

**SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)  
ANTI- DOPING DISCIPLINARY HEARING**

<b>ATHLETE</b>	<b>MR L HARMSE</b>
<b>SPORTS FEDERATION</b>	<b>SOUTH AFRICAN NATURAL BODYBUILDING ASSOCIATION</b>
<b>DATE</b>	<b>WEDNESDAY 5 DECEMBER 2012</b>
<b>VENUE</b>	<b>SAIDS OFFICES, CLAREMONT, CAPE TOWN, SOUTH AFRICA</b>
<b>DISCIPLINARY PANEL ('PANEL')</b>	<b>PROF DEBBIE HAMMAN (CHAIRPERSON) DR JASON SUTER (MEDICAL REPRESENTATIVE) PROF ELMARIE TERBLANCHE (SPORT ADMINISTRATOR)</b>
<b>PROSECUTOR</b>	<b>MR RAHIDIEN CULLIS</b>
<b>SCRIBE</b>	<b>MS RAYANAH REZANT</b>
<b>OBSERVER</b>	<b>MR FAHMY GALANT (SAIDS)</b>
<b>ANTI-DOPING RULE VIOLATION</b>	<b>VIOLATION IN TERMS OF ARTICLE 2.1 OF THE SAIDS ANTI-DOPING RULES</b>

## **APPLICABLE LAW**

SAIDS is an independent corporate body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997, as amended ("the Act"). SAIDS formally accepted the World Anti-Doping Code ("WADC"), adopted and implemented in 2003 by the World Anti-Doping Agency ("WADA"), in 2005. SAIDS thereby introduced anti-doping rules and regulations to govern all sports under the jurisdiction of SASCO, the South African Sports Confederation and Olympic Committee as well as any national sport federation.

The SAIDS Anti-Doping Rules ("the Rules") were adopted and implemented in 2009. These proceedings are governed by the Rules.

This SAIDS Anti-Doping Disciplinary Panel ("the Panel") has been appointed in accordance with Article 8 of the Rules, to adjudicate whether the Athlete, Mr Harmse, has violated any of the said Rules, and if so, what the consequences of that violation should be.

## **PROCEDURAL MATTERS**

The Athlete elected not to attend the hearing. No representative from the South African Natural Bodybuilding Association (SANABA), though notified, was in attendance.

## **CHARGE RELATING TO ANTI-DOPING VIOLATION**

The Prosecutor presented a bundle of documents as both documentary and corroborative evidence relating to the charge.

The charge against the Athlete is contained in written correspondence sent to the Athlete dated 16 November 2012. The charge sheet reads as follows:

*You are formally 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 22 September 2012, you provided a urine sample (2634329) during an in-competition test. Upon analysis, the South African Doping Control Laboratory reported the presence of prohibited substances in your urine sample. The substances identified in your sample were:*

- 1 *Metabolites of the Anabolic Agent, Methandienone i.e. Epimetendiol, 17  $\alpha$  - methyl – 5  $\beta$  – androstane – 3  $\alpha$ , 17 $\beta$  – diol, 6 $\beta$  – hydroxymethandienone and 17 – epimethandienone. Methandienone is classified under **Class S1 Anabolic Agents, in specific (a) Exogenous** on the World Anti-Doping Code Prohibited List International Standard;*
- 2 *The Anabolic Agent Dehydrochloromethyltestosterone and its metabolite 6 $\beta$ -hydroxydehydrochloromethyltestosterone. Dehydrochloromethyltestosterone is classified under **Class 1 Anabolic Agents, in specific (a) Exogenous** on the World Anti –Doping Code 2012 Prohibited List International Standard;*
- 3 *The Stimulant, Methylhexanamine. Methylhexanamine is classified under **Class S6 Stimulants, in specific (b) Specified Stimulants**, on the World Anti-Doping Code 2012 Prohibited List International Standard.*

The Athlete declined the opportunity to have his B-Sample tested.

## EVIDENCE

- 1 The **documents** record the following:

That the Athlete, Mr Harmse, is a 24 year old male bodybuilder who competed in the Western Province Bodybuilding Championships on 22 September 2012 in the Senior Novice category when he was tested. It is not clear from the documentation whether Mr Harmse won or earned a minor placing in the competition and whether or not he received points, medals or prizes.

The Prosecutor tendered evidence relating to *inter alia* the Doping Control Form, the Laboratory A-Sample Analysis Report which indicated the presence of the substances contained in the charge sheet and the Chain of Custody Form.

The Athlete declined a B Sample test.

