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
Andy Branfield doctor member
Greg Fredericks administrator member

In the matter between

SAIDS

and

GIDEON MULLER

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

In the disciplinary hearing of

GIDEON MULLER

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 South African Rugby Union, "**SARU**", as the national federation governing the sport of rugby in South Africa, has adopted and implemented **SAIDS** anti-doping policies and rules which conform to the Code and the Rules.

PANEL CONSTITUTION

7. This **SAIDS** Anti-Doping Disciplinary Committee hearing panel, consisting of John Bush - Chairperson and Legal Representative, Andy Branfield - Medical Practitioner and Gregory Fredericks - Sports Administrator, ("the **Panel**") was appointed by **SAIDS** in accordance with the provisions of Article 8 of the **Rules**, to adjudicate whether the athlete Gideon Muller ("**Muller**") had committed an anti-doping rule violation of **Rules** and if so what the consequences should be.

CHARGE RELATING TO ANTI-DOPING VIOLATION

8. The charge against **Muller** is contained in a letter which was addressed and couriered to him on 25 April 2012. (A copy of the letter is - 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 19 January 2012 you provided a urine sample (A2633705) during an out –of-competition test. Upon analysis, the South African Doping Control Laboratory at the University of Free State reported the presence of a prohibited substance in your urine sample.

The substances identified were 17β Hydroxmethyl-17α-methyl-18-nor-androst-1,4,13-triene-3-one and 17α-methyl-5β-androstane-3α,17βdiol, all metabolites of Methandinone; as well as Boldenone and its metabolite 5β-androst-1-en-17 β –ol-3-one. Methandienone and Boldenone are categorised under **Class S1, "Anabolic Agents", in specific 1(a) Anabolic Androgenic Steroids** on the World Anti-Doping Code 2012 Prohibited List International Standard."

9. 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 - INTRODUCTION, PERSONS ATTENDING & PROCEDURE

10. The prosecutor for **SAIDS** in this matter was Mr Nick Kock, **"Kock"**.

11. The hearing began at 17h00 on 19 June 2012 with those present welcomed by the Chairperson and invited to introduce themselves.

12. **Muller** was represented by Advocate Jacques Pienaar **"Pienaar"**, who appeared de bono/ pro amico. **Muller's** father Mr Hennie Muller, **"Mr Muller (snr)"** who remained present throughout the hearing and Mr Steve Nel were present as witnesses to lead evidence on **Muller's** behalf. It was accepted that the proceedings be conducted in English and Afrikaans as best suited each person speaking.

13. Although Ms Surprise Mbatha did not fully understand Afrikaans she took minutes of the proceedings, which were also recorded. **SARU** did not have any representative at the hearing.

14. The Chairperson outlined the procedure relating to the hearing.

ADMISSIONS - CURTAILMENT OF PROCEEDINGS

15. **Pienaar,** in requesting that he be permitted to open in order to expedite matters advised the defence had received all the documents and there was no need to read these as **Muller** pleaded guilty to all the charges.

EVIDENCE

16. This plea was accepted by **Kock** who advised that he wished to place the plea of guilty in context. This was accepted as **Kock** then proceeded to put questions to **Muller** which established the following, namely, that **Muller**

- was 19 years of age
- was not studying
- worked as a motor car salesman
- had been playing rugby for 13 years
- played Under 20 for the Lions at his highest level of participation and for a club
- did not compete in any other sports or engage in any other capacity - such as coach
- had not been engaged in anti-doping education whilst at the Lions, as - "hy was nie deel van die sessie nie" (he was not part of the session)
- had similarly not been engaged in any anti-doping education by SARU whilst a member of the Baby Bok squad or any other SARU forum
- received this through chatting to other sportsmen
- understanding of doping in sport was that "you get the edge" but it was not worth it
- had not been tested before - the test on 19 January was his first.

17. Before turning to the doping control form **Kock** then presented the following documentary evidence, which **Muller** accepted as correct in agreeing to everything recorded therein,

Exhibit A	Letter dated 17 February 2012 notifying adverse analytical finding
Exhibit B	Report on A sample analysis
Exhibit C	Doping Control Form
Exhibit D	Letter dated 30 May 2012
Exhibit E	Letter dated 24 April 2012
Exhibit F	Letter dated 15 May 2012

18. **Kock** referred to the medicine declaration on the doping control form. He noted that Muller had declared one product for asthma and then asked who had prescribed this, to which **Muller** replied that this was the doctor at the Bergbron Medicross. He added that he went to his "huis dokter" (GP) for a test every winter and did so on the recommendation of the Lions doctor.

19. **Muller's** response to some further questions posed by **Kock** in conclusion of his "setting the scene" within such contextual inquiry was that **Muller**

    - had told his doctor that he was a rugby player and should not take any illegal stuff
    - was careful as to what he put into his body
    - took a USN Protein shake as a supplement. This he bought from Dischem. He started this on the recommendation of friends whilst at school as it then helped to build weight and made one feel good
    - did not have any other medical condition other than sore ankles / injuries for which he platelets were drawn and injections received.

20. **Pienaar** responded to Dr Brandfield's question to **Muller,** in asking how the substance(s) ended up in his body if he was not taking any other medication, by stating that the defence would establish this.

21. **Pienaar** then called **Mr Muller (snr)** as **Muller's** first witness to lead evidence regarding <u>how</u> the prohibited substances entered **Muller's** body. He did this as he referred to the letter statement which **Mr Muller (snr)** the father of **Muller** had prepared, copies of which were distributed to the **Panel** and **Kock**.

EVIDENCE IN MITIGATION OF SANCTION

*Evidence of Hennie Muller - "**Mr Muller (snr)**"*

22. It is important to note that **Mr Muller (snr)'s** letter, which was handed in and received as an exhibit, was not a sworn statement / affidavit or affirmation as to the truth of its contents.

    The contents were effectively received into evidence however as being "200% correct" in his confirming the contents thereof, as well as read out by him in his evidence-in-chief and expanded upon under the questions asked by **Pienaar** in relation thereto, all of which produced the evidence/ responses set out below.

    (For the sake the record the **Panel** refers to this unsigned letter statement as Exhibit G)

23. The contents of such letter read and responses provided by **Mr Muller (snr)** revealed that

    Responses

    1. he is **Muller's** father.
    2. he drafted the letter with the help of his wife shortly after the results (of the adverse analytical finding were made known).
    3. when he approached the pharmacist, referred to 5 below, **Muller** was in Stellenbosch for the training camp. (U20 Baby Bok training squad)
    4. five days after **Muller** returned (from the training camp) he went on holiday to Scottsburgh with his mother and younger brother "Boetie" .

    Letter content translated

    5. in January 2011 he {**Mr Muller (snr)**}, underwent gastric by-pass surgery. This resulted in him losing 50 kgs and strength to the extent that he could not lift the weights he had in the past at gym.
    6. during December 2011 he saw his pharmacist for help as he explained his position.
    7. the pharmacist proposed that he make up a mixture which would help him to recover his strength to the extent that when he had finished the course he would be able to continue to pick up the heavier weights.
    8. whilst he was at the pharmacist he chatted about **Muller's** inclusion in the U20 Baby Boks training squad and his realisation that **Muller** appeared overtired /exhausted - "oormoeg".
    9. this was due to the fact that he had pushed **Muller** hard to do his very best and had urged him to do extra training sessions. This had resulted in **Muller** doing one hour weight sessions each morning and 2 x 2.4 kms runs each week, over and above the daily training sessions which he had at the Lions. As this included the off-season **Muller** had little time for his body to recover.
    10. the pharmacist recommended that he make up a mixture of multi-vitamins and vitamin B which **Muller** could be injected with. He stated that this would give **Muller** energy for the next training camp, as well as the World Cup if **Muller** was selected.
    11. as the family were already on holiday in Scottsburgh and he had work to complete, he arranged for his friend Steve Nel, who had booked into the caravan park at Scottburgh from 20 December 2011, where they had regularly holidayed together, to take the mixture, which he had wrapped and placed in a Biogen "blik" (container), to **Muller**.
    12. **Muller** told him on Christmas day that the mixture which he had sent him worked very well for him in the gym and he had bench pressed 180kg. **Mr Muller (snr) did** not believe this so he suggested that they test this at the gym after Family Day.

13. when they did so two days later and he saw the ease at which **Muller** was able to lift considerably heavier weights he realised something was not right. ("iets was nie reg nie")
14. he then asked for the mixture which the pharmacist had put into a syringe and to his utter shock realised that he had sent **Muller** the wrong mixture, suggesting that this was due to the fact that he only planned to use his own mixture after the December holidays.
15. he immediately called and explained to the pharmacist what had happened, receiving the assurance that the substances would be out of **Muller's** system by the time of the camp.
16. he was relieved and at ease even advising **Muller** that he had nothing to be worried about – following **Muller** having told him that a urine sample had been taken from him.
17. the pharmacist is not prepared to provide a statement. He appears to be afraid of losing his licence. **Mr Muller (snr)** had unsuccessfully tried to set up and tape conversations with the pharmacist.
18. asked that this bizarre set of circumstances be considered at **Muller's** hearing.
19. felt totally responsible for what happened to **Muller.**
20. had he been more mindful and personally made sure that he (**Muller**) was given the right mixture, the whole mix-up and misunderstanding would not have taken place.
21. the last thing a father would want would be to sink a son's rugby career.
22. **Muller** really did not know what was in the mixture and that it was prohibited substances which had entered his system and would have remained.
23. he cannot not change what happened but asked that the surrounding circumstances be considered in mitigation.
24. **Muller** had a good future in rugby and "onskuldig" (innocently) used the mixture in seeking to do his best for the sport for which he lives - rugby.
25. **Muller** is totally anti-drugs and does not take alcohol.

Prosecutor's cross-examination

24. **Kock** proceeded to put questions to **Mr Muller (snr)** in his cross-examination resulting in the following summary of his pertinent responses

- he expected **Muller** to put in extra training at the time when he was tired and nursing an injury
- he did not think this would hurt **Muller** further as he did not think the injury was serious
- **Muller** was not present when he went to the pharmacist
- there was no sample left –there were originally two syringes for injections – not a powder - a mixture of 3mls
- the two syringes were taped together and inserted into the powder (the Biogen mass builder container)
- he had used what was left of the two syringes

25. **Kock** then went on in seeking to establish the source of the prohibited substance. **Mr Muller (snr)** advised that he had sought to contact the pharmacist in the week but he was un-cooperative. It was accepted that he was unlikely to help SAIDS with any testing which it would be prepared to do to verify the source of the prohibited substances.

26. Mr Fredericks requested an explanation for the speed and ease at which **Muller** had moved to benchpress 180kgs, on taking the wrong mixture sent to him. This was answered more in terms of sense of rest and well being rather than any scientific reason.

27. **Kock** put further questions to **Mr Muller (snr)** in seeking understanding about how it was possible the mistake had occurred knowing that **Muller** was responsible for what could or could not be put into his system and was most likely to be tested.

The answers which followed, which also flowed from questions put by the Chairperson and Andy Branfield the doctor member on the Panel, provided evidence that

- he simply placed the syringes in the freezer after returning from work and then wrapped and sent them to **Muller** later
- he made a mistake in being very careless in mixing up the four syringes and that was why he was at the hearing
- he did not think that there would be something illegal in the mixture (which he sent)
- having been careful enough to tell the pharmacist about the fact that his son was a rugby player his not being careful when storing them just did not add up (Prosecutor)
- he thought that as there were two different colours he would recognise the right one, which had the lighter fluid
- he was not in a hurry when he packed the wrapped syringes which were sent after work
- the medication was bought from the pharmacy on 18 December 2011 and given to his friend Steve Nel on 19 December to give to **Muller**
- his wife, who was a former nurse, was qualified to inject **Muller**
- although she was a former nurse, he, rather than his wife - was responsible for **Muller's** medication
- as he went to the pharmacist he was fully responsible, the one to be punished rather than **Muller**
- he had a prescription for his medication but not for **Muller** as this was for vitamins
- the first injection was administered on the day of arrival, the second on the Monday which followed, being two injections of 1.5ml each in a week
- confirmed that there had been no more of the "wrong stuff"- that had been purchased - left. **Mr Muller (snr)** had used what had been left, seemingly only the vitamins/multivitamins after he returned from holiday, as he had paid for it
- he trusted his pharmacist, a professional who he had used for years
- there had been no invoice issued by the pharmacist who kept a box of stuff in his back office
- he knew that by the time he bought what he had for himself from the pharmacist this was illegal
- as everybody came to the pharmacist he thought that the pharmacist "knew his stuff" but he didn't as the illegal substances had not left the system within 7 days as he said would happen.
- the pharmacist appeared to be acting against what **SAIDS** was trying to control
- although he had asked the pharmacist for a letter to present to the Panel, or he would mention his name, the pharmacist had asked him not to.

28. **Kock** in pointing out the illegality of such pharmacist's conduct under Article 2.8 provided insight into the provisions of Article 10.5.3 of the **Rules** which stated that substantial assistance in identifying the source would assist in the reduction of up to ¾ of any sentence/sanction imposed.

29. *In reply* ***Pienaar*** *reminded that the athlete* ***Muller*** *was not at the pharmacist and not part of* this (what transpired there).

Evidence of Steve Nel

30. In his evidence regarding mitigation of sanction upon being questioned by **Pienaar,** Mr Nel provided that

- **Mr Muller (snr)** was his employer / "boss"
- he took a container, sealed with tape, to **Muller** on the 20 December 2011
- he received this on the previous day being 19 December 2011
- he collected it at **Mr Muller (snr)'s** house
- he did not know what was inside
- he was asked to keep it still and to give it to **Muller.**

The hearing then adjourned from 19h10 -19h47

*Evidence of **Muller***

31. Prompted by questions posed by his advocate **Pienaar** and expanding thereon in his answers the following evidence was provided by **Muller**.

- He was 19 years old – would turn 20 on 24 November 2012.
- He played provincial rugby - always for the Lions / "Leeus"- at under 16, under 18 and u 19 levels.
- He had not made the under 20 Bok team but was at trials for a position in the team
- He attended the High Performance Centre at Pretoria University as an under 18
- also played England, France and Namibia.
- His "Pa"/ Father gave Mr Nel the mixture to give to him. The mixture was in a Biogen container.
- His mother injected him.
- He did not take the content of both syringes on one day
- He did not know the syringes contained the prohibited substances
- He assumed that that the contents were vitamins.
- His contract with the Lions had been terminated.
- He was immediately suspended from the (Baby) Bok squad.
- His brothers younger - 12 and older - 27 also played rugby.
- His father (**Mr Muller (snr)**) was always very involved with them. He put pressure on them – helped set goals and targets which one had to achieve. These involved fitness, strength, "explosion" and speed.
- His weakness was cardiovascular as he struggled with running; his strong points as a prop forward were strength and aggression.
- His father would chat to him about his progress after games.

32. In addition **Muller** provided further evidence in closing to the effect that

- after his father's operation his father did not eat anything for three months. He took protein pills but did not eat.
- his father mentioned that he needed something to give him, his father, a boost. His father was previously very strong but after three months struggled to do 5 squats.
- he was aware of the pharmacist but did not know what his father used
- he had asked his father for something as he was totally drained from the 6 hour a day sessions at the 2 week training camp. He was not a "Brendan Venter" who did not need to train.
- he did not see the woman team doctor at the time of the training camp. The reason being that one would be tested for fitness. The doctor could be seen as one's "worst

enemy" if one had to make the team and was being very careful to do so with the World Cup so close.

