

SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE: MR DARYL IMPEY

SPORTS FEDERATION: CYCLING SOUTH AFRICA ("CSA")

DATE: 28 AUGUST 2014

PLACE OF HEARING: WEBBER WENTZEL, 10 FRICKER ROAD, ISANDO,
JOHANNESBURG

DISCIPLINARY PANEL ("PANEL"): MR ANDREW BREETZKE (CHAIRMAN)
DR SELLO MOTAUNG (MEDICAL REPRESENTATIVE)
MR MANDLA TSHABALALA (LEGAL)
Mr LEON FLEISER (SPORTS ADMINISTRATOR)

PROSECUTOR: ADV J LUBBE SC

ATHLETE REPRESENTATIVE: ADV I MILTZ SC instructed by Mr Christopher Kok of
Webber Wentzel Attorneys

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 (“the 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 Adv I Miltz SC, instructed by Mr Christopher Kok of Webber Wentzel Attorneys. SAIDS were represented by Adv J Lubbe SC.

Prior to the commencement of proceedings, the Panel was presented with a bundle of documents. The documents, and the content thereof, were agreed between the parties – the facts as set out in the documentation were therefore common cause.

There was no issue in dispute, and the Panel was required to determine the appropriate sanction relative to the evidence and argument presented.

THE CHARGE

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 19 August 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 6 February 2014, you provided a urine sample (2822522) during an in-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 Diuretic, Probenecid. Probenecid is categorised under Class S5 Diuretics and Other Masking Agents on the World Anti-Doping Code 2013 Prohibited List International Standard.

FINDING ON THE CHARGE

The presence of the prohibited substance identified as *Probenecid* was not disputed by the Athlete. 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.

EVIDENCE AND ARGUMENT AS TO SANCTION

Evidence was presented by way of a bundle of documents, containing a number of witness statements. As stated, there was therefore no dispute on the facts as presented. The salient facts are as follows:

1. The Athlete has been a professional cyclist since 2003, and he currently rides for the Orica GreenEdge Cycling team. His contract with the team sets out severe penalties for any breach of anti-doping rules and he has willingly submitted to the team's internal anti-doping controls.
2. The Athlete has never missed a doping control test, never been issued with a warning, and is part of the UCI's biological passport programme. During his career he has been subjected to at least 35 out-of-competition blood and urine tests and has been tested at races at least 5 times a year. Save for the positive test in question, he has never before returned an adverse analytical finding.
3. The Athlete is acutely aware of the dangers of inadvertent doping, and does not take supplements unless they have been checked with his team doctor. The Athletes

caution in this regard, was evidenced by a series of emails in December 2011, where he engaged with SAIDS on the use of Salbutamol, and the possibility that he may be required to apply for a Therapeutic Use Exemption for the medication.

4. The test in question took place at the South African Road Cycling Championship in Durban, between 4 and 9 February 2014.
5. Prior to the time trial event of the 6 February 2014, the Athlete prepared capsules of sodium bicarbonate. In taking the sodium bicarbonate, the Athlete fills empