SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE:	**MS RENATE VAN DYK**
SPORTS FEDERATION:	**SOUTH AFRICAN POWERLIFTING FEDERATION**
DATE:	**TUESDAY, 18 OCTOBER 2011**
PLACE OF HEARING:	**1 MONA CRESCENT, NEWLANDS, CAPE TOWN**
DISCIPLINARY PANEL ("PANEL"):	**MR ANDREW BREETZKE (CHAIRMAN)** **DR NASIR JAFFER (MEDICAL REPRESENTATIVE)** **MR WILLIAM NEWMAN (SPORTS ADMINISTRATOR)**
PROSECUTOR:	**ADV NIC KOCK**
SAIDS REPRESENTATIVES:	**MR FAHMY GALANT, MS ANIQUE COETZEE**
ANTI-DOPING RULE VIOLATION:	**ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.1 OF THE SAIDS ANTI-DOPING RULES.**

APPLICABLE LAW

SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended). SAIDS has formally accepted the World Anti-Doping Code adopted and implemented by the World Anti-Doping Agency in 2003. In so doing, SAIDS introduced anti-doping rules and regulations to govern all sports under the jurisdiction of South African Sports Confederation and Olympic Committee, as well as any national sports federation.

The SAIDS Anti-Doping Rules ("the Rules") were adopted and implemented in 2009. These proceedings are therefore governed by the Rules. This SAIDS Anti-Doping Disciplinary Panel has been appointed in accordance with Article 8 of the Rules, to adjudicate whether the Athlete has violated the said Rules, and if so the consequences of such a violation.

PROCEDURAL MATTERS

The Athlete was not in attendance at the proceedings. The Panel requested that the issue of her non-attendance be addressed by the Prosecutor. The Athlete was advised of the disciplinary hearing on the 4 October 2011, by way of written notification (email attachment "P"). On the 6 October 2011 documentation to be used in the inquiry was couriered to the Athlete and confirmation of receipt was presented ("Q").

The Athlete communicated with SAIDS by way of email on the 3 October 2011 ("N") advising that she would "*not attend the hearing*". A subsequent email (11 October 2011) was forwarded by the Athlete advising that she would "*not attend the hearing on 18 October* ".

The Athlete was also advised in the email correspondence of 4 October that should she not attend, Article 8.4.5 would be applicable, being that the failure to attend the hearing after notification will be deemed to be an abandonment of the right to a hearing. In reviewing the evidence presented the Panel was satisfied that the Athlete had received proper notification of the hearing, had confirmed receipt of the notification, but had elected not to attend proceedings. The Panel was therefore satisfied that the matter could proceed in the absence of the Athlete.

The Panel noted that the Athlete in the email of 3 October ("N") indicated that she was not interested in attending the hearing as she believed there was a "prejudiced feeling in the air". The Panel is an independent objective panel and it is charged to fulfil its duty in a fair and impartial manner (Article 8.2.2) and it is unfortunate that the Athlete has not recognised this fact. The Panel noted its regret that the Athlete had decided not to attend, as it would be in the interests of any athlete to attend such proceedings to present their evidence and argument.

The Panel would like to record its disappointment at the fact that no representative of the South African Powerlifting Federation was in attendance at the hearing, despite a formal invitation to attend being forwarded by SAIDS to the Federation.

The hearing commenced at 19h00.

EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents marked "A" to "S" as documentary and corroborative evidence to the oral evidence presented. The Athlete, although not present, had forwarded various medical reports and information which was duly considered by the Panel.

The charge against the Athlete was set out in written correspondence emailed to the Athlete on the 4 October 2011 ("P"). The charge against the Athlete read as follows:

> *You have been charged with an anti-doping violation in terms of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS).*
>
> *On 24 June 2011, you provided two urine samples (A2531887/2531889) during an in-competition test after your event (72kg) at the South African Powerlifting Championships, 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 both urine samples. The substances identified were the Diuretics, Hydrochlorothiazide, Amiloride and Furosemide. These*

*Diuretics are categorised under the **Class S5 "Diuretics and Other Masking Agents"** on the World Anti-Doping Code 2011 Prohibited List International Standard.*

The Athlete is an adult female, who returned the above positive test at the South African Powerlifting Championships in June 2011. The Prosecutor gave evidence as to the testing process undertaken, presenting the Doping Control Form ("B") as well as the A-Sample Reports ("C" and "D") indicating the presence of the identified substances. The chain of custody form of the doping control session was also presented ("E").

