

SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE: MR BRANDON STEWART

SPORTS FEDERATION: CYCLING SOUTH AFRICA ("CSA")

DATE: 24 July 2014

PLACE OF HEARING: HOLIDAY INN, UMHLANGA, DURBAN

DISCIPLINARY PANEL ("PANEL"): **MR ANDREW BREETZKE (CHAIRMAN)**
DR GLENN HAGEMANN (MEDICAL REPRESENTATIVE)
MR RISHI HANSRAJ (SPORTS ADMINISTRATOR)

PROSECUTOR: ADV KOCK, ADV LUBBE

ATHLETE REPRESENTATIVE: MR R WOLFSON

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

INTRODUCTION

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 South African Sports Confederation and Olympic Committee, as well as any national sports federation.

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

PROCEDURAL MATTERS

The Athlete was in attendance, and was represented by Mr Roy Wolfson. A paginated bundle of documents was tabled by SAIDS.

The parties indicated that the only issue in dispute was the sanction of two years, and that the positive test itself was not being contested. It was however, placed on record that the Athlete reserved his right to dispute specific issues that he had previously been unaware of, should these be raised.

Although the onus rested on the Athlete to convince the panel as to a reduction in the two year sanction, it was agreed that the SAIDS witness, Anique Coetzee, would testify first due to her having to fly back to Cape Town.

SUMMARY OF EVIDENCE AND ARGUMENT

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 13 March 2014. The charge against the Athlete read as follows:

You are formally 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 7 July 2013, you provided a urine sample (2725779) during an out-of-competition test. Upon analysis, the South African Doping Control Laboratory reported the presence of a

prohibited substance in your urine sample. The substance identified in your sample was the Anabolic Agent, Testosterone. Testosterone is categorised under Class S1 Anabolic Agents, in specific (6)(a), Non-Specified Stimulants on the World Anti-Doping Code 2013 Prohibited List International Standard.

Anique Coetzee gave evidence in her capacity as an employee of SAIDS. She is responsible for the administration of the Temporary Use Exemption (TUE) applications received by SAIDS. She retrieves the applications, checks them for completeness and submits them to the TUE committee. She has no authority to grant TUE's. In February 2013 the Athlete made contact with Ms Coetzee telephonically informing her that he had made a TUE application through ADAMS on the WADA website. She undertook to check the application for completeness and in doing so, she determined the additional medical information was required. She communicated a few times with the Athlete on that day. Ms Coetzee stated that she had not given the Athlete permission to use the substance for which he was requesting at TUE.

Under cross examination, it was put to Ms Coetzee that the Athlete only contacted her twice – from the doctors surgery on the 21 February 2013 and the next day; this was disputed by Ms Coetzee who recalled a number of conversations. Telephone records provided by the Athlete indicated that there was only one call from his cell phone on the 21 February 2013. Ms Coetzee confirmed under cross examination that she had informed the Athlete that he could not take the medication, and would have to wait until a TUE was granted. This was disputed by the version of the Athlete, who was adamant that Ms Coetzee had confirmed that SAIDS could not prevent him from taking medication, it was his Constitutional right – Ms Coetzee disputed this. He had confirmed this understanding in subsequent emails. It was further put to Ms Coetzee with reference to email correspondence that the Athlete had noted in the emails that he was still participating in events. Ms Coetzee gave evidence that it was not within her capacity/function to advise an athlete on issues relating to being in competition pending a TUE application. The Athlete pointed out that this contradicted her evidence where she had informed him that he could compete once a TUE was issued – as this constituted advice. She could not recall being aware that the Athlete was competing.