- ➢ although weak he continued with the long hours of training and running.
- ➢ he had asked his father if the medication which he gave him was "ok" and his reply was that it was "ok".

33. At this juncture Mr Fredericks asked **Muller** what his thoughts were when he received the package, especially whether he inquired whether it was legal. **Muller's** response was that "hy het nie daaraan hard gedink nie", meaning "he did not give serious consideration to this" as he thought they were safe because he trusts his father – **Mr Muller (snr).**

34. The prosecutor **Kock** then inquired about **Mr Muller (snr's)** involvement as father in **Muller's** sport which resulted in the following

- o his foundation for fitness was laid in standard 8 due to the pressure his father had out on him
- o his training involved 5-6 sessions of gym, fitness, ball sessions and the 2.4 kms
- o his Father came to his gym sessions
- o his Father had watched his games from school
- o he would look at his Father's reaction as to how he played, being scared he would 'get a clip across the head'
- o his Father would then point out how he could improve at the rucks, in tackles and as a ball carrier.
- o he could see from his father's walk just how he had played
- o *his Father's ambition for him was that he would be a Springbok.*
- o he realised this was a possibility and could be realised in he always did his best.
- o his 27 year old brother who had played for the high school team had not made a provincial team.

35. In response to Dr Branfield's questions which followed **Muller** replied that

- o *he had only had vitamin injections before – he is quite scared of injections*
- o after he had received the stuff from his dad's friend he had 2 injections
- o he was quite sure he only had two injections - after it was noted that the 30kg improvement from 150kgs in his bench press lift was remarkable
- o he knew he was responsible for what went into his system
- o it was his father's fault that he took the illegal stuff. He trusted his father and did everything he told him to. He had told him to take the medication to get better

36. **Muller's** reply to **Kock's** final question was to the effect that that he had no reason not to trust his father.

FINAL SUBMISSIONS & PROPOSED SANCTION

Prosecutor

37. **Kock** submission can be summarised as follows.

- ✓ **Muller** and his father **Mr Muller (snr)** had a close relationship.
- ✓ His father was prepared to do everything to assist his son's rugby career.
- ✓ It was of concern to **Kock** that **Mr Muller (snr)** initially said he got his medication from the pharmacist 'above board', then changed this to stating there had been cash paid and no receipt.

- ✓ It appeared that **Mr Muller (snr)** went to the pharmacist knowing he could get things for **Muller's** recovery.
- ✓ It is not known specifically how weak or injured **Muller** possibly was.
- ✓ The reliability of **Mr Muller (snr)'s** evidence is of concern as some of submissions about the pharmacist only came later (under cross-examination).
- ✓ **Mr Muller (snr)** would not hurt his son
- ✓ **Mr Muller (snr)** went back to seek confirmation from the pharmacist that the substances would be out of the system in 7 days.
- ✓ Despite the concern about the reliability of **Mr Muller (snr)'s** evidence he had undertaken to provide assistance under Article 10.5.3 of the **Rules** for what **SAIDS** was willing to consider as having been sports related in the dispensing of schedule 4 medication in contravention of the Medicine Act.
- ✓ As regards the further evidence relating to **Muller**,
    - o he was not present when the medication was purchased;
    - o he was not told what was given to him. This did not sit comfortably with **Kock** having regard to the close relationship and the vested interest **Mr Muller (snr)** had in Muller and every facet of his rugby career;
    - o is that not having told **Muller** the 'how and the why' the information which his father had given relating to the medication was limiting;
    - o he, as athlete, had his own medical doctor, who could have assisted him. Instead of showing his weakness however he chose to risk getting something outside of the support structure.
    - o his assumption of risk was a calculated risk as being "better having the cake, than eating it too" !
- ✓ the athlete has to prove exceptional circumstances for a reduction in sanction from 4 years
- ✓ **Mr Muller (snr)** has committed to provide evidence by way of affidavit. This will need to be assessed in determining what type of sanction could be argued for – having regard to the substances and willingness to consider this and any submissions.

38. In his closing remarks **Kock** pointed out the evidentiary burdens which the **Panel** had to consider, namely

1. the athlete - as being proof on a balance of probability
2. the prosecution - as being proof to the comfortable satisfaction of the **Panel**

and in doing so asked the Panel to consider whether the source had been identified.

Kock then called upon the Panel to consider a 4 year period of ineligibility taking into account the period served under provisional suspension, as the appropriate sanction.

Pienaar** – for **Muller

39. In his submission **Pienaar** stated that

- ✓ he disagreed with a period of 4 years
- ✓ the athlete (**Muller**) could avoid an increased sanction under Article 10.6 (aggravating circumstances) in two ways
    - o if he could prove to the comfortable satisfaction of the hearing committee (**Panel**) that he did not knowingly commit the anti-doping rule violation

- admitted the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the SAIDS Anti- Doping Disciplinary Committee (**Panel**)

✓ this was done

✓ sentence could be reduced under Article 10.5 of the **Rules** if the athlete could show no fault or negligence, or no significant fault or negligence

✓ the test for negligence under South African law was set out in the 1960 case of **S v T** at page 111 in the well known judgment of Judge MT Steyn, as being that determined under the criteria of a reasonable man not an armchair critic

✓ with respect, that the determination of negligence in the light of the facts in this case should be considered with regard to

- a reasonable 19 year old rugby player in **Muller's** position – one month out of being a minor
- a player specifically not disclosing an injury as he would then not be able to play and someone else would take his place
- **Muller** under a lot of pressure it being his dream to be named in the squad to represent his country
- his father pressing **Muller** too hard
- **Muller** cannot be blamed for having regard to the society and family environment one does not question his father
- he did not question his father under this background, he accepted his father at his word and had no reason to distrust him

✓ **Muller** had no fault, alternatively, was negligent but not intentionally so. All the boys at the camp would have done what he **Muller** did (in not going to the doctor)

✓ The tribunal (**Panel**) take into account

- the impact on **Muller**
- **Muller's** willingness (through his father's commitment) to provide assistance (under Article 10.6)
- **Pienaar** himself being prepared to be personally involved through his connections within the SAPS who are involved in entrapment cases
- the affidavit which **Mr Muller (snr)** would provide would disclose the name of the pharmacy (location) and owner - nothing would be hidden.
- **Mr Muller (snr)** was willing to work with SAIDS with regard to the matter to save other athletes on the West Rand

The Chairperson then asked questions (with regard to the pharmacy) as to

1. why the disclosures were not made in **Mr Muller (snr)'s** letter statement;
2. the inconsistency and thus reliability of **Mr Muller (snr)'s** evidence.

Pienaar's respective reply to these being

1. it was his (**Pienaar's**) fault, as he had wanted to mention these at the beginning
2. **Muller** was not part of what happened at and not present at the pharmacy **Mr Muller (snr)** had not expected the pharmacy to harm his son

PANEL DECISION & REASONS

Verbal decision

40. A short adjournment for deliberation by the **Panel** members followed, after which the hearing was re-convened for the delivery of the **Panel's** verbal decision by the Chairman.

    In acknowledging

    - the anti-doping violation admitted by **Muller**
    - providing a brief rationale for the **Panel's** findings that although **Muller** had not established on a balance of probability that he had not been at fault or negligent (Article 10.5.1), he had established on a balance of probability to the Panel's satisfaction that he had not been significantly at fault or negligent (Article 10.5.2),

    the Chairperson delivered the following decision on the understanding that the full written decision of the **Panel,** with reasons, would be delivered in due course.

    " Mr Gideon Muller serve an 18 month period of ineligibility commencing from the date of notification of the "AAF" - adverse analytical finding - ie 17 February 2012. Such period to run to 17 August 2013, on the understanding that

    1. **time served from the date of notification of the adverse analytical finding on 17 February 2012 be credited to such period;**

    2. **6 (six) months of such 18 month period is suspended, on condition that Mr Muller provides substantial assistance to SAIDS (as ADO), the criminal authority or professional disciplinary body, referred to in Article 10.5.3 which results in**

        2.1 SAIDS (as ADO) discovering or establishing an anti-doping violation by another Person,

        or,

        2.2 a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person,

    within 6 (six) months of the date of decision ie by the 19 December 2012."

41. What follows records the **Panel's** full finding and decision with regard to Muller's admission of the anti-doping rule violation, the applicable law / governing rules and reasons relating to what the **Panel** considered to be the appropriate sanction.

GUILTY FINDING – ANTI DOPING VIOLATION

42. The **Panel** having accepted that **Muller's** violation of Article 2.1 of the **Rules** had been admitted by **Muller** at the outset of the hearing accordingly found **Muller** had in fact committed the anti-doping violation referred to in the charge.

SANCTION

Introduction

43 In the light of such finding the **Panel** was thus required to consider and decide

43.1 what the appropriate sanction ought to be having regard with Articles 10.1 and 10.2, read with Article 10.6, of the **Rules**;

43.2 whether, once this was determined, there was any basis for any possible elimination or reduction of any period of ineligibility imposed upon **Muller**, under either of Articles 10.5.1, 10.5.1.2 or 10.5.1.3 of the **Rules,** provided that the totality of the evidence before the **Panel** supported there being, either

43.2.1 no fault or negligence - (Article 10.5.1)

or

43.2.2 no significant fault or negligence – (Article 10.5.2)

on the part of **Muller**

and

43.3.3 in the event of the provision of substantial assistance by **Muller** to **SAIDS,** in discovering or establishing an anti-doping rule violation, or which results in a criminal or disciplinary body discovering or establishing a criminal offense (sic) or the breach of professional rules. (Article 10.5.3),

what this period, or such periods should be.

This the **Panel** did in making its further findings through the evaluation of all the evidence within the totality of the circumstances giving rise thereto having regard to all applicable laws - governing rules, precedent and South African law, as follows.

Applicable law/ governing rules

44. The governing **Rules** and definitions which the **Panel** was obliged to consider- in the light of the South African Constitution, common law and decided cases (precedent) concerning these matters - in reaching its decision - are as follows:

44.1 ***Article 3.1***
Burdens and Standards of Proof
SAIDS has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established 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 or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

44.2 **Article 10.5**
Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

10.5.1 *No Fault or Negligence*

If an Athlete establishes in an individual case that he or she bears *No Fault or Negligence,* the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Markers* or *its Metabolites* is detected in an *Athlete's Sample* in violation of *Code* Article 2.1 *(*Presence of *Prohibited Substance), the Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* eliminated.

In the event that this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

10.5.2 *No Significant Fault or Negligence*

If an Athlete or other Person establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of *Code* Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* reduced.

10.5.3 Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations

The SAIDS *Anti-Doping Disciplinary Committee* or SAIDS *Anti-Doping Appeal Board* may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of *Ineligibility* imposed in an individual case where the *Athlete* or other *Person* has provided Substantial Assistance to an *Anti-Doping Organization*, criminal authority or professional disciplinary body which results in the *Anti-Doping Organization* discovering or establishing an anti-doping rule violation by another *Person* or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another *Person*. After a final appellate decision under Article 13 or the expiration of time to appeal, the SAIDS *Anti-Doping Disciplinary Committee* or SAIDS *Anti-Doping Appeal Board* may only suspend a part of the applicable period of *Ineligibility* with the approval of *WADA* and the applicable International Federation.

The extent to which the otherwise applicable period of *Ineligibility* may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the *Athlete* or other *Person* and the significance of the *Substantial Assistance* provided by the *Athlete* or other *Person* to the effort to eliminate doping in sport.

No more than three-quarters of the otherwise applicable period of *Ineligibility* may be suspended. If the otherwise applicable period of *Ineligibility* is a lifetime, the non-suspended period under this section must be no less than 8 years. If the SAIDS *Anti-Doping Disciplinary Committee* or SAIDS *Anti-Doping Appeal Panel* suspends any part of the period of *Ineligibility* under this Article, it shall promptly provide a written justification for its decision to each *Anti-Doping Organization* having a right to appeal the decision. If the SAIDS *Anti-Doping Disciplinary Committee* or SAIDS

Anti-Doping Appeal Panel subsequently reinstates any part of the suspended period of *Ineligibility* because the *Athlete* or other *Person* has failed to provide the *Substantial Assistance* which was anticipated, the *Athlete* or other *Person* may appeal the reinstatement pursuant to Article 13.2.

44.3 **Article 10.6**
Aggravating Circumstances Which May Increase the Period of *Ineligibility*

If the SAIDS *Anti-Doping Disciplinary Committee* or SAIDS *Anti-Doping Appeal Panel* establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of *Ineligibility* greater than the standard sanction, then the period of *Ineligibility* otherwise applicable shall be increased up to a maximum of four years unless the *Athlete* or other *Person* can prove to the comfortable satisfaction of the hearing Committee that he did not knowingly commit the anti-doping rule violation.

An *Athlete* or other *Person* can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the SAIDS *Anti-Doping Disciplinary Committee* or SAIDS *Anti-Doping Appeal Panel*.

44.4 **Article 10.9**
Commencement of *Ineligibility* Period

10.9.1 Except as provided below, the period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed

10.9.2 Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served.

10.9.3 Delays Not Attributable to the *Athlete* or other *Person*.
Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the SAIDS *Anti-Doping Disciplinary Committee* may start the period of *Ineligibility* at an earlier date commencing as early as
the date of *Sample* collection or the date on which another anti-doping rule violation last occurred.

10.9.4 Timely Admission.
Where the *Athlete* promptly (which, in all events, means before the *Athlete* competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by SAIDS, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the *Athlete* or other *Person* shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* or other *Person* accepted the imposition of a sanction or the date of a hearing decision imposing a sanction.

10.9.5 If a *Provisional Suspension* is imposed and respected by the *Athlete*, then the *Athlete* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed.

10.9.6 If an *Athlete* voluntarily accepts a *Provisional Suspension* in writing from SAIDS and thereafter refrains from competing, the *Athlete* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete*'s voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of a potential anti-doping rule violation under *Code* Article 14.1.

10.9.7 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *Athlete* elected not to compete or was suspended by his or her team.

44.5 **Article 18.2**
Interpretation

18.2.1 The headings used in these Anti-Doping Rules are for convenience only and shall not be deemed part of the substance of these Anti-Doping Rules or to affect in any way the language of the provisions to which they refer.
18.2.2 The INTRODUCTION and the APPENDIX 1 DEFINITIONS shall be considered integral parts of these Anti-Doping Rules.
18.2.3 These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the *Code* and shall be interpreted in a manner that is consistent with applicable provisions of the *Code*. The comments annotating various provisions of the *Code* shall be referred to, where applicable, to assist in the understanding and interpretation of these Anti-Doping Rules.

44.6 **Article 20.3**
Governing Law

South African law governs these Anti-Doping Rules.

44.7 **DEFINITIONS**

No Fault or Negligence:
The *Athlete's* establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had *Used* or been administered the *Prohibited Substance* or *Prohibited Method.*

No Significant Fault or Negligence:
The *Athlete*'s establishing that their fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.

Substantial Assistance:
For purposes of Article 10.5.3, a *Person* providing *Substantial Assistance* must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an *Anti-Doping Organization* or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought

THE PANEL'S FINDINGS & DECISION

The **Panel's** findings relating to its consideration of whether any grounds existed for the possible elimination, reduction or increase in any period of ineligibility under the **Rules**, as well as the **Panel's** decision with regard to what the appropriate period of ineligibility should be, if such grounds be found to exist, are dealt with as follows.