It was specifically highlighted that on the Doping Control Form, the Athlete had listed that she had taken a Diuretic tablet – "Diuretic 1 Tab 23/6/2011". This was the day before her in-competition test. A number of other medications were listed by the Athlete on the form, but none were relevant in respect of the positive test. The Athlete was offered the opportunity for a B-Sample to be analysed ("A"), but this request was not acted upon by the Athlete.

On being informed of the positive test (5 August 2011 "A"), the Athlete responded by advising that she would obtain relevant documentation/report from her gynaecologist as the Diuretics were a prescribed medication. A report (10 August 2011 "I") was forward by the Athlete from Dr J.P. de Flamingh ("Dr De Flamingh"), a gynaecologist practising in Hermanus. The report indicated that the Athlete had been a patient of his since 17 August 2007. He had been treating her for hormonal imbalance, caused by cystic disease of the ovary. This problem had resulted in fluid retention with severe breast tenderness. He had treated her with a combination of a Diureticum (Moduretic or equivalent), and a progesterone (Uterogestan). He indicated that the treatment was purely for medical reasons.

The Athlete filed a Therapeutic Use Exemption ("TUE") application on the 30 August 2011 ("H"). The diagnosis and medication details were as stated by Dr De Flamingh in his report.

A sonologist report of Dr Deirdre Grobbelaar was also submitted ("J"). There was some confusion as to the date that this report was submitted.

The TUE application of the Athlete was denied (21 September 2011 "K") on the basis that the treatment prescribed was not the mainstay of treatment of Polycystic Ovarian

Syndrome ("L"). The Athlete noted her discontent and unhappiness at this decision in the email of 3 October 2011 ("N").

Further evidence was presented that contact was made by the Prosecutor with Dr De Flamingh as to the treatment received by the Athlete. Dr De Flamingh presented a second report dated 13 October 2011 ("R") advising that the prescription of the Diuretic was for the fast relief of symptoms, and was not a treatment for her condition. He advised that there were other options for the longer-term management of her symptoms – but that the treatment prescribed would be patient specific. A further note from Dr De Flamingh ("S") indicated that on the 15 December 2010 he had prescribed Puresis (Furosemide 40 mg/tab) which he did not want her to take *"for too long"*. He again saw her on the 13 January 2011 and prescribed a weaker drug that could be used for a longer period (Moduretic). Dr De Flamingh advised that he was unaware that the Athlete was participating in professional sport, and had not known a diuretic was a prohibited substance under anti-doping rules and regulations. He did state that with this knowledge (of anti-doping rules), other avenues for the management of her symptoms could be explored.

In response to the positive test, and subsequent interactions, the Athlete stated as follows (email correspondence marked "N"):

> *"...I know that I practice my sport drug free and just because I forgot to get a form from my dr stating that I use certain medication, I am now seen as a druggy. I was honest enough to declare the fact that I drank a diuretic on the drug test form but my honesty counts for nothing. My health is important to me so I will keep on drinking my "prescribed" diuretic as well as any other medication that I need for my so called condition"*

In a further email of 11 October 2011, the Athlete again confirmed that the Diuretic was taken for medical purposes and that she had honestly declared this on the Doping Control Form. She stated that *"before the competition I did not had any time to get my doctor to complete a form for prohibited substances"*. Furthermore, she stated that she was an attorney and she practiced her occupation in an ethical and professional manner as she did her sport.

The Prosecutor argued that the evidence proved that the Athlete was guilty. Further he argued that the evidence presented justified a sanction of a period of 12 months ineligibility, taking into consideration factors that justify a reduction on the maximum 2 year period of ineligibility. In respect of the sanction he referred to:

- The high prevalence of diuretics in sports such as powerlifting, and the advantage that they do give to such athletes;

- The timing of the ingestion of the tablet (23/6/2011), a day before competition;

- Her failure to take any proactive measures to engage with her medical practitioner on her sport and the prohibited list;

The Prosecutor did acknowledge the co-operation of the Athlete subsequent to the positive test, and her disclosure of the issues relating to her medical condition. As such, he acknowledged that Article 10.4 of the Code was applicable.