- 2 **The Prosecutor**, with Mr Fahmy Galant providing support for the prosecution, advocated that
  - the SAIDS hearing may legitimately proceed in the athlete's absence (Article 8.4.5);

- Sample A stands on its own (no request for a B Sample analysis);
- there was thus sufficient evidence of a violation of Article 2.1;
- if necessary, an adverse inference may be drawn from the athlete's refusal to attend the hearing, subject to the demonstrated reasonable notice according to Article 3.2.4;
- according to Article 2.1.1 the Athlete is responsible for substances that enter his system;
- the Athlete is guilty of the doping violation as charged;
- the most severe sanction in an anti-doping violation where multiple *Prohibited Substances* are found must be pursued according to Rule 10.7.4. *In casu* a two year period of ineligibility as well as a disqualification of the results in that competition and forfeiture of any prizes, points or medals are the appropriate sanctions;
- it is not recommended that the Panel consider increasing the period of ineligibility under Article 10.6 "aggravating circumstances" as there is no evidence that the Athlete committed the doping violation as part of a doping scheme or used the *Prohibited Substances* on multiple occasions;
- no reduction of the prescribed period of ineligibility in terms of Article 10.5 is possible as the Athlete elected not to appear at the hearing, in essence failing to prove a crucial part of "exceptional circumstances", i.e. **how** the banned substances entered his system (the case of ***UK Anti-Doping Organisation v Mc Dermott*** ,case reference Number 120041, was cited).

3 **Dr Suter** provided a comprehensive explanation of the effects of the three *Prohibited Substances*. According to Dr Suter the appearance of the three *Prohibited Substances* in the Sample A is indicative of the common practice of "stacking" whereby a potent anabolic agent is ingested to produce a muscle mass surge. This is used in combination with a longer acting anabolic agent followed by use of a thermogenic agent to secure the "ripped" appearance of the muscles prior to a competition.

However it is unclear from the available evidence whether all 3 *Prohibited Substances* were ingested using one product or whether they entered the Athlete's system on three separate occasions. The Athlete did not attend the hearing and could not be questioned on this aspect.

## **FINDING ON THE CHARGE**

After a short adjournment for deliberation, the Panel agreed that the presence of the substances identified as the *Prohibited Substances* i.e. *Methandienone*, *Dehydrochloromethyltestosterone* and *Methylhexaneamine* was proven. The Panel has therefore determined that the Athlete is guilty of the anti-doping 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.

## **PANEL DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION AND POSSIBLE REDUCTION**

### **1 THE ANTI – DOPING VIOLATION**

**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 applied to anti-doping violations. All athletes are required to adhere to a clear and definitive standard of compliance. Athletes are held accountable should they fail to adhere to these standards. Strict liability excludes ignorance of the Anti-Doping Rules and /or Prohibited List as an excuse.

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 *Prohibited Substances*, namely *Methandienone*, *Dehydrochloromethyltestosterone* and *Methylhexaneamine* on the World Anti-Doping Code 2012 Prohibited List International Standard.

### **2 SANCTION**

The Panel has therefore determined that the Athlete is guilty of the anti-doping offence as set out and addressed by the Prosecutor. The Athlete has committed

a violation of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug Free Sport.

The only live issue for determination by the Panel was the question of sanction in respect of the proven charge.

## 2.1 MULTIPLE USE OF PROHIBITED SUBSTANCES

**Article 10.7.4** of the Rules directs that where multiple *Prohibited Substances* occur in the sample, the more severe sanction is the most appropriate one.

*In casu*, the Athlete's valid sample showed use of three *Prohibited Substances*, the third one being a *Specified Substance*. A sanction of two years for a first violation is applicable in all three cases.

It could be argued that the potential *reductions* of periods of *Ineligibility* may indicate which the most severe sanction is if all three *Prohibited Substances* carry the same prescribed period of *Ineligibility*, namely two years. These reductions vary between a total elimination (Article 10.5.1), a reduction of half the period of *Ineligibility*, i.e one year (Article 10.5.2) and a possible reprimand and no period of *Ineligibility* (Article 10.4). However for any of these reductions, the Athlete has to prove, on a balance of probabilities, *how* the substance entered his system. *In casu* the Athlete did not appear at the hearing to offer any such explanation so an examination of precisely which sanction is the *most severe* in light of potential reductions is not necessary.

## 2.2 APPROPRIATE SANCTION

The Prosecutor and the Doping Control Manager confirmed that the current anti-doping offence was a first anti-doping violation for the Athlete.

The Panel agreed that the appropriate sanctions are the disqualification of any results the Athlete achieved in the 2012 Western Province Bodybuilding Championships, and forfeiture of prizes, medals and points received as per **Article 9** and **Article 10.1** of the Rules. In addition, the prescribed two year period of *Ineligibility*, as per **Article 10.2**, is applicable to the Athlete unless a reduction in terms of Article 10.5.1 or Article 10.5.2 is justified.

## 2.3 REDUCTION OF SANCTION

The Panel then discussed the possibility of a reduction of the prescribed sanction in terms of **Article 10.5: Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances**.

The grounds for reduction are set out in Articles 10.5.1, 10.5.2 and 10.5.3.

Article 10.5.3 is not applicable as there was no evidence that the Athlete supplied substantial assistance in discovering or establishing anti-doping violations.