45.1 ***No fault or negligence –Article 10.5.1***

45.1.1. **THE PANEL'S FINDINGS** are that **Muller**

- ✓ was at fault or negligent;
- ✓ is therefore not entitled to the elimination of the applicable period of ineligibility as envisaged under Article 10.5.1 of the **Rules.**

45.1.2. This is because **Muller**, upon whom the evidentiary burden and thus onus of proof rested by virtue of the anti-doping violation having been admitted, failed in the **Panel's** view - regard being had to its careful consideration and weighing up of all the evidence and arguments presented within the totality of the circumstances - to establish that

> *"he did not know or suspect and could not have reasonably have known or suspected, even with the exercise of utmost caution, that he had used or been administered the Prohibited Substances."*

45.1.3 The reasons for such failure, in the **Panel's** view, as established by the evidence, were that Muller failed

- ❖ the tests for fault / negligence as laid down in a number of CAS - Court for Arbitration in Sport – arbitral awards, in particular that of CAS 06/001, in the *Lund case*, as set out below, other decided anti-doping cases;
- ❖ the test for negligence in a subsidiary legal sense, as applied under South African law. This test being based upon the standard of care which a reasonable person in the position of **Muller** would have been expected to exercise in the same situation that **Muller** was in.

  The elements of such test were initially laid down in Appellate Division case of *Kruger v Coetzee 1966(2) SA 428* AD at page 430. These required that the reasonable person in **Muller's** position,

  1. would have foreseen the possibility of harm

2. would have taken steps to avoid the harm
3. failed to do so.

Such test is more flexibly applied in an abstract or relative sense, or even as a hybrid of both today, with the facts of the case determining which approach may be best suited in the circumstances.

See the cases of *Groenewald vs Groenewald, Mukeiber vs Raath* and *Sea Harvest vs Duncan Dock Cold Storage* , referred to in the chapter on Negligence at page 199 in the volume on Delict in the Law of South Africa

(Unfortunately the decision of Judge MT Steyn in S v T referred to in paragraph 37 of this record of the hearing and decision could not be found by reference to what appears the citation provided by **Pienaar.**)

45.1.4 In the *Lund case* the decision of the ad hoc division of CAS is reported in margin note 20 as providing

> *"The burden on an athlete to establish No Fault or Negligence is placed extremely high. As has been noted above, Mr Lund would have to establish either that he did not know or suspect or that he could not reasonably have known or suspected even with the exercise of utmost caution that he was not using a Prohibited Substance. In the present case, it cannot seriously be argued that an athlete who realized (and has been told by his national federation) that he had to check the Prohibited List each year and who failed to look at the list at all for over a year had exercised the utmost caution, albeit that for several years previously he had scrutinised the list with care. It is his failure to continue to monitor the Prohibited List, in accordance with his duty as an athlete, that has placed Mr Lund in his present predicament."*

45.1.5. **Muller** faced a twofold burden in also having to establish <u>how</u> the Prohibited Substances, namely

- 17β Hydroxmethyl-17α-methyl-18-nor-androst-1,4,13- triene-3-one and 17α-methyl-5β-androstane-3α,17βdiol, all metabolites of Methandinone; and
- Boldenone and its metabolite 5β-androst-1-en-17 β –ol-3-one ,

<u>had entered his system</u>, in order to have any period of ineligibility eliminated. As **Muller** had failed to prove that he bore no fault or negligence, it is not necessary at this point to record the **Panel's** finding on whether Muller had established <u>how</u> the Prohibited Substances <u>had entered his system.</u> The **Panel's** findings on this point, equally applicable to both Articles 10.5.1 and 10.5.2, are set out in paragraph 45.2.3 below.

Panel's approach to formulating findings and decision

45.1.6 Whether the reasons should be stated before or after the **Panel's** finding is not material. It is submitted that reaching a decision, or decisions, may be an arduous process and, if so generally circular in nature. It sometimes 'ends where it began' – for example, confirming hypotheses initially drawn and sometimes 'beginning at the end' – for example, testing conclusions reached. In all such a process requires logic and reason. It also requires both an individual and collective discerning wisdom for the consideration and evaluation of all factually determined and related hypotheses which may be presented by opposing parties in accordance with the governing laws, rules, precedent, policy and principles. In addition such decisions ought to be reached with due regard to fundamental human rights and values, predicated by a quest for seeking an outcome based upon, inter alia, truth, fairness and consistency, as it strives for harmony and understanding between competing forces and/or other interests, all of which weighed according with the prevailing societal as well as cultural norms and/or dictates.

45.1.7 Although decisions may sometimes be "clear-cut" more often than not they are quite difficult and complex. The causes of this possibly due to insufficient, incomplete or unreliable evidence, reluctant witnesses and of course ever increasing costs, especially as more lawyers are called upon to defend or prosecute cases.

45.1.8 The decision in this case was accepted as not being an "easy" one. It sought to deal with the ever increasing threat and danger that doping presents to athletes and society at large in relation to the rights of individual athletes engaging in sport according to the rules of association and participation which they accept.

45.1.9 Against this 'backdrop' then the **Panel** seeks to ensure justice between the prosecution and defence and their respective and competing interests in delivering its findings in relation to the appropriate sanction and its reasons for such findings. This is based upon **Rules** providing, as they do, for the possibility of sanctions being modified upon specified criteria and in so doing providing a reasonable balance between effective anti-doping and the interests of the athlete.

Preface

45.1.10 The **Panel's** reasons for finding **Muller** at fault or negligent are prefaced by referral to the comments under Article 2.1.1 and 18.2 (Interpretation) of the **Rules,** supporting this, which read

Comment to Article 2.1.1

For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), SAIDS Anti-Doping Rules adopt the rule of strict liability which was found in the

Olympic Movement Anti-Doping Code ("OMADC") and the vast majority of pre-Code anti-doping rules. Under the strict liability principle, an Athlete is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete's Sample.

The violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault. If the positive Sample came from an In-Competition test, then the results of that Competition are automatically invalidated (Article 9 (Automatic Disqualification of Individual Results)).

However, the Athlete then has the possibility to avoid or reduce sanctions if the Athlete can demonstrate that he or she was not at fault or significant fault (Article 10.5 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances)) or in certain circumstances did not intend to enhance his or her sport performance (Article 10.4 (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances)).

The strict liability rule for the finding of a Prohibited Substance in an Athlete's Sample, with a possibility that sanctions may be modified based on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all "clean" Athletes and fairness in the exceptional circumstance where a Prohibited Substance entered an Athlete's system through no fault or negligence on the Athlete's part. It is important to emphasize that while the determination of whether the anti-doping rule has been violated is based on strict liability, the imposition of a fixed period of Ineligibility is not automatic. The strict liability principle set forth in SAIDS Anti-Doping Rules has been consistently upheld in the decisions of CAS.

18.2 INTERPRETATION

18.2.2 The INTRODUCTION and the APPENDIX 1 DEFINITIONS shall be considered integral parts of these Anti-Doping Rules.

18.2.3 These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code shall be referred to, where applicable, to assist in the understanding and interpretation of these Anti-Doping Rules.

45.1.11 Although **Muller** may have indeed established that he did not know or suspect that he had used or been administered the Prohibited Substances, (ie had the required knowledge or at least suspicion), the **Panel's** is satisfied that **Muller** failed the lesser "hurdle" and was indeed at fault or negligent under Article 10.5.1 of the **Rules**.

This was because he failed to establish that he could not have reasonably known or suspected even with the exercise of utmost caution that he had used or been administered the Prohibited Substances, which had entered his system, based on the reasons set out in paragraph 45.1.12 below.

45.1.12 **THE PANEL'S FINDING** is that **Muller** failed to exercise the utmost caution he ought reasonably to have done under the duty of care which rested upon him alone.

Muller was, is and shall remain strictly responsible for what prohibited substances, metabolites or markers might be found present in his system.

Considering the evidence and his admissions relating to

- ✓ his experience and exposure at highly competitive levels as a player;
- ✓ his being aware that he was responsible for what entered his system;
- ✓ what he had learned from fellow rugby players regarding doping and the consequences of doping in sport,

he clearly failed to take the steps which were reasonably required of him, and ought reasonably to have foreseen ought to have been taken by him beforehand, in order to establish,

- ➢ what it was that his father **Mr Muller(snr)** had obtained from the pharmacy and arranged be delivered to him, as contained in the syringes (ie vitaminB /multivitamins, or not), as thereafter injected by his mother; and
- ➢ whether - this was / these were - on the World Anti Doping Code Prohibited List.

45.1.13 The reasons supporting this finding by the **Panel** that **Muller** was at fault or negligent are

- ➢ trusting his father entirely about the specific multivitamin/vitaminB medication his father had ordered and purchased from the pharmacist for **Muller** restore his energy and get better;
- ➢ not making his own further reasonable - due and diligent- inquiry, beyond asking his father if the multi-vitamin/vitamin mixture was "Ok", which a rugby player in his position ought to have done;
- ➢ relying entirely on his father, not even his mother who was a nurse about his fatigued / exhausted ("oormoeg") condition and his choosing to ask him to get him something for this, because his father seemingly looked after him from a rugby point of view;
- ➢ not consulting with and seeking any guidance from

- his own/their family doctor (GP) at the Bergbron Medicross, at the very least,

and then more specifically, having regard to his status as an experienced and contracted Golden Lions player ,

- the medical practitioner(s) appointed by the Golden Lions, and /or
- a qualified and competent sports doctor and/or an expert in sports medicine, fully conversant with anti-doping in sport and thus the WADA Prohibited List

This would have allowed **Muller** to discuss his "oormoeg" condition and even any possible injury, which he may have been carrying and had not wished to raise with Baby Bok training squad team doctor.

(The evidence produced at the hearing provides only an oblique reference to the possibility of such an injury as relating to his ankles.)

Any such practitioners would have been better placed to make a specific diagnosis. They would also have ensured that any medication or treatment prescribed complied with the Prohibited List;

- seemingly not taking any steps at all, other than the call made by made by **Muller snr** to the pharmacist, once it had been established that "something was wrong" ("iets was nie reg nie ") about the multi-vitamin/vitaminB mixture which his mother had apparently injected into him, to fully establish what it was that was injected into **Muller**.

The only evidence produced at the hearing was that **Muller Snr,** called the pharmacist immediately this was discovered and that he and thus **Muller** through him, relied on the pharmacist's assertion that this would have been out of **Muller's** system by the next training Baby Bok training camp.

In the **Panel's** view reliance on the pharmacist response about this, as may have been directly relayed to **Muller** by his father, was simply not enough for **Muller** to escape liability for fault or negligence and have any period of ineligibility eliminated.

The evidence pointed to **Muller snr's** being aware of the fact that the mixture, which he had obtained for rebuilding his own muscle **(Muller snr's)** strength "came from behind the counter" and thus according to **Mr Muller snr** was ostensibly "illegally" dispensed.

In the **Panel's** view, especially given that **Muller** was on the brink of possible Baby Bok selection and especially before the next Baby Bok training session, **Muller snr** ought to have made sure that **Muller,** either on his own, or with his assistance, immediately try to find out by way of wider inquiry than just the pharmacist what the "wrong" mixture was that had been injected into Muller.

This could, indeed, should, have been done by

- testing what mixture may have been left in the "wrong" syringes delivered to **Muller**; (it is not entirely clear from the hearing record that this was the case);

- **Muller,** if this was not possible, simply having his own urine tested,

in conjunction therewith **Muller** possibly seeking advice from any of the medical practitioners referred to above, preferably experts in sports medicine and even pharmacologists, in order to establish what

- substances were in **Muller's** system
- **Muller** himself ought to have been done to deal with the outcome of any such tests in his best interests in such circumstances;

➢ without question and evidently without any further action on his part accepting and trusting his father at his word,.

Evidence was led that **Muller** cannot be blamed for this.
Further evidence was led to the effect that the reasons for this were that he trusted and relied on his father, had no reason to doubt him and would certainly not have questioned him based upon the society, cultural and family environment in which **Muller** was raised.

45.1.14 The upshot of all this was that **Muller** - even as it was established that he had bench-pressed 30 kgs above the 150ks he had previous done - seemingly on the advice of his father **Mr Muller snr** and through him the advice of the pharmacist, simply took a calculated risk that the mixture (which **Muller** had twice been injected with) would have left **Muller's** system by the time of the next Baby Bok squad training camp.

Muller believed his father's word. He placed his trust in his father. He believed that what would have been injected into him was a multi-vitamin/vitaminB mixture, would restore his energy and was "Ok".

Muller also believed what his father had reported regarding the timing of the wrong mixture leaving his system.

Muller chose to respect and accept his father's word concerning this alone. He did not to seek the advice of any experts and/or have his urine tested on a voluntary basis, as he could possibly have done as outlined in paragraph 45.1.13 above.

Muller through such trust, respect and apparent obedience, which was naively exercised in the **Panel's** view, having regard to the "dark world" of doping in sport, was thus perhaps unwittingly prepared to risk jeopardising his dream of his possible selection to the Under 20 South African Baby Bok rugby team, which eventually won the World Cup.

45.1.15 Whether reliance can placed **Mr Muller (snr)'s** evidence and to what extent the **Panel** might to do so is not necessary for the **Panel** to decide and canvass this stage.

This is because the **Panel** is satisfied on **Muller's** evidence alone that **Muller** has simply not discharged the onus placed on him to prove, even as a single witness - without the requirement for corroboration as prescribed under Article 10.4 - that he was not at fault or negligent.

Note: The **Panel's** finding and reasons relating to the reliability of **Mr Muller Snr's** evidence are provided in paragraph 45.2.3. This is where the **Panel** deals with the question of whether any possible reduction in any applicable period of ineligibility under Article 10.5.2 of the **Rules** was justified in **Muller's** case.

45.1.16 **The Panel therefore confirms its earlier verbal finding** - given at the conclusion of the hearing on 19 June 2012 - **that**

- **Muller** was indeed at fault and negligent.

The Panel's finding is in line with the decision in the following CAS case

Arbitration CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA), award of 27 May 2003

43. .....

"Having said that, however, the Panel takes the position that the Appellant clearly acted with negligence in not specifically queried (sic) *(should be "querying")* both his physician and his coach regarding the identity of the substances which were administered to him. As Dr. Saugy stated in his testimony, athletes have been placed on notice that the engesting (sic) of food and vitamin supplements carries risk. The Appellant should not have ignored this risk, not only at the time he purchased the illegal substances in an Athens pharmacy just before leaving for

Tunis, but especially when such substances are injected by the coach and not his physician on the eve of a competitive event"

(There clearly being no basis for **Muller** being excused from all blame, as submitted by **Pienaar** and in particular by his father **Mr Muller (snr),** who had sought to "take the rap", for what had transpired through not just a simple mistake, or inadvertent error on his part, but having regard to the circumstances conduct bordering on gross negligence in the Panel's view.)

- **Muller** is therefore not entitled to the elimination of the period of ineligibility as may be determined by the **Panel,** as provided under Article 10.5.1 of the Rules.

45.2 *No significant fault or negligence –Article 10.5.* **2**

45.2.1 **THE PANEL'S FINDINGS,** in the light of decided cases and the distinguishing facts of the admissible and probative value of all the evidence provided by **Muller** in mitigation of sanction, are that

- **Muller's** fault or negligence was not significant in relationship to his admitted and accepted anti-doping violation.