FINDING ON THE CHARGE

The presence of the substances identified as Diuretics, Hydrochlorothiazide, Amiloride and Furosemide, in the sample (sample numbers A2531887 and 2531889) of the Athlete was uncontested. The Panel has therefore determined that the Athlete is Guilty of the offence as set out, and is in violation of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

Article 2.1.1 of the Rules reads as follows:

> *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.

This Article is the foundation of the strict liability principle that is applicable to anti-doping violations. There is a clear and definitive standard of compliance that all athletes are required to adhere to and it is on this basis that they are held accountable. Ignorance of the anti-doping provisions and/or prohibited list cannot be accepted as an excuse. This high and strict standard is not diluted by the fact that an athlete may be taking prescribed medication. The responsibility that rests on the athlete is therefore clear, and the liability that rests on the Athlete *in casu* has been established.

Despite this strict standard, the Panel is however able to eliminate, or reduce the period of ineligibility and may award, at a minimum, a reprimand and, at a maximum, a period of two (2) years ineligibility. The question of whether it is appropriate to decide on a period "no ineligibility" or "some ineligibility" depends on the degree of fault the Panel considers to exist on the part of the Athlete. Article 10.4 is the relevant provision and reads as follows:

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing Committee the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.

The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility

The issue before the Panel is therefore whether circumstances exist such that it is able to consider any elimination, or reduction, of the period of ineligibility as provided for under Article 10.4. This entails a consideration of the degree of fault of the individual athlete and the appropriate sanction for the athlete viewed in the light of that degree of fault. In this regard there are a number of factors to consider:

1. The Athlete has established how the Specified Substances entered her body;

2. The Athlete disclosed on her Doping Control Form that she had taken a Diuretic on the 23 June 2011, the day prior to the in-competition test;

3. The Athlete co-operated with the subsequent investigation, and provided medical information on her own volition;

4. The medical information presented confirms the existence of a medical condition for which the prohibited substances were prescribed;

5. This is the first positive test of the Athlete.

The above factors are mitigating factors relevant to the degree of fault. There are various issues in this matter however, that indicate a serious degree of fault on the part of the Athlete:

6. The Athlete is an adult sportsperson, professionally qualified, participating at the highest level in her sport. The onus was on her to inform her medical practitioner as to her participation in competitive sport, the fact that she may be subjected to an anti doping test, and the issue of prohibited substances. The ignorance of the medical practitioner does not diminish her fault in this regard. Evidence of her medical practitioner was that

he was unaware that she was participating in competitive sport, and was unaware that the Diuretic was a prohibited substance. However, he stated that given the knowledge he now has, he would be able to pursue other avenues of management of the Athlete's symptoms. Her disclosure to him could have avoided this positive test. This issue has been dealt with comprehensively in international case law, and is succinctly summarised in the matter of ***P v International Tennis Federation (ITF) (Court of Arbitration for Sport 2008/A/1488).*** In this matter, the athlete returned an adverse finding for the prohibited substances hydrochlorthiazide and amiloride (Diuretics). These substances had been prescribed to her by her medical practitioner. The athlete was suspended for a two year period (under pre 2009 WADA Code). The court dealt directly with the situation where the medical practitioner prescribed medication to an athlete for legitimate medical purpose and in summary stated as follows:

> *In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances. If the doctor is not a specialist in sports medicine and not aware of anti-doping regulations, it is of even greater importance that the athlete be significantly more diligent in his/her efforts to ensure that the medication being administered does not conflict with the Code.*

> *While it is understandable for an athlete to trust his/her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence. It is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention". To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the*

established strict regulatory standard and increased circumvention of anti-doping rules.