The Athlete gave evidence as to his medical problem that ultimately gave rise to the TUE application. He had consulted his general practitioner, Doctor Peter Appelt in September 2012 due to various symptoms – severe fatigue, decreased libido, erectile dysfunction, muscle weakness, radical mood swings. Blood tests were taken, and indicated low testosterone. He was aware that Testosterone was a banned substance, and so he tried a number of natural remedies. By the middle of February 2013, the situation had not improved. It was then that he saw his doctor again, and the

testosterone treatment was recommended. He had received information from Deslyn Pather, the cycling anti-doping whereabouts manager, that he must contact Anique Coetzee at SAIDS as she is the person responsible for TUE applications. His doctor had prescribed Nebido, a slow acting testosterone treatment, advising him he would need four sets of treatment – first 4 weeks apart, and then six week apart. It was then that he phoned SAIDS, as he was on the whereabouts programme, being tested every second week, and expected to receive the correct advice. The Athlete gave evidence that Anique Coetzee was aware of the treatment, and that she stated that it was against his Constitutional right for SAIDS to deny him treatment.

The prescription was given on the 21 February 2013. He had completed the online TUE application with the assistance of his doctor. The Athlete confirmed that he was then informed in writing, that he required a medical report.

The Athlete took the prescription to Alpha Pharm in Hilton, and the testosterone was administered on the 22 February 2013. His next communication from Anique Coetzee was on the 20 April 2013, advising that the TUE had been denied. The Athlete did not accept the decision. During this period, the Athlete had been tested at various events – Cape Epic, Grape Escape, Joberg 2C and SA Marathon Championships, all of which were negative. The positive test came after an out-of-competition test on the 7 July 2013.

The Athlete gave evidence that he had consistently confirmed the statement by Anique Coetzee that his treatment could not be denied, in various emails he had sent to her. Furthermore, on his ADAMS profile it indicated that the TUE application had been submitted. He had also declared his use of Testosterone on the Doping Control Form.

Subsequent to the refusal to grant the TUE, the Athlete went to Dr Baccus, and endocrinologist. She submitted a report to SAIDS. This report confirmed the use of Nebido every 12 weeks.

On the 9 July 2013, the Athlete was informed that his application was finally rejected. From the moment the first application was rejected, the Athlete ceased using the Testosterone,

On the 31 October 2013 he was informed of the positive test. He had phoned SAIDS and spoken to Fahmy Galant who advised that he had no knowledge of the TUE. He had also phoned Nick Kock who had recommended he voluntarily suspend himself from participation. He had been advised by SAIDS to appeal the TUE refusal, and his understanding was that pending this appeal he had not been charged. His appeal could not be upheld, and this decision was given on the 3 March 2014.

Under cross examination the Athlete confirmed that he had been cycling professionally for 15 years, was part of the national testing pool, had been tested on numerous occasions and was aware Testosterone was prohibited – and as such required a TUE. In reviewing the report from Dr Appelt, the Athlete conceded that the doctor had made an error in stating on the 27 February that nothing had been given to enhance testosterone levels, as he had received the treatment a week earlier. Extensive cross examination focused on the issue of Anique Coetzee and her authority relative to the granting of the TUE – the Athlete giving evidence that he was aware that a committee determined the TUE application, but was under the impression that Anique Coetzee could give permission in a retroactive basis. The Athlete, under cross examination, stated that Anique Coetzee did not inform him that she had the authority to grant a TUE.

The medical report of Dr Baccus indicated that prior to consulting with the Athlete on the 29 May 2013, he had been on Nebido for 6 months – this was also highlighted in the TUE Appeal documentation. This was prior to the 21 February date. Under cross examination, the Athlete contended that this was an error by the Doctor, who must have confused the natural treatment he had been receiving prior to February with the Nebido treatment.

The Athlete confirmed that he had assisted riders in his team during the ABSA Cape Epic Race on 27 March 2014. He was aware of the provisional suspension provisions in the initial SAIDs communication of 31 October 2013 (Adverse Analytical Finding) notification, but on subsequent communicating with SAIDs on the issue of the TUE he believed that this charge would not proceed and as such the provision was not to be enforced. He had contacted the organisers and asked if he could act as a team manager; they informed him that as he was under provisional suspension he was not able to act in this capacity. His wife, who was ill at the time, took up the role of team manager whilst he assisted riders. The Athlete did not regard his actions as a breach of his suspension. The Athlete confirmed further that the UCI was investigating his role at the race, and whether he was in fact in breach of the suspension. The position of UCI was that he had signed for the race numbers, and this was a management function that was a breach of the suspension.