- **Muller** is therefore entitled to a reduction of the otherwise applicable period of ineligibility in accordance with the provisions of Article 10.5.2 of the **Rules.**

- the 2 (two) year period of ineligibility which the **Panel** was obliged under Article 10.2 of the Rules to impose upon **Muller** for a first anti-doping rule violation is accordingly reduced by 6 (six) months to 18 (eighteen) months.

Such findings are in line with numerous CAS - Court for Arbitration in Sport cases and awards which the chairperson was able to consider in formulating this decision and reasons on behalf of the **Panel.**

These include those referred to in Annexure X of which the following are specifically noteworthy -

- ✓ the *Lund case in CAS 06/001,*
- ✓ the *Jessica Hardy case in 2009/A/1870;*
- ✓ *the Squizzato case 2005/A/830*
- ✓ *the Knauss case 2005/A/847.*

45.2.2. The findings were reached because the **Panel** is satisfied that **Muller**, upon whom the evidentiary burden and thus onus of proof rested by virtue of the anti-doping violation having been admitted, had established to the **Panel's** satisfaction on a balance of probability,

- ✓ how the Prohibited Substances entered his system
- ✓ that he bore No Significant Fault or Negligence.

The basis upon which the **Panel** reached its findings concerning how the Prohibited Substances entered **Muller's** system and that **Muller** bore No Significant Fault or Negligence are dealt with paragraphs 45.2.3 and 45.2.4 below.

45.2.3 **How the Prohibited Substances entered Muller's system** ?

Assessment of the evidence.

***Mr Muller (snr)* – Muller's father**

a. **Kock** as Prosecutor expressed a degree of concern about **Muller's** failure to establish the source or origin of the Prohibited Substances.

In the Panel's estimation this is not material. Origin has some evidentiary value in assisting in determining *what* may have indeed entered Muller's system. It provides, inter alia, the opportunity to provide or dispute evidence lead by witnesses. It does not prove actually *how* the prohibited substances entered **Muller's** system. Put somewhat differently, it is the manner in which the prohibited substances entered **Muller's** system, which is of fundamental importance for **Muller,** to prove on a balance of probability, in order to establish one of the two requirements for any possible reduction of sanction under Article 10.5.2, rather than where the substances were obtained from.

b. Such failure appears primarily due to

- **Muller** not having led, or produced any other evidence, in support of or corroborating his father's statements with regard to the pharmacy and purchase of the mixtures ordered and obtained by **Mr Muller snr;**
- the credibility and thus the reliability of **Mr Muller snr's** evidence.

  This was impacted significantly by the contradictions and initial non-disclosures in his testimony.

It also resulted in

- the disclosure of apparent illegalities, surrounding the *purchases which he made at the pharmacist;*
- the unresolved issues arising from the questions posed in (h) below,

requiring the **Panel** give consideration to possible motive or purpose in relation thereto.

c. **Muller's** father **Mr Muller (snr)** was the only witness to what happened

- at the pharmacy; and
- in discussions with the pharmacist,

relating to the mixtures – multivitamin/vitaminB and prohibited substances - ordered and obtained from the pharmacy.

The **Panel** was thus obliged to apply the necessary caution, which it did as outlined below, in evaluating **Mr Muller snr's** testimony and giving such credence and thus weight (probative value) to it as the **Panel** deemed fit.

d. This is because on **Muller's** own evidence and that of his father, **Muller** was not present at the pharmacy. He was also not privy to any of the discussions held between his father and the pharmacist relating to that which his father obtained from the pharmacist.

e. What we have before us as part of **Muller's** undisputed evidence is that **Muller's** father told **Muller** about the pharmacist who **Mr Muller (snr)** had approached

- for something to build his father's strength following his (**Mr Muller snr's**) *gastric bypass operation;*
- about vitamins/multivitamins which were to be sent to **Muller** who was on holiday to regain his energy.

f. What was and remains perplexing for the **Panel** are those unresolved issues relating to the questions raised in (h) below, which gave rise to possible "factual gaps" in the evidence led by **Pienaar** on **Muller's** behalf in mitigation of sanction and/or the **Kock's** (as prosecutor) submissions and/or opposition to this at the hearing.

g. Such questions may not have been directly or impliedly raised at the hearing. The **Panel** nevertheless had to consider these to decide whether any rational legal basis existed for the **Panel** to draw any inferences, adverse or otherwise, which may have been relevant to this finding on the credibility of the witnesses, or any other of the **Panel's** *findings and decision.*

h. These questions are.

- Why was no corroborating documentary evidence in support of any of the purchase, or purchases which **Muller's** father made from the pharmacist produced at the hearing ?

  In the light of the pharmacist's reluctance / seeming refusal to provide any letter or statement for **Mr Muller (snr)**, some invoice or receipt for such purchases ought to have been produced.
  At the very least an invoice or receipt relating to the vitamins/multivitamins or the alleged prescription for the purchased ought to have been produced.

- Why did **Mr Muller snr** not provide any statement by his own doctor or specialist team member of the gastric bypass operation that he had undergone ?

- Why **Muller's** mother, who injected the contents of the syringe into **Muller**, was not called as a witness, more so because she had *helped her husband* ***Mr Muller (snr)*** *prepare Exhibit G.*

- Why **Muller's** father (**Mr Muller (snr)** did not find out and tell **Muller** specifically what vitamins the pharmacist had prepared for **Muller**, which he had then packaged and sent to **Muller** for him to have injected by his mother **?**

- Why the typed statement – *Exhibit G* - which **Mr Muller (snr)** made with his wife's help and "200% true" was not a sworn statement?

- Why **Mr Muller (snr)** did not make full and proper disclosure in Exhibit G, or at least in his evidence-in-chief, rather than as was partially discovered when he was under cross-examination of,

  - all that transpired concerning the purchases at the pharmacist and afterwards;
  - the pharmacist's name and the pharmacy address and contact details, (which remain unknown),

having regard to the sensitivity any such information, especially with reference to possible threats and unprofessional conduct, having regard to **Muller's** subsequent willingness and commitment at least by way of affidavit to provide substantial assistance to **SAIDS** for a reduction of any applicable period of ineligibility under Article 10.5.3 ?

- Why such typed letter statement was not dated and signed by **Mr Muller (snr)** ?

THE PANEL'S FINDING, relating to the evidence given by **Mr Muller (snr)** and therefore his credibility as a witness, having regard to

- the totality of the evidence given in **Mr Muller snr's** evidence–in-chief, under cross examination and by the other witnesses, as set out in paragraphs 22-29 of this record of the hearing and decision;

- the particularly close "father and son" relationship he had with **Muller,** at least as far as rugby is concerned;

- both **Muller** and **Mr Muller snr** being present throughout the disciplinary hearing proceedings ;

- willingness to do anything he could to support **Muller's** rugby playing career, which included taking the blame in accepting full responsibility for his mistake in rather bizarre circumstances;

- the **Panel** being entitled to draw such inferences - adverse or otherwise - as the **Panel** might concerning any "factual gaps" arising from the questions raised in (h) in dealing with motive .

  Whether these "factual gaps" arose as a result of

  - likely witnesses not having been called;
  - documents or other supporting material not having been produced;
  - lack of capacity, time, financial means, or other resources;
  - tactical decisions or inadvertent omissions by the defence or prosecution,

  the fact that such matters which formed the subject matter of the questions may not been raised, or objected to, by **Pienaar** on behalf of the defence, or by **Kock** on behalf of the **SAIDS,** or any request made to adjourn or postpone the proceedings in order to address these, allowed the **Panel** the latitude to decide upon not giving any weight at all to such "gaps" or failures.

The **Panel's** additional reasons - having regard to the nature of such "gaps" or failures – are that

- it would have been unfair had any inferences which the **Panel** could possibly have been drawn not have been raised and tested within the confines of the hearing itself;
- any such untested inferences would remain purely speculative - based on presumption and not proven;
- even if fairly and correctly drawn these inferences would not have had any impact on the **Panel's** overall findings and decision.

- the clear contradictions and non-disclosures, mentioned in paragraphs 37 and 39 of this record of decision;
- it being unlikely that **Mr Muller Snr,** who was so intensely involved in and committed to the success of his son's rugby career and prepared to do as much as he could to assist in furthering **Muller's** rugby career would intentionally seek to harm his son or sink his very promising rugby career,

is that the **Panel** is obliged to exercise and apply a significant degree of evidentiary caution in considering and accepting **Mr Muller's (snr's)** evidence.

In so doing the **Panel** has determined that it

- accept such of **Muller Snr's** evidence as admissible and of probative value, which
  - was corroborated by the other witnesses being **Muller,** or **Mr Muller snr's** friend Steve Nel;
  - confirmed in Exhibit G,
- not to place any probative value on any evidence which **Muller snr** had
  - failed to disclose in Exhibit G or in his evidence-in-chief , whether this may have been due to intention, inadvertent mistake, or legal advice received - tactical or not, such as the significant " fall out" with and threats made to his long standing pharmacit;
  - contradicted himself, such as that relating to his initial testimony relating to his "above board" purchase of his own mixture under prescription and then the concession that such purchase apparently

"illegal" as it had come from "behind the counter" and no invoice or receipt issued..

(Such matters may well be best dealt with in the affidavit which **Muller snr** has committed to provide under **Muller's** commitment to provide substantial assistance for a possible reduction in sentence under Article 10.5.3 of the Rules.

Muller's evidence

a. This is set out in paragraphs 16/20 – prosecutor's questions for context, 31/34 - *evidence-in-chief, cross-examination and other, including* submissions - 37/39.

b. Both **Mr Muller Snr** and **Muller's** testimony was given in each other's presence and there were no objections raised to this.

c. The **Panel** is satisfied in finding that **Muller** was a very credible witness whose testimony, even as a single witness, was of a significantly high probative value could be relied upon.

d. The **Panel's** reasons for this being that **Muller's** testimony

   - was given in a respecting and forthright manner without any hesitation and inconsistencies;
   - remained uncontroverted under cross examination, although possibly somewhat naive having regard to his "blind" faith and trust in his father, who **Muller** said was 'at fault" for his taking the "illegal stuff";
   - was corroborated by both **Mr Muller Snr** and **Steve Nel** in certain aspects – the packing and delivery of the package by **Steve Nel** and then as regards the vitamins/multivitamins which **Mr Muller Snr** had ordered for delivery to **Muller** and these being **"ok"**
   - *was open and honest – admitting to his strengths and weaknesses;* being aware of the way his father walked after a game as indicative about how he had played and of course the consequences of his being dropped from the squad and losing his Lions contract when the adverse analytical finding was made known.

e. The only aspects of his overall evidence which may have been of concern to the **Panel,** apart from those described in paragraph 45.1.9 which led to the **Panel's** finding **Muller** negligent in 45.1.11 were that

   - although it was evidently proven that **Muller** was feeling drained and exhausted from over training, it was not clear to the **Panel** whether **Muller** may also have been carrying any injury during the Stellenbosch training camp and, if so, just what such injury was.

- the dramatic improvement in **Muller** being able to bench press 30 kgs above what he had previously attained. This based, not only on *prohibited substances which had been injected into his system on* two occasions but also on **Muller** being on holiday, rested and *psychologically motivated to improve.*

f. In the **Panel's** view this was more a result of the interrogatory processes adopted at the hearing not properly clarifying this for all concerned.

Steve Nel's evidence

a. This is set out in paragraph 30 of this record of the hearing and decision.
b. Employed by **Mr Muller Snr**, Steve Nel's testimony was "short and sweet" - simply that he did not know what was in the sealed parcel which he collected from the home of his boos **Mr Muller Snr** and delivered to **Muller** on 20 December 2011.

*The **Panel's** reasons for its finding that **Muller** had established HOW the prohibited substances had entered his system.*

Even though the **Panel** had to consider and thus seek rely on the evidence of single witnesses, concerning

- the possible origin or source of the prohibited substances which had entered his system, itself not a requirement but an indication perhaps (the single testimony of **Mr Muller Snr** regarding the purchase**),**

or

- how such substances actually entered his system - (under **Muller's** own testimony regarding the injecting of the contents of the syringe(s) wrongly set to him)

corroboration and proof to the comfortable satisfaction of the hearing Committee (ie the **Panel)**, which are specific requirements under Article 10.4 of the **Rules,** in dealing with the elimination or reduction of the period of ineligibility for Specified Substances in specified circumstances, are not required under Articles 10.5.1 and 10.5.2 of the **Rules.**

The **Panel** is thus in a position to find - on a balance of probability –

as established from the circumstances and the totality all the admissible evidence *before the* **Panel**, *being that of* **Muller**, **Mr Muller Snr** *and* **Mr Steve Nel,** *whether as* single witnesses to the facts testified about and/or corroborating each other's evidence, such as matter relating to the pharmacist and delivery (as described and assessed in paragraph 45.2.3 above) as well being in line with the submissions made by **Pienaar**, Counsel appearing for **Muller** (paragraph 39 above) -

that it was more likely than not,

(following "the cocaine kissing case" award in

Arbitration CAS 2009/A/1926 International Tennis Federation (ITF) v. Richard Gasquet & CAS 2009/A/1930 World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet, award of 17 December 2009)

that the Prohibited Substances, being

- 17β Hydroxmethyl-17α-methyl-18-nor-androst-1,4,13- triene-3-one and 17α-methyl-5β-androstane-3α,17βdiol, all metabolites of Methandinone; and
- Boldenone and its metabolite 5β-androst-1-en-17 β –ol-3-one

did enter **Muller's** system in the manner described by **Muller**, namely through the two 1.5ml injections given to him by his mother as a former nurse.

THE PANEL FINDS therefore that that Muller has thus satisfied the burden of proof/onus resting on him establishing **how** the Prohibited Substances entered his system.

This follows the decision in

Arbitration CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA), award of 27 May 2003

43. *"Taking into account the Appellant's own statements and those of the experts* Professor Dimitrios Har. Mourtzinis and Dr. Saugy, the Panel is unable to draw a final conclusion regarding the origin of the prohibited substances found in the Appellant's body fluids, but does not exclude the possibility that the injection administered by his coach was the cause."

What remains then is for the Panel to consider and determine the answer to the following question.

45.2.4 **Whether Muller was able to establish that he bears No Significant Fault or Negligence ?**

45.2.4.1 Applicable law & Introduction

Article 10.5.2 of the **Rules** provides for the reduction of any period of ineligibility as follows

If an Athlete or other Person establishes in an individual case that he or she

Bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable.....

The definition of *No Significant Fault* or negligence provides

The *Athlete*'s establishing that their fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation

The comments to Article 5 of the **Rules** read

[Comment to Articles 10.5.1 and 10.5.2

SAIDS Anti-Doping Rules provide for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation.

This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault.

These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation.

Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances:

(a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);
(b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and
(c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates.

(Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)

For purposes of assessing the Athlete or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete or other Person's departure from the expected standard of behaviour. Thus, for example the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.

While minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete or other Person's fault under Article 10.5.2, as well as Articles 10.4 and 10.5.1.

Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.]

45.2.4.2 Precedent

The **Panel** considered, inter alia, the listed CAS – Court for Arbitration in Sport – cases and the advisory opinion in determining its findings and making its formal written decision.

Extracts from the listed CAS decisions which were more relevant and as regards certain aspects "on all fours" with **Muller's** case have been included in Appendix X.

