that the one signature which he had previously contested was a genuine one and that the evidence strongly indicated that the other contested one was in all probability a genuine signature.

11. During cross-examination on this contested evidence **Lund** persisted with the averment that this signature did not look like his but that he was willing to accept the evidence of an expert witness on that point. In any event he did not dispute that he was the person in the tent with Mr **Maqwatini** and did not deny he was the person tested.

12. Mr **Lund**'s further testimony, as recorded, provided that

    - he accepted that he was asked to select a vessel
    - he could not remember having been asked to check the seals of the vessels
    - **Maqwatini** covered the vessel in toilet paper
    - he (**Lund**) did not put a lid back on the vessel
    - if **Maqwatini** had put the lid back on the vessel he hadn't seen him do it
    - **Lund** insisted that he was never told to wash his hands by **Maqwatini**
        - he could not remember choosing a sample kit, or
        - been asked whether the rest of his urine should be discarded
    - he was absolutely mortified when he was informed that an Adverse Analytical Finding was returned
    - this impacted on him personally and socially as well as in the business context
    - he would never condone the use of illegal substances, nor was he aware of any illegal substances by team mates
    - he felt that
        - everything that he had ever achieved had been negated

- it was destructive at every level

13. He demonstrated how it was impossible to take his hand off his cycling bib and vest whilst having something is his hand. The prosecution sought not to contest this evidence.

14. In response to why he had not raise any concern about the test with Mr **Maqwatini** when he told him "it went well" **Lund** testified that he had never been tested before and that he would not have known a good test from a bad one.

15. When **Lund** was asked whether it was possible that he had placed the sample on the toilet seat after he provided the sample he answered that **Maqwatini** offered to hold the sample and he gave it to him.

16. **Lund** also testified that

    i. he did not divide the sample into A and B samples
    ii. he could not see whether the sample was exposed but certainly didn't see Mr **Maqwatini** putting a lid on it
    iii. the sample was not in his (**Lund**'s) view at all times and was held by Mr **Maqwatini**
    iv. the distance between the tent and the porta-loo felt to him to be in the region of 50-80 metres , certainly not 2-3 metres, away as testified by **Maqwatini**
    v. in addition to the supplements he took he also took various vitamins
    vi. he was cautious about the supplements he took and only took those that were provided to him by Dr Wian Stander.

ASSESSMENT OF EVIDENCE

A. MAQWATINI

114. Maqwatini's report

Heyns' submission in this regard provides that

1. This was prepared less than 2 months after the sample collection session. He gave evidence on 25 August and 27 October...6-8 months after the event.

2. It was of considerable evidence that **Maqwatini**'s evidence changed substantially from the time he completed his report to when he gave evidence.

3. When asked why the report stated
   "explained what was required:

   - From the time I notify him, his got one hour to report to the Doping Control Officer
   - He should not drink an unsealed water, drink etc.
   - If he want to eat he can, but on his own risk, as long he (sic) wouldn't be given by me."

Maqwatini replied that he told **Lund** what was required.

4. One was able to conclude that **Maqwatini** intended to refer to the requirements set out in D.4.1- D.4.18 of Annex D to the IST, yet **Maqwatini** only referred to 3 requirements being D.4.11 to D.4.13 ie the volume of the urine, the collection of the urine sample collection kit and the checking of the code numbers.

5. When **Maqwatini** came to give evidence 6 months after the event he presented a version where all requirements were fulfilled.

6. Even if accepted that he did not know what **Lund's** defence would be at the time he prepared his report and that he did not know which requirements to refer to, it remains unexplained why **Maqwatini** failed to mention any of the important and relevant requirements that were traversed during evidence, but instead referred to wholly irrelevant requirements.

115. Discussions on evidence

Heyns submission in this regard stems from **Maqwatini's** insisting that he did not discuss his evidence with anyone prior to 25 August 2011.

Heyns postulated that as **Maqwatini's** testimony was that he only spoke to **Kock** in general terms prior to this date, but not about the evidence, this certainly did not explain **Maqwatini's** stunning recollection of the requirements and the exact words of his conversation with Mr **Lund**, one could

i. have reasonably inferred that **Maqwatini** had in fact consulted with members of the prosecution team or **SAIDS**, for them to present **Lund**'s defence, as it appeared from the correspondence that passed between **Lund**'s attorney and **SAIDS**, which would not have been untoward, even though **Maqwatini** had insisted that he had not.

ii. draw the only reasonable conclusion that **Maqwatini** was concerned with presenting evidence that would impress upon the **Panel** his adherence to all required procedures.

116. Use of toilet paper to cover the sample

Heyns submitted that **Maqwatini** failed to explain the direct contradictory change in evidence from his report, in which he stated that he used toilet paper to cover the urine sample, to that in which he stated that **Lund** in fact covered the sample.

117. Training in the IST

It was submitted by **Heyns** that **Maqwatini** attempted to cast his evidence in a more favourable light when he stated that they had received training on the IST from a lady Poland and by stating how important these requirements were. As it turned out the woman from "Poland" (Finland) did not give training on this aspect and **Maqwatini** was trained in the Procedures of Sample Collection and not under the heading International Standards for Training.

118. Distance from tent to porta-loos

It simply did not make sense, so **Heyns** submitted, that having regard to **Maqwatini**'s incredible evidence that the portaloo (mobile toilets) were 2 to 3 metres from the tent he would have been concerned about the privacy of **Lund's** sample. One would have understood if **Maqwatini** could not remember the exact distance but he insisted this was so.

119. Impression of **Maqwatini** as a witness

Heyns submitted that

i. the **Panel** may feel that **Maqwatini** did not impress as a witness and he called for an adverse credibility finding to be made about his evidence
ii. it was indisputable that he gave false evidence on a number of issues
iii. although some matters were on the face of it not of much importance, **Maqwatini** persisted with his evidence on these points, despite his being referred to incontrovertible evidence to the contrary... and referred to " Falsus in uno, falsus in omnibus" – (false in one, false in all, suggesting that a witness who wilfully falsifies one matter is not credible on any matter)
iv. one could not escape the conclusion that **Maqwatini** did not give his evidence truthfully. He noted occasions relating to when he refused to answer a straightforward question and even refused to answer a question put to him. Whilst conceding that **Maqwatini** did not give evidence in his home language he had assistance from the Chairman to ensure that he understood the questions put to him. The Chairman had cause to warn him about an unsatisfactory answer and also that he avoiding the answering of a question.
v. even though the question arose as to what evidence was untruthful by virtue of the above named principle **Maqwatini**'s evidence should be rejected where it had not been corroborated with other credible evidence.
vi. **Maqwatini** had a motive to present his evidence so as to suggest that he had complied with all the requirements of the IST. As he was being paid for his duties as a Doping Control Officer ("DCO") it could be reasonably inferred that he might have been concerned about losing his position.

B. LUND

120. General assessment

Heyns submitted the following concerning his assessment of **Lund's** evidence, in contrast to that of **Maqwatini,** as such that

i. it was given in an honest, full, frank and open manner
ii. **Lund** did not deny that
   a. he used nutritional supplements
   b. there were some aspects that he could not remember
   c. even that there were some contradictions in his evidence

all of which, in **Heyns'** further submission, were the true hallmarks of a truthful witness.

121. Criticism for failing to have supplements tested

Heyns noted the criticism which **Lund** had received in cross-examination for not having had the supplements tested and the **Panel**'s concern regarding the hearing not knowing what the origin of the banned substance was.

Heyns then

i. referred the **Panel** to Article 10 of the Anti-Doping Rules 2009 which made it clear that **Lund** would not have qualified for any elimination or reduction of ineligibility in circumstances where the supplements he admitted to having used were contaminated
ii. reminded the **Panel** about **Lund**'s evidence that he consulted with Dr Wian Stander and that he took only those supplements that were prescribed by Dr Stander. These are not circumstances which would have qualified **Lund** for the elimination or reduction of the period of ineligibility, no matter what the source of the substance.

as he suggested that **Lund** should not be criticised for

i. not going through the expense of having the nutritional supplements tested (Footnote: Although it was suggested that **SAIDS** would have assisted with this there was no evidence that this offer was ever extended to **Lund**)

and

ii. focusing his case on the evidence which shows that there were departures from the IST, which could reasonably have caused the adverse analytical finding.

APPLICATION OF THE EVIDENCE ON THE RULES

122. In paragraph 45.1 of the heads of argument **Heyns** submitted that as the following departures from the IST were not* in dispute, clause 6.3.2 of the IST was breached in its totality, as (*this was presumed to be an error by the **Panel**)

i. *the Doping Control Station did not comply with clause 6.3.2 of the IST*, as it was

- not private
- not used solely as a DCS for the duration of the Sample Collection Session

ii. *the DCO did not record the deviations from these deviations from the criteria.*

123. He submitted further in paragraph 45.2 that **Maqwatini** was not suitably qualified under the requirements listed in Annex H of the IST for *Sample* Collection Personnel.

Heyns argued that this was so because **Maqwatini** was neither a Doping Control Officer, nor a Chaperone, as provided for in Annex H, which

i. makes no mention of the position of Anti-Doping Control Officer
(presumably referring to paragraph 2.5 of the **SAIDS** letter dated 19 August to **Lund**'s attorney Mr **Harty**, which refers to Assistant Doping Control Officer, rather than Anti-Doping Control Officer...see pararagraph 12 of the heads of argument)

ii. states in H.5.5 that **only Doping Control Officers may perform activities involved in the *Sample* Collection Session,.......... or they may direct a Chaperone to perform specified activities that fall within the scope of the Chaperone's authorised duties.**

124. **Heyn's** went on to submit that the **Panel** ought to reject **Maqwatini**'s evidence where not corroborated by other evidence where other breaches (of the IST) were in issue for the reasons he had stated above (ie within paragraphs 34-42).

125. He continued as he submitted that although it was clear that there were other breaches, these could not reasonably have caused the adverse analytical finding, whereas those breaches which could reasonably have caused an adverse analytical finding were,

i. **Maqwatini** handling the sample
ii. his covering the sample with toilet paper
iii. **Lund** not washing his hands before he passed the sample.

126. It was submitted that in these circumstances and given the veracity of the evidence the **Panel** ought to find that the breaches of the IST could, at the very least, have caused the adverse analytical finding.

127. Furthermore, it being the case that the IST had been breached and in the event that the **Panel** finds that these breaches could reasonably have caused the adverse analytical finding, then **SAIDS**

i. attracted the burden to prove that the breaches did not cause this
(Article 3.2.2 of the Anti-Doping Rules 2009)

ii. failed to discharge such onus, for example - by leading expert testimony to prove that the covering of the urine sample with toilet paper could not have caused contamination to the extent that was found in **Lund**'s sample.

128. In **Heyns** further submission was thus that if the **Panel** found that there were breaches of the IST which could reasonably have caused the (adverse) analytical finding then **Lund** should be acquitted.

129. He contended that it was of the utmost importance that athletes and the public alike, should be able to rely fully on the legitimacy and the integrity of the testing, and in this instance, the Sample Collection Procedure of **SAIDS**.

130. He went on to state that this principle was settled in common law, administrative law and even sports law and quoted from the *Court of Arbitration for Sport, CAS 94/129 USA*

Shooting & Q / Union Internationale de Tir, award of 23 May 1995, in which it was held as follows at paragraph 50:

> "The **Panel** nevertheless points out that if the UIT (*read here **SAIDS***) adopts a strict liability test it becomes even more important that the rules for the testing procedure are crystal clear, that they are designed for reliability and that it may be shown that they have been followed."

131. **Heyns** submitted that the strict liability test placed an almost unbearable burden on an athlete who returns an adverse analytical finding, for even in circumstances that an athlete can prove no fault can be attributed to him/her, he /she is still guilty.
(The footnote 13 recorded that such liability was absolute as opposed to strict)

132. He implored the **Panel** to demand the highest possible standards from the regulatory authority / **SAIDS**, as being expected in such circumstances, and suggested, without being unnecessarily critical of **SAIDS**, that it could not be said that the Sample Collection Session at the Cape Argus Cycle Tour was of the highest quality, by way of the following being noted by **Heyns**

    i. The Doping Control Station (DCS) did not adhere to even one of the requirements set out in the IST
    ii. It was either the case that **Lund**'s sample was handled by the Doping Control Officer (DCO) or it was, as was put to **Lund**, placed on the toilet seat of a toilet to which all and sundry had access.
    iii. In either event, both of these eventualities could reasonably have led to the contamination of the sample.
    iv. The toilet paper which covered the sample was taken from a toilet roll to which the public had access and which members of the public used
    v. Prior to the Sample Collection Session **Lund**
        - was not asked to wash his hands
        - did not wash his hands
    vi. the normal congratulations and backslapping which **Lund** received at the end of the race spoke directly to this kind of situation which concerned the requirement for the washing of hands
    vii. **Maqwatini's** evidence as regards this only came to the fore during cross-examination, only when challenged with the exact requirement the IST. He made no reference to the washing of hands in his statement and in his evidence in chief he referred to **Lund** washing his hands subsequent to the provision of the sample.

133. The **Panel** was then asked by **Heyns** to hold **SAIDS** to their own rules under the Latin maxim "*Quis cusodiet ipsos custodies*" and beseeched to have regard to the enormous impact of an adverse analytical finding on an athlete, as he then respectfully reminded the **Panel** of **Lund**'s testimony about this impact on his (**Lund**'s) whole being.

134. In conclusion **Heyns** submitted that

i. **Lund** had established that the departures from the IST could reasonably have caused the adverse analytical finding

ii. **SAIDS** did not present a shred of evidence, having attracted the burden to establish that the departure(s) did not cause the adverse analytical finding

In the circumstances, and for all the reasons mentioned above, he respectfully submitted that the **Panel** ought to acquit **Lund.**

PANEL DECISION & REASONS

Introduction / Fundamental matter(s) for decision

135. The members of the hearing **Panel** – John Bush, Beverley Peters and Sello Motaung - met on the 8 December in order to deliberate on the evidence, having regard to

   i. the heads of argument submitted by **Kock** and **Hattingh**, representing the **SAIDS** prosecution and **Heyns**, representing **Lund**'s defence team,
   ii. the **SAIDS** Anti-Doping Rules 2009
   iii. the International Standards for Testing – January 2009 ("IST")

136. The **Panel's** *in-principle* decision that was taken on 8 December 2011 was reached unanimously.

137. Such decision was reached after the members debated and considered the merits and demerits of the totality of evidence relating to the disputed matters – with due regard to such evidence as had been accepted, adduced and/or proven - in accordance with the evidentiary burdens and standards of proof as set out in the Article 3 of the **SAIDS** Anti-Doping Rules 2009, with particular emphasis on the following central points

   i. whether or not **Lund** had established on a balance of probability that the departures from IST were such that these could reasonably have caused the Adverse Analytical Finding

   ii. if this was so and the burden had then shifted onto **SAIDS** to establish that such departures could not have caused the Adverse Analytical Finding, that **SAIDS** had either established this, as provided under Article 3.2.2, or had not,

   in the light of the **Panel** having considered the fundamental areas of dispute, which had been agreed between the **SAIDS** prosecution and **Lund**'s defence team, relating to

   1. the credibility of the witnesses
   2. compliance with the IST, in particular, the Sample Collection Session, including the Sealing of the Sample
   3. the qualifications and competency of the Doping Control Officer
   4. departures from / breaches of the IST.

Preliminary comment

138. The **Panel** is grateful to both the **SAIDS** prosecution and **Lund's** defence teams for their commitment and approach towards reaching agreement on limiting the issues in dispute and thereby curtailing the hearing proceedings, although this could possibly have been better.

139. Such issues were initially raised in the correspondence between **Harty**, as **Lund's** attorneys, and **SAIDS**, following **Lund** having been notified of the Adverse Analytical Finding ("AAF") by way of the **SAIDS** letter dated 5 April 2011.

140. It is considered noteworthy to mention that whilst such exchange of correspondence - which was accepted into evidence as one composite Exhibit –

   i. sought clarity, through the obtaining and/or provision of the relevant further particulars necessary for both **SAIDS** prosecution and **Lund's** defence in this matter

it also

   ii. provided insight into the process leading to the agreement on the limiting of issues in dispute for consideration in the hearing before the **Panel**;
   iii. by virtue thereof and/or positions taken concerning matters raised therein, also touched and reflected on the credibility and thus the character of prospective witnesses.

141. The notification of the AAF was followed by the **Harty** in his letter dated 12 April, in which **SAIDS** was advised that he acted for **Lund.** This letter provided, inter alia, that

"3. Our client wishes to record his shock and bitter disappointment upon receiving your notification of the alleged adverse analytical finding, as he has always committed himself to competing cleanly and ethically, and has never knowingly taken any banned substance. Furthermore our client competes as an amateur, purely for the love of the sport, and has no incentive whatsoever to cheat. Accordingly your notification came as a nasty surprise.

4. With regard to the Doping Control Form ...the following....

4.1 ....the box third party has been ticked. There was no third party at the testing and the full name had not been filled in;

4.2 the signature alongside the heading "Athlete's signature" under the box headed "Notification Date" is not that of our client. Our client has no knowledge as to whose signature is on the form, but it is definitely not his;

4.3 similarly, the signature alongside the box headed "Consent for Research", is not that of our client;

4.4 on the form, the volume of the sample is given as 125ml, whereas in the lab report, the volume is given as 79ml.