In closing, the Athlete argued that he was aware of the status of Testosterone as a prohibited substance; he was aware he required a TUE. He took all the necessary steps to obtain the TUE and was led to believe by SAIDs, that he had a right to continue taking his medication. He relied on the advice of his medical practitioners, and his performance was not enhanced during the period when he was taking the Testosterone. He at no time attempted to hide or conceal his actions, he was open and transparent. In dealing with Article 10.5, it was argued that there was no fault on the part of the Athlete, but at worst he was negligent in that he failed to establish the correct facts. As such,

a one year sentence, taking into consideration the 6 month period already served, would be appropriate. The Athlete also argued that Article 10.5.4 was also relevant, in that the Athlete had voluntarily admitted his use of Testosterone, and he had been subjected to 4 or 5 tests prior to the positive test.

SAIDS argued that the Athlete was in the registered testing pool, and was therefore subject to Article 4.4.2. It was conceded that the Athlete had disclosed his Testosterone use in subsequent races, but the evidence of his medical practitioners contradicted his evidence. There was no basis to argue a reduction in sanction, and as such the two year sanction should be imposed.

FINDING ON THE CHARGE

There are a number of facts that are undisputed in this matter:

- a) The Athlete underwent an out-of-competition drugs test on the 7 July 2013.
- b) The sample, which was recorded as that of the Athlete, tested positive for the presence of Testosterone. The Athlete has not contested the positive test.
- c) Testosterone is a prohibited substance and a non-specified substance under WADA's Prohibited List.

The presence of the prohibited substance identified as *Testosterone* was not disputed. 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 Testosterone. Testosterone is categorised under Class S1 Anabolic Agents on the World Anti-Doping Code 2013 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.

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. Undisputed evidence was presented that the Athlete had taken Nebido, and that this was the source of the Testosterone. He had at all times disclosed the use of Testosterone on his Doping Control Forms. 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; WADA v O'Neil CAS 2008/1/1592*. 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*”.

The defence therefore involves measuring the degree of fault or negligence of the athlete. If the fault or negligence is not significant, then this Panel may reduce the sanction that would otherwise arise by strict liability (*Puerta c ITF (CAS 2006/A/1025)*).

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*.

In reviewing the evidence, it is clear that the Athlete was acutely aware of the fact that he had to apply for a TUE in respect of the Nebido. He made his application online on the 21 February 2013, at the offices of his doctor, when it was prescribed, and on his version received the first treatment the following day. He then contacted Anique Coetzee at SAIDS, and a clear dispute of facts surrounds their interaction. Whilst the Athlete contends that she informed him that medical treatment could not be denied and he could proceed to use it, she denies that she made this statement to him. There are two conflicting versions as to what transpired. The evidence of the Athlete under cross examination changed over the course of questioning: in referring to the TUE Appeal record the Athlete confirmed that he had testified that Anique Coetzee had state that she had the authority to grant the TUE; he later stated that he could not recall whether she had stated that she had authority, and at the end of cross-examination conceded that Anique Coetzee did not have the authority to grant the TUE.

The Athlete is an experienced professional athlete, is in the Registered Testing Pool and has undertaken numerous doping tests. He is therefore under a positive obligation to have detailed knowledge of the anti-doping rules and regulations. He participates in a sport where anti-doping issues are high profile, to the extent that he has access to a designated anti-doping cycling official. He was aware that the TUE could only be granted by the committee and was aware that Anique Coetzee did not have the authority to grant the TUE. In addition, Article 4.4.2 of the Rules requires that he must make the application as soon as possible and no later than 21 days before participation in an event. Furthermore, given the discrepancies in his medical reports as to when he commenced using Nebido, his attention should have been focused on ensuring compliance with the TUE process.