This has been done for completeness and ease of reference purposes.

1. **Arbitration CAS 98/208 N., J., Y., W. / Fédération Internationale de Natation (FINA), award of 22 December 1998***
2. **Arbitration CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA), award of 27 May 2003**

3. **Arbitrage TAS 2007/A/1252 Fédération Internationale de Natation (FINA) c. M. & Fédération Tunisienne de Natation (FTN), sentence du 11 Septembre 2007**

4. **Arbitration CAS ad hoc Division (OG Turin) 06/001 World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBSF) and Zachery Lund, award of 10 February 2006**

5. **Arbitration CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008**

6. **Arbitration CAS 2005/A/847 Hans Knauss v. FIS, award of 20 July 2005**

7. **Arbitration CAS 2005/A/830 S. v. FINA, award of 15 July 2005**

8. **Arbitration CAS 2005/A/918 K. v. FIS, award of 8 December 2005**

9. **Arbitration CAS 2009/A/1926 International Tennis Federation (ITF) v. Richard Gasquet & CAS 2009/A/1930 World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet, award of 17 December 2009**

10. **Arbitration CAS 2009/A/2012 Doping Authority Netherlands v. N., award of 11 June 2010**

11. **Arbitration CAS 2009/A/1870 World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA), award of 21 May 2010**

12. **Advisory opinion CAS 2005/C/976 & 986 Fédération Internationale de Football Association (FIFA) & World Anti-doping Agency (WADA), of 21 April 2006**

45.2.4.3 Principles to be applied

The guiding principles gleaned from such cases and advisory opinion which the **Panel** ought to have considered in determining whether or not there had been significant fault or negligence on the part of **Muller** are.

1. The **Panel** must assess whether **Muller's** fault or negligence was not significant when viewed in the totality of the circumstances of his particular case.

2. The **Panel** ought to weigh the efforts and precautions undertaken by **Muller** in their totality, in determining whether these meet the threshold of *"no significant fault or negligence"* and if they do not, how far short they fall.

3. *The* **Panel** *has to determine the reasons which prevented* Muller in a particular situation from complying with his or her duty of care.
For this purpose, the **Panel** has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the **Muller's** departure from the required conduct under the duty of utmost care was *not significant*, may the **Panel** apply art. 10.5.2 of the Rules and depart from the standard sanction.

4. The **Panel** has the discretion to depart from the standard laid down in reducing any period of ineligibility.

5. Other than as illustrated in the commentary to Article 10.5 "truly exceptional circumstances" have not been defined.

6. The **Panel** is not required to distinguish between whether these circumstances are "objectively" or "subjectively", determined, although it is obvious that these must be *specific* and *relevant* to explain the athlete's departure from the expected standard of behaviour.

7. Anti-Doping Organisations are "waging a war" against those athletes who infringe the rules relating to doping in sport. The **Panel** ought to bear policy in mind ...for.....

> "If an athlete who competes under the influence of a prohibited substance in his body is permitted to exculpate and reinstate himself in competition by merely pleading that he has been made the unwitting victim of his or her physician's (or coaches) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat."

42.2.4.4 ***Panel's*** *Findings - assessment and application of the evidence in line with precedent and guiding principles.*

Having established that **Muller** was negligent (paragraph 45.1.13) the **Panel** gave consideration to whether such negligence in the

totality of the circumstances was significant in relationship to the anti-doping violation.

This was done in accordance with the decided cases and advisory opinion, quoted above in - 45.2.4.2, as well as guiding principles - 45.2.4.3, anti-doping policy, the article written by Olivier Niggli and Julien Sieveking, titled "*Selected Case Law Rendered Under the World Anti-Doping Code*" written for *Jusletter,* as well as other decided cases including those referred to therein.

THE PANEL'S FINDING IS THAT

the **Panel** is satisfied that **Muller** has established on a balance of probability that he did not bear significant fault or negligence in the totality of the circumstances in relationship to the anti-doping violation.

This finding is based on the Panel's finding relating to the credibility and thus reliability of **Muller's** testimony and the corroboration thereof. Such evidence was not disputed and remained uncontroverted throughout the hearing proceedings.

It is also given in spite of there being no evidence at all before the **Panel** that **Muller,** who was on the brink of possible Baby Bok selection, had taken any steps at all - under the duty which existed upon him at the time (as indeed he and all other athletes always have) to exercise utmost caution ie the very highest standard of care, to ensure that no prohibited substance entered his system.

The **Panel** notes in particular in this regard that no evidence was led to establish that **Muller**

- had made or attempted to make contact with, or consult with any doctor – whether his family doctor, the Golden Lions provincial team doctor, or the Baby Bok training squad doctor;

- contacted, or at least attempted to contact any other competent sports medicine practitioner for the purpose of their possibly providing any relevant diagnosis, assistance or advice; or

- made contact or attempted to make contact with any other person other than his father,

for any information which would have assisted in **Muller** being able to discharge the onerous duty of care he faced requiring that he

exercise the *"utmost caution"*, in doing all that he could reasonably be expected of him to ensure that no prohibited substance entered his system, by taking steps to establish and/or verify

- the cause for and diagnosis of the presenting symptoms giving rise to **Muller's** state of fatigue / exhaustion ("oormoeg"), or possible injury (about which only an oblique reference was made and very little other evidence was led or disputed at the hearing);

- whether or not the multi-vitamins/vitamin mixture which **Mr Muller snr** had arranged be delivered to **Muller** would comply with the WADA Prohibited List at least before his mother gave him the two injections with what turned out to be the wrong mixture, meant for **Mr Muller snr**;

- what was in the mixture which had been injected into his system and not simply relying on what the pharmacist had told **Mr Muller snr** would leave **Muller's** system by the time of the next training camp, or within 7 days, as also mentioned in evidence:

  The **Panel's** view is that this ought to have happened immediately after it was realised that something was wrong ("iets fout was") ie. at the time when **Mr Muller snr** observed Muller bench-press 180kgs ie 30 kgs above what he had previously achieved 150kgs, as outlined in paragraph 45.1.12.;

- what he as an athlete, who did not do drugs or take alcohol according to **Mr Muller snr**, ought reasonably to have done in such circumstances.

Although the circumstances appear bizarre, as described by **Muller snr,** it was not disputed by the **Kock** on behalf of the **SAIDS** prosecution that **Muller**

a. had not intentionally taken the prohibited substances which were found to be in system;
b. had asked his father for something, as he was "drained" / 'oormoeg' – fatigued/exhausted;
c. expected to receive a mixture of multivitamins /vitaminB in the syringes which his father had sent to him;
d. had two injections which he expected would restore his energy in time for the next training camp given to him by his mother;
e. was the victim of the mistake which **Muller** held his father responsible for;

This was due to **Mr Muller snr's** failure to ensure that right syringes containing the vitamin mixture meant for **Muller** were delivered to him.

The **Panel** views **Mr Muller snr's** conduct in this regard as being grossly negligent.

f. had just turned 19, a month out of being a minor under South African law;

g. had a very close relationship with his father;

h. trusted and had no reason to doubt his father;

i. did everything his father told him to do;

j. asked his father if what he had sent to him was "Ok" and was told it was "Ok";

k. had no reason to believe that his father would have intentionally caused him any harm, let alone "sink" what appeared to be Muller's promising future rugby career;

l. had been watched and nurtured, as well as assisted in the development and monitoring of his school and rugby playing careers by his father, **Mr Muller snr,** who also seemingly provided support in all aspects relating to his rugby welfare;

m. was pushed and pressured to perform by his father, with **Mr Muller snr** possibly obsessively and excessively zealous in this regard;

n. was not a party to any discussions which his father had with the pharmacist relating to the purchase of either the vitamins/multivitamins for **Muller** and / or the strength building mixture for **Muller Snr;**

o. did not visit the pharmacy or make contact with the pharmacist at the time as he was on holiday in Scottsburgh**;**

p. did not know what his father had ordered from the pharmacist, as initially prescribed according to **Mr Muller snr**, to rebuild his father's strength following the gastric by-pass operation which **Mr Muller snr** had undergone

The comments to Article 10.5 of the **Rules** suggest that the elimination or reduction of sentence, as provided into Articles 10.5.1 and 10.5.2 of the **Rules**, have an impact **only** *in truly exceptional circumstances*.

The **Rules** do not define "exceptional circumstances". The comments, or explanatory notes as the *Niggli and Sieveking* have referred to them, provide limited illustrative positions, some of which are equivocal, as a guide to interpreting what may or may not amount to fault or negligence, or significant fault or negligence.

It is clear that the **Panel** is therefore not limited to or bound by such examples.

The **Panel** reached its findings and decision by applying the more rigorous approach adopted by the panels in some of the decided cases, as supported by *Niggli* and *Sieveking,* under the following two-fold test.

1. Whether, within the circumstances giving rise to **Muller's** negligence such negligence can be considered to fall within the bounds of exceptional circumstances, in order for such negligence to then be considered as possibly not being significant, for the purpose of any reduction in the sanction; and

2. If so, whether such negligence fell to be considered as ordinary negligence – allowing for a possible reduction of up to one half of any period of ineligibility, or as significant negligence – not allowing for any reduction at all, or somewhere in between.

The comments to Article 10.5 of the **Rules** provide that the evidence which ought to be considered for such purposes *must be specific and relevant to explain the Athlete's departure from the expected standard of behaviour.*

The **Panel** is satisfied that **Muller** established on a balance of probability that truly exceptional circumstances did exist.

The following specific and relevant evidence, arising from the **Panel** having considered the evidence covered by the bulleted points a-p outlined above, <u>are the **Panel's** reasons</u> for this.

- The expectation that **Muller** had that he would receive a mixture of multivitamins/ vitaminB to help him regain his energy, not a mixture containing prohibited substances.

- **Mr Mulller snr's** making what the **Panel** views as a grossly negligent mistake in sending **Muller** the wrong mixture.

- **Muller's** very close, respecting and trusting relationship with his father.

- **Muller's** acceptance of and no reason to doubt his father's word. He had asked his father if the mixture was "Ok" and had received his father's assurances that it was "Ok".

- **Muller** having no reason to believe that his father would have intentionally caused him any harm, let alone "sink" what appeared to be **Muller's** very promising future rugby career.

In addition -

- ✓ It being highly unlikely that if **Muller** had indeed asked the pharmacist what he had made up for **Muller** at **Mr Muller snr's**

request, such pharmacist would have given any other reply to **Muller** than that of "multivitamins/VitaminB".

✓ It is not unreasonable, having regard to such circumstances, for **Muller** not to have questioned his father.

The reason for this being that it is highly likely that in the society, cultural and family environment, and given this background in which **Muller** was raised, children - even adult children - would not question their fathers, more especially as **Muller snr** had told **Muller** that the mixture was "Ok".

Panel's Findings - No Significant Fault or Negligence

It follows from the same reasoning- by which the **Panel** was able to find the circumstances as truly exceptional - that the **Panel** was thus able to reach its finding that **Muller** has established on a balance of probability that he did not bear significant fault or negligence in the totality of the circumstances in relationship to the anti-doping violation.

DETERMINATION OF APPROPRIATE SANCTION

In considering the appropriate sanction the **Panel** turned its attention to the following matters..

1. Aggravating Circumstances – Article 10.6

Kock, as prosecutor submitted that a 4 (four) year period of ineligibility, taking the period served under provisional suspension into account, was appropriate, unless **Muller** was able to establish exceptional circumstances as a basis for any reduction of 'sentence'.

The **Panel** accepted **Pienaar's** submissions that **Muller** was able to establish that he had proved to the comfortable satisfaction of the hearing committee (**Panel**) that

- he did not *knowingly commit the anti-doping rule violation;*
- he had *admitted the anti-doping rule violation as asserted promptly after being confronted with the anti-doping violation by the SAIDS Anti-Doping Disciplinary Committee* ie the Panel

The Panel's further finding was thus that there was no basis for increasing any period of ineligibility, as had been determined

under Article 10.2 of the Rules for a first violation, for any aggravating circumstances under Article 10.6.

The **Panel** also noted that the existence of aggravating circumstances had not been specifically presented or directly argued in **Muller's** case.

2. Offer of Substantial Assistance in Discovering or Establishing an Anti-Doping Violations - Article 10.5.3

Mr Muller snr offered to provide the substantial assistance envisaged under Article 10.5.3 towards a possible suspension of of any period of ineligibility which the **Panel** might decide to impose on **Muller**.

Pienaar, in confirming and expanding upon what this offer would involve in terms of an affidavit by **Mr Muller snr** dealing with the pharmacist's conduct, himself offered support through contacts that he had within the SAPS – South African Police Services, especially experienced in entrapment cases.

The offer was accepted, formulated and incorporated into the **Panel's** decision as recorded in the verbal decision, set out in paragraph 40 and as follows.

3. "Setting the bar"

The **Panel** considered how much of the period of ineligibility should be reduced.

This was based on the Panel's evaluation of the degree of **Muller's** negligence, as it "set the bar" for such negligence as falling somewhere between ordinary and significant.

It was noted in particular by the panel in the **Knauss award** that

> *"The higher the threshold is set for applying the rules, the less the opportunity remains for differentiating meaningfully and fairly within the range of the sanction. But the low end of the threshold for the element "no significant fault" must also not be set too low; for otherwise the period of ineligibility of two years laid down in article 2 FIS rules would form the exception rather than the general rule(s) sic"*
>
> **CAS 2005/A/847 Hans Knauss v. FIS, award of 20 July 2005**

By assuring harmony and thus consistency of decision making, by reference to the following decided cases, the Panel was satisfied that the degree of Muller's negligence was fairly set at 50% (fifty per cent allowing for a 6 (six) month reduction in the applicable 2 (two) year period of ineligibility .

CAS 2009/A/1870 WADA v Jessica Hardy & USADA, award 21 May 2010 ; CAS 2005/A/830 S. v. FINA, award of 15 July 2005; CAS 2002 A 385 T v FIG 23 January 2003.

The Panel's decision as regards the appropriate sanction is as follows.

THE PANEL'S DECISION

Mr Gideon Muller, having admitted the anti-doping violation and all the elements thereof, serve an 18 month period of ineligibility commencing from the date of notification of the "AAF" - adverse analytical finding - ie 17 February 2012. Such period to run to 17 August 2013, on the understanding that

1. **time served from the date of notification of the adverse analytical finding on 17 February 2012 be credited to such period;**

2. **6 (six) months of such 18 month period is suspended, on condition that Mr Muller provides substantial assistance to SAIDS (as ADO), the criminal authority or professional disciplinary body, referred to in Article 10.5.3 which results in**

   2.1 SAIDS (as ADO) discovering or establishing an anti-doping violation by another Person,

   or,

   2.2 a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person,

   within 6 (six) months of the date of decision ie by the 19 December 2012."

NOTE: It is understood as a given, but mentioned nevertheless that during such period **Muller**

- is not entitled to participate in any capacity under any other SASCOC affiliated sporting code, other than authorised anti-doping education or rehabilitation programs, in compliance with Article 10.10;
- will be required as a condition of regaining eligibility to make himself available for out-of-competition testing in compliance with Article 10.11.

John Bush	Andy Branfield	Gregory Fredericks
Chairman	Member	Member

16 August 2012

By assuring harmony and thus consistency of decision making, by reference to the following decided cases, the **Panel** was satisfied that the degree of **Muller's** negligence was fairly set at 50% (fifty per cent allowing for a 6 (six) month reduction in the applicable 2 (two) year period of ineligibility .