5. it accordingly appears that the doping control form has been tampered with by the insertion of false signatures. The identity of the person being tested has not been

properly verified and the correct procedures have not been followed. This may lead to the test result being invalidated in terms of Rule (Article) 7.3 of the Anti-Doping Rules.

6. However, given his commitment to competing cleanly and fairly and in order to clear his name, our client is more than willing to submit to an additional test, as recommended in Rule 7.3.1.4

7. In the circumstances and given the serious irregularities in regard to the completion of the Doping Control Form, our client requests that a formal review be undertaken in terms of the provisions of Rule 7.3.1.1.

8. We thank you for your assistance and look forward to receiving your determination pursuant to the review, at your earliest convenience......"

142. The review of all the documentation was conducted by Professor Winton Hawksworth on **SAIDS** behalf, in accordance with Article 7.3.1.1, which provided that

> "Upon receipt of an Adverse Analytical Finding, **SAIDS** shall review for any irregularity all of the documentation relating to the Sample Collection Session (including the Doping Control Form, Doping Control Officer Report and other records), and the laboratory analysis."

His finding that the documentation was "all in order" was set out in his e-mail to **SAIDS** dated Friday 1 April 2011 which was contained in Exhibit "Q".

143. Exhibit "Q" was accepted into evidence, and some of the matters, such as the athlete's identity and the sample volume, along with the other matters subsequently accepted in terms of the process outlined in paragraph 19 on the first day of the hearing proceedings.

144. It is the **Panel**'s view that it could not have been without expectation and surprise that the impact, import and effect of the allegations regarding the apparent tampering and given serious irregularities with the DCF as set out in the **Harty** letter, referred to in paragraph 141 above, had reverberations and consequences (some dramatic) throughout the hearing, more importantly as regards the integrity of **Maqwatini,** as the sole witness subsequently called by **SAIDS** and aspects of the Sample Collection Session, as will be dealt with more fully below.

145. Having regard to further exchanges of e-mails and letters between **SAIDS** and **Harty**, the letters worth mentioning as having import and effect on both the preparations for and hearing itself are those dated 16 August 2011 - **Harty** to **SAIDS** and 19 August 2011- **SAIDS** to **Harty**.

146. Although almost all the information which was requested was provided, the impression gained by the **Panel** at the outset of the hearing was that despite the flurry which resulted in further documents then being tabled there were indeed still some matters outstanding between them.

147. The **Panel's** view is that whether or not it this might have had an impact and/or affected either **SAIDS** and/or **Harty**'s preparations obo **Lund** for the hearing, the late or non-provision of information and/or evidence, particularly in relation to the following

i. <u>Harty</u> - letter 16 August 2011

"2.9 all documentary evidence that would prove compliance with the International Standards of Testing at the relevant event. In the event that you intend to lead evidence, other than documentary evidence, at the hearing, we will also require prior notification of such evidence, as well as the nature and extent thereof.

ii. <u>SAIDS</u> – letter dated 19 August 2011

" 4. Please provide us with a list of questions that will clarify the aspects of concern pertaining to the report on the test conducted on your client. These questions will be posed to Mr **Maqwatini** and forwarded to you to remedy any misunderstanding . Mr **Maqwatini** will be present at the hearing to answer any further questions.

There is no delay envisaged for the commencement of the disciplinary proceedings on the 25th August 2011.

Furthermore, we request that you provide us at your earliest convenience before the scheduled hearing date on 25th August 2011 with the following information:

1. What the nature and extent of all (the) evidence you intend to lead ?

2. Whether any expert witness will be lead and what the nature of such expert witness ('s evidence) will be ?

3. Provide us with all documentary evidence you intend to introduce at the hearing ?

4. Furthermore could you please provide us with copies of the following

   a. Doping Control Form (black copy) which was sent with the documentation informing Mr Lund of the adverse analytical finding

   b. Doping Control Form (green copy) which was given to Mr Lund on the day of the test

   c. Doping Control Form (red copy) which was which was given to Mr Lund on the day of the test

led to what in the **Panel**'s view was a lack of understanding and hence apparent confusion on some important issues, such as

i. **Maqwatini's** designation (status) as a DCO / Assistant DCO,

ii **Maqwatini's** training in the International Standards of Testing, having regard for what **Hattingh** in his re-examination of **Maqwatini** revealed were the more exacting standards as set out in the manual (Doping Control Manual) which he had initially developed.

148. Whether or not **SAIDS** and /or **Lund** were seemingly advantaged or disadvantaged, by the delay in the provision of or lack of information, what in essence ought to have been some very simple matters to determine and agree became quite complex. In the **Panel**'s view these difficulties could simply have been avoided had such information been provided and/or explained either before the commencement of the hearing, or time taken within the context of the hearing itself to do.

149. Unfortunately this was possibly too late and not to be. For given the nature of the adversarial legal system, with "the dice having been cast" and "battle lines drawn", it was thus, as the **Panel** saw it, then clearly open to the **SAIDS** prosecution and **Lund's** legal representatives, in their respective prosecution and defence of the charge against **Lund,** to capitalise on and exploit to best advantage any possible evidentiary weaknesses manifesting themselves in the advancement of their cases.

150. This more so having regard to the nature of the strict liability provisions of Article 2 of the **SAIDS** Anti-Doping Rules – 2009, particularly within the context of the burdens and standards of proof set out in Article 3 which then faced them in their essential tasks of convincing the **Panel**, either <u>to its comfortable satisfaction</u>, being on <u>more than a mere balance of probability</u>...as in the case of **SAIDS**, or on a <u>balance of probability</u>, as in the case of **Lund's** legal representatives, that

i. the sample testing of **Lund** had either been conducted in substantial compliance with the *International Standards for Testing* in force, "IST", as prescribed within the **SAIDS** Anti-Doping Rules - 2009 or not.

ii. the testimony of either **Lund,** or **Maqwatini** - as the only witnesses to lead evidence before the **Panel** - having regard to all the other accepted evidence, whether corroborated or not, was to believed, whether this was in part or whole.

151. Following the **Panel**'s decisions not to delay the proceedings any further in order to allow Kassiem Adams, as the lead DCO, to lead any corroborating evidence, and thereafter not to allow the layout plan, which Kassiem Adams had prepared, into evidence, the **Panel** was left to reach its decision in the light of the testimony provided by **Maqwatini** and **Lund,** as the sole witnesses to those matter raised in dispute, along with all the other evidence, including any corroborating evidence, which had been accepted.

152. The **Panel** reached its decision, as recorded below, having regard to **Heyns'** impassioned plea that the **Panel** demand and thus apply the highest possible standards to **SAIDS** as the regulatory body.

153. The **Panel** had due regard to **Heyns**' referral to the award of the *Court of Arbitration for Sport, CAS 94/129 USA Shooting & Q / Union Internationale de Tir*, award of 23 May 1995, in which it was held as follows at paragraph 50:

> "The **Panel** nevertheless points out that if the UIT (*read here* ***SAIDS***) adopts a strict liability test it becomes even more important that the rules for the testing procedure are crystal clear, that they are designed for reliability and that it may be shown that they have been followed."

Guiding principles

154. The findings/decisions reached by the **Panel** are set out in this record of decision. These record the findings made by the **Panel**, covering not only those matters which were contested from the outset and remained so throughout the hearing, but to the extent necessary also with regard to the uncontested matters - whether these were initially established as common cause, or subsequent admissions by the parties.

155. Such matters are covered in paragraphs 18 and 19, on pages 3-4 of this decision under the heading Proceedings; paragraphs 96, 97 and 98 under the heading **SAIDS** Prosecution- Heads of Argument at page 19; and paragraphs 109 and 110 on page 26 under the heading Defence Heads of Argument.

156. **Lund's** defence case, as it was put within the submissions made in the heads of argument prepared by **Heyns,** following his setting out of a summary of the relevant regulatory framework, could simply be put as

1. **SAIDS , through its DCO, did not comply with the IST**
2. **the departures (listed) could reasonably have caused the Adverse Analytical Finding.** (refer HoA 11:109)

157. The **Panel** sought to simplify its approach by dealing with each of those departures from the IST, listed by **Heyns** as elements of Lund's defence case, separately. In so doing the **Panel**, had regard to the following,

i. the governing regulatory framework;
ii. the evidence;
iii. the assessment of the evidence;
iv. the credibility of the witnesses in relation thereto;
v. the submissions made within the respective heads of argument which were presented by the **SAIDS** prosecution and **Lund's** legal representatives;
vi. the burdens and standards of proof;
vii. any inferences made and/or conclusions drawn;
viii. general matters, especially those falling outside of the scope of i-vii.

158. In so doing the **Panel,** for reasons which will be clear from the **Panel**'s findings, thus gave consideration to whether each one of the following departures from the IST, namely

158.1 the Doping Control Station did not comply with the requirements set out in clause 6.3.2

158.2. the collection of the sample did not comply with the requirements set out in Annex D

158.3. the official who was responsible for the sample collection did not meet the requirements for a DCO set out in Annex H.

were such that **SAIDS** did not comply with the IST and that such departure of itself and thereafter collectively, could reasonably have led to the Adverse Analytical Finding.

159. The following records the **Panel's** approach, including its findings, in dealing with each of such departures as aspects of Lund's case raised within **Lund's** overall defence of the anti-doping violation charge which **SAIDS** had brought against him.

159.1. *The Doping Control Station did not comply with the requirements set out in clause 6.3.2 of the International Standards for Testing, "IST".* {158.1 – refer 11 of HoA}

159.1.1 Applicable rule(s)

Clause **6.3.2** under **6.0 Preparing for the sample Collection Session** of the IST provides that

"The DCO shall use a Doping Control Station, which at its minimum, ensures the Athletes privacy and where possible is used solely as a Doping Control Station for the duration of the Sample Collection Session. The DCO shall record any significant deviations from the criteria".

159.1.2 **Lund's case** (refer 45.1 of HoA)

***SAIDS**, through its DCO, did not comply with the International Standards for Testing and that these departures could reasonably have caused the adverse analytical finding. These departures were the following:*

"The Doping Control Station did not comply with the requirements set out in clause 6.3.2 of the International Standards for Testing."

Heyns submitted that clause 6.3.2 (of the IST) was breached in its entirety as

1. it was not private
2. it was not used solely as a Doping Control Station
3. the DCO did not record these deviations from the criteria.

159.1.3 Evidence

Supporting evidence adduced by **Lund**
(refer 68- evidence in chief; 113 HoA)

- he followed **Maqwatini,** who was a very friendly likeable guy, for about 1km to the tent, as they chatted (on the way)

- at no point had he felt that he was in a demarcated area when they arrived at the tent (Doping Control Station)
- he could not tell the difference as there were a couple of tents with the (DCS) tent in one corner, numerous people walking about
- the tent was classic white pvc marquis with four sides, three of which were completely closed off, with one side completely removed, which he estimated was 9m x 6m
- there was a hive of activity in the tent, which had testing tables on both sides and chairs, with what looked cyclists, people and coaches and **SAIDS** persons not in uniform
- there was a row of pvc chairs and an umbrella, with people sitting there, the tent opened up to the whole public area... to the portaloos, which he had the impression were 50 metres past the tent.
  (refer 68 bullet points 1-6)
- he did not feel that the doping control area was private, and it was particularly uncomfortable in that area and the walk to the toilet (refer 75 bullet point 8)
  Cross-examination
- he saw quite a few people walking in and out of the tent, with his attention not focused on what was happening around him he estimated there to have been about 10-20 people. (refer 80 bullet point 10)
  HoA
- The testing station was – not in a demarcated area, he couldn't tell the difference between the tents and he perceived it to be a public area (refer 113.6 of record and 23 of HoA)
- He described the DCS as a classic marquis of about 9m x 6m, there were a number of persons in it and he gained the impression that coaches, friends and friends linked to the cyclists were allowed into the tent. (refer 113.7 and 24 of HoA)
- The toilets used for sample collection were about 50-80 metres from the tent. There were about 2 to 3 porta-loos nest to each other and they had to wait to go in and out of the toilets. He stated that it was a novel experience to him, he was very excited just having won a race and that there were a few details which he could not remember.
  (refer 113.8 and 25 of HoA)

Other evidence –

Maqwatini *in his evidence-in- chief (refer page 6)*

- the DCS – doping control station - was in the vicinity of the large TV screen (refer 26, 1st bullet point page 6)
- It was shared with the paramedics (refer 26, 2nd bullet point)
- the mobile toilets were 10 metres from the DCS
  (refer 26, 3rd bullet point)
- the DCS was in a tent (refer 26, 4th bullet point)
- apart from Collen Hlazo, a DCO and 2 other DCOs the lead DCO Kassiem Adams were also at the DCS (four DCOs and the lead DCO)
  (refer 26, 2nd bullet point)

- had **Maqwatini** made a mistake in the procedure, or on the doping control form – DCF he was permitted, or required to get permission, to tear up the form (refer 26, 6nd bullet point)
- **Maqwatini** did not made a mistake in the procedure or form (refer 26, 7th bullet point)

***Maqwatini** under cross-examination* (refer 29 on pages 7& 9)

- the toilets were mobile, the DCS was not a mobile station as such but a tent (refer 29, 13th bullet point)
- although it was unclear whether the DCS area was clearly demarcated and/or identified as a DSC, there was
  - the tent where the DCOs worked
  - fences for the crowds
  - sharing of the tent with the paramedics, who also used it (14th bullet point)
- because of the media presence and concern about privacy he had given **Lund** toilet paper to cover the urine sample container, once **Lund** had finished providing the urine sample, which he got from the toilet
- they - **Maqwatini** and **Lund** - did not queue (15th bullet point)
- **Heyns** indicated that **Lund**'s evidence would be that there had been concerns about privacy and that they had to queue, as he raised areas of likely dispute (16th bullet point)
- although the members of the public could have used the mobile toilets this was probably limited (17th bullet point)
- once the toilet door was closed it was only **Lund** and **Maqwatini** (who were there) (18th bullet point)
- Then **Maqwatini** advised in response to **Heyns** question as to who had been in the tent with him that Mr Geldenhuys, Kassiem Adams (lead DCO) and Colin Hlazo. (43rd bullet point page 9)
- He stated that N Gasa was outside of the tent (09h48-10h14) as reflected in the register in response to **Heyns** questioning whether N Gasa was there at the time. (45th bullet point page 9)
- The **Panel** and thus **Lund's** defence team were informed by **Hattingh** that he (**Hattingh**) had developed the original training programme for **SAIDS**. He stated this lined up with other Federations and that such programme, in the form of the **SAIDS** Doping Control Manual, was fully aligned with and more onerous than the IST. (refer 42 & 43 page 11)
- **Heyns** asked **Maqwatini** about the Doping Control Station, ("DCS"). This resulted in him answering that it was
  - covered on both sides
  - shared with the paramedics
  - open in the front
  - had a door facing the toilets
  - not possible for one to see what was inside when the door was closed
  - like a tent, as it had a sail cover
  - a big tent. (refer 51 on page 12)

***Maqwatini** under re-examination*

- Further responses by **Maqwatini** provided that
  - the tent had a single door
  - the paramedics occupied one half of the tent
  - one could deal with two athletes at the same time
  - the tent was not congested
  - the DCO had own privacy and table to deal with the athlete

    (refer 61 on page 12)

- To questions, relating to what had happened at the Doping Control Area after **Lund** went to the toilet, which were then posed for clarification purposes by **Kock**, **Maqwatini** responded that the register was signed and name entered, **Lund** was asked about what he had drunk and medication taken. There was a waiting area with four chairs. (Refer 62 on page 12)

159.1.4 <u>Assessment of evidence</u>

i. The **Panel's** view and thus finding in this regard is that it does not need to make a finding on who of **Maqwatini** or **Lund** was the more truthful, with regard to either part, or the whole of their evidence, as set out above, in order to deal with the apparent conflicts and/or contradictions in reaching a decision concerning the matter raised in 159.1, as amplified under 159.1.1. and 159.1.2.

ii. The reason for this is that the **Panel** finds that **Lund's** evidence, regarding the DCS as not being private, was of very little probative value, as it was limited and vague, more of a suggestive and speculative nature, based more on perception, the expression of feeling, conjecture and impression, than actual fact.

    The **Panel's** finding in this regard is based, upon the following

    - "Mr **Lund** stated that they walked for about a kilometre until they arrived at the testing station. It was not in a demarcated area and he couldn't tell the difference between the tents. Mr **Lund** perceived it to be a public area" (HoA 23)

    - "Mr **Lund** described the DCS as a classic marquis of about 9m x 6m, there were a number of persons in it and he gained the impression that coaches, friends and friends linked to the cyclists were allowed into the tent." (HoA 24)

    - there was a row of pvc chairs and an umbrella, with people sitting there, the tent opened up to the whole public area... to the

portaloos, which he had the impression were 50 metres past the tent (refer 68 bullet point 6)

- he did not feel that the doping control area was private, and it was particularly uncomfortable in that area and the walk to the toilet (refer 75 bullet point 8)

The **Panel** found furthermore that to the extent that **Lund**'s evidence may have been established to have any evidentiary value, it failed to establish and prove that any deviations from Rule 6.3.2 of the IST were significant for the DCO to have had to record these.

iii. By contrast, excepting for the distance of the toilet from the DCS, as dealt with below, **Maqwatini's** evidence relating to the DCS even under cross-examination remained factually extensive, considered, concise, clear and consistent.

iv. The **Panel's** view, in contrast to that held by **Heyns** in his submissions contained in **Lund's** Heads of Argument, when he stated in paragraph 40, that

> "Another aspect of Mr **Maqwatini**'s evidence that was incredible was his evidence that the porta-loo was about 2-3 meters from the tent. It simply did not make sense that **Maqwatini** would have been concerned about the privacy of Mr **Lund**'s sample in the purported 2 to 3 metres from the porta-loo to the tent. Again one would have understood if **Maqwatini** could not remember the exact distance but he insisted on the distance being 2 to 3 meters."

is that whilst conflicts and contradictions in testimony regarding the actual distance to the toilet may have some, or relative bearing on credibility, (which will be dealt with later), as such distance is not prescribed in the IST and not significant it is not necessary to deal with this in reaching a decision under the matters raised in 159.1 and 157.2.

v. The **Panel** accordingly finds to its comfortable satisfaction that the evidence of **Maqwatini** regarding the DCS as highly probable and is thus accepted.

