

**SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)**

**ANTI DOPING DISCIPLINARY HEARING**

**ATHLETE: MR ALBERT LOUBSER**

**SPORTS FEDERATION: WEIGHTLIFTING**

**DATE: THURSDAY 25 OCTOBER 2012**

**PLACE OF HEARING: SAIDS OFFICES, CLAREMONT, CAPE TOWN, SOUTH AFRICA**

**DISCIPLINARY PANEL ("PANEL"): MR ANDREW BREETZKE (CHAIRMAN)**

**DR GEORGE VAN DUGTEREN (MEDICAL REPRESENTATIVE)**

**MR HASNODIEN ISMAIL (SPORTS ADMINISTRATOR)**

**WEIGHTLIFTING: KEVIN DU PLOOY**

**PROSECUTOR: RAHIDIEN CULLIS**

**SCRIBE: MS RAYANAH REZANT**

**ANTI-DOPING RULE VIOLATION: ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.1 OF THE SAIDS ANTI-DOPING RULES.**

## **APPLICABLE LAW**

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

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

## **PROCEDURAL MATTERS**

The matter was initially convened on the 24 July 2012, but the Athlete failed to attend. The matter was postponed to the 25 October 2012. The Athlete again failed to attend, despite being contacted by SAIDS on a number of occasions before the hearing. The Athlete advised that he would not be in attendance, but would be available via telephone.

It is never ideal for a tribunal to proceed in the absence of the Athlete. However, the Athlete was informed of the inquiry date, and given every opportunity to attend. It was his decision not to attend, and to rather give evidence via telephone.

The Athlete was contacted by telephone, and given an opportunity to provide evidence as to his response to the anti-doping allegation. The prosecutor was given an opportunity to cross-examine the Athlete and the Athlete was also given the opportunity to ask any questions. As such, the Panel was able to ensure that despite the absence of the Athlete, the rules of fairness and natural justice were complied with.

## SUMMARY OF EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents as documentary and corroborative evidence to the oral evidence presented.

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 13 September 2012 (initially on the 14 June 2012). The charge against the Athlete read as follows:

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

*On 24 March 2012, you provided a urine sample (2634506) 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 substance identified were Epimetendiol, 17-methy-5-androstane-3, 17-diol, epimethandienone and 6 hydroxymethandienone; all metabolites of the Anabolic Agent, Methandienone. Methandienone is categorised under Class S1 "Anabolic Agents" in specific S1(a) on the World Anti-Doping Code 2012 Prohibited List International Standard.*

The Athlete was advised of the nature of the charge and recognised the seriousness of the process. The Athlete had not requested that his B-Sample be tested and did not dispute the positive test.

The Athlete gave evidence that he had needed to obtain a supplement as he was worried about gaining weight. A friend of his (not a weightlifter) sourced a supplement for him. After testing positive he later discovered that the substance was a steroid – Dianabol. It was a blue heart-shaped pill. The only other substance that he took was an anabolic USN product. He had exchanged some of the USN supplement for the pills. He trusted his friend who had advised him it was not a steroid – he admitted that he was responsible for what he took, but had no intention to cheat. He had felt no better after taking the pills, and of the 20 pills he received he only took 4. The Athlete had no idea where his friend had obtained the pills.

When he was tested, he did not know the name of the pills and had therefore not noted them in the Doping Control Form.

He had only used 4 of the pills after his coach had advised him to stop taking them. He had only realised they were steroids after the positive test, as he then researched the pill on the internet.

Under cross examination the Athlete stated that he did not know much about anti-doping. He asked that he be given another chance as he would not take such a substance again.

Mr Kevin du Plooy gave evidence that the Athlete was in a pool of elite athletes, of whom much was expected. He had competed at a high level, and was on an elite training camp when the test was done. The Athlete had received some education on doping issues.

## **FINDING ON THE CHARGE**

The presence of the prohibited substance identified as *Methandienone* was proven. The Panel has therefore determined that the Athlete is Guilty of the offence as set out, and is in violation of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport.

## **DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION**

Article 2.1.1 of the Rules reads as follows:

*It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*

This Article is the foundation of the strict liability principle that is applicable to anti-doping violations. There is a clear and definitive standard of compliance that all athletes are required to adhere to and it is on this basis that they are held accountable. Ignorance of the

anti-doping provisions and/or prohibited list cannot be accepted as an excuse. The responsibility that rests on the athlete is therefore clear, and the liability that rests on the Athlete *in casu* has been established.

The Athlete has been found guilty of a doping offence in respect of the substance identified as *Methandienone*. *Methandienone* is categorised under Class S1 “*Anabolic Agents*” in specific S1(a) on the World Anti-Doping Code 2012 Prohibited List International Standard.