CAS 2009/A/1870 WADA v Jessica Hardy & USADA, award 21 May 2010 ; CAS 2005/A/830 S. v. FINA, award of 15 July 2005; CAS 2002 A 385 T v FIG 23 January 2003.

The **Panel's** decision as regards the appropriate sanction is as follows.

THE PANEL'S DECISION

Mr Gideon Muller, having admitted the anti-doping violation and all the elements thereof, serve an 18 month period of ineligibility commencing from the date of notification of the "AAF" - adverse analytical finding - ie 17 February 2012. Such period to run to 17 August 2013, on the understanding that

1. **time served from the date of notification of the adverse analytical finding on 17 February 2012 be credited to such period;**

2. **6 (six) months of such 18 month period is suspended, on condition that Mr Muller provides substantial assistance to SAIDS (as ADO), the criminal authority or professional disciplinary body, referred to in Article 10.5.3 which results in**

   2.1 SAIDS (as ADO) discovering or establishing an anti-doping violation by another Person,

   or,

   2.2 a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person,

   within 6 (six) months of the date of decision ie by the 19 December 2012."

NOTE: It is understood as a given, but mentioned nevertheless that during such period **Muller**

- is not entitled to participate in any capacity under any other SASCOC affiliated sporting code, other than authorised anti-doping education or rehabilitation programs, in compliance with Article 10.10;
- will be required as a condition of regaining eligibility to make himself available for out-of-competition testing in compliance with Article 10.11.

John Bush	Andy Branfield	Gregory Fredericks
Chairman	Member	Member

16 August 2012

By assuring harmony and thus consistency of decision making, by reference to the following decided cases, the **Panel** was satisfied that the degree of **Muller's** negligence was fairly set at 50% (fifty per cent allowing for a 6 (six) month reduction in the applicable 2 (two) year period of ineligibility .

CAS 2009/A/1870 WADA v Jessica Hardy & USADA, award 21 May 2010 ; CAS 2005/A/830 S. v. FINA, award of 15 July 2005; CAS 2002 A 385 T v FIG 23 January 2003.

The **Panel's** decision as regards the appropriate sanction is as follows.

THE PANEL'S DECISION

Mr Gideon Muller, having admitted the anti-doping violation and all the elements thereof, serve an 18 month period of ineligibility commencing from the date of notification of the "AAF" - adverse analytical finding - ie 17 February 2012. Such period to run to 17 August 2013, on the understanding that

1. **time served from the date of notification of the adverse analytical finding on 17 February 2012 be credited to such period;**

2. **6 (six) months of such 18 month period is suspended, on condition that Mr Muller provides substantial assistance to SAIDS (as ADO), the criminal authority or professional disciplinary body, referred to in Article 10.5.3 which results in**

   2.1 SAIDS (as ADO) discovering or establishing an anti-doping violation by another Person,

   or,

   2.2 a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person,

   within 6 (six) months of the date of decision ie by the 19 December 2012."

NOTE: It is understood as a given, but mentioned nevertheless that during such period **Muller**

- is not entitled to participate in any capacity under any other SASCOC affiliated sporting code, other than authorised anti-doping education or rehabilitation programs, in compliance with Article 10.10;
- will be required as a condition of regaining eligibility to make himself available for out-of-competition testing in compliance with Article 10.11.

John Bush	Andy Branfield	Gregory Fredericks
Chairman	Member	Member

16 August 2012

APPENDIX X

Extracts of CAS cases and advisory opinion considered by the Panel

Arbitration CAS 98/208 N., J., Y., W. / Fédération Internationale de Natation (FINA), award of 22 December 1998*

1. **The burden of proof lay upon FINA to establish that an offence had been committed. This flows from the language of the doping control provisions as well as general principles of Swiss Law. The presumption of innocence operates in the athlete's favour until FINA discharged that burden. The standard of proof required of FINA is high: less than criminal standard, but more than the ordinary civil standard.**

2. **It is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence under the FINA rules, irrespective of whether or not the competitor intended to ingest the prohibited substance.**

3. **If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden of proof shifts to the competitor to show why the maximum sanction should not be imposed. It is only at the level of sanction, not of finding of innocence or guilt, that the concept of shifting burden becomes relevant at all. And it is only at this juncture that questions of intent become relevant.**

Arbitration CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA), award of 27 May 2003

43. Taking into account the Appellant's own statements and those of the experts Professor Dimitrios Har. Mourtzinis and Dr. Saugy, the Panel is unable to draw a final conclusion regarding the origin of the prohibited substances found in the Appellant's body fluids, but does not exclude the possibility that the injection administered by his coach was the cause. Having said that, however, the Panel takes the position that the Appellant clearly acted with negligence in not specifically queried both his physician and his coach regarding the identity of the substances which were administered to him. As Dr. Saugy stated in his testimony, athletes have been placed on notice that the engesting of food and vitamin supplements carries risk. The Appellant should not have ignored this risk, not only at the time he purchased the illegal substances in an

Athens pharmacy just before leaving for Tunis, but especially when such substances are injected by the coach and not his physician on the eve of a competitive event

44. If an athlete who competes under the influence of a prohibited substance in his body is permitted to exculpate and reinstate himself in competition by merely pleading that he has been made the unwitting victim of his or her physician's (or coaches) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat. It is the trust and reliance of clean athletes in clean sports, not the trust and reliance of athletes in their physicians and coaches which merits the highest priority in the weighing of the issues in the case at hand. If such a defense were permitted in the rules of sport competition, it is clear that the majority of doped athletes will seek refuge in the spurious argument that he or she had no control over the condition of his or her body. At the starting line, a doped athlete remains a doped athlete, regardless of whether he or she has been victimized by his physician or coach.

Arbitrage TAS 2007/A/1252 Fédération Internationale de Natation (FINA) c. M. & Fédération Tunisienne de Natation (FTN), sentence du 11 Septembre 2007

38. *"The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction. In administrative law, the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal. A long series of CAS decisions have developed the principle of proportionality in sport cases. This principle provides that the severity of a sanction must be proportionate to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim.* (...)". (CAS 2005/C/976 & 986, para. 138-139).

Arbitration CAS ad hoc Division (OG Turin) 06/001 World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBSF) and Zachery Lund, award of 10 February 2006

In the light of Mr Lund's acknowledgement of a breach of the USADA Protocol and of the FIBT Doping Control Regulations, WADA submits that USADA should have imposed a two-year period of ineligibility on Mr Lund in accordance with Art. 10.2 of the FIBT Doping Control Regulations.

WADA further submits that the burden rests on Mr Lund to establish either that he bears "No Fault or Negligence" (in which case the period of ineligibility can be eliminated or "No Significant Fault or Negligence" (in which case the period of ineligibility can be reduced).

Under the FIBT Doping Control Regulations, in order to establish "No Fault or Negligence" Mr Lund has to show that he *"did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution"* (emphasis added), that he had used the Prohibited Substance. In order to establish "No Significant Fault Mr Lund has to show that he *"did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution"* (emphasis added), that he had used the Prohibited Substance. In order to establish "No Significant Fault or Negligence", Mr Lund has to show that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence" was not significant in relation to the anti-doping rule violation.

20. The burden on an athlete to establish No Fault or Negligence is placed extremely high. As has been noted above, Mr Lund would have to establish either that he did not know or suspect or that he could not reasonably have known or suspected even with the exercise of utmost caution that he was not using a Prohibited Substance. In the present case, it cannot seriously be argued that an athlete who realized (and has been told by his national federation) that he had to check the Prohibited List each year and who failed to look at the list at all for over a year had exercised the utmost caution, albeit that for several years previously he had scrutinised the list with care. It is his failure to continue to monitor the Prohibited List, in accordance with his duty as an athlete, that has placed Mr Lund in his present predicament.

21. It follows that the period of ineligibility required by the FIBT Doping Control Regulations cannot be eliminated.

22. As CAS Panels have frequently stated and the WADA Code, the FIBT Doping Control Regulations and Annex A to the USADA Protocol expressly provide, it is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Furthermore, athletes are responsible for any Prohibited Substance found in their bodily specimen

23. In these circumstances, the Panel concludes that Mr Lund, on his own admission, an admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility.

24. The Panel arrives at this decision with a heavy heart as it means that Mr Lund will miss the XX Olympic Winter Games. The Panel found Mr Lund to be an honest athlete, who was open and frank about his failures. WADA did not suggest otherwise. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organisations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organisation until his positive test in late 2005.

25. The Panel finds this failure both surprising and disturbing, and is left with the uneasy feeling that Mr Lund was badly served by the anti-doping organisations.

26. However, for the reasons already given, he cannot escape all liability. Art. 10.2 of the FIBT Doping Control Regulations and the WADA Code enable a Panel to take the *"totality of the circumstances"* into account in deciding whether there has been No Significant Fault

or Negligence. The Panel finds that Mr Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduces the period of ineligibility from two years to one year.

27. The one-year period of ineligibility is to start on the date of the positive doping test (10 November 2005). The Panel has chosen that date as it enables Mr Lund, who, as a result of this decision will miss the XX Olympic Winter Games in Turin to begin racing again early next season.

28. WADA asks that all Mr Lund's results after the test should be disqualified. Art. 10.7 of the FIBT Doping Control Regulations provides that such a result should follow *"unless fairness requires otherwise"*. In the Panel's opinion on the facts of this case fairness does require otherwise, and it declines to disqualify those results.

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The Appeal filed by the World Anti-Doping Agency on 2 February 2006 is allowed in part.
2. The USADA Decision made on 22 January 2006 is overruled.
3. Mr Lund's period of ineligibility is for one year commencing on 10 November 2005 and concluding on 9 November 2006.
4. WADA's request for the disqualification of Mr Lund's results after 10 November 2005 is rejected.

Arbitration CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008

1. **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.**

2. **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.**

3. **A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.**

4. **In cases where a final decision finding an anti-doping violation has been rendered prior to 1st January 2009, but the athlete is still serving his/her period of ineligibility, the athlete may apply to the relevant body for reconsideration of the sanction in light of the 2009 WADA Code.**

7. The question the Panel must determine in this appeal is whether P., in the circumstances of this case, demonstrated that she bore No Significant Fault or Negligence, for her admitted doping offence. Therefore establishing the possibility that this Panel might exercise its discretion to reduce the period of ineligibility under TADP Article M.5.2.

8. The TADP and the WADC provide that to benefit from finding of No Significant Fault, the athlete must first meet the condition precedent of establishing how the prohibited substance entered into his or her system. The Panel notes that the ITF accepted P.'s explanation and confirms the first instance tribunal's conclusion. The Appellant has therefore met this first threshold requirement.

9. In order to determine whether a period of ineligibility can be reduced under TADP Article M.5.2, the Panel must assess whether the athlete's fault or negligence was not significant when viewed in the totality of the circumstances of the case.

10. This Panel finds that neither in P.'s written submissions, nor at the hearing before the Panel, did she provide any evidence that she had advised Dr. Neus Tomas of her very strict responsibilities as an athlete and the onerous provisions under the TADP and the Code to which she was subject. Her own testimony during the hearing revealed that she merely asked the doctor if any of the ingredients in the medication would cause her performance to improve. The player did not bring the List of Prohibited Substances with her to the doctor, and she did not indicate that she was subject to random drug testing for a variety of different substances...

13. The Respondent cited a number of cases in support of its position that P. did not demonstrate that she bore no significant fault or negligence in this case. The ITF specifically referred to cases where the athlete was able to establish how the substance entered into his or her system, yet was unable to show that he or she bore no significant fault or negligence in its ingestion in support of such a determination. In CAS OG 04/003, the CAS confirmed that it was not reasonable to accept and ingest a product without having properly examined and investigated the product for prohibited substances; and in *ITF v. Neilsen,* the Anti-Doping Tribunal dismissed the player's plea of No Significant Fault or Negligence, stating that the player *"did not take any steps at all to check whether his medication infringed the anti-doping rules".* Similarly in this circumstance the Panel finds that P. has not demonstrated that she

took any responsibility in verifying that her prescribed medication did not violate the anti-doping regulations of the TADP or the Code.

14. The facts accepted by the Tribunal demonstrate that P. had been a patient of Dr. Neus Tomas for one year, a specialist in nutrition and food science. However, there is no evidence to suggest that the doctor was familiar with the provisions of the TADP or had knowledge of the WADC List of Prohibited Substances. The player testified during the hearing that she asked her doctor who prescribed Ameride, if there were any ingredients in the drug that would improve her performance. She testified that the doctor answered no, that if anything it would have the opposite effect. She further stated that she always sent her mother to pick up her prescriptions at the pharmacy and she always instructed her mother to ask if there were any ingredients in the medication that would cause her to test positive.

15. For any professional athlete, the most rudimentary of actions would have been to query the doctor prescribing the medication as to its composition and whether the substances complied with the Code.

16. P. relies on the argument that her doping violation was unintentional. The player's Appeal Brief directs the Panel to consider the violation's unintentional nature and P.'s lack of awareness as to the constituents of the administered medication, which she argues, reflects her intention to treat her physical ailments, and not to enhance her performance. The Panel is unable to accept these assertions in these circumstances as the basis that P. bore No Significant Fault or Negligence. First, while it is understandable for an athlete to trust his or 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 according to TADP Article M.5.2.

17. Secondly, it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention" as submitted by the Appellant. P.'s fault cannot be considered insignificant given that she did not conduct a thorough investigation into the composition of the drug and did not take even the most elementary of steps and advise her medical professional that she cannot ingest any Prohibited Substances. 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.

18 As such a result is undesirable, the Panel must concur with the Tribunal's finding that *"the player clearly failed to comply with the duty of utmost caution, or to exercise any reasonable level of care to comply with the anti-doping programme"*. In its Decision, the Tribunal listed the following reasons as the basis for declining to reduce the mandatory period of ineligibility:

"She did not give any consideration to whether the prescription medicine might contain a prohibited substance, by checking the constituents of Ameride against the prohibited list, which is available on the internet. She did not make any enquiry of her medical practitioner, nor ask her to check the position by reference to the ITF wallet card. She could not reasonably expect her medical practitioner who is not a specialist in sports medicine, to warn her that Ameride contained prohibited substances. She failed to take advantage of the telephone advice line offered by the ITF. She did not make any enquiry of her national federation or her national anti-doping organisation".

19. In the view of the Panel, based on the Tribunal's above reasons and the Panel's own findings, the particular circumstances of this case do not amount to exceptional circumstances within which P.'s fault can be described as insignificant. The Player had at her disposal several different methods to ensure that the prescribed medication did not infringe on the anti-doping rules, yet she failed to any steps whatsoever. Furthermore, in addition to failing to take any precautions, the Panel further relies on the player's failure to declare that she was taking this medication on her doping control form as support for the finding that P. fault cannot be described as insignificant. The lack of investigation and the non disclosure of the medication on the doping control form were acts that the player could have avoided and are not actions that can illustrate No Significant Fault or Negligence. Taking into account the circumstances of the case and, in particular the Appellant's testimony, the Panel takes the view that the application of the sanctions provided for in the TADP is not disproportionate.