159.1.5 <u>Application of the evidence on the rule, findings and reasons</u>

1. The **Panel** duly applied **Maqwatini's** evidence to Rule 6.3.2 of the IST, as read with the definition of Doping Control Station, as meaning

"the location where the Sample Collection Session will be conducted" ,

having regard to

- the highest standards, as implored by **Heyns**, (HoA 51), which would have respected the privacy of **Lund,** being applied in accordance with the such Rule and objective laid down for the Sample Collection Session;

- the provisions of Article 5.3 of the **Rules**, which requires that

  "Testing conducted by **SAIDS** and its National Federations shall be in substantial conformity with the IST in force at the time of testing."

2. **The Panel's finding** is that it in the light of **Maqwatini's** evidence and the limited value it placed on **Lund's** evidence,

   - it was highly unlikely and improbable that Clause 6.3.2 had been breached in its entirety, as had been submitted in **Lund**'s case, or even in part;

   - the **Panel** was thus comfortably satisfied that it had been proven on well more than a balance of probability, that

     - the Doping Control Station was in fact private and that **Lund**'s privacy within the DCS had been ensured throughout the Sample Collection Session, as provided for under 6.3.2, particularly in the sense that the DCS was not open to the public, and /or, to the extent that may have been any deviation from the prescribed criteria laid down in Rule 6.3.2, that these had not been significant;

     - although the DCS was shared with the Paramedics, this was permissible in terms of rule 6.3.2, which provides that " and <u>where possible</u> is used solely as a DCS for the duration of the Sample Collection Session "SCS";

     - no evidence had been produced by **Lund** to establish why the sharing with the Paramedics ought not to have been permitted;

     - it was therefore clearly not necessary to record any significant deviations from the prescribed criteria laid down in 6.3.2, as there had not been any such deviations.

     - there was thus no basis for accepting there had been any departure from the IST, as had been submitted in this regard.

159.2 *The Sample Collection Session did not comply with the requirements set out in Annex D of the IST.* (refer 11 of HoA:156.2)

159.2.1 Applicable rule(s)

i. The WADA Code which provides under

Article 5.2 – Standards for Testing, that

"Anti-Doping Organisations conducting Testing shall conduct such Testing in conformity with the International Standards for Testing"

"**Testing**" is defined as

"The parts of the Doping Control Process involving test distribution planning, Sample collection, Sample handling and sample transport to the laboratory"

ii. The **Rules,** which under **Article 5 – Testing,** provide as follows

Article 5.1 Authority to Test

All Athletes under the jurisdiction of a National Federation shall be subject to In-Competition Testing by the Athlete's National Federation, The Athletes International Federation, SAIDS and any Anti-Doping Organisation responsible for Testing at a Competition or Event in which they participate

Article 5.2 Testing Standards

Testing conducted by SAIDS and its National Federations shall be in substantial conformity with the International Standards for Testing in force at the time of Testing.

and also provide for the following included under **Definitions**

"Competition" A single race, match, game or singular athletic contest...

"Doping Control" All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as the provision of whereabouts information, sample collection, handling, laboratory analysis, therapeutic use exemptions, results management and hearings.

"In-Competition" Unless provided otherwise in the rules of an International Federation or other relevant Anti-Doping Organisation, "In-Competition" means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through to the end of such competition and the Sample collection process related to such Competition.

"National Sports Federation" Any national, provincial, or territorial Person governing sport in South Africa or part thereof and its affiliated members, clubs, teams, associations and leagues.

"Person" A natural Person or organisation or entity.

"Sample" Any biological material collected for the purposes of Doping Control.

iii. The International Standards for Testing – January 2009, "IST", which provides for defined terms specific to the IST, which include

Chain of Custody: The sequence of individuals or organisations who have the responsibility for a Sample from the provision of the Sample until the Sample has been received for analysis. (COC)

Doping Control Station: The location where a Sample Collection Session will be conducted. (DCS)

Sample Collection Equipment: Containers or apparatus used to directly collect or hold the Sample at any time during the Sample collection process, Sample Collection Equipment shall as a minimum, consist of:

For urine Sample collection:

- Collection vessels for collecting the Sample as it leaves the Athlete's body;
- Sealable and tamper-evident bottles and lids for securing the Sample
- Partial Sample kit. (SCE)

Sample Collection Personnel: A collective term for qualified officials authorised by the ADO (**SAIDS**) who may carry out or assist with duties during the Sample Collection Session. (SCP)

Sample Collection Session: all of the sequential activities that directly involve the Athlete from notification until the Athlete leaves the Doping Control Station after having provided his/her Sample/s. (SCS)

Suitable Specific Gravity for Analysis: Specific gravity measured at 1.005 or higher with a refractometer, or 1.010 or higher with lab sticks.

Suitable Volume of Urine for Analysis: A minimum of 90 mL for full or part menu analysis.

iv. The following IST rules have been included as being of likely further relevance as these set the context framework for the application of **Annex D** of the IST.

5.4 Requirements for notification of Athletes

- When initial contact is made..the DCO... shall ensure that the Athlete is informed

- that the Athlete is required to undergo a Sample collection
- of the authority under which the Sample collection is to be conducted
- of the type of Sample collection and any conditions
- of the Athlete's rights, including... that to
    - have a representative
    - ask for additional information about the Sample collection process
    - request a delay in reporting to the DCS for valid reasons

- of the Athlete's responsibilities....including requirement to
    - remain within direct observation of DCO
    - produce identification
    - comply with Sample collection procedures (and the Athlete should be advised of possible consequences of Failure to comply
    - report immediately for test unless there are valid reasons for delay ..ito 5.4.4
    - of the location of the DCS
    - that if the athlete chooses to eat or drink at own risk with regard to requirement to produce a Sample with Suitable Specific Gravity for Analysis
    - that Sample provided to Sample Collection Personnel (SCP) should be first passed after notification.

- when contact is made, the DCO shall
    - keep athlete under observation at all times
    - identify themselves using official authorisation documentation provided and controlled by ADO (**SAIDS**), by name and carry supplementary identification
    - confirm the athlete's identification...by method determined by the ADO (**SAIDS**) and recorded on doping control documentation failure to be documented
    - where not confirmed **SAIDS** may decide if failure to comply be investigated.

- DCO then has Athlete to sign appropriate form acknowledging notification
- any reasons possible delay to be documented
- delay request rejected in DCO unable to continuously chaperone Athlete
- if, while keeping the Athlete under observation, SCP(DCO) observe any matter with potential to compromise the test, DCO shall report circumstances and document these...consider if appropriate for Investigation of Failure to Comply and/or collect an additional Sample from Athlete.

6.0 Preparing for the Sample Collection Session

- <u>objective</u> – ensure session is conducted efficiently and effectively
- **SAIDS** to establish

- system for collecting all necessary details of SCS
- criteria for who may be present during SCS, at minimum
  - Athlete's entitlement to be accompanied by representative during SCS – except when passing urine Sample
  - ...

- DCS meets minimum criteria for duration of SCS which
  - ensures Athlete's privacy
  - where possible is used solely as a DCS
    DCO shall record any significant deviations from these criteria.

- SCE used by ADO (**SAIDS**) to meet minimum criteria
  - unique numbering system – all bottles, containers tubes or other items used to sample
  - sealing system that is tamper evident
  - ensure identity of Athlete is not evident
  - clean and sealed prior to use
- ADO to develop system for recording Chain of Custody of Samples and Sample collection documentation. ....confirming arrival of these at intended destinations

7.0 Conducting the Sample Collection Session

- **objective** – to conduct SCS in such a manner that ensures integrity, security and identity of the Sample and respects the privacy of the Athlete.
- main activities involve
  - preparing for collecting of the Sample
  - collecting and securing the Sample
  - documenting the Sample collection
- **Requirements prior to Sample collection**
  - **SAIDS** responsible for overall conduct of SCS, specific responsibilities to DCO
  - DCO shall ensure Athlete is informed of his rights and responsibilities (see 5.4.1)
  - DCO to provide Athlete opportunity to hydrate, avoiding excess re-hydration due to requirement for Suitable SG Analysis
  - Athlete to leave DCS under continuous observation of DCO with DCO approval after considering any reasonable request made by Athlete (5.4.5-5.4.6) until Athlete is able to provide a Sample
  - approval to leave DCS agree conditions with Athlete on purpose, time of return, must remain under observation at all times and not to pass urine until return to DCS – with DCO to document actual times of departure and arrival.

- **Requirements for Sample collection**
  - DCO shall collect urine Sample according to Annex D: Collection of Urine Samples
  - behaviour by Athlete or anomalies with potential to compromise the Sample collection shall be recorded in detail by DCO

- if appropriate **SAIDS** shall institute Investigating a possible Failure to Comply
- DCO to provide Athlete to document concerns about how the SCS was conducted
- minimum information to be recorded as per DCF
- at conclusion of SCS signing of appropriate document (DCF) by DCO and Athlete indicating satisfaction that documentation accurately reflects details of the SCS, including any concerns recorded by Athlete.

v. **Annex D – Collection of urine Samples**

- **objective D.1** - <u>to collect urine Sample in a manner that ensures</u>

  - consistency with internationally recognised precautions in healthcare settings so that the health and safety of Athlete and Sample Collection Personnel are not compromised

  - Sample
    - meets suitable SG and volume for analysis
    - has not been manipulated, substituted, contaminated or otherwise tampered with in any way
    - is clearly and accurately indentified
    - is securely sealed in a tamper-evident kit.

- **Scope D.2**

  Begins with ensuring that the Athlete is informed of the Sample collection requirements and ends with discarding of any residual urine remaining at end of the Athlete's SCS

- **Responsibility D.3**

  DCO responsibility for
  - ensuring that each Sample is properly collected, identified and sealed
  - directly witnessing the passing of the urine Sample

- **Requirements D.4**

  - DCO shall
    - ensure Athlete is informed of the requirements of the Sample Collection Session - SCS
    - ensure choice of appropriate equipment for collecting Sample
    - instruct Athlete to select a collection vessel

    - instruct Athlete to check that
      - all seals are intact
      - equipment has not been tampered with

- Athlete shall retain control of the collection vessel and any sample provided until the Sample is sealed. Additional assistance in exceptional circumstances by representative or SCP during SCS where authorised by Athlete and agreed by DCO
- DCO witnessing passing of Sample of same gender
- DCO should where practicable should ensure that the Athlete thoroughly washes hands prior to provision of Sample
- DCO and Athlete to proceed to area of privacy to collect Sample

- DCO shall
  - ensure an unobstructed view of Sample leaving Athlete's body
  - continue to observe the Sample after provision until the Sample is securely sealed
  - record the witnessing in writing
  - instruct Athlete to remove or adjust clothing which restricts clear view in order to ensure uninterrupted view of the passing of Sample
  - ensure that no additional volume is passed by Athlete which could have been secured in collection vessel

- DCO shall verify, in full view of Athlete, that the Suitable Volume of Urine for Analysis has been provided
- where insufficient DCO to conduct partial Sample collection procedure as per Annex F
- DCO to instruct Athlete to select Sample collection kit containing A and B bottles
- once selected DCO and Athlete check all code numbers match and DCO records this accurately
- if not the same Athlete to chose another and DCO to record this

- Athlete shall pour
  - the minimum Suitable Volume of Urine for Analysis into B bottle (to minimum of 30mL)
  - the remainder into A bottle (to minimum of 60mL)

- If more than minimum required provided DCO to ensure that Athlete first fill A bottle and then B bottle to the capacity recommended by the manufacturer and in so doing to ensure that a small amount of urine is left over in the collection vessel to enable the DCO to test the residual urine as set out below
- urine to be discarded once the residual urine has been tested. Suitable Volume of Urine for Analysis to be seen as an absolute minimum
- Athlete to seal the bottles as directed by DCO who checks in full view of the athlete that the bottles have been properly sealed
- DCO shall test residual urine to determine if the Sample has a Suitable Gravity for Analysis. (Annex G sets out the procedure to be followed if it does not.)

- DCO shall ensure that Athlete is given option of requiring that any residual urine that will not be sent for analysis is discarded in full view of Athlete.

159.2.2 **Lund's** case (refer 11 HoA:156)

i. ***SAIDS**, through its DCO, did not comply with the International Standards for Testing and that these departures could reasonably have caused the adverse analytical finding. These departures were the following:*

"The Sample Collection Session did not comply with the requirements set out in Annex D of the International Standards for Testing".

ii. In support thereof **Heyn's** made the following further submissions

- the breaches which could reasonably have caused the adverse analytical finding are:
  - Mr **Maqwatini**'s handling of the sample,
  - his covering it with the toilet paper, or, on **SAIDS** own version Mr Lund having to place the sample on a toilet seat open to the public (footnote 9 pg 23 of HoA), and
  - Mr Lund not washing his hands before he passed the sample.

- although it was clear that there were other breaches as well, it is conceded that these could not reasonably have caused the adverse analytical finding (footnote 10 on page 23 of the HoA)

- the **Panel** ought to reject Mr **Maqwatini**'s evidence where it is not corroborated by other evidence. (refer HoA 45.3)

- in the circumstances covered (within paragraph 45) and given the veracity of the evidence the **Panel** ought to find that the breaches of the International Standards of Testing could at the very least reasonably have caused the adverse analytical finding.

159.2.3 The evidence

Approach adopted

i. The evidentiary issues facing the **Panel** in this matter appear to be limited to only those breaches of the Sample Collection Session, as raised in 159.2.2 (ii. 1st bullet point), which **Heyns** submitted could reasonably have caused the adverse analytical finding.

ii. This might suggest that **Panel** limit its consideration of whether there had been such breaches of, or departures from, the IST to the veracity

of the evidence provided by **Lund** and **Maqwatini** as regards these matters only.

iii. The **Panel** decided however that in the light of

- the clear conflicts and contradictions in the evidence
- both **Lund's** defence submissions and those of the **SAIDS** prosecution

regarding **Maqwatini's** and **Lund's** testimony and their overall credibility as a witnesses, it was necessary for the **Panel** to consider all the relevant evidence relating to the Sample Collection Session, for the purpose of reaching the **Panel**'s findings concerning such testimony, credibility and departures from the IST, whether made in the context of such submissions, the evidence as a whole, or, any of the **Panel**'s findings in relation to the charge and/or Lund's defence thereof.

iv. The following are therefore the extracts of the evidence which the **Panel** considered relevant and/or of value, emanating from either the hearing record, or heads of argument / submissions, for the **Panel**'s decision making purposes concerning this matter and for its final decision.