### **Article 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.

### **Article 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.

Both Articles 10.5.1 and 10.5.2 set two conditions for the reduction of the *Ineligibility* period applied to an athlete found guilty of an anti-doping violation as set out *supra*:

1. The Athlete must establish how the *Prohibited Substance* entered his system  
and

2. The Athlete must establish that he bears no fault or negligence (for the sanction to be eliminated) or establish no significant fault or negligence on his part (for a reduction of, at most, half the prescribed period of *Ineligibility*).

The onus of proof is on the athlete and the degree of proof for the athlete to satisfy is “on a balance of probabilities” according to the comments on the application of Article 10 (p41 of SAIDS Rules).

In the matter of **CAS 2011/A/2384 UCI v. Alberto Contador**, the court confirmed the legal position that the onus was on the Athlete to prove *how* the substance entered his system. Similarly in **CAS 2006/A/1130 WADA v Stanic and Swiss Olympic Association**, the court stated as follows: “*Obviously this precondition is important and necessary otherwise an athlete’s degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up*”.

In addition, the strict application of the “precondition” (i.e *how* part of the athlete’s onus) has also been confirmed. In the matter **CAS 2006/A/1032 Karatantcheva v. ITF**, the court stated: “*Obviously this precondition to establishing no fault or no significant fault must be applied quite strictly, since if the manner in which a substance entered an athlete’s system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence*”.

*In casu*, the Athlete elected not to attend the hearing, nor did the Athlete submit documentation offering any explanation as to how the *Prohibited Substances* entered his system. The Athlete has not proved how the *Prohibited Substances* entered his system. The Athlete has thus failed to meet the onus of proving the source of the *Prohibited Substance* as required by Article 10.5 (*Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances*). As a result, the degree of fault or negligence on the Athlete’s part is irrelevant since the first condition must be met in order for the Panel to consider the Athlete’s degree of fault or negligence.

These two conditions are cumulative requirements and a reduction can only be considered if the athlete can satisfy both conditions. This is supported by the decision in **UK Anti-Doping Organisation v Mc Dermott (Case ref: 120041)** where the hearing Tribunal found that the Athlete had failed to establish the “threshold showing”, namely, how the *Prohibited Substances* in question had entered his body and proceeded to concluded in paragraph 6.2 that “...the Respondent was unable to rely upon either of Articles 10.5.1 or 10.5.2 for a



reduction of the sanction period and the question of degrees of negligence did not arise on the facts of this case”.

The key question of whether the Athlete, Mr Harmse, has fulfilled the first condition is answered in the negative.

There is therefore no justification for a reduction of the prescribed sanction.

## **2.4 AGGRAVATING CIRCUMSTANCES**

The Panel considered the possibility of the presence of aggravating circumstances which could justify increasing the standard period of *Ineligibility* up to a maximum of four years. **Article 10.6** states that if aggravating circumstances are established, the period of *Ineligibility* shall be increased to four years, unless the Athlete can prove to the comfortable satisfaction of the hearing Committee that he did not knowingly commit the anti-doping rule violation.

Examples of aggravating circumstances which may justify an increase in the sanction include the violation as part of a doping scheme, the Athlete used or possessed multiple *Prohibited Substances*, the Athlete used a *Prohibited Substance* or *Prohibited Method* on multiple occasions, a normal person would enjoy the performance- enhancing effects of the anti-doping violation beyond the otherwise applicable period of *Ineligibility* or where the Athlete engaged in deceptive or obstructive conduct in an attempt to avoid the detection or adjudication of an anti-doping rule violation.

The list of examples is not an exhaustive list.

Dr Suter posited that the Athlete, Mr Harmse, would in all likelihood not benefit from the effects of the three *Prohibited Substances* beyond a period of one year, markedly less than the standard two year sanction.

The Panel conceded that in view of the available evidence, it would be difficult to conclude that any aggravating circumstances have been established.

## **SUMMARY OF APPLICABLE SANCTIONS**

The Panel expressed regret that the Athlete chose not to attend the hearing.

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, which ineligibility includes the coaching of sport;
2. The period of two years will be effective as from 17 October 2012 (being the date of notification of the adverse finding and implementation of provisional suspension), to terminate at midnight on 17 October 2014;
3. The above anti-doping Rule violation occurred during the Western Province Bodybuilding Championships held on 22 September 2012. It is not clear from the documentation whether the Athlete won or secured a minor placing in the bodybuilding competition. If so, the additional sanction of automatic disqualification of the Athlete's results in the aforementioned competition and forfeiture of medals, points and prizes in terms of Article 9 and Article 10.1 is applicable.

This done and signed at Cape Town, December 2012.

A handwritten signature in black ink, appearing to read 'D Hamman', written in a cursive style.

Professor Deborah Hamman (Chairperson)

For and on behalf of the Tribunal Panel

Dr Jason Suter, Professor Elmarie Terblanche