The Athlete gave significant weight in argument to the fact that Anique Coetzee advised him that treatment cannot be withheld and he could continue using the Nebido. This was disputed by SAIDS. However, even if one were to accept the evidence of the Athlete on this point, given the above analysis of his status as an experienced professional rider and member of the registered testing pool,

he should not have accepted this statement without reservation. It is each athlete's personal duty to ensure that no prohibited substances are in his system and this goes to the core of the Strict Liability basis of anti-doping: It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

To succeed with the argument of No Fault or Negligence, the Athlete must prove that he has acted with the utmost care. The Athlete has failed to prove on a balance of probabilities that he acted with the utmost care, and the provisions relating to No Fault or Negligence cannot be considered.

To succeed with the argument of No Significant fault or Negligence, the Athlete must prove on a balance of probabilities that his departure from the required conduct under the duty of utmost care was not significant. In this regard his evidence relating to Anique Coetzee is critical – under cross examination he admitted that he was aware that TUE committee had to approve the TUE, and that she did not have the authority to grant the TUE. Given this evidence, it was incumbent upon him to ensure that he did not use Nebido until such time as the TUE was granted – despite this he immediately commenced using Nebido almost simultaneously with the online submission of the TUE application. Furthermore, on the version of the Athlete both his doctors made errors in recording when he commenced using the Nebido – to the extent that the TUE Appeal hearing regarded his application as a retroactive application. If the Athlete was aware that a TUE Committee was the body authorised to grant or deny the TUE, why did he proceed to use the Nebido immediately, before a decision had been made? Again, we refer back to his status as a senior professional athlete, member of the national testing pool, experienced in anti-doping matters – given the consequences of a potential adverse analytical finding; the actions of the Athlete were a significant departure from the required duty of utmost care.

The panel is therefore unable to reduce the sanction on the grounds of no significant fault or negligence.

SANCTION

The sanction on the finding of Guilty is as follows:

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;

EFFECTIVE PERIOD

Article 10.9.5 provides that 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.

Evidence was led as to the involvement of the Athlete in the ABSA Cape Epic Cycle Race that took place on the 27 March 2014. On being notified of the Adverse Analytical Finding on the 31 October 2013, the Athlete was also informed that he was provisionally suspended from competing or participating in any organised sport under Article 10.10. He presented evidence that he then contacted SAIDS to question his TUE status, and was under the impression that SAIDS would not proceed with the charge until this was finalised – and as such that the provisional suspension was not relevant. He also contacted the Cape Epic organisers with a request that he be permitted to assist with management of his team – they informed him that he was provisionally suspended and could not do so. In so far as there may have been confusion as to his status subsequent to the receipt of the 31 October 2013 notification, there should have been no confusion once the formal charge was presented to the Athlete on the 13 March 2014, which was before the Cape Epic event. He was therefore provisionally suspended at the time of the race.

The question then is: did his actions constitute participation in any capacity? The phrase “participating in any capacity” in the Rules prevents a suspended athlete taking part in various activities, and not just “playing” sport (*Drug Free Sport New Zealand v Jared Noho, ST/01/13*). The signing for the receipt of race numbers would in the normal course of events be an activity undertaken by team management, and as such would fall within the scope of “participation”.

It has therefore been established that there is a violation of the provisional suspension. Once the Athlete had received the Anti-Doping Rule Violation charge, he should have ensured that he was aware of what actions would constitute “participation”. Had he done so, he would have been aware

that the signing for team numbers would constitute a management duty, and he is unable to show that there was no significant fault or negligence in this regard.

The period of Ineligibility shall therefore commence on the 27 March 2014, and terminate on the 26 March 2016.

The Athlete is reminded of his right to Appeal this finding in accordance with the provisions of the Rules.

This done and signed at Cape Town this 8 day of August 2014

A handwritten signature in black ink, appearing to be 'A. Breetzke', with a long horizontal line extending to the right.

Andrew Breetzke

Chairperson

On behalf of Dr Glenn Hagemann, Mr Rishi Hansraj.