Lund's** case in defence of the charge - evidence adduced by **Lund

- Evidence-in-chief

  - (**Lund)** was very cautious, using supplements to aid recovery and deal with lactic acid, aware that drug testing would be "part and parcel" of the cycling drug space with tests continuously (63)
  - was satisfied with his supplement programme, as he had spoken to Andre McLean, being extremely cautious and alert all the time with regard to what one had eaten and drank
  - In response to **Heyns'** question as to how he ensured everything was above board, **Lund** said he trusted Dr Stander, as a professional, to ensure that everything was within legal bounds and consulted with other athletes (64)
  - was aware of testing at the Argus and certainly at big races (66)
  - was incredibly exhausted after the race
  - moved through the refreshment channel to backslapping and congratulations from his wife and friends, who had come to watch the race and had spent about 40 minutes having coffee with them
  - then went to drop off the bikes as these had been booked to be taken up to Johannesburg
  - It was then that **Lund** testified he had met **Maqwatini,** who had approached him and introduced himself. **Lund's** further evidence,

which followed this introduction, was that **Maqwatini** asked him to follow him as he (**Lund**) had to give urine for a doping test. (67)

- whilst in the office he chose one of various sample collection vessels, which he took and had in his hand (68)
- had to take off two layers and drop shorts to provide the sample. Whilst **Maqwatini** was chatting and friendly he asked for the sample.He did not remember there being any cap on the vessel which **Maqwatini** wrapped toilet paper around
- having arrived at the porta-loos, the area was not guarded, it was a confined space for 2 persons to be in....they had to queue to go in ....there were 2/3 porta-loos...he was sorry he could not recall everything, which were all new to him, being excited about the race
- **Heyns** turned to the IST and asked **Lund,** to the extent he could remember, whether **Maqwatini** had referred to the IST requirements. (69)

Lund 's testimony concerning this was that

  - there had been social discussion
  - **Maqwatini** had told him he needed to do a drug test
  - the paperwork at the tent must have been the signing of the register
  - the sample had been taken
  - when they got back to the tent the urine sample was split
  - he had not recalled being told that he had one hour to report to the DCS (70)

- At that point **Lund** stated in response to **Heyns's** opening statement regarding **Lund** initial position as having denied that two of the signatures (on the doping control form) were his, that he (**Lund**) still didn't agree that the one signature was his as the evidence had not been conclusive. (71)
- **Kock** on behalf of the prosecution immediately responded to this as he questioned whether this was not an attempt to being ambushed as **Lund** had clearly accepted the report (72)

- Following a request by the Chairman that **Lund's** defence team take instructions from **Lund** regarding this sudden and surprising change in position and the brief adjournment which was allowed for this purpose, **Heyns** advised that
  - **Lund** did not dispute anything in the report (Palm report)
  - if it would be of assistance to the tribunal (**Panel**) and **Kock ,** evidence to the contrary was to be disregarded
  - whatever was heard that was prejudicial to the prosecution was similarly to be disregarded
  - the purpose of the question (which had been posed) was to clarify the change in **Lund's** position, in order to get

evidence on record of probative value that **Lund** was not dishonest when he disputed the signatures

- it was to be understood that no adverse finding should be made against the prosecution
- **Lund** did not have the time and money to contest the matter of the signatures further
- He, **Heyns,** was aware of his professional and ethical obligations regarding the leading of evidence and knew what not to lead, as the correct evidence should be served
- **Lund** took a view as a layman when confronted with the Doping Control Form at that time, which changed following the evidence of a professional
- was in any event not disputed that **Maqwatini** was in the tent with **Lund** and **Lund** was tested. (73)

- **Lund** added that he definitely had to accept that the signatures could be his, not denying that these were, as he had then denied, as he changed his stance. He then stated that although the signatures did not look like his it had been shown that one was genuine and the other was in all probability a genuine one (74)

- **Heyns** returned to leading **Lund's** further evidence-in-chief as **Lund** provided the following further testimony –

  - he accepted that he was asked to select a vessel when around at the table
  - he did not remember whether he was asked to check if the seals had not been tampered with
  - whilst in the toilet **Maqwatini** covered the vessel in toilet paper, placed it on the table and handed it back to **Lund** after he had covered it
  - he definitely did not put the lid on the vessel
  - he could only presume that **Maqwatini** put the lid on the vessel, although he did not see this
  - **Maqwatini** did not ask him to wash his hands
  - he did not feel that the doping control area was private, and it was particularly uncomfortable in that area and the walk to the toilet
  - the area was messy with tables and a whole bunch of bottles on them
  - he did not choose the bottles (sample kit)
  - he was not ever asked to discard the rest of the urine

- **Lund** demonstrated how it was impossible for him to take of his cycling bib and vest when he had something in his hand. He testified further that he did not question **Maqwatini's** writing of "it all went

well" with the test on the DCF, as he had not been tested before and would not have known a good test from a bad one (77)

- In closure regarding further evidence of and substantiation of earlier evidence of the sample collection procedure **Lund** added that
  - **Maqwatini** had taken the sample from him as there was no place to put a cup down or rest a cup (in the toilet) whatsoever
  - he did not divide the sample into A and B samples
  - he had not seen whether the sample was exposed or if **Maqwatini** had put a lid on it
  - the sample was not in his view at all times
  - he did not know why he had suffered the problem of showing how – (the sample had contained the banned substance) (78)

- Cross-examination

  - Having established **Lund** was aware of and accepted that testing for substance abuse would have taken place at the Argus **Lund** provided the following responses to questions put to him by **Kock,** namely that
    - the sample volumes were contested because they were strangely different and were no longer in issue
    - concerns about verification and some of the documentation had been satisfied
    - he was generally happy but unhappy that procedure had not been followed
    - although **Maqwatini** appeared to be a gentleman and introduced himself **Lund** denied that **Maqwatini** had positively identified himself
    - he had signed the bottom signature but did not read the small print, concerning his acceptance of the fact that the sample collection etc was conducted in accordance with the relevant procedures, taking this to mean,(as this was not explained to him) to mean a summary of the procedure as he understood it
    - he took this procedure to mean the completion of the paperwork and was shocked when he realised what this meant
    - he did not look at the signatures which he had subsequently contested as his
    - the reason for this was that they did not look like his
    - he had to accept that QIB under the evidence of a professional was genuine authentic signature and was prepared to accept the other contested signature, as, although himself unsure about it, he had to accept it
    - had not raised any concerns in commenting " it went well" as **Maqwatini** had not asked him if there were, (it being noted by **Kock** that he was not sure why **Maqwatini** would ask this)

- in any event he had never been in this position and would not have known the difference between good and bad. (79)

- In response to questions raised by **Kock** relating to the sample collection procedure **Lund** advised that
  - he handed the sample to **Maqwatini**
  - **Maqwatini** carried the sample to the DCS
  - there was no option to put it down
  - the sample was completely wrapped (in toilet paper)
  - he did not put the red lid on
  - it was not in his sight when he was getting changed, as he did not focus on **Maqwatini's** hands when he was changing and **Maqwatini** was to his (**Lund's**) right, not entirely within vision
  - the distance of the walk from the toilets to the DCS felt like 50-80 metres, definitely not 3 metres, as he stood by what he said
  - the vessel was put on the table and the toilet paper removed
  - **Maqwatini** then opened the kit and divided the sample
  - he saw quite a few people walking in and out of the tent
  - with his attention not focused on what was happening around him - from voices and what he saw - he estimated there to have been about 10-20 people walking in and out (80)

- **Hattingh** inquired whether **Lund** was aware that 25% of supplements contained banned substances or had knowledge of the legal bounds and constraints regarding these and how amino acids increased strength within such a legal context (82)
- **Lund's** response was that he trusted what was written on the label as best advised by Dr Stander as he would not advise anything illegal (83)
- **Lund** was then asked whether he was aware that legal products could be contaminated and if he ever felt at risk....to which his reply was that he had heard of cases and cyclists and other sportspeople must be cautious (84)
- **Hattingh** then queried why if **Lund** was very cautious and trusting in someone who he had paid a consultancy fee to, having realised how long the hearing would take, he had seemingly not
  - had his supplements analysed
  - had a consultation towards seeking advice for such purpose
  - asked for an extension of time confident that this would be the result for this purpose (85)
- **Lund's** response was that he couldn't afford this and that the procedure (testing) needed to be challenged as he still did not believe how the test result was possible and would not have helped his argument (86)
- **Lund** advised that he had handed the supplements to Wian Stander and asked him if there was anything illegal in them and to provide an opinion. He stated that he did not have such

supplements with him and that as he had basically abandoned/ stopped cycling he had no need for them as he was banned (88)

Prosecution's case

Supporting evidence adduced by **Maqwatini**

- Evidence-in-chief

  Maqwatini stated

  - (he) is a **SAIDS** DCO – Doping Control Officer
  - he was a DCO at 50 events....(clarified .. after 15 had been heard incorrectly). Richie Mc Caw, who he stated was very professional, was one of the persons he had tested
  - received training as a DCO in Durban through South African.. Drug Free Sport
  - had not had any complaints made against him
  - was not the only DCO at the event
  - knew who to look out for as he was advised by Amanda to look out for V 377
  - was helped by Darius who offered to check for his athlete as there were so many cyclists
  - was phoned by Darius who told him that he had found Russell (**Lund**) and would wait for him
  - introduced himself to **Lund** and showed him his accreditation
  - asked **Lund** for any ID, or licence to which **Lund** replied that everything was in the hotel
  - wrote in the time of notification as 09:50 on the doping control form (Exhibit D) which was when he (**Lund**) signed it
  - asked **Lund** how Cape Town and the race was on the way to the doping control station
  - wrote in the time of 09:57 as the arrival time at the doping control station "DCS"
  - asked **Lund** if he had ever been tested before and was told 'No' whilst walking to the DCS
  - also told **Lund** his rights, that he had 1hr to report to the DCS and could eat had he wished and drink water, whilst walking to the DCS
  - **Lund** was in full view at all times and on way to the DCS
  - told **Lund** to sign the control station register (Exhibit J) when they got to the DCS
  - told **Lund** what to do for a urine sample and that he would wait for him
  - advised that they then went to the mobile toilets where he saw **Lund** pull off his trousers and pee in front of him in providing the 125ml sample
  - gave toilet paper to **Lund** as he advised that the sample needed to be covered as this was very sensitive matter
  - noted the time for the provision of the sample as 10:05

  - advised **Lund** to

- to choose from the sample storage bottles and check if anyone had opened them first (the breaking of the blue stripe (seal) would mean that he would have opened a bottle first)
- start with the bottle for the B sample and to fill it to the mark which he showed him
- then close it and make sure that it was sealed
- thereafter do the same for the A sample bottle and leave a little bit

➢ noted before recording the SG that there were no bubbles in the two plastic bottles and that if the sample was too diluted ie SG below 1.005 another sample would have to have been provided

➢ asked **Lund** whether there was any medication which he had taken within the last seven days which he wished to disclose to him to which **Lund** response was no and that he had not taken anything

➢ then went on to advise how the doping control form was then completed as he
  - dealt with the research option which **Lund** understood and accepted
  - printed his name and signed as the DCO
  - scratched (drew the line through) the boxes under athlete representative, as there had not been any
  - printed his name and signed as the urine sample witness certifying that the sample collection was conducted in accordance with the relevant procedures
  - asked **Lund** how he felt about the process and was advised that it went well
  - recorded this
  - added the time 10:16 in the box for the time of completion
  - advised **Lund** that as he (**Lund**) would be the last person to sign the form he should check everything, including address and then if he was happy to sign it, which **Lund** then did

➢ explained how the copies of the signed form were distributed which, based upon their colour, would go to
  - the Federation
  - **SAIDS**
  - Laboratory
  - **Lund** himself

➢ mentioned that **Lund** would be advised within 3 weeks if there was anything **SAIDS** wished to let him know about (23)

➢ In further clarification of **Maqwatini's** opening statement **Kock** then put further questions to **Maqwatini** (24)

➢ The first of which were challenged as leading questions by **Heyns,** who asked that **Kock** not be so leading in his questions. This was because **Kock** had stated that **Lund** had carried his own urine sample from the toilet to the DCS - doping control station and

had placed it in front of him in choosing a test kit - when **Kock** sought answers from **Maqwatini** on these very matters especially without any inferences drawn from what is recorded in clause 23 above (25)

- Such questions led to **Maqwatini** providing the following which are considered to be of evidentiary value

    - the DCS – Doping Control Station - was in the vicinity of the large TV screen
    - it was shared with the paramedics
    - the mobile toilets were 10 metres from the DCS
    - the DCS was in a tent
    - apart from Colleen Hlazo, a DCO and 2 other DCOs the lead DCO Kassiem Adams were also at the DCS (four DCOs and the lead DCO)
    - had **Maqwatini** made a mistake in the procedure, or on the Doping Control Form – DCF he was permitted, or required to get permission, to tear up the form
    - **Maqwatini** did not made a mistake in the procedure or form
    - the mistake in his writing of the tel no on the DCF was due to the information **Lund** gave
    - there had been no other urine samples in the area
    - **Maqwatini** and **Lund** had gone straight to the DCS once the urine sample had been obtained
    - although it was not clear just how many forms there were the green form was given to **Lund** at the same time as when everything was finished (26)

- <u>Cross-examination</u>

    - he had done 50 events as a DCO
    - he started in 2010
    - he went to Durban in September 2010 for the training at around 16/17 ....the dates he could not remember
    - the training involved a lot of activities
    - he was of course trained in the International Standards for Testing
    - a lady from Poland was there
    - he realised that it was very important what standard had to be achieved
    - such standard was achieved (in this case)
    - he had been involved with other tests
    - he had drafted the report in Exhibit "H", which he himself had typed from original notes which were scrapped, around about April-May (if he was correct) after he was notified to do so
    - the affidavit which was deposed to on the 21 April before the Railway Police was in his own handwriting
    - knew that the International Standards for testing were very important

- the toilets were mobile, the DCS was not a mobile station as such but a tent
- although it was unclear whether the DCS area was clearly demarcated and/or identified as a DCS, there was
  - the tent where the DCOs worked
  - fences for the crowds
  - sharing of the tent with the paramedics, who also used it
- because of the media presence and concern about privacy he had given **Lund** toilet paper to cover the urine sample container, (collection vessel) once **Lund** had finished providing the urine sample, which he got from the toilet
- they - **Maqwatini** and **Lund** - did not queue
- **Heyns** indicated that **Lund**'s evidence would be that there had been concerns about privacy and that they had to queue, as he raised areas of likely dispute
- although the members of the public could have used the mobile toilets this was probably limited
- once the toilet door was closed it was only **Lund** and **Maqwatini** (who were there)
- there was a clear dispute of fact regarding the apparent conflict between the use of the words *"I used toilet paper to cover his urine sample because the media was outside"* and *"I gave him the toilet paper to cover…."*.
- As offered by **Heyns** in **Lund'**s defence this was a deliberate change of evidence in an attempt to ensure compliance with what would have been seen as a breach of the International Standards for Testing, had **Maqwatini** himself touched or covered the sample himself.
- If it was not this then it could well have been a result of difficulty with expressing oneself clearly in language which was not one's own mother tongue, as alluded to by the Chairman
- another area of clear dispute arose regarding **Maqwatini** having responded that he had not touched the testing samples, as he had asked **Lund** to choose his own and advised **Lund** to himself check if the paper (seals) had been broken to see if these had been opened by anyone else, before he opened it,
- In opposition to this **Heyns** advised that **Lund**'s evidence would be that **Maqwatini** touched the samples and put them in the bag
- **Maqwatini's** response to this was that **Lund** had put the samples in the bag. To which **Heyns** retorted that this could have been **Maqwatini's** impression but it was not fact, for the evidence which **Lund** would lead was that he (**Maqwitini**) carried and covered the sample. **Maqwatini** responded to **Heyns** advice that he had received instructions that **Maqwatini** had covered the sample by stating that he (**Lund**) "is lying".
- To **Heyns'** statement that it would have been objectively impossible, ("no way in the world"), for **Lund** to both hold the sample and remove his bib and cycling vest at the same time **Magwatini's** response was that it was made clear to **Lund** that **Lund** would carry his own sample and **Lund** did so in his own

hand. He recalled **Lund** taking his trousers off and putting the sample down as he, **Maqwatini,** told **Lund** about the toilet paper.

- **Heyns** went on to question **Maqwatini** why this was not in his report after having stated rhetorically that **Maqwatini** was more concerned about the procedure than with what actually happened. He then rephrased the question as he inquired of **Maqwatini** why it was important that the athlete handle the sample and **Lund** should carry his own sample.
- **Maqwatini** responded by stating that the procedure was that the athlete was the only person to carry the sample.
- **Heyns** then asked **Maqwatini** why if this was part of the International Standards for Testing this was not in his report, to which **Maqwatini's** response was that he did not see to put it into the report.
- In then turning to the highlighted phrase "**explained what is required**" in paragraph 4 of **Maqwatini's** report, **Heyns** asked **Maqwatini** when he had explained this. **Maqwatini** replied that this happened as they walked to the doping control station, ("DCS") whereas **Lund's** evidence would be that this happened when they had arrived at the DCS.
- **Maqwatini** then mentioned that he had told **Lund** that he could go to friends. **Heyns** made it clear that in his view **Maqwatini** had listed matters irrelevant to the proceedings. He stated that it was of utmost importance that the report covered everything that had happened, as the evidence he would lead on **Lund's** behalf would deal with the procedure. **Maqwatini** stated that he (**Heyns**) could not write his report.
- **Heyns** in stating that **Maqwatini** had chosen to use the toilet paper then asked **Maqwatini** where this was to be found in the International Standards for Testing, ("IST"). **Maqwatini** failed to reply to this question which could have simply been answered that he did not know.
- It was then stated by **Heyns** that it would be eventually be argued that the use of toilet paper from a mobile toilet to cover the urine sample was a completely unacceptable breach of the International Standards for Testing.
- **Maqwatini** responded by stating that once a person had peed the sample vessel was closed with a red cover (lid).
- **Heyns** questioned **Maqwatini** regarding why it was necessary for **Lund** to cover the sample. **Maqwatini** replied that this was in case of anything coming up and that he told **Lund** to take the toilet paper when he (**Lund**) was in front of him.
- To the suggestion that **Maqwatini** had carried the sample in front of **Lund**, **Maqwatini** responded that this would not have been okay as **Lund** had to carry the sample.
- On the further question posed by **Heyns** of when **Lund** had finished **Maqwatini** replied he had looked for him for about an hour.