The responsibility on the Athlete was a personal responsibility to ensure that no prohibited substance entered her body – she had a duty of care in this regard and she failed to act accordingly. Furthermore, she had a duty of care to communicate with her medical practitioner as to the issues raised above; again she failed in this regard;

7. Save for disclosing that she had taken a Diuretic on the 23 June 2011 (a day prior to competition), all medical information (including the TUE) was submitted subsequent to her being advised of the positive doping test. Although her co-operation in this regard is a factor in her favour; it is reasonable to expect that an Athlete of her standing and experience would have taken reasonable measures prior to being tested. For example, had she applied for the TUE timeously before the South African Powerlifting Championships she could have consulted with her medical practitioner, her medication could have been reviewed and alternative medication prescribed (a fact acknowledged by Dr Flamingh). The statement of the Athlete that she did not have time prior to the Championships (email 11 October 2011) and that she "forgot" to get a form from her doctor (email 3 October) are a clear indication that she failed in respect of her strict duty of care;

8. The evidence available as to the prescribed medication raises numerous unanswered questions. The initial report of Dr De Flamingh (10 August 2011, "I"), stated that he had prescribed a combination of Diuretic and a Progesterone. This was also confirmed in the TUE application. This explains the presence of Hydrochlorothiazide and Amiloride in the sample of the Athlete, but not the presence of Furosimide. The presence of Furosimide was only explained in a subsequent report of Dr Flamingh ("S") where he confirmed having prescribed Puresis (Furosemide) on the 15 December 2010.

   Furthermore, the Athlete indicated that she took one tablet (Diuretic) on the 23 June 2011. Assuming that this tablet resulted in the presence of Hydrochlorothiazide and Amiloride in the sample, the question must then be asked how the Furosimide was also

detected. It is highly unlikely that Furosimide taken in December 2010 would result in a positive sample for the substance in June 2011. The only deduction can be that this substance was administered at some stage prior to the in-competition test. It is regrettable that the Athlete was not present to answer to these questions.

9. Diuretics are prevalent in power sports (power lifting, weight lifting and boxing). Although the Athlete has stated that she did not take the medication to enhance/assist in her sport, it cannot be disputed that the taking of the Diuretic may have enhanced and or assisted her performance. This prevalence of Diuretics in her sport is in itself another factor that should have focused the Athlete into ensuring compliance with the provisions of the Code in respect of the TUE and her interaction with her medical practitioner.

As stated, the application of Article 10.4 requires a review and assessment of the degree of fault on the part of the Athlete. In the matter of ***FINA v Cesar (Court of Arbitration for Sport 2011/A/2495),*** the Court in reviewing and assessing the degree of fault of an athlete in respect of the equivalent "special circumstances" clause focused on whether the athlete could have initiated any action to avoid the positive test results. It found that there were no reasonable measures that could have been initiated and therefore determined that no period of ineligibility would be a fair sanction. This is not the case *in casu.* The points raised in 6 to 9 above clearly indicate that there were measures that the Athlete could have initiated, in addition to the fact that there are facts relating to the use of the Diuretics that remain unanswered. The Panel has therefore found that there is fault, albeit diminished, on the part of the Athlete and the sanction must therefore reflect this conclusion.

In reviewing the above, the sanction on the finding of Guilty is as follows:

1. The Athlete is ineligible to participate in any organised sport, club or higher level or as envisaged in Article 10.10 of the Rules, for a period of twelve(12) months which period

will be effective as of 5 August 2011 (being the date of notification of the adverse finding and implementation of provisional suspension), to terminate on the 4 August 2012;

2. The above anti-doping violation occurred during the South African Powerlifting Championships on the 24 June 2011. The rule violation is therefore related to an in-competition test. In terms of Article 9 of the Rules an anti-doping violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition, including forfeiture of medals, points and prizes. In accordance with this Rule, the Athlete therefore forfeits her performance in the South African Powerlifting Championships 2011 including medals, points and prizes.

This done and signed at Cape Town, October 2011

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Andrew Breetzke (Chair)

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Dr Nasir Jaffer

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Mr William Newman

Subject: Renate van Dyk
Date: Monday 24 October 2011 9:41:24 AM SAST
From: Andrew Breetzke
To: Fahmy Galant
CC: 'M.Nasir Jaffer', William Newman

Dear Fahmy

Enclosed herewith the finding in the above matter.

The finding has been studied and approved by the Panel, but has been electronically distributed and therefore not signed.

I will forward an original copy to you in due course.

Should you have any queries, please feel free to contact me.

Regards

Andrew Breetzke