20 Indeed as was evidenced during the hearing, the player appeared truly ignorant of all the readily available resources at her disposal. While this is truly regrettable, the Panel finds that a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent these very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

21. It is therefore the conclusion of this Panel that the decision of the ITF's Independent Anti-Doping Tribunal's was in the circumstances, the correct one, and is upheld by this Panel. The Panel accepts the Tribunals determination that there existed no circumstances in this case that would warrant the elimination or the reduction of the presumptive two year period of ineligibility and upholds the Tribunal's decision and reasons in awarding the sanction.

---

38. To sum up, the Panel concludes that the Appellant did less rather than more than could be expected of him to minimise the risk associated with nutritional supplements about which he was warned, in particular, those originating from a company such as Ultimate Nutrition. If one therefore weighs the efforts and precautions undertaken by the Appellant in their totality, they fall just under the threshold of *"no significant fault or negligence"*. In the light of Article 10.5.2 FIS-Rules, the Panel takes the view that the term of ineligibility could lie even closer to two years than one year and still comply with the principle of proportionality.

Arbitration CAS 2005/A/830 S. v. FINA, award of 15 July 2005

An athlete fails to abide by his/her duty of diligence if, with a simple check, he/she could have realised that the medical product he/she was using contained a prohibited substance, the latter being indicated on the product itself both on the packaging and on the notice of use. Furthermore, it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor or, at the very least, a physiotherapist. However, if it appears that the athlete had no intention whatsoever to gain advantage towards the other competitors, his/her negligence in forgetting to check the content of the medical product can be considered as mild in comparison with an athlete that is using a doping product in order to gain such advantage. Accordingly, although it cannot be considered that the athlete bears no fault or negligence in such a case, it can be held that he/she bears no significant fault or negligence, which opens the door to a reduced sanction.

Substantial elements of the doctrine of proportionality have been implemented in the body of rules and regulations of many national and international sport federations by adopting the World Anti-Doping Code, which provides a mechanism for reducing or eliminating sanctions i.a. in cases of "no fault or negligence" or "no significant fault or negligence" on the part of the suspected athlete. However, the mere adoption of the WADA Code by a respective Federation does not force the conclusion that there is no other possibility for greater or lesser reduction of a sanction.

A mere "uncomfortable feeling" alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction of the sanction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the WADA Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised.

34. In the case at hand, the Appellant certainly established how the prohibited substance entered her system; however she failed to abide by her duty of diligence. With a simple check, she could have realised that the cream was containing a doping agent, as clostebol is indicated on the product itself both on the packaging and on the notice of

use. At least she could have asked her doctor, coach or any other competent person to double-check the contents of the cream bought by her mother.

35. Also the age of the Appellant (at that time 17) does not absolve her from responsibility because the Appellant had been competing for 10 years at that time, and in swimming is not uncommon to have 17-year old athletes compete at the highest level (see also CAS 2003/A/447 *"... age does not fall within the category of „Exceptional Circumstances""*).
36. Furthermore, the Panel is of the view that it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor or, at the very least, a physiotherapist.
37. On this basis, the Panel considers that the Appellant is responsible for what happened. One cannot not reasonably think that she does not bear *no Fault or Negligence* in the sense of article DC 10.5.1. Therefore, the elimination of Period of Ineligibility is not possible.
38. As the Appellant appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage. Accordingly, the Appellant appears to bear *no Significant Fault or Negligence*, in the sense provided for by article DC 10.5.2.

Arbitration CAS 2005/A/918 K. v. FIS, award of 8 December 2005

In the view of the Doping Panel, the Appellant had failed to discharge her "onus of proof" to justify a reduction of the sanction in that she

> *"... has not demonstrated on a balance of probabilities that she did everything that could be reasonably expected of her to avoid the use of or administration of the Prohibited Substance Dexamethason, nor has she established that her negligence can be considered as not being significant".*

The Doping Panel cited the negligence of the Appellant in relying upon the treatment and medication prescribed by her doctor.

> *"All Athletes have position and proactive responsibility and duty of care to ensure that all treatments and medications used by them do not violate the FIS Rules. Ultimate responsibility for what an Athlete puts into his or her body belongs to the Athlete. It is not acceptable, nor is it a defence, to delegate this responsibility to any third party including a physician, coach or trainer".*

The Doping Panel disallowed the Appellant's pleading of ignorance of the FIS-Rules and, without diminishing her responsibility for using the substance, criticized the "conduct" of the Polish Ski Association.

Arbitration CAS 2009/A/1926 International Tennis Federation (ITF) v. Richard Gasquet & CAS 2009/A/1930 World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet, award of 17 December 2009

22. The main issues to be resolved by the CAS Panel are:

A. Has there been an adverse analytical finding with respect to the Player's urine sample?
B. Is the urine sample to be considered as having been taken in or out of competition?
C. If a doping offence has been committed, can the Player prove, considering the required standard of evidence, how the prohibited substance entered his system?
D. If the Player can meet the relevant requirements of evidence to the prior question, was he acting with no fault or negligence or with no significant fault or negligence?
E. In case applicable, what must be the sanction imposed on the Player? Particularly, which duration would a ban on the Player's eligibility need to have, when would such ban start to run, and which results of the Player would have to be disqualified, leading to loss of prize money and ranking points?
May such sanction be reduced due to reasons of proportionality?

Ingestion of substance on a balance of probability

29. In order to determine whether the Player acted with no fault or negligence or with no significant fault or negligence when he was contaminated with the prohibited substance, he first needs to establish how the prohibited substance entered his system. In order to establish whether the Player can prove, at a satisfactory level of probability, how the prohibited substance entered his system, the Panel recalls the provisions providing for the relevant level of evidence, i.e. Art. K.6.2 of the Programme, according to which:
"Where this Programme places the burden of proof upon the Participant alleged to have committed a Doping Offence to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability ...".

30. And furthermore Art. 3.1 of the WADA Code, which provides that:
"Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability ..."

31. In view of these provisions, it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.

Contamination with cocaine through kissing is, from a medical point of view, a possibility in the present case:
"We are agreed that there is no need to postulate any mechanism by which cocaine may have entered Mr Gasquet's body other than an intimate kiss with "Pamela" immediately after she had used cocaine".

In view of all of the above, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. The Panel is satisfied that there is at least a 51% chance of it having occurred. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. With regard to a possible contamination from physical contact with persons other than Pamela at "Set", the Panel emphasises that it is not established with which persons the Player had any physical contact, e.g. by shaking hands, if any, and if these persons were cocaine users. In any case, the closest physical contact the Player had with anyone during the night from 27 to 28 March 2009 was with Pamela, who was, at least at that time, a regular cocaine user

48. The Panel therefore concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion. Therefore, in a next step, the Panel has to consider whether the player acted with no fault or negligence, or with no significant fault or negligence.

Arbitration CAS 2009/A/2012 Doping Authority Netherlands v. N., award of 11 June 2010

Athlete's caution and degree of fault or negligence

27. With regard to the duty of caution required under the applicable rules, the Sole Arbitrator shares the following opinion expressed by other CAS Panels:

"«No fault» means that the athlete has fully complied with the duty of care.

«No significant fault» means that the athlete has not fully complied with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may [...] depart from the standard sanction" (CAS 2005/C/976 & 986; CAS 2007/A/1370 & 1376).

This definition is also in line with the WADC's official comments to Article 10.5.1 and 10.5.2 WADC.

29. In the light of such definition of the athlete's duty of care, even if the Athlete's explanation of how the cocaine metabolite had come into his body were plausible, it seems to the Sole Arbitrator that the Athlete's behaviour was significantly negligent under the circumstances. His departure from the required duty of utmost caution was clearly significant. Indeed, the Athlete did not exercise the slightest caution.

30. From the additional record of the hearing at DAC and the Athlete's brief the Sole Arbitrator concludes that the Athlete deliberately used cocaine, but that the Athlete argues that inhaling the cocaine was a mere incident, an act on an impulse and that *"he was unaware of the possible consequences"*, also because he was *"unaware of the fact that cocaine can even be traced after four days and consequently forgetting the entire*

act". At the day of the match, it did not occur to him that he had sniffed cocaine four days earlier.

31. Although it might have slipped his mind at the day of the match, the Athlete knew that he had consumed cocaine four days before the match on 5 April 2009. Still he did not tell anyone about it, nor had he seen a doctor for advice, nor did he make a comment on the Doping Control Form. He just played the match without thinking that the cocaine might He just played the match without thinking that the cocaine might still be present in his body. Under these circumstances the Athlete knowingly and wilfully accepted the risk that a prohibited substance would still be present in his body at the day of the match.

32. Therefore, the Sole Arbitrator finds that the Athlete's degree of 'fault or negligence, viewed in the totality of the circumstances, is clearly "significant" in relation to the anti-doping rule violation. It follows that Article 41 ISR Doping Regulations also is not applicable.

43. The WADC and the ISR Doping Regulations, considerably restrict the application of the principle of proportionality. Whether an Athlete has never tested positive before in his sporting career is relevant only for determining the applicable range of sanctions as mentioned in Articles 38 and 45 ISR Doping Regulations. The Athlete's age, that he took the prohibited substance unthinkingly and not with the intention to enhance performance, the question of whether taking the cocaine metabolite had a performance-enhancing effect, the (not timely) admission, the admission in public, his unawareness of the traceability of cocaine, the fact that the presence of cocaine in the sample of an Athlete in an out-of-competition control does not constitute a violation of the Doping Regulations or the peculiarities of the particular type of sport, are not – according to the WADC – matters to be weighed when determining the period of ineligibility. The purpose and intention of the WADC is, inter alia, to make the fight against doping more effective by harmonising the legal framework and to provide uniform sanctions to be applied in all sports. These rules, for instance, do not distinguish between amateur or professional athletes, old or young athletes or individual sport or team sport.

Arbitration CAS 2009/A/1870 World Anti-Doping Agency (WADA) v. Jessica Hardy & United States Anti-Doping Agency (USADA), award of 21 May 2010

In the AAA Interim Award, the AAA Panel indicated that it had to determine the following issues:

"(a) Has Respondent [Hardy] met her burden under DC 10.5.2 of proving by a balance of probability how the Prohibited Substance entered her system in order to have the period of Ineligibility reduced? As part of this burden, is it necessary for Respondent [Hardy] to prove that there was a sufficient quantity of the Prohibited Substance in her system to cause the concentration of the Prohibited Substance in her sample # 1517756 ?

(b) Has Respondent [Hardy] established under DC 10.5.2 that her negligence, when viewed in the totality of the circumstances, was not Significant in relation to the anti-doping rule violation? Respondent [Hardy] does not argue that she bore no Fault or Negligence, so the issue in one of the degree of her negligence.

(c) If the Panel finds that Respondent [Hardy] has met her burden of proof under DC 10.5.2, then the Panel is to determine the reduction in the period of Ineligibility.

(d) The effect, if any, of Olympic Charter Rule 45 on the period of Ineligibility".

In light of the evidence submitted, the AAA Panel found that Hardy had met "her burden by a balance of probability in showing the presence of clenbuterol in the AdvoCare Argenine Extreme supplements she was taking prior to her doping control of July 4, 2008" and that she had "no further burden of proof with respect to whether the quantity of clenbuterol shown to be in her contaminated supplements produced the concentration levels of clenbuterol in her Sample #1517756".

The AAA Panel, then, considered the degree of Hardy's negligence to determine, in light of the relevant precedents and for the purposes of the applicable provisions of the FINA DC and of the 2004 World Anti-Doping Code (the "2004 WADC"), whether it *"was Significant, which would negate any possibility of a reduction in the period of Ineligibility, or simply ordinary negligence, which would allow the consideration of a reduction"*, as follows:

"7.22 When considering all of the steps taken by Respondent prior to taking the contaminated supplements, the Panel notes the following:

(a) Respondent had personal conversations with AdvoCare about the supplements" purity prior to taking them.
(b) The AdvoCare web site assured that its products were "formulated with quality ingredients". The association to known steroid enhanced activities such as bodybuilding promoted "natural" bodybuilding rather than „steroidal" bodybuilding.
(c) Respondent was told by AdvoCare that its products were tested by an independent company for purity and its web site confirmed that, though only with respect to one of its products.
(d) Respondent obtained the supplements directly from AdvoCare with whom she had a contractual relationship, not from an unknown source.
(e) The supplements Respondent took were not labelled as „steroidal" or otherwise labelled in a manner which might have raised suspicions.
(f) Respondent took the same supplements for a least eight months prior to her positive doping control result.
(g) Respondent obtained an indemnity from AdvoCare with respect to its products.
(h) Respondent consulted with various swimming personnel, including the team nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products.

7.23 The Panel must look to the totality of the circumstances in evaluating whether Respondent's case is indeed "truly exceptional". None of the CAS cases reviewed by the Panel includes the combination of circumstances listed above. In totality, they do add up to "truly exceptional" circumstances.

7.24 While the Panel declines to find that there was any intention by Respondent to cheat or that she was seeking to enhance her performance inappropriately or in violation of the rules, there is no doubt that Respondent acted with "fault or negligence" in committing an anti-doping violation under the FINA DC Rules. She took a nutritional supplement which was the cause of her positive doping control result. She took supplements in spite

of being aware of the warnings of USADA and despite her hesitation about taking supplements due to the risk of contamination. She does not argue that she was not negligent. The issue is whether her conduct is below the level of Significant Negligence defined in the FINA DC rules. Looking to the Comments in the Code [WADC], the two criteria mentioned there as "illustrations which could result in a reduced sanction based on No Significant Fault or Negligence" are found in this case. Those criteria are: the source of her supplements had no connection to Prohibited Substances and the label of the contaminated supplement did not list the Prohibited Substance".

7.25 *..Because of the totality of the factors listed above, the Panel finds that Respondent"s negligence did not rise to the level of being Significant and thus her period of Ineligibility may be reduced from two years".*

The AAA Panel then concluded that, *"based on the totality of the circumstances in this case"*, Hardy's ineligibility period could be reduced to the maximum possible extent under the applicable rules, and that an ineligibility period of one year was fair and reasonable.