- **Maqwatini** responded that he did not know to **Heyns'** statement that **Lund's** evidence would be that he had spent a considerable amount of time with family and friends.
- **Maqwatini** advised that he was an assistant DCO with Mr Adams the lead DCO when asked whether he was a DCO.
- **Heyns** questioned **Maqwatini** on whether he knew it was a requirement that the athlete was required to wash his hands, to which **Maqwatini** responded in the affirmative. When asked why this had not been put in his report **Maqawatini** replied that he had maybe forgotten about this.
- **Heyns'** retort was that **Maqwatini** had not asked **Lund** to wash his hands at all.
- **Maqwatini** was questioned on whether he had asked **Lund** if he wanted a representative and if there was anything else which **Maqwatini** hadn't met. **Maqwatini** avoided answering the questions stating in response, when pressed to do so – and by the Chairman - that the statement was a "broad one".
- **Maqwatini** advised that the volume of the sample was 125ml, when questioned regarding what such volume was. He said this was split into the A and B sample ie two bottles, with that little bit which was left over of the diluted sample thrown into the bin.
- It was pointed out by **Heyns** that this was another example of a requirement of the IST not put into the report, namely to split what was required and discussed this. **Maqwatini** replied that this is what he had done.
- In turning to Exhibit D, the Doping Control Form, **Heyns** asked **Maqwatini** whether there was anything that he did not complete and then what was not in his handwriting.
- **Maqwatini** answered that he had not completed the name of the third party and that Kassiem Adams the lead DCO had completed the test mission code, sport, discipline/ team, notification date and date of sample collection.
- Then **Maqwatini** advised in response to **Heyns** question as to who had been in the tent with him that Mr Geldenhuys, Kassiem Adams (lead DCO) and Colleen Hlazo.
- Attention was then drawn to the Doping Control Station Register – Exhibit J with **Maqwatini** describing the process of going along with the athlete to enter his name, being able to sign out and the change from 10:11 to 10:16, a correction ("scratch"- in his words) made to tie in with the Doping Control Form, ("DCF") and not remembering whether he had asked about this
- He stated that N Gasa was outside of the tent (09h48-10h14) as reflected in the Doping Control Register in response to **Heyns** questioning whether N Gasa was there at that time. (29)
- **Maqwatini** advised that he had not but spoke generally with **Kock** on the way to the hearing. He mentioned that this was not about the evidence he was lead but about the fact that Mr Fahmy Galant of the **SAIDS** office had asked him to write a report. He also responded to further questions by saying that he

had not spoken to **Kock** about the International Standards for Testing or to anyone about his evidence (40)

- Regarding the evidence about the toilet paper which **Maqwatini** had earlier given, **Heyns** reminded **Maqwatini** that there was substantial dispute, as **Heyns** thereafter posed questions relating to the mobile toilets, number of media (representatives) outside and **Maqwatini's** request that the sample be covered by **Lund** (47)
- In dealing with whether the toilets were public or private **Heyns** conceded that although it was clear that there were members of the media outside of the mobile toilets, which were thus open to the public, it was not in dispute that once inside the mobile toilet which had been chosen this was "private" (48)
- In questioning the need for the sample being covered outside of the toilet **Heyns** asked **Maqwatini** what the distance from the room / the doping control station to the toilets was. **Maqwatini** said this was 2-3 metres and that is was necessary to cover the sample because of members of the media being around (49)
- **Maqwatini** confirmed this distance as correct. As he did so he chose not to comment to **Heyns** response that this was incredible and not such distance, but (rather) between 50/80 metres, as it was more probable that one would have used the toilet paper over such longer distance. When asked whether he understood the question **Maqwatini** chose not to reply and declined to answer this question, posed in statement form, when invited to do so. (50)
- Questions then followed on **Maqwatini's** report – Exhibit "H". **Heyns** asked **Maqwatini** to look at the middle of the page, which **Maqwatini** said he had himself typed, when asked if this was so, as **Heyns** sought reasons for the statement "**explained what is required**" in the context of the report and by virtue of further questions, in relation to compliance with the IST.

  (He advised that he had not kept his notes relating to preparation of the report.)

  These questions resulted in **Maqwatini's** response to the former being that the statement

  - stood alone - because that is what was told to **Lund**
  - was in bold print form - because it was important

  and that he also told **Lund** that he had one hour to report to the doping control office (52)
- Referring to the report **Heyns** challengingly questioned whether **Maqwatini** had met with the procedural requirements relating to the collection of urine samples and if this was so why mention of these and other matters relating to the IST were not made in **Maqwatini's** report (53)
- **Heyns'** further challenge to **Maqwatini** was such that **Lund**'s evidence would be that he (**Maqwatini**) had covered the sample

with toilet paper and taken control of the sample for such purpose (54)

- **Maqwatini,** who wrote "I used toilet paper to cover his urine sample because the media was outside" in his report, was quite adamant that he gave **Lund** the toilet paper to cover the sample. He was also sure that **Lund** had the sample under his own (**Lund**'s) personal control, even when it appeared, as pointed out by **Heyns** that when undressing **Lund** would not have been able to hold the sample himself. (55)

- Re-examination

  - **Maqwatini** provided the following initial answers (some of which were in response to leading questions, such as the media presence in dealing with the reason for the covering and handling of the sample, which were noted as such)
  - the covering of the sample was because he did not want the media to see it
  - the media were not watching but taking photographs
  - **Lund** had put the sample in front of him when he had finished "peeing" in order to close the cap
  - the sample could not be closed with the toilet paper
  - in a situation where an athlete could not handle his own sample then the DCO would put this in front of the athlete (58)

- Other evidence

  All the Exhibits, documents and correspondence, handed in and accepted as undisputed evidence, including without limitation the Palm report and the Labaratory report – Exhibit "D".

159.2.4 Assessment of the evidence

Introduction and approach

i. The **Panel** assessed all the evidence in this matter, relating to whether or not the Sample Collection Session conducted by **Maqwatini** had complied with the requirements of Annex D of the International Standards for Testing and the related issues of the credibility of the witnesses, with due and thankful regard to the submissions made by **Kock** and **Hattingh** as the **SAIDS** prosecution team, as well as **Heyns** on behalf of **Lund**.

ii. In making the findings set out below the **Panel** excluded any leading evidence, which the **Panel** found had been obtained through leading questions, such as that mentioned in paragraphs 25 on page 6, 60 on page 13.

iii. It is important to note at the outset that the **Panel** made its evidentiary findings relating to those other aspects of **Lund's** defence submissions, as raised and dealt with in 159.1 and 159.3, having decided that it did not need to consider and determine the veracity of the evidence of each witness and make any findings on their credibility.

iv. The **Panel**'s approach to dealing with the evidence in this aspect of **Lund's** case in defence was different however. It required that the **Panel** fully consider and determine matters relating to the veracity and the relative weighting of the evidence, which was adduced by the witnesses, as well as making such findings, as were necessarily relevant, on these matters and the credibility of the witnesses.

This was because

- the case, which **Heyns** has raised in **Lund's** defence submissions, relating to departures from the IST which **Heyns** submitted and argued *could reasonably have caused the adverse analytical finding,* required evidentiary proof of such departures;

- significant differences and conflicts existed between **Lund's** and **Maqwatini's** evidence regarding whether any or all of the submitted departures had occurred or not.

EVIDENTIARY FINDINGS

vi. The **Panel's** findings established in accordance with the approach adopted by the **Panel** are set out below.

The **Panel's** view was that **Lund's** entire defence case, as well as each of the composite elements thereof, would "stand or fall" according to the veracity of **Maqwatini's** evidence and his credibility.

These were called into question in the submissions made by **Heyns** on **Lund's** behalf.

For the purposes hereof

- the aspects of **Maqwatini's** evidence and credibility which were raised in such submissions have first been considered and findings

- referral to the submissions made by the **SAIDS** concerning **Maqwatini's** evidence and **Lund's** evidence have been made, as and where this was necessary or relevant.

A. **Maqwatini's** evidence

Lund's defence submissions

1. **Heyns** submitted that
    a. an adverse credibility finding should be made against **Maqwatini** if the **Panel** did not feel that he impressed as a witness HoA 40
    b. **Maqwatini's** evidence should be rejected where it is not corroborated with other credible evidence. HoA 41

2. The reasons and explanations which **Heyns** advanced for this are more fully covered in paragraphs 34-42 of his HoA and 114-119 of this record of decision.

3. The **Panel's** findings, which are italicised, follow the summary of each of the aspects of the submissions made by **Heyns** set alongside the bullet points which follow

    - **It was of considerable significance that Maqwatini's evidence changed substantially from the time he completed his report to when he gave evidence**

      FINDING 1

      *The **Panel** does not accept that **Maqwatini** failed to explain this. It also does not accept that such failure was established and that **Maqwatini** gave indisputably false evidence.*

      *The **Panel**'s reasons for these findings are that*

      - ***Maqwatini** did in fact explain why he did not include and it was thus not necessary for him to have included,*

        all the important and relevant requirements that were traversed during his evidence, but instead referred to wholly irrelevant requirements *HoA 35*

        in his report.

      - *He did so under cross-examination by **Heyns** when **Heyns** asked **Maqwatini** to look at the middle of his report and asked him why* *(HoA 34 & 52)*

        explained what was required:

- *From the time I notify him, his got one hour to report to the Doping Control Office*
- *He should not drink any unsealed water, drink etc.*
- *If he want to eat, he can, but on his own risk as long as he (sic) wouldn't been given by me.*

*was stated in his report, by responding that the statement stood alone "because that is what he told **Lund** and was in bold because it was important."* *(52)*

- *The statement was thus intended to be a general one embracing all of the requirements of Annex D, which **Maqwatini** was expected to explain to Lund (not necessarily all at once but rather as the Sample Collection Session progressed) and not the full detail. The three bulleted points being added as illustrative of what **Maqwatini** had told **Lund** earlier on in the process, on the way to the Doping Control Station and within the context of the totality of the evidence accepted clearly not exhaustive of these requirements.*

- *It is more likely that **Heyns** had clearly misunderstood such response and/or inadvertently conflated the general statement **explained what was required** and the examples which followed.*

- *In doing so **Heyns** reached a mistaken conclusion, through unreasonably assuming and imputing a meaning to the statement which it did not have within the context and reason for the report, namely that **Maqwatini** "intended to refer to the requirements as set out in Annex D of the IST D4.1-D4.18" but did not, as he only referred to D4.11-D4.13.*

- *Such misunderstanding becomes <u>highly probable</u> when seen and considered within the context of*

  - *the totality of the evidence, especially the uncontroverted and corroborated evidence of **Maqwatini***

- *the apparent and unexplained failure by* ***Lund's Harty***to respond to **SAIDS** request, as contained in *paragraph 4 of its letter dated 19 August, to*

  > ***"Please provide us with a list of questions that will clarify the aspects of concern pertaining to the report on the test conducted on your client. These questions will be put to Mr Maqwatini and forwarded to you to remedy any misunderstanding. Mr Maqwatini will be at the hearing to answer any further questions".***

- *the apparent and unexplained failure of* ***Kock*** *and* ***Hattingh*** *on behalf of the* ***SAIDS*** *prosecution and* ***Harty****and* ***Heyns****, as Lund's legal representatives, to liaise with each "about the evidence" , which would have included the report specifically, during the period of adjournment, as had been agreed for the purpose of further limiting the issues, particularly having regard to*

  - ***Heyns'*** *statement that "the defence faced another case to the one which they had prepared for"*
  - **Lund** *not having commenced* testifying *the defence of his case*
  - *The opportunity which* ***SAIDS*** *and* ***Harty****had prior to the commencement of the hearing, to clarify aspects of concern and remedy any misunderstanding concerning the report between them.*

- *The* ***Panel*** *being entitled to reasonably infer that as any clarification of the* ***Maqwatini*** *report outside of the hearing itself could have been prejudicial* ***Lund's*** *case in his defence,* ***Lund's*** *legal representatives had avoided seeking this.*

- *This inference being more highly probable as such clarity would have resulted in the submissions made by* ***Heyns****, as regards* ***Maqwatini***

- *presenting and not explaining the reasons for the differences in the two versions of evidence which were presented in his evidence and the report*
- *any suggestion of his having given false evidence in this regard*

being thoroughly negated.

- *The report was prepared and typed by **Maqwatini***
  - *in English, which is not his home language. It understandably contained inelegant language and some grammar and spelling errors*
  - *at the request of Mr Fahmy Galant the Doping Control Manager at **SAIDS***
- *No evidence was led that it had to based upon any required content or format.*
- ***Maqwatini** could quite simply have copied all of the Sample Collection Session activities, for which he was responsible, directly from Annex D or followed the Doping Control Manual DCM for this*

*The **Panel** accordingly finds further to its comfortable satisfaction that the words **explained what was required,** when read and taken in conjunction with the reasons set out above, established on well more than a balance of probability why **Maqwatini's** report did not contain all the important and relevant requirements of Annex D.4.1 to D.4.18 and only referred to D4.11- D4.13.*

- **He insisted that he had not discussed his evidence with anyone prior to the 25th August and spoke only to Kock in general terms but not about the evidence. Only reasonable conclusion drawn is that he was concerned with presenting evidence which would impress upon the Panel his adherence to all required procedures.**

FINDING 2

*The **Panel** does not accept the submission made, as well as any inferences and conclusion drawn relating to **Maqwatini***

*not having discussed the evidence with anyone and having spoken only to **Kock** in general terms, prior to the 25 August 2011, but not about the evidence.*

*The **Panel's** reasons are* *(refer 39-40)*

- *the evidence on this point was established under cross-examination*
- ***Maqwatini's** reply was not challenged nor was it put to him that the defence intended to or would place such statements in dispute within the defence case*
- *it was not contested or placed in dispute in terms of any other evidence adduced in **Lund's** defence case at all*
- *the submission is 'bald' one, highly speculative, seemingly based on assumption or presumption, devoid of substance and support*
- *the submission thus has no evidentiary value*
- *the conclusion, suggestive of **Maqwatini** being **"concerned with presenting evidence that would impress upon the Panel his adherence to all required procedures",** is consequently unfoundedly spurious*

- *highly improbable therefore that **Maqwatini**, who **Lund** himself confirmed to be friendly and a gentleman, would have compromised his personal integrity, as well as his status and record as an experienced **SAIDS** DCO, through any false testimony whatsoever, whether suggested or not, in the very presence of both **Kock** and **Hattingh**, at the hearing, when either of them could well have been called to testify, or at least answer any questions, as to the correctness of such statements*

- *that it was highly probable, given the **Panel's** findings in 159.1 and 159.3, that the only logical conclusion that could be drawn as regards **Maqwatini's** "stunning recollection of the requirements" and compliance therewith, as had been delivered within his evidence-in-chief and under cross–examination, was based rather upon the following undisputed reasons*

    - ***Maqwatini's** lengthy test and event record*
    - *the type of training he received as a DCO*
    - *his clean test / conduct record*
    - *the corroboration and thus vindication of his testimony by the Palm report, regarding the*

disputed signatures as accepted into evidence by the defence (34)

- *his other evidence which had been corroborated eg: Kassiem Adams had filled in some of the detail on the DCF- the Palm report; his test/event record, training and course record-established by the documents accepted*

*The **Panel** accordingly finds further that the evidence adduced by and/or through **Maqwatini** to be acceptable as reliable and received into evidence.*

- **Another glaring change in evidence pertains to the contradiction between "I used the toilet paper to cover his urine sample (because the media was outside)" and " I gave him toilet paper to cover his sample" , which was unexplained by Maqwatini**

FINDING 3

*The **Panel's** finding, having regard to its further findings under 159.1 and 159.3, as well as the totality of evidence accepted, is that the apparent contradiction between*

> **"I used a (sic) toilet paper to cover his urine sample (because the media was outside)"** *appearing in the report*
> and
> **"I gave him toilet paper to cover his sample"** *in **Maqwatini's** evidence in both his evidence-in-chief and under cross-examination*

*had clearly not arisen from **Maqwatini** deliberately changing his evidence to secure compliance with the IST, but rather as a result of the incorrect use of the English language in expressing what he meant to convey in the report.*

*This finding was reached with the **Panel** taking into account*

- ***Maqwatini's** own admission that if he had touched the urine sample this would have been a breach of the IST*

- *his seemingly not having understood the statement relating to this resulting in a change from non-compliance to compliance*
- *his not have given a straight answer for such change even when asked to do so by the Chairman*
- *the nature of the approach adopted in **Lund's** defence case, with only one witness on each side being called to lead evidence, as possibly more adversarial than those involving multiplicity of witnesses, more especially following the **Panel's** decisions not to allow for Kassiem Adams to lead any evidence and the layout of the DCS was also disallowed.*

*The **Panel's** reasons for such finding, apart from what the **Panel** has found to be the reason for the contradiction arising in the first place, are that*

- *it would have been highly improbable that **Maqwatini** would have jeopardised the integrity of the entire Sample Collection Session, which he had initiated and conducted for the collection of **Lund's** urine sample, through touching or handling the sample, as had been suggested by **Lund**.*

- *The further reasons for this being*
    - *his lengthy test and event record that reflects his vast experience*
    - *his clean test and conduct record*
    - *the corroboration and vindication of his testimony by the Palm Report on all accounts relating to the Doping Control Form*
    - *the type of training which DCO's receive under within the context of the DCM*

- *It is highly probable that although all the elements of the DCOs responsibilities and activities, as prescribed within Annex D.4.1.-D4.1.18 and the DCM are drummed into the DCOs, that which is described in D.4.5 which requires that*

"The athlete shall retain control of the collection vessel and any sample provided until the Sample is sealed"

would be one which would be considered to be of significant importance for a DCO such as ***Maqwatini*** *to have adhered to*

- *"**control**" does not have the meaning which* ***Heyns*** *would seem to have ascribed to it, namely "in one's hand". The Pocket Oxford Dictionary (8th Edition 1992) describing it to mean "power of directing"*

- *contrary to suggestions that* ***Maqwatini*** *may have had the motive to do change or manipulate his evidence in any way, to ensure that he complied with the IST the opposite is true*

- *this is because the IST provides*
  - *for "second chances" and for forms with mistakes to be torn up and a fresh start to be made the IST encourage*
  - *and importantly "encourages" that mistakes be acknowledged and any deviations/ departures be documented for the record and learning*

- *furthermore this is because departures, which do not or could not reasonably have caused the adverse analytical finding, shall not invalidate the results. (Article 3.2.2)*

- *the evidence of* ***Lund*** *in this regard which seeks to promote rather than prove his case ought to have been corroborated*

The ***Panel*** *therefore finds to its comfortable satisfaction that* ***Maqwatini*** *had therefore* ***not***

- *changed his evidence concerning the covering* ***Lund's*** *urine sample*

- *breached or been responsible for any departure from D.4.5 of the IST.*

- **Attempt to cast evidence relating to his training in the IST in a more favourable light**

  Finding 4

  *The **Panel** reached is findings and provided its reasons on this matter relating to **Maqwatini's** training and qualification as a DCO in 159.3.5*

- **Distance from the tent to the porta-loo was 2 to 3 meters of the toilet was incredible as it did not make sense to be concerned about the privacy of Lund's sample**

  Finding 5

  *The **Panel** reached is findings and provided its reasons on this matter within the context of whether or not the Doping Control Station complied with 6.3.2 of the IST under 159.2.5 and its further findings set out in this record of decision.*

- **Refused to give a simple answer, gave an unsatisfactory answer and avoided answering a question**

  Finding 6

  The **Panel** has made a finding with regard to these matters in Finding 3 above. The **Panel**'s further view, as reinforced by such finding, is that as these were not material, arising through possible lack of understanding and obstinacy rather than dishonesty.