As such, it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. Article 10.5 reads as follows:

**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.

Article 10.5 sets 2 conditions for the reduction of the ineligibility period to be applied on an athlete following a finding of guilty for the anti-doping violation as set out above:

1. The athlete must establish how the Prohibited Substance entered his system;
2. The athlete must establish that he bears No Fault or Negligence, or No Significant Fault or Negligence.

The key question *in casu*, is whether the Athlete has fulfilled the first condition. For the Athlete to be able to establish that he bears No Fault or Negligence, or No Significant Fault or Negligence, he must first establish how the prohibited substance entered his system.

The Athlete has submitted in evidence that the only probable explanation as to how the prohibited substance entered his system by way of pills that a friend gave to him. The onus is on the Athlete to prove, to the satisfaction of the Panel, how the prohibited substance entered his system. It was not possible to verify this evidence as the friend was not identified, nor gave evidence. However, the Athlete gave specific and detailed evidence as to the pills – advising that he had received 20 pills, and taken 4 of them; he had exchanged some of his USN supplement for the pills, and had later researched the pill once he had tested positive.

The Athlete has been able to prove to the satisfaction of the Panel how the prohibited substance entered his body.

The issue to determine therefore relates to the second condition. The commentary to Articles 10.5.1 and 10.5.2 states that they “*are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*” The Rules provide a definition of *No Fault or Negligence* and *No Significant Fault or Negligence*:

*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.*

From these definitions it is evident that there is a duty of care that rests on the athlete. The onus on an athlete in respect of the application of *No Fault or Negligence* is onerous. It requires that the athlete must have not known or suspected that they had used a prohibited substance, and that the athlete must have exercised utmost caution in his actions. For example, an athlete is required to provide his/her physician with information that he/she is an athlete subject to applicable anti-doping regulations (*ATP v Vlasov 24/4/2005*). There is a heightened duty of diligence and a personal responsibility on the athlete (*CAS 2005/A/830 G.Squizzato v/FINA; ITF v Koubek 18/01/2005*).

To succeed with an argument of *No Significant Fault or Negligence*, all circumstances must be assessed in totality and provide evidence that the fault or negligence was not significant in relationship to the anti-doping rule violation. In such a case the period of ineligibility may be reduced to half of the applicable period. The issue as to whether the negligence of an athlete is significant has been debated in many cases, *CAS 2005/A/847 Knauss v. FIS; CAS 2008/A/1489 CCES & BCS & Despres; CAS 2009/A/1870 WADA v. Hardy & USADA; CAS 2008/A/1565 WADA v. CISM & Turrini; CAS 2006/A/1133 WADA v. Stauber; ITF Doping Tribunal, ITF v. Koubek (2005); IBAF 10-001, IBAF v. Luque*. In the Hardy matter, the athlete had returned an adverse analytical finding after using a contaminated nutritional supplement. She had taken various precautions prior to taking the supplement, including consulting the manufacturer, not purchasing from a third party – she exercised care and was found to bear “No Significant Fault or Negligence”. In *CAS 2008/A/1488 P. v. International*

*Tennis Federation (ITF)*, the court referred to *CAS OG 04/003*, where CAS confirmed that it was not reasonable for an athlete 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 casu* the Athlete has not demonstrated that he took any responsibility in verifying that what he was given did not violate anti-doping regulations. He initially took the pills without any verification.

In conclusion, the position on the discussion of Article 10.5 and its application can be summarised as follows: "No fault or Negligence" means that the athlete has fully complied with the duty of care. "No significant fault or Negligence" means that the athlete has not **fully** complied with his or her duty of care. The Panel has to determine the reasons which prevented the athlete in a particular situation from complying with his duty of care. For this purpose, the Panel 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 Panel may then depart from the standard sanction (*CAS 2005/C/976 & 986, FIFA & WADA; CAS 2007/A/1370 & 1376 FIFA & WADA v/Dodo*).

It is therefore incumbent upon this Panel to review and evaluate the specific and individual circumstances of the Athlete *in casu*.

It is evident that the Athlete is at fault. He has taken a substance, without any consideration of what it may be. As such, Article 10.5.1 is not applicable.

In dealing with the question of *No Significant Fault or Negligence*, the Athlete failed to act in a responsible manner and significant fault and negligence was present. He was not able to present any evidence as to his circumstances for consideration in this regard.

The prosecution argued that the only appropriate sanction was that of 2 years.



In reviewing the above, the Panel has determined that the sanction on the finding of Guilty is as follows:

1. The Athlete is ineligible to participate in any organised sport, club or higher level or as envisaged in Article 10.10 of the Rules, for a period of two years;
2. The period of two years will be effective as of 20 April 2012 (being the date of notification of the adverse finding and implementation of provisional suspension), to terminate on the 19 April 2014;

This done and signed at Cape Town this 5 day of November 2012.



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Mr Andrew Breetzke on behalf of

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Dr George van Dugteren

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Mr Hasnodien Ismail