The AAA Panel, however, examined whether such conclusion could be affected by some regulations adopted by the International Olympic Committee (IOC) on 27 June 2008 under Rules 19 and 45 of the Olympic Charter, which, if applied to Hardy, would have caused her to be denied the opportunity to attempt to qualify for, and to compete at, the 2012 Olympic Games.
Indeed, under such regulations (referred to in the AAA Interim Award as "Rule 45" and hereinafter also as the "Olympic Rule" or the "IOC Rule")

> *"1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.*
> *2. These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all international Federations, to all National Olympic Committees and to all Organising Committees for the Olympic Games".*

The AAA Panel remarked that *"the overall effect of the one year period of Ineligibility on Respondent, taking into account the impact of Rule 45, is far in excess of what should be expected when applying the principles of fundamental justice and fairness in the circumstances of this case. The effect of this penalty imposed upon Respondent is first a one year period of Ineligibility (including missing the 2008 Olympic Games for which she qualified) and second, because of Rule 45, no eligibility to compete in the next Olympic Games. This penalty is indeed, in the view of the Panel, evidently grossly disproportionate, under the principles of proportionality. In addition, this penalty is inconsistent with the provision of the FINA DC and the Code [WADC]".*

As a result, the Panel deemed to be *"just and equitable to fashion a remedy that allows Respondent the opportunity to apply to the IOC for a waiver of the*

applicability of Rule 45 in her case" and to retain *"jurisdiction over this case until such time as: a. the IOC has appealed this decision to CAS and the appeal has been initiated under the CAS rules; or b. Respondent has applied to the IOC for a waiver of Rule 45 on or before July 31, 2009 (the date of expiration of Respondent"s one year period of Ineligibility); and the application for a waiver of Rule 45 has been denied by the IOC or the IOC has not responded"*. At the same time, the Panel decided, *"in the event the IOC either does not respond to Respondent"s application or denies the*

(CAS proceedings)

16. The above provisions are applied as rules in force at the time the alleged anti-doping rule violation was committed, under the principle *"tempus regit actum"*. New regulations, in fact, do not apply retroactively to facts that occurred prior to their entry into force, but only for the future (award of 19 October 2000, CAS 2000/A/274, in REEB (ed.), *Digest of CAS Awards II (1998-2000)*, The Hague 2002, p. 389 at 405). This Panel, however, has the power, according to the *"lex mitior"* principle, to apply those rules subsequently entered into force which are more favourable to the athlete (advisory opinion of 5 January 1995, CAS 94/128, in REEB (ed.), *Digest of CAS Awards (1986-1998)*, Bern 1998, p. 477 at 491; award of 23 April 2001, TAS 2001/A/318, in REEB (ed.), *Digest of CAS Awards III (2001-2003)*, The Hague 2004, p. 173). The Panel, however, remarks that no submissions have been filed by the parties referring to the application in this case of the *lex mitior* principle: the rules entered into force after the alleged anti-doping rule violation was committed (the Adverse Analytical Finding refers to a sample collected on 4 July 2008), in fact, do not appear to be more favourable to Hardy than the rules in force on 4 July 2008, which, therefore, this Panel exclusively applies.

32. In light of the parties' submissions and petitions, the questions that the Panel has to examine are the following:
    a) Can Hardy be found to bear *"No Significant Fault or Negligence"* for the anti-doping rule violation she committed?
    b) What is the appropriate length of the suspension to be imposed on her?
    c) Is Hardy entitled to a finding of this Panel as to the impact of the IOC Rule on the measure of the sanction to be imposed on her? Can the sanction be determined taking into account the IOC Rule?

33. The Panel shall consider each of said questions separately.

a. Can Hardy be found to bear "No Significant Fault or Negligence" for the anti-doping rule violation she committed?

34. The AAA Panel found that Hardy, responsible for an anti-doping rule violation, was entitled to the benefits under FINA DC 10.5.2. First, the AAA Panel held that Hardy had established that the prohibited substance had entered into her system as a result of her use of the AdvoCare supplements she was taking. Then, the AAA Panel found the degree of Hardy's negligence to be non significant, considering the totality of the circumstances of the case, defined to be *"truly exceptional"*. As a result, the AAA Panel concluded that the otherwise applicable period of ineligibility could be reduced.

35. WADA disputes such conclusion. While accepting that Hardy had tested positive because of the contaminated food supplements she had ingested, WADA, in fact, submits that the circumstances of Hardy's case are not truly exceptional and that Hardy's negligence must be considered to be significant. In support of this allegation

WADA underlines that, even though Hardy was aware of the explicit warnings against the potential dangers of food supplements, and, as an experienced top-level athlete, she should have been particularly vigilant, she had chosen to trust blindly a sponsor that commercializes nutritional supplements described as enhancing muscle growth, even signing an Endorsement Agreement; that she had failed to conduct further investigations with a doctor or any other reliable specialist, in addition to making direct inquiries with the supplement manufacturer; that she could have realized, by a simple search on the Internet, that the description of the food supplements offered to her was alarming; that she did not have the supplements tested; that the indemnity clause contained in the Endorsement Agreement indicates that Hardy had accepted that her behaviour could be risky.

36. FINA DC 10.5.2 sets two conditions for the reduction of the ineligibility period to be applied on an athlete following the finding of the violation of FINA DC 2.1 (presence of a prohibited substance):

    i. the athlete must establish how the Prohibited Substance entered his or her system;
    ii. the athlete must establish that he or she bears No Significant Fault or Negligence.

37. The Panel notes that the first condition is satisfied. The issue is indeed not even disputed by the parties in this arbitration: the AAA Panel held that Hardy had established that the prohibited substance had entered into her system as a result of her use of the AdvoCare supplements; and WADA accepts that Hardy tested positive because of the contaminated food supplements she had ingested.

38. The dispute between the parties concerns, actually, the satisfaction of the second condition, denied by WADA and affirmed by the First Respondent, who endorses the conclusions of the AAA Panel.

39. The issue whether an athlete's negligence is "significant" has been much discussed in the CAS jurisprudence (e.g., in the cases CAS 2005/A/847, award of 20 July 2005 [the "Knauss Award"]; CAS 2008/A/1489, & CAS 2008/A/1510, award of 30 September 2008 [the "Despres Award"]; CAS 2006/A/1025, award of 12 June 2006; CAS 2005/A/830; CAS 2005/A/951; CAS 2004/A/690; CAS OG 04/003) which offers guidance to this Panel.

40. Two principles are usually underlined with respect to the possibility to find an athlete's negligence to be "non significant": a period of ineligibility can be reduced based on no significant fault or negligence only in cases where the circumstances are truly exceptional and not in the vast majority of cases; for instance, a reduced sanction based on "no significant fault or negligence" can be applied where the athlete establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements (cf. Despres Award, at § 7.4, quoting from the official commentary of the WADC).

41. As a result, a point can be established: the fact that an adverse analytical finding is the result of the use of a contaminated nutritional supplement does not imply *per se* that the athlete's negligence was "significant"; the requirements for the reduction of the sanction under FINA DC 10.5.2 can be met also in such circumstances. It is in fact clear

to this Panel that an athlete can avoid the risks associated with nutritional supplements by simply not taking them; but the use of a nutritional supplement *"purchased from a source with no connection to prohibited substances, where the athlete exercised care in not taking other nutritional supplements"* and the circumstances are *"truly exceptional"*, can give rise to "ordinary" fault or negligence and do not raise to the level of "significant" fault or negligence.

42. The Panel agrees with the AAA Panel that the circumstances of Hardy's case are *"truly exceptional"*: Hardy had personal conversations with AdvoCare about the supplements' purity prior to taking them; Hardy had been told by AdvoCare that its products were tested by an independent company for purity and its website confirmed that, though only with respect to one of its products; the AdvoCare website assured that its products were *"formulated with quality ingredients"*; Hardy had obtained the supplements directly from AdvoCare, not from an unknown source; the supplements Hardy took were not labelled in a manner which might have raised suspicions; Hardy took the same supplements for at least eight months prior to her positive doping control result; Hardy had obtained an indemnity from AdvoCare with respect to its products; Hardy had consulted with various swimming personnel, including the team nutritionist and the USOC sports psychologist, and her coach, about the quality of the AdvoCare products. In other words, Hardy appears to have purchased the supplements which caused the Adverse Analytical Finding from a source unrelated to prohibited substances, and exercised care in not taking other nutritional supplements.

43. The Panel recognizes that Hardy could have taken other conceivable steps. WADA, indeed, indicated in its submissions other actions that Hardy could have taken: for instance, she could have conducted further investigations with a doctor or another reliable specialist; she could have the supplements tested. Those circumstances actually show that Hardy was indeed negligent, also considering that the risks associated with food supplements are well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabeled products were detected and considered in the CAS jurisprudence. The Panel however finds that Hardy has shown good faith efforts *"to leave no reasonable stone unturned"* (Despres Award, § 7.8) before ingesting the AdvoCare products: she made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements.

44. Contrary to the finding of good faith it is not possible, in the Panel's opinion, to invoke the fact that Hardy obtained from AdvoCare an indemnity in the Endorsement Agreement. The Panel finds this clause not to be an indication that Hardy felt the use of the supplements she was endorsing to be risky: it rather constitutes a sign of a reassurance by AdvoCare that its products were safe and that the information and reassurance given by AdvoCare to her were true and reliable.

45. In light of the foregoing, the Panel holds that Hardy can be found to bear "No Significant Fault or Negligence" under FINA DC 10.5.2 for the anti-doping rule violation she committed.

<u>b. What is the appropriate length of the suspension to be imposed on Hardy?</u>

46. Pursuant to FINA DC 10.5.2, if an athlete is found to bear "No Significant Fault or Negligence" for the anti-doping rule violation committed, then *"the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than*

one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years".

47. The Panel finds that, for the determination of the length of the sanction, the degree of negligence is relevant: in deciding the period of ineligibility in a range between one and two years, the Panel has to review the level of the athlete's fault or negligence (Knauss Award, at § 7.3.). In this respect, the AAA Panel, exercising its discretion, decided to reduce the sanction to the maximum possible extent and to declare Hardy ineligible to compete for one year, i.e. for one-half of the two-year period of ineligibility otherwise applicable in accordance with FINA DC 10.2.

48. In general terms, this Panel subscribes to the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4).

49. Whether this principle applies also to the review of awards rendered by AAA panels under the USADA rules can however be left open: AAA panels are admittedly not disciplinary bodies of a sporting federation. The Panel, in fact, in this specific case, and taking in mind the totality of its circumstances, holds the sanction imposed by the AAA Panel to be proportionate to the level of Hardy's negligence.

50. Indeed the Panel finds that, however not in a significant measure, Hardy was negligent: her Adverse Analytical Finding occurred years after that the risks connected to the use of nutritional supplements had first become known to athletes. Much information has been given and stringent warnings have been issued in this respect. As a result, this Panel finds that the level of diligence due by an athlete rose over the years; and the athlete's behaviour should be considered with care, when assessing the measure of the reduction of the sanction he or she should receive. Further, it follows from this that CAS precedents (as any other kind of precedents) have to be reviewed carefully to determine whether or not the standard of care established at that time is still valid today.

51. Notwithstanding the above, the Panel finds that imposing now on Hardy the period of ineligibility requested by WADA would mean on the one hand to apply a sanction too harsh and on the other hand to apply a sanction which does not find a sufficient basis in the rules. WADA itself, recognized the peculiarities of the case. This follows from its requests. To begin with WADA's request that *"Ms Jessica Hardy is sanctioned with a period of suspension of two years, starting on the date on which the CAS award enters into force. Any period of suspension (whether imposed to or voluntarily accepted by Ms Jessica Hardy) before the entry into force of the CAS award shall be credited against the total period of suspension to be served"*. This request, however, is not in line with the applicable rules. According to FINA DC 10.9, in fact, the period of ineligibility starts no later than the hearing date. The hearing date in the sense of FINA DC 10.9 is not the one held by this Panel on 12 March 2010, but the one of the AAA Panel. Any period of ineligibility must, therefore, start at the latest on 1 August 2008. However, WADA is not requesting a two-year period of ineligibility as of 1 August 2008 either. At the hearing, WADA waived its request that the competitive results obtained by Hardy after the end of the period of suspension already served (one year) and before the commencement

of the second year of ineligibility sought should be disqualified. In other words, WADA specified at the hearing that it was seeking a second year of suspension of Hardy, to start on the date of the CAS award, but – as a matter of fairness – no consequences for Hardy between the first and the second year of suspension. Basically this amounts to splitting a two-year period of suspension (foreseen – in principle – by the applicable rules) into two separate one-year periods of ineligibility. As acknowledged by WADA during the hearing, an additional period of ineligibility, starting from the date of this award, would constitute a sort of a (separate) second sanction. The applicable rules, however, do not provide for this.

52. Since this Panel is bound by the Appellant's requests, the requests of the Appellant are not supported by the applicable rules and, in addition, the consequences following from the Appellant's requests appear to be particularly harsh and disproportionate, the Panel concludes that the period of the ineligibility of one year imposed by the AAA Panel is proper under FINA DC 10.5.2 for the anti-doping rule violation committed by Hardy.

c. Is Hardy entitled to a declaratory finding of this Panel as to the impact of the IOC Rule on the measure of the sanction to be imposed on her? Can the sanction be determined taking into account the IOC Rule?

(noteworthy as Ms Hardy is competing in the 2012 London Olympics – but not relevant)

Advisory opinion CAS 2005/C/976 & 986 Fédération Internationale de Football Association (FIFA) & World Antidoping Agency (WADA), 21 April 2006

Degree of Fault which is Relevant to Determine the Duration of the Sanction

72. The WADC is based on the principle of fixed sanctions which will apply in the vast majority of cases, subject to elimination or reduction only under "exceptional circumstances" as indicated by the title of art. 10.5 ("Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances") and the Comment to art. 10.5.2. The Panel notes, however, that the wording of the WADC does not refer to "exceptional circumstances" but uses only the terms "no fault or negligence" and "no significant fault or negligence", which are defined in Appendix 1 of the WADC as follows:

> *"No Fault or Negligence: The Athlete's establishing that he or she did not know or suspect, and could reasonably have known or suspected even with the exercise of* **utmost caution**, *that he or she had Used or been administered the Prohibited Substance or Prohibited Method" (emphasis added).*
>
> *"No Significant Fault or Negligence: The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation".*

73. The WADC imposes on the athlete a *duty of utmost caution* to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national

and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marihuana).

Further case law is likely to continue to identify other situations where there is an increased risk of contamination, and, thus, constantly specify and intensify the athlete's duty of care.

The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition.

However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with.

Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the comment to art. 10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence".

74. It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has *fully complied* with the duty of care. This does not exclude that there may still be a positive finding but such finding will not lead to a sanction other than disqualification.

In the first contaminated supplement-cases, there may have been a valid excuse of the athlete that he had no chance to know about the contamination. Today, however, the risk of contamination is widely known and the anti-doping organizations have issued explicit warnings to use any nutritional supplements without medical advice. An athlete who is still continuing to take nutritional supplements on his or her own account is violating his or her duty of care. Thus, an athlete's attitude which complied with his or her duty of care in the past, may not suffice in the future.

75. "No significant fault" means that the athlete has *not fully complied* with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was *not significant*, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction.

76. The WADC does not define whether these circumstances must be "objective" or "subjective" and the sanctioning body is not required to make such a distinction. It is obvious that these circumstances must be *specific* and *relevant* to explain the athlete's departure from the expected standard behaviour.

77. The reference to "*exceptional* circumstances" in the title of art. 10.5 WADC has in the Panel's view no separate meaning. Whether a specific circumstance is considered "exceptional" or "truly exceptional" is not a pre-requisite for the application of art. 10.5.1 and 10.5.2 of the WADC.

78. Such a construction of Section 10.5.1 and 10.5.2 of the WADC is consistent with the understanding of WADA's Chairman, Mr. Richard W. Pound, as stated by him at the FIFA Centennial Congress on May 21, 2004 in Paris: *"There is a universal view that each doping case has to be considered as an individual case and that all of the facts relevant to that case (such as the circumstances of the athlete the nature and quantity of the substance, and the repetition of offenses) have to be carefully studied before any sanction could be considered. The WADA shares this philosophy entirely".*

79. Accordingly, CAS Panels have taken a similar approach when deciding cases based on anti-doping regulations of organizations which have implemented the WADC.

80. Once an athlete's specific behavior has been identified as a *non-significant* departure from the required duty of utmost care, the sanctioning body must determine the *quantum of the reduction* from the standard sanction. As a consequence, the individual sanction will be fixed within the penalty framework set by the WADC, namely between two years and one year.

81. There is no explicit guidance in the WADC about how the individual quantum shall be measured but CAS case law is already developing principles or criteria to assist in deciding whether the specific quantum of a sanction within the given framework corresponds to the degree of fault of the athlete.