  In any event

  - two of these instances were resolved within the findings made 159.3.5 and Finding 3 above, and

- the nature of the approach adopted in **Lund's** defence case, with only one witness on each side being called to lead evidence, as being possibly more adversarial than those involving multiplicity of witnesses, more especially following the **Panel's** decisions not to allow for Kassiem Adams to lead any evidence and the layout of the DCS was also disallowed, could reasonably have caused **Maqwatini** to have been more circumspect and guarded with answering such questions as he did.

- **Indisputable that he gave false evidence on a number of issues some on the face of it not of much importance**

- **Cannot escape the conclusion that he did not give his evidence truthfully**

Finding 7

*The **Panel** has made it clear and provided its reasons why it does not agree with these submissions concerning any suggestion of false evidence and untruthfulness in the evidence provided by **Maqwatini.***

*The **Panel** has also provided its reasons for accepting all of the evidence so "stunningly recollected" and presented by **Maqwatini.** It did so with due regard to his sometimes obstinate display and reluctance to answer three specific questions put to him within the rigours and "cut and thrust" of his being cross-examined by **Heyns.***

*The **Panel** found that **Maqwathini's** evidence was overwhelmingly comprehensive, concise, consistent, cohesively clear, essentially incontrovertible and undisputed, as well as corroborated in part, by not only by the Palm report relating to the disputed signatures, but **importantly** the laboratory report Exhibit "D" regarding the integrity of the sample submitted for testing – with reference to the condition, SG and pH and all other documentary evidence, such as his DCO training programme and his record of tests/events as a DCO.*

*The **Panel** thus accordingly found **Maqwatini** to be a **truthful and reliable witness to the Panel's entire and comfortable satisfaction**, in applying the most exacting standard in assessing all the evidence which had been presented, as **Heyns** had implored be done in this case, where **Lund** faced the principles of strict (possibly absolute) liability under the provisions of Article 2.1.1 of the Rules.*

*The **Panel** finds further that is no basis for*

- *making any adverse finding of credibility against **Maqwatini**, or*
- *applying the Roman legal principle of "**falsus uno, falsus in omnibus**" – meaning false in one false in all, to his evidence*
- *only accepting his corroborated evidence.* *(HoA 40)*

- **Motive to present his evidence so as to suggest that he had complied with all of the IST requirements was such that he was being paid as DCO and it could be reasonably inferred that he may have been concerned about losing his job.**

  Finding 7

  *The **Panel's** finding on this aspect regarding **Maqwatini's** evidence is to be found under Finding 3.*

SAIDS Prosecution submissions

i. **Maqwatini** was vindicated when the scientifically based forensic Palm report, Exhibit "T",

  - conclusively established that one of the signatures which Lund had disputed as his own, being signature (Q1b) in such report, was "a genuine /authentic signature"
  - conclusively established that the other signature, which Lund had disputed as his own, being signature (Q1a) in such report, was "in all probability a genuine /authentic signature"

confirmed his evidence and **Heyns** accepted the report contents and agreed that there was no need for the **SAIDS** prosecution to call Mrs Palm as the signatures would not be disputed. (In his regard refer to Attorney **Harty**'s letter dated 20 October 2011, handed in and accepted as one of the correspondence Exhibits)

ii. The Palm report also corroborated **Maqwatini's** evidence relating to the fact that there were two authors and that Kassiem Adams as the lead DCO had completed those sections which **Maqwatini** had stated under cross examination on the first evening.

iii. **Maqwatini** showed himself to be truthful, modest and yes a bit obstinate at times.

FINDING 8

*The **Panel** noted and accepted the submissions made under i - iii.*

---

iv. Futher

- DCOs do not use IST but use DCM based on WADA Code and IST (the DCM is an operating manual)

- **Maqwatini's** concerns about privacy are consistent with DCS in a tented environment as covered in DCM.
  (Covered under 6.3.2 of the IST and dealt with under 159.1)

FINDING 9

*The **Panel** noted and accepted the submissions made under iv.*

B. LUND'S EVIDENCE

Defence submissions (HoA 43-44)

i. **Heyns** submitted that **Lund** gave his evidence (in contrast to that of **Maqwatini**) in an honest, full, frank and open manner. He did not deny that he used nutritional supplements, nor that there were some aspects which he could not remember and even that there were some contradictions in his evidence.

ii. He went on to submit that these are the hallmarks of a truthful witness.

iii. **Lund's** failure to have the supplements tested (to establish what the origin of the banned substance was) should not be criticised he submitted.

iv. This was because **Lund** had chosen to focus his case on the evidence which shows that there were departures from the IST, which could reasonably have caused the adverse analytical finding, rather than going through the expense of having his nutritional supplements tested.

SAIDS prosecution submissions

i. It was significant that **Lund**, apart from indicating that the supplements were being analysed never attempted to provide any explanation for the presence of Methandienone and its metabolites in his system. (34)

ii. It is reasonable to expect of any athlete to present supplements consumed prior to the AAF (Adverse Analytical Finding) to the tribunal...this was not the case here...this was forfeited in favour of an attack on the competence of the DCO (**Maqwatini**) (35)

iii. The immediate stop to consuming of supplements on notification of the AAF, as well as handing over of supplements to Dr Wian Stander and initial indication to have it (sic) (these) analysed are significant. It is clear that he accepts that only possible source for the banned substance in his body fluids is the consumption of his supplements. (36)

iv. Highly improbable that having regard to **Maqwatini's** experience and flawless test record that he made the mistakes **Heyns** alleged that he made, which are very basic and form the essential elements that are drilled into DCO's during training and critical to a successful mission, occurred. (38)

v. All evidence relating to transgressions was given by **Lund.** No corroboration by a third party or documentary or other evidence. (41

vi. **Lund's** sudden contention of the signature, which he had disputed was his, did not look like his, raised after the agreement that the contents of the Palm report was not in dispute was reached, allowed for **Lund** to provide evidence of lack of funding to contest the Palm report. (21)

vii. It was submitted as significant that, apart from the demonstration of the prohibition of movement in removing his cycling kit, no aspects where a third person could testify and support **Maqwatini's** evidence were disputed by **Lund.** Hence the defence team tactic to chip away at his credibility to counter impact of his evidence in such situations. (30)

viii. Focus on conduct and competence of **Maqwatini** in disputing every single facet of sample collection and sealing procedure. (32)

FINDING 10

The **Panel's** further findings concerning its analysis and assessment of the evidence in the light **Lund's** defence and the **SAIDS**' prosecution submissions, follow the **Panel's** preliminary comment, below.

Preliminary comment

i. The approach which **Lund's** legal representatives adopted, in presenting the case in **Lund's** defence on the anti-doping violation charge brought against **Lund,** required focus on those departures from the IST which it was submitted could have reasonably have caused the adverse analytical finding referred to in Exhibit "B". (HoA 44)

ii. This was because - assuming each of the aspects of **Lund's** case was proven - the evidentiary burden (onus), which had hitherto rested on **Lund**, as the Athlete in terms of Article 3.2.2 of the **Rules**, shifted onto **SAIDS** having to prove that such departures did not cause such adverse analytical finding.

iii. It should also be noted within this context that the standards of proof described in Article 3.1 of the **Rules** for **SAIDS** and **Lund** as the Athlete are different. Article 3.1 provides that

- **SAIDS has the burden ......of establishing an anti-doping rule violation to the comfortable satisfaction of the hearing Panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.**

- **Where these Anti-Doping Rules place the burden of proof upon the Athlete .. alleged to have committed an anti-doping violation to rebut any presumption or establish any facts or circumstances .. the standard of proof shall be by a balance of probability........**

iv. **Lund** disputed **Maqwatini's** evidence in certain respects and presented his own evidence concerning the collection of **Lund's** urine sample, within the Sample Collection Session and related other IST breaches, which were submitted supported **Lund's** case.

v. Such evidentiary disputes, as there were and which remained following admissions made, sought to place **Maqwatini's** qualifications, capacity, capability and competency, the veracity of his uncorroborated evidence and ultimately his credibility, integrity and reputation, as a person and as a respected **SAIDS** DCO into question and doubt.

vi. Simply put, if **Lund** could and was therefore able to place enough evidence before and prove to the **Panel's** satisfaction, on the balance of probability, that all, or at least sufficient of the relevant elements, of those aspects of **Lund's** case relating to the submitted breaches of, or departures from, and thus non-compliance with the IST, whether in part or whole, could reasonably have caused the adverse analytical finding, **Lund** would also have had to prove that

- the breaches ("departures" under the Code, **Rules** and IST) relied upon did in fact occur, or, at the very least, could reasonably have occurred and
- a departure could reasonably have caused the adverse analytical finding.

in order for **SAIDS** to then have had the evidentiary burden to establish that such departure did not cause the adverse analytical finding. (Article 3.2.2)

vii. For this purpose **Lund's** objective in his case in defence of the charge, was to seek and establish weaknesses in the **SAIDS** prosecution's case, relating to such IST procedural breaches. In doing so he sought to prove these could reasonably have occurred on a balance of probability, because

- **SAIDS**, through its DCO **Maqwatini** had committed the specific breaches relied upon
- **Lund's** evidence could be relied on
- **Maqwatini's** evidence could not.

viii. This objective was apparent right from the start of Lund's defence, which commenced with Attorney **Harty**'s letter to **SAIDS**, dated 12 April 2001, responding to the notification of the adverse analytical finding –sample number A2530620 addressed to Lund on 5 April 2011, on **Lund's** behalf.

ix. The averments in such letter placed matters relating to the Identification of the Athlete (5.0 of the IST) and the Sample Collection Session (6.0 & 7.0 – including Annex D - of the IST) and thus compliance with the IST in dispute.

x. Those relating to

- the two signatures on the Doping Control Form, (DCF), which **Lund** clearly had no knowledge of and denied were his own (paragraph 4)

- the apparent tampering of the DCF by the insertion of false signatures (paragraph 4 & 5), and the emphatic and unqualified statement "given the serious irregularities" (paragraph 7)

cast direct and indirect aspersions upon the integrity and competency of **Maqwatini**, personally and as a **SAIDS** DCO.

The Panel's findings

Lund's evidence

1. As this was given under his single testimony and uncorroborated by third parties and/or documentary evidence, the appropriate caution should be exercised in the acceptance of any evidence presented, as well as relative weighting thereof assessed and applied also in making or reaching any finding and/or decision on this point specifically and with regard to all other matters.

2. Although he focused considerably on personal information relating to his sporting career, training, nutrition, the race and his feelings this was within acceptable norms having regard to the seriousness of the matter. (63-66)

3. Did not build his case in defence through direct evidence. In some instances this was clearly and in others probably, or possibly, as a result of poor recollection. However in the light of

    - the **Panel**'s finding regarding **Lund's** motive, as set out in 11 below

    - overall findings on evidence, as set out in the **Panel's** findings in **Findings 1- 9** above and decisions with regard to those other aspects of **Lund's** defence, as set out in 159.1 and 159.3,

    it was undoubtedly for the purpose set out in 4 below.

4. Chose to lead contradictory evidence which would, place compliance with the procedural matters which formed the basis of **Lund's** defence case and for that matter, the veracity of **Maqwatini's** evidence and his credibility as a witness, in doubt and thus dispute.

    Examples of this are

    - those areas of **Maqwatini's** evidence in the **SAIDS** case relating to the submitted departures from the IST, which formed the subject matter for consideration (HoA 45.3), which apart from the demonstration regarding how impossible it was for Lund to remove his cycling bib and vest and hold the sample, (HoA 16 : 77) could not have been corroborated by third parties. (75) (**SAIDS** 26)

- covering of the urine sample (collection vessel) with toilet paper
- did not divide the sample into A and B samples (78)
- no place to put a cup (collection vessel) down (in the toilet) (78,80)
- the sample was not in his (Lund's) view at all times (80)
- **Maqwatini** carried the sample to the DCS (80)
- they had to queue at the toilets (68)
- (Lund) did not put the red lid on (80)
- distance from DCs to toilets was 58-80 metres definitely not 2-3 metres (80)
- **Maqwatini** ...introduced himself (no suggestion of any accreditation being shown) (5& 67)

4. <u>Failed to provide answers to questions</u> on the basis of not being able to recall/remember

   - he could not remember if there was cap on the collection vessel (68);
   - he could not recall everything, these were all new to him, he was excited about the race (68)
   - did not remember whether he was asked to check the seals (75)
   - did not recall being told that he had one hour to report to DCS (79)
   - his describing the nutritional supplements he was taking ie Glutamine, ZMA and CLA not by their trade names, as well as Arginine, within a range of products he could not remember (66)

   This would generally be acceptable but **Panel** exercised caution and was circumspect in determining whether the answers were acceptable or not, having regard to the materiality of the matter(s) disputed and/or weighting of such evidence.

5. <u>Vague</u> in some respects with regard to answers to the question put to him. Such as

   - the time when **Heyns** asked **Lund** to remember whether **Maqwatini** had referred to the IST requirements with Lund giving testimony that "there had been a social discussion...he needed to do a drug test etc (69 & 70)
   - his recollection of the signing of the DCF and acceptance of the procedures undertaken and basis for saying "it went well" (79)
   - his not revealing the trade names of the supplements he was taking but preferring, even under cross–examination, to refer to (some) ingredients names, Glutamine, ZMA and CLA – from USN, as well as Arginine, within a range of products he could not remember (66)

6. Much of what he had testified about the Doping Control Station was of little probative value, being more of a suggestive and speculative nature, based on the expression of feeling, conjecture and impression than actual fact.

(159.1.4 - HoA 23-24: 68 & 75)

7. One of the "legs" of **Lund's** argument, which his defence representatives initially sought to establish, for the purpose of bolstering evidence in support of the submissions in his case that the departures could reasonably have caused the Adverse Analytical Finding, related to the assertion that **Maqwatini** carried an unsealed urine sample, covered only with the toilet paper obtained from the mobile toilet, to the DCS.

   It is significant that this prospect in support of such submissions, related to contentions that the sample could thereby reasonably have been contaminated, was discarded when it became clear on **Maqwatini's** evidence that the urine sample in the collection vessel was covered with a red lid and not only the toilet paper.

   (8 & 58 : HoA 45.3: **SAIDS** 22-23)

8. The **Panel** accepts **Heyns'** explanation for **Lund** focussing his case on the evidence that shows that there were departures from the IST, which could reasonably have caused the adverse analytical finding. Although this was not helpful to the **Panel's** concern, after the hearing one still did not know what the origin of Methandienone and its metabolites were.

9. It views **Lund's** failure to lead any evidence concerning

   - the full trade description of the full range of the nutritional supplements he was taking at the time and to present the containers of such supplements to the hearing, as was the expected norm

   - the outcome of the test results on the nutritional supplements **Lund** was taking, which was referred to in the letter dated 30 August 2011 addressed to **SAIDS** by **Harty**, Attorney

   in the light of

   - **Heyns'** submission that **Lund** ought not to be criticised for not going through the expense of having the nutritional supplements tested and focussing his case as he did, because Article 10 of the Rules would not permit any elimination or reduction of the period of ineligibility in circumstances where the supplements which **Lund** admits to having used
     - were contaminated

- were only those supplements which Dr Wian Stander who he had consulted had prescribed (HoA 44)

- **Lund's** evidence that
  - he had heard of cases of where legal supplements were contaminated (84)
  - he had handed the supplements to (Dr) Wian Stander and asked him if there was anything illegal in them and to provide an opinion
  - he did not have such supplements with him and that, as he had basically abandoned/stopped cycling, he had no need for them as he was banned

- the contents of paragraph 3.1 of **Harty**'s letter dated 30 August, referred to above and Dr Wian Stander not having been called to lead evidence on behalf of **Lund** at the hearing

- no further evidence being led as to the status of Dr Wian's investigation and opinion, which Lund had him asked for

- **Lund's** failure to have called for his "B" Sample analysed, as **SAIDS** had invited to do by the 12 April 2011 in accordance with its letter dated 5 April 2011, Exhibit "B"

- the time period which was available for **Lund** to have the nutritional supplements tested for banned or prohibited substances

- the probability that costs of any such tests would have been less than the legal costs relating to the case which **Lund** presented in his defence, (156 and 159)

the **Panel** is entitled to deduce as highly probable and logical conclusions, that

1. the origin of the Methandienone and its metabolites was either likely to have been established, or had in fact been established, by Dr Wian Stander, in the determination of whether there were any illegal substances in the supplements handed to him and the provision of the opinion, which **Lund** had asked him to do, whether the origin or details of such origin were known to **Lund,** before the conclusion of the hearing, or not,

   alternatively, that such origin was likely to have been established by any other person or entity

2. if **Lund** did or still does not know this, that **Lund** accepted that the only possible source for such Prohibited Substances being in his body fluids, leading to the adverse analytical finding and the charge for the doping violation against him, was his own consumption thereof.

10. During his evidence-in-chief, in answer to an opening question which **Heyns** had put to **Lund** for the purpose of establishing that **Lund** was not dishonest when he had originally disputed the two signatures on the DCF, **Lund** quite surprisingly stated that he still did not agree that the second originally disputed signature was his. (71)

- This was queried by the **Panel** and vehemently contested by the **SAIDS** prosecution at the time of the hearing, as being an about turn on the agreement earlier reached on the Palm report.

- The agreement, as was recorded in **Harty**'s letter to **SAIDS** dated 20 October 2011, provided that there was no issue with the contents; Mrs Palm would not have to attend the hearing; and for the avoidance of doubt the Palm report were accepted and Mr Lund didn't dispute the signatures on the Doping Control Form.

- At the suggestion of the Chairman the hearing was adjourned for **Lund's** legal representatives to clarify **Lund's** position on the matter.

- Upon his return **Heyns** reported that

  - **Lund** did not dispute anything in the report (Palm report)
  - if it would be of assistance to the tribunal (**Panel**) and **Kock ,** evidence to the contrary was to be disregarded
  - whatever was heard that was prejudicial to the prosecution was similarly to be disregarded
  - the purpose of the question (which had been posed) was to clarify the change in **Lund's** position, in order to get evidence on record of probative value that **Lund** was not dishonest when he disputed the signatures
  - it was to be understood that no adverse finding should be made against the prosecution
  - **Lund** did not have the time and money to contest the matter of the signatures further
  - He, **Heyns,** was aware of his professional and ethical obligations regarding the leading of evidence and knew what not to lead, as the correct evidence should be served
  - **Lund** took a view as a layman when confronted with the Doping Control Form at that time, which changed following the evidence of a professional
  - it was in any event not disputed that **Maqwatini** was in the tent with **Lund** when **Lund** was tested. (73)

- The **Panel** accepted the agreement had not been reneged upon and the status of the Palm report had been fully restored.

- **Lund's** "flip flop" position concerning his evidence relating to the signatures was most unsatisfactory in the **Panel's** view.

- this changed from 12 April to 27 October 2011,as follows
  - *having no knowledge as to whose signatures were on the form, but they were definitely not his*
  - *it appears that the doping control form has been tampered with by the insertion of false signatures*
    (**Harty** letter dated 12 April), to
  - *Mr Lund does not dispute the signatures on the Doping Control Form*
    (**Harty** letter dated 20 October), to
  - *He didn't agree that the one signature was his, as the evidence had not been conclusive.*
    (evidence –in-chief 27 October), to
  - *he definitely had to accept that the signatures could be his, not denying that these were, as he had then denied, as he changed his stance. He then stated that although the signatures did not look like his it had been shown that one was genuine and the other was in all probability a genuine one*
    (evidence –in-chief 27 October) (74)

  All of this ought to considered with regard to **Lund's** statement under cross – examination that he did not look at the signatures, which he subsequently contested.

  Indicating as highly probable therefore that, as

  - he had signed the DCF in the bottom right corner
  - commented that it had all went well, notwithstanding his averment that this was because **Maqwatini** had not asked him if he had any concerns.

  he therefore did not need to look at the signatures which he had just signed. (79 vii)

11. That **Lund** had a clear motive in presenting his case in defence of the charge is beyond doubt. This was to prove his case in defence of the charge as has been fully explained in the preliminary comment above.

FINDING IN CONCLUSION

The Panel's overall finding with regard to Lund's evidence, based on

- **the above findings, inferences and conclusions drawn**
- **all the other Panel's findings as regards Lund's testimony,**

is that

as there was no need to place any reliance on any of LUND's evidence, for the purposes of the Panel's decision as set out in 159.2 below, there was no need for the Panel to make any finding on the veracity of Lund's evidence, and/or his credibility as a witness.

Maqwatini's evidence

1. The **Panel's** findings dealing with the submissions made by

   - **Heyns** in **Lund's** defence, are covered under **Findings 1-7**

   - The **SAIDS** prosecution, are covered under **Findings 8-9**

   relating to both the veracity of the evidence led by **Maqwatini** and his credibility.

   The **Panel** has considered it unnecessary to repeat these but simply to refer to them for the sake of convenience.

2. The findings and decisions made by the **Panel** under

   - 159.1 - particularly 159.1.5 - of this record of decision, in finding that the Doping Control Station did comply with Clause 6.3.2 of the International Standards for Testing

   - 159.3 - particularly 159.3.5 - of this record of decision, in finding that the official **(Maqwatini)** who was responsible for the Sample Collection Session did meet the requirements for a DCO as set out in Annex H

   are relevant as these established the **Panel's** finding that **Maqwatini's** evidence relating to

   - the Doping Control Station even under cross-examination remained factually extensive, considered, concise, clear and consistent

- his being a Doping Control Officer was confirmed.

FINDING IN CONCLUSION

The Panel's overall finding with regard to Maqwatini's evidence, based on all of the above findings, is that it was to be believed

---

159.2.5 Application of the evidence on the rules, findings and reasons.

i. *Matters for decision*

- *Whether there had been departures from the IST ?*
- *Whether such departure could reasonably have caused the adverse analytical finding ?*

Departures (breaches)

The following are the departures, which **Heyns** submitted could reasonably have caused the adverse analytical finding, for adjudication by the **Panel** under 159.2.2, which set out **Lund's** case on this aspect of his defence of the (HoA 11 45.3)

1. **Maqwatini's** handling of the sample

   or, on **SAIDS** version,

   Lund having to place the sample on a toilet seat open to the public

2. **Maqwatini** covering it with toilet paper

3. **Lund** not washing his hands before he passed the sample

ii. *Rules*

The rules to be applied are **D.4.5** and **D.4.7** of the listed **D.4 Requirements D.4.1 – D.4.18** of **Annex D - Collection of urine Samples** of the International Standards for Testing, (IST) with reference to Article 3.2.2 of the Rules.

D.4.5 provides that

"The *Athlete* shall retain control of the collection vessel and any *Sample* provided until the *Sample* is sealed, unless assistance is required by an *Athlete's* disability as provided in Annex B -

Modifications for *Athlete's* with disabilities. Additional assistance may be provided in exceptional circumstances to any *Athlete* by the Athlete's representative or *Sample Collection Personnel* during the Sample Collection session where authorised by the *Athlete* and agreed by the *DCO.*"

D.4.7 provides that

"The *DCO/Chaperone* should where practicable ensure that the *Athlete* thoroughly wash his or her hands prior to the provision of the *Sample.*

iii. *Findings*

AD 1 **Maqwatini's** handling of the sample

The Panel finds that

- **Maqwatini did not handle the Sample.**
- **There had therefore been**
  - **no breach of D.4.5**
  - **no departure from the International Standards of Testing, as contemplated under Article 3.2.2 of the Rules.**

Lund having to place the sample on a toilet seat open to the public

The Panel finds that

- **This would not have been a breach of D.4.5**
- **Lund would still have been in control of the sample.**
- **There had therefore been no departure from the International Standards of Testing, as contemplated under Article 3.2.2 of the Rules.**

AD 2 **Maqwatini** covering it with toilet paper

The Panel finds that

- **Maqwatini did not cover the sample with toilet paper**
- **There had therefore been**
  - **no breach of D.4.5**
  - **no departure from the International Standards of Testing, as contemplated under Article 3.2.2 of the Rules**

AD 3 <u>**Lund** not washing his hands before he passed the sample</u>

The Panel finds that

- **Maqwatini only provided evidence under re-examination that admitted to Lund having been told to wash his hands <u>after</u> he had passed the sample**
- **There was no evidence led by Lund or any other evidence provided establishing that it would have been <u>reasonably practicable</u> ie on a balance of probability, for Lund to have washed his hands thoroughly prior to Lund passing the sample**
- **There had therefore been no breach of D.4.7.**
- **Consequently, there had been no departure from the International Standards for Testing, as contemplated under Article 3.2.2 of the Rules.**

iv. *Reasons*

The **Panel's** reasons for the decisions made under AD 1 and AD 2 and AD 3, are based on

1. The **Panel** having placed full reliance on the veracity - truthfulness and total honesty - of the evidence presented by **Maqwatini's** and his credibility, as manifestly clear from the **Panel's** findings on his evidence within this record of decision.

2. The **Panel's** understanding and interpretation of all the applicable rules.

3. The **Panel's** decision not considering any evidence that **Lund** had led because of the relative weighting and thus value if any the **Panel** had decided should be given to this in accordance with the **Panel**'s findings on his evidence as appears within this record of decision.

159.3. <u>*The official who was responsible for the sample collection did not meet the requirements for a DCO set out in Annex H of the IST.*</u> {refer 11 of HoA; 156.3}

159.3.1 <u>Applicable rule(s)</u>

Annex H to the **IST** records the **Sample Collection Personnel Requirements**

This provides, inter alia,

H.1 Objective

To ensure that Sample Collection Personnel have no conflict of interest and have adequate quailifications and experience to conduct Sample Collection Sessions.

H.2 Scope

Sample Collection Personnel requirements start with the development of the necessary competencies for Sample Collection Personnel and end with the provision of identifiable accreditation.

H.3 Responsibility

The ADO has the responsibility for all activities defined in this Annex H.

H.4 Requirements –Qualifications and Training

H.4.1 The ADO shall determine the necessary competence and qualification requirements for the positions of Doping Control Officer, Chaperone and Blood Collection Officer. The ADO shall develope duty statements for all Sample Collection Personnel that outline their respective responsibilities.

H.4.2 ....

H.4.3 The ADO shall establish a system that ensures that Sample Collection Personnel are adequately trained to carry out their duties.

H.4.3.1 ....traning program for Blood Collection Officers

H.4.3.2 The Training Program for Doping Control Officers as a minimum shall include

a) Comprehensive theoretical training in different types of Testing activities relevant to the Doping Control Officer position;

b) Observation of all Doping Control activities related to requirements in this standard;

c) The satisfactory performance of one or more complete Sample Collection Session on site under the observation of a qualified Doping Control Officer or similar. The requirement for the actual passing of Sample shall not be included in the on-site observation.

H.4.3.3 The training program for Chaperones shall include studies of all the relevant requirements of the Sample Collection process.

H.4.4 The ADO shall maintain records of education, training, skills, and experience.

H.5 Requirements – Accreditation, re-accreditation and delegation

H.5.1 The ADO shall establish a system for accrediting and re-accrediting Sample Collection Personnel.

H.5.2 The ADO shall ensure that Sample Collection Personnel have completed the training program and are familiar with the requirements of the International Standards for Testing before granting accreditation.

H.5.3 Accreditation shall only be valid for a maximum of two years. Sample Collection Personnel shall be required to repeat a full training program if they have not participated in Sample collection activities within the year prior to re-accreditation.

H.5.4 Only Sample Collection Personnel that have an accreditation recognised by the ADO shall be authorised by the ADO to conduct Sample collection activities on behalf of the ADO.

H.5.5 Doping Control Officers may personally perform any activities involved in the Sample Collection Session, with the exception of blood collection unless particularly qualified, or they may direct a Chaperone to perform specified activities that fall within the scope of the Chaperone's authorised duties.

ADO **Anti-Doping Organisation:** A Signatory that is responsible for adopting rules for initiating. Implementing or enforcing any part of the Doping Control Process. This includes, for example, the International Olympic, the International Paralympic Committee, other Major Event Organisations that conduct testing at their events, WADA, International Federations and National Anti-Doping Organisations.

Sample Collection Personnel are defined under the IST to mean *"a collective term for qualified officials authorised by the ADO who may carry out or assist with duties" during the Sample Collection Session.*

Sample Collection Session is defined to mean *"all of the sequential activities that directly involve the Athlete from notification until the Athlete leaves the Doping Control Station after having provided his/her Sample(s)"*

Doping Control Officer (DCO) is defined as "an official who has been trained and authorised by the ADO with delegated responsibility for the on-site management of a Sample Collection Session."

159.3.2 Lund's Case (refer HoA 11 & 45.2; 123)

***SAIDS**, through its DCO, did not comply with the International Standards for Testing and that these departures could reasonably have caused the adverse analytical finding. These departures were the following:*

"The official who was responsible for the sample collection did not meet the requirements for a DCO set out in Annex H of the IST."

Heyn's submitted that in terms of Annex "H" of the International Standards for Testing 2009 **Maqwatini** was not suitably qualified as a Sample Collection Personnel member. Annex "H" makes no reference to the position of Anti-Doping Control Officer and it is stated that only Doping Control Officers may perform activities involved in the *Sample* Collection Session, or they may direct a Chaperone to perform specified activities that fall within the scope of the Chaperone's authorised duties. **Maqwatini** is neither a Doping Control Officer, nor a Chaperone. (refer HoA 45.2)

Note:

1. Annex H makes no mention of the position of Anti-Doping Control Officer
2. It is probable that reference is in fact being made to Assistant Doping Control Officer, as mentioned in paragraph 2.5 of the **SAIDS** letter dated 19 August to **Lund**'s attorney Mr **Harty**, which refers to Assistant Doping Control Officer, rather than Anti-Doping Control Officer...see paragraph 12 of the heads of argument)

Training in the IST

It was submitted by **Heyns** that **Maqwatini** attempted to cast his evidence in a more favourable light when he stated that they had received training on the IST from a lady Poland and by stating how important these requirements were. As it turned out the woman from "Poland" (Finland) did not give training on this aspect and **Maqwatini** was trained in the Procedures of Sample Collection and not under the heading International Standards for Training. (Refer HoA 38)

159.3.3 The Evidence

Evidence adduced by **Lund** (refer 66-78; HoA 26-28)

- he (**Lund**) then went to drop off the bikes as these had been booked to be taken up to Johannesburg
- It was then that **Lund** testified he had met **Maqwatini,** who had approached him and introduced himself. **Lund's** further evidence,

which followed this introduction, was that **Maqwatini** asked him to follow him as he (**Lund**) had to give urine for a doping test

- **Lund's** testimony continued with him stating that
  - had to take off two layers and drop shorts to provide the sample
  - whilst **Maqwatini** was chatting and friendly he asked for the sample, he did not remember there being any cap on the vessel which **Maqwatini** wrapped toilet paper around
  - having arrived at the porta-loos, the area was not guarded, it was a confined space for 2 persons to be in....they had to queue to go in ....there were 2/3 porta-loos...he was sorry he could not recall everything, which were all new to him, being excited about the race
- **Heyns** turned to the IST and asked **Lund,** to the extent he could remember, whether **Maqwatini** had referred to the IST requirements
- **Lund 's** testimony concerning this was that
  - there had been social discussion
  - **Maqwatini** had told him he needed to do a drug test
  - the paperwork at the tent must have been the signing of the register
  - the sample having been taken
  - when they got back to the tent the urine sample was split
  - he had not recalled being told that he had one hour to report to the DCS
- At that point **Lund** stated in response to **Heyns's** opening statement regarding **Lund** initial position as having denied that two of the signatures (on the doping control form) were his, that he (**Lund**) still didn't agree that the one signature was his as the evidence had not been conclusive.
- **Heyns** returned to leading **Lund's** further evidence-in-chief as **Lund** provided the following further testimony
  - he accepted that he was asked to select a vessel when around at the table
  - he did not remember whether he was asked to check if the seals had not been tampered with

Cross-examination (refer 79)

- although **Maqwatini** appeared to be a gentleman and introduced himself **Lund** denied that **Maqwatini** had positively identified himself
- he had signed the bottom signature but did not read the small print, concerning his acceptance of the fact that the sample collection etc was conducted in accordance with the relevant procedures, taking this to mean,(as this was not explained to him) to mean a summary of the procedure as he understood it

HoA

- It was then that he was approached by Mr **Maqwatini**

- When asked about whether Mr **Maqwatini** had informed him of the requirements ito the IST **Lund** replied that they had a social conversation in which he was told that he needed to do a drug test. He recalled doing some paperwork in the tent, filling in the register and when he returned from the sample collection, the process of splitting the urine sample. He certainly couldn't recall being told that he had one hour to report to the testing station.

- During cross-examination on this contested evidence **Lund** persisted with the averment that this signature did not look like his but that he was willing to accept the evidence of an expert witness on that point. In any event he did not dispute that he was the person in the tent with Mr **Maqwatini** and did not deny he was the person tested.

Other Evidence

Maqwatini evidence –in-chief (refer 23)

Maqwatini stated that he

- is a **SAIDS** DCO – doping control officer
- had been a DCO at 50 events ....(clarified .. after 15 had been heard incorrectly) Richie Mc Caw, who he stated was very professional was one of the person he had tested
- received training as a DCO in Durban through South African.. Drug Free Sport
- had not had any complaints made against him
- was not the only DCO at the event
- knew who to look out for as he was advised by Amanda to look out for V 377
- was helped by Darius who offered to check for his athlete as there were so many cyclists
- was phoned by Darius who told him that he had found Russell (**Lund**) and would wait for him
- introduced himself to **Lund** and showed him his accreditation
- asked **Lund** for any ID, or licence to which **Lund** replied that everything was in the hotel
- wrote in the time of notification as 09:50 on the doping control form (Exhibit D) which was when he (**Lund**) signed it
- asked **Lund** how Cape Town and the race was on the way to the doping control station
- wrote in the time of 09:57 as the arrival time at the doping control station "DCS"
- asked **Lund** if he had ever been tested before and was told 'No' whilst walking to the DCS
- also told **Lund** his rights, that he had 1hr to report to the DCS and could eat had he wished and drink water, whilst walking to the DCS
- **Lund** was in full view at all times and on way to the DCS

- **Maqwatini** did not made a mistake in the procedure or form (refer 26)

Cross-examination (refer 29 bullet points 1-9)

- he had done 50 events as a DCO
- he started in 2010
- he went to Durban in September 2010 for the training at around 16/17 ....the dates he could not remember
- the training involved a lot of activities
- he was of course trained in the International Standards for Testing
- a lady from Poland was there
- he realised that it was very important what standard had to be achieved
- such standard was achieved (in this case)
- he had been involved with other tests
- **Maqwatini** advised that he was an assistant DCO with Mr Adams the lead DCO when asked whether he was a DCO (refer 29 bullet point 35)
- In turning to Exhibit D, the Doping Control Form, **Heyns** asked **Maqwatini** whether there was anything that he did not complete and then what was not in his handwriting (refer 29 bullet point 41)
- **Maqwatini** answered that he had not completed the name of the third party and that Kassiem Adams the lead DCO had completed the test mission code, sport, discipline/ team, sample provided time, time of completion (refer 29 bullet point 42)
- At that stage **Heyns** asked **Maqwatini** about whether he remembered being questioned about being trained in the IST. He raised questions specifically concerning such training with reference to the training programme which was then placed before **Maqwatini** and generally regarding his understanding of what the IST were. (refer 41)
- These resulted in -
  - **Maqwatini** stating that
    - the standards that they were trained in lined up with the IST
    - he was not the person who formulated the training
    - what was done as South Africans and the IST were the same, providing examples such as the way to identify the athlete and sealing of sample
  - **Hattingh** at this point, with **Maqwatini** having difficulty answering the questions posed regarding how the subject matter of the training programme aligned with training in the IST, provided some assistance. He referred, without objection, to the right hand side of the programme and identified the sample collection procedure and witnessing sample collection. He mentioned that this would be part of the IST and that the South African standard lined up with other Federations (refer 42)

- In retort **Heyns** challenged whether the training programme had anything to do with the IST, to which **Hattingh's** response was that he (**Hattingh**) was the consultant who had prepared the original manual. (Doping Control Manual) He had worked with a lady from Finland. It

was pointed out that it mattered not whether the lady who prepared the document for the course was from Poland or Finland as **Maqwatini** had not been trained by her. (refer 43)

- **Heyns** then asked **Maqwatini** to refer to the programme to show where he had been trained in the IST. **Maqwatini** did not answer this question and chose furthermore not to do so when the Chairman asked him to do so. (refer 44)

<u>HoA</u> (refer 17;112.10)

- **Heyns** submitted that the training which **Maqwatini** had received was in September 2010 in Durban, as corroborated by Exhibits "X" and "Y", being the training attendance register and Doping Control Officer Workshop – program.
- In cross-examination he was asked whether he was trained in the International Standards for Testing. He had replied that
  - i. he had of course been trained in the IST
  - ii. he recalled that this training was given by a woman from Poland.
  - iii. he was unable to provide an answer as to why there had been no reference to the IST in the workshop program.

It was then pointed out to him by reference to the Programme that what could be regarded as training in the IST was the training under Sample Collection Procedure which was given by **Hattingh**, not by a lady from "Poland" (Finland")

Unable to explain this anomaly when pushed on his earlier evidence (in order to show whether he had in fact been trained in the IST) **Maqwatini** answered that the question should be directed to **SAIDS**.

<u>Other</u> (117;Lund's HoA 38)

- It was submitted by **Heyns** that **Maqwatini** attempted to cast his evidence in a more favourable light when he stated that they had received training on the IST from a lady Poland and by stating how important these requirements were. As it turned out the woman from "Poland" (Finland) did not give training on this aspect and **Maqwatini** was trained in the Procedures of Sample Collection and not under the heading International Standards for Training.

159.3.4 <u>Assessment of the evidence</u>

The **Panel** has assessed all the evidence outlined above in the light of admissions made and the Exhibits accepted into evidence.

The **Panel** findings are that

i. **Lund** did not himself present a single shred of direct evidence in his evidence-in-chief, or under cross-examination, which sought to suggest and/or prove that **Maqwatini** was neither qualified as a Sample Collection Personnel / DCO, nor accredited as such by **SAIDS** to carry out Sample collection activities;

ii. The only evidence which **Lund** presented - which is as outlined above and not exhaustive examples - are the statements which **Lund** made suggestive more of **Maqwatini's** conduct, failings and incompetency relating to the procedures for the notification of athletes and the sample collection session, as well as that in which he simply denies that **Maqwatini** had "positively identified himself", although he had stated that **Maqwatini** had initially "approached him and introduced himself".

iii. Thus, other than the evidence of **Maqwatini** concerning his training as a DCO with particular regard to his being "trained in the IST", which **Heyns** had called into possible doubt in his cross-examination of **Maqwatini,** as covered in paragraphs 17 and 38 of the Heads of Argument submitted by **Heyns** on **Lund**'s behalf there is absolutely no other evidence adduced by **Lund,** in support of his case, as was outlined by **Heyns** in 11 of the HoA.

iv. This appears to be both unfair and unsatisfactory, because all that has happened is that **Lund's** defence team have sought, as is their right through such a line of questioning, to seemingly create an element or elements of doubt regarding the veracity of **Maqwatini's** testimony in this regard, rather than establish facts to support **Lund's** case, by establishing evidence through the credible testimony of third parties supported and /or corroborated by other third parties and/or documents.

v. **Maqwatini's** evidence on the other hand, relating to his actual qualification (including training) and accreditation as a DCO in accordance with Annex H of the IST, whether covered in his evidence-in-chief, under cross-examination or re-examination, to be factual, extensive, consistent, reliable and credible, by reason of it

- not being disputed, save for his understanding of the requirement for being trained in the IST, as referred to above, which will be dealt with in 157.3.5 below;

- corroborated by other undisputed evidence, being,

- o the fact and record of doping control cases which he had handled as DCO
- o the Exhibits "X" – the Training Attendance Register, "Y" – the Doping Control Officer Workshop programme
- o the Doping Control Form which he had completed as DCO.

vi. That having regard to these findings there is thus no need to introduce any further debate on the relative credibility of the witnesses concerning evidence led but to simply apply the evidence to the rules previously recorded, as follows.

159.3.5 Application of the evidence on the rules, findings and reasons.

i. The **Panel** first considered those matters arising from **Heyns** cross-examination of **Maqwatini** in challenging "whether he (**Maqwatini)** had been trained in the IST", as the anomaly seemingly established therein, raised doubt about **Maqwatini's** qualification and accreditation as a DCO.

In so doing the **Panel** noted

- H.5.2 of Annex H to the IST provides

  "The ADO shall ensure that Sample Collection Personnel have completed the training program and are familiar with the requirements of the International Standards for Testing before granting accreditation."

- The question and related matters were dealt in paragraphs 11, 17, 38 and 45.2 of the Heads of Argument submitted by **Heyns** on behalf of **Lund,** as well paragraphs 41-44,112.10 and 117 of this record.

and found to **Panel's** comfortable satisfaction, having regard to the totality of the evidence before it, that

- bearing in mind that DCOs do not use the IST but the **SAIDS** Doping Control Manual ("DCM") based upon the WADA Code and the IST;

- having regard to the question put to him in relation to the provisions of H.5.2, which required that **SAIDS** ensure that the requirements for accreditation of a Sample Collection

Personnel (DCO) be met, **Maqwatini's** reaction regarding whether he had been trained in the IST in suggesting the question as phrased be put to **SAIDS** was understandable;

- the rule came to **Maqwatini's** assistance in placing the obligation on **SAIDS**, as the accrediting authority, to ensure that **Maqwatini** was "familiar with the IST" and not trained therein, as **Heyns** had alluded to;

- when **Maqwatini** had stated that they had received training on the IST from a lady Poland and how important these requirements were, that this was not an attempt to cast his evidence in a more favourable light;

- the anomaly regarding **Maqwatini**'s assertion that he had been trained in the IST, not by a lady from Poland, or Finland (as it turned out), but rather by **Hattingh** - when it was established by reference to the Doping Control Officer program that the training under Sample Collection Procedure, (a part of the IST), had been done by **Hattingh** – was thus not intentional and more likely to have arisen from a misunderstanding of the question itself.

ii. Based upon the above conclusion, the overwhelming evidence pointing to **Maqwatini** being qualified as a DCO, for the reasons covered in 159.3.4, and the application of the rules referred to, it was not a difficult matter for the **Panel** to thereafter make its finding concerning **whether the official, who was responsible for the sample collection, met the requirements for a DCO, as set out in Annex H of the IST, or not.**

iii. The **Panel** therefore finds on the evidence accepted by the **Panel** that it was highly probable and thus to the **Panel's** comfortable satisfaction that

1. As at 13 March 2011, **Maqwatini**

   - was accredited as a Doping Control Officer by **SAIDS**;

   - accordingly met the requirements for a DCO as set out in Annex H of the International Standards for Testing;

- was recognised and authorised by **SAIDS** to conduct Sample collection activities.

2. **SAIDS**, through **Maqwatini** as DCO, had thus not breached the provisions of the International Standards for Testing, "IST";

3. **Lund** had therefore not proved that there had been a departure from Annex H of the IST which could reasonably have caused an adverse analytical finding, as had been submitted in **Lund's** defence of the charge for the anti-doping violation brought against **Lund** by **SAIDS**.

PANEL'S FINDING

After considering and weighing up all the evidence placed before the **Panel**, including the admissibility and weighting thereof, in the light of

- the binding anti-doping regulatory framework,
- the applicable principles of common law and administrative law,

and in so doing reaching the findings and decisions the **Panel** was required to reach concerning **Lund's** case in defence, with particular regard to those aspects which were addressed specifically by the **Panel** under 159.1, 159.2 and 159.3 of this record of decision,

THE PANEL FINDS THAT

1. **Lund** had not established in accordance with the provisions of Article 3.2.2 of Anti-Doping Rules - 2009 of the South African Institute for Drug-Free Sport (**SAIDS**), "the Rules", that any, or all of the departures from the International Standards for Testing, which he had testified about, (or other anti-doping rule or policy- for that matter) could reasonably have caused the Adverse Analytical Finding, as defined under the Rules.

2. For that reason the Adverse Analytical Finding, which, apart from the cause which could have given rise thereto, had not been contested and had identified the breach of the Rules which led to the charge against **Lund** as described in paragraph 9 above, had therefore not been invalidated.

3. **Lund** had therefore, by virtue of his having breached the strict liability provisions of Article 2.1 of the Rules, committed the Anti-Doping Rule Violation he had been charged with and is found guilty of having done so.

4. **Lund** is accordingly sanctioned through the imposition of the following sanctions.

   4.1 The automatic disqualification of the result obtained by him at the 2011 Cape Argus Cycle Tour with all the resulting consequences, including forfeiture of any medals, points and prizes.

   4.2 The imposition of a 2 (Two) year period of ineligibility.

   This means that during such period **Lund** is barred from participating in a single race or singular athletic contest and may not participate in any capacity in an SASCOC Team, or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by any Signatory to the World Anti-Doping Agency Code, such Signatory's member organisations, including a National Sport Federation, or a club or other member organisation of a Signatory's member organisation, including a National Sports Federation, or in any race organised by any professional league or any international or national level Event organisation, where a series of individual races, matches, games or

singular athletic contests are organised under one ruling body (e.g. the Olympic Games.

4.3 The period of ineligibility shall run from the 31 January 2012 to 31 January 2014 with the time already served under the Provisional Suspension imposed by **SAIDS** from 5 April 2011 shall be credited against this period.

5. **Lund** has the right to Appeal the **Panel**'s decision, as set forth under Article 13 of the Rules.

John Bush	Sello Motaung	Beverley Peters
Chairman	Member	Member
30 January 2012	30 January 2012	30 January 2012

300112

PANEL'S FINDING

After considering and weighing up all the evidence placed before the **Panel**, including the admissibility and weighting thereof, in the light of

- the binding anti-doping regulatory framework,
- the applicable principles of common law and administrative law,

and in so doing reaching the findings and decisions the **Panel** was required to reach concerning **Lund's** case in defence, with particular regard to those aspects which were addressed specifically by the **Panel** under 159.1, 159.2 and 159.3 of this record of decision,

THE PANEL FINDS THAT

1. **Lund** had not established in accordance with the provisions of Article 3.2.2 of Anti-Doping Rules - 2009 of the South African Institute for Drug-Free Sport (**SAIDS**), "the Rules", that any, or all of the departures from the International Standards for Testing, which he had testified about, (or other anti-doping rule or policy- for that matter) could reasonably have caused the Adverse Analytical Finding, as defined under the Rules.

2. For that reason the Adverse Analytical Finding, which, apart from the cause which could have given rise thereto, had not been contested and had identified the breach of the Rules which led to the charge against **Lund** as described in paragraph 9 above, had therefore not been invalidated.

3. **Lund** had therefore, by virtue of his having breached the strict liability provisions of Article 2.1 of the Rules, committed the Anti-Doping Rule Violation he had been charged with and is found guilty of having done so.

4. **Lund** is accordingly sanctioned through the imposition of the following sanctions.

   4.1 The automatic disqualification of the result obtained by him at the 2011 Cape Argus Cycle Tour with all the resulting consequences, including forfeiture of any medals, points and prizes.

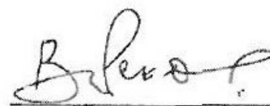
   4.2 The imposition of a 2 (Two) year period of ineligibility.

   This means that during such period **Lund** is barred from participating in a single race or singular athletic contest and may not participate in any capacity in an SASCOC Team, or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by any Signatory to the World Anti-Doping Agency Code, such Signatory's member organisations, including a National Sport Federation, or a club or other member organisation of a Signatory's member organisation, including a National Sports Federation, or in any race organised by any professional league or any international or national level Event organisation, where a series of individual races, matches, games or

singular athletic contests are organised under one ruling body (e.g. the Olympic Games.

4.3 The period of ineligibility shall run from the 31 January 2012 to 31 January 2014 with the time already served under the Provisional Suspension imposed by **SAIDS** from 5 April 2011 shall be credited against this period.

5. **Lund** has the right to Appeal the **Panel**'s decision, as set forth under Article 13 of the Rules.



John Bush	Sello Motaung	Beverley Peters
Chairman	Member	Member
30 January 2012	30 January 2012	30 January 2012

300112

PANEL'S FINDING

After considering and weighing up all the evidence placed before the **Panel**, including the admissibility and weighting thereof, in the light of

- the binding anti-doping regulatory framework,
- the applicable principles of common law and administrative law,

and in so doing reaching the findings and decisions the **Panel** was required to reach concerning **Lund's** case in defence, with particular regard to those aspects which were addressed specifically by the **Panel** under 159.1, 159.2 and 159.3 of this record of decision,

THE PANEL FINDS THAT

1. **Lund** had not established in accordance with the provisions of Article 3.2.2 of Anti-Doping Rules - 2009 of the South African Institute for Drug-Free Sport (**SAIDS**), "the Rules", that any, or all of the departures from the International Standards for Testing, which he had testified about, (or other anti-doping rule or policy- for that matter) could reasonably have caused the Adverse Analytical Finding, as defined under the Rules.

2. For that reason the Adverse Analytical Finding, which, apart from the cause which could have given rise thereto, had not been contested and had identified the breach of the Rules which led to the charge against **Lund** as described in paragraph 9 above, had therefore not been invalidated.

3. **Lund** had therefore, by virtue of his having breached the strict liability provisions of Article 2.1 of the Rules, committed the Anti-Doping Rule Violation he had been charged with and is found guilty of having done so.

4. **Lund** is accordingly sanctioned through the imposition of the following sanctions.

   4.1 The automatic disqualification of the result obtained by him at the 2011 Cape Argus Cycle Tour with all the resulting consequences, including forfeiture of any medals, points and prizes.

   4.2 The imposition of a 2 (Two) year period of ineligibility.

   This means that during such period **Lund** is barred from participating in a single race or singular athletic contest and may not participate in any capacity in an SASCOC Team, or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by any Signatory to the World

Anti-Doping Agency Code, such Signatory's member organisations, including a National Sport Federation, or a club or other member organisation of a Signatory's member organisation, including a National Sports Federation, or in any race organised by any professional league or any international or national level Event organisation, where a series of individual races, matches, games or singular athletic contests are organised under one ruling body (e.g. the Olympic Games.

4.3 The period of ineligibility shall run from the 31 January 2012 to 31 January 2014 with the time already served under the Provisional Suspension imposed by **SAIDS** from 5 April 2011 shall be credited against this period.

5. **Lund** has the right to Appeal the **Panel**'s decision, as set forth under Article 13 of the Rules.

John Bush	Sello Motaung	Beverley Peters
Chairman	Member	Member
30 January 2012	30 January 2012	30 January 2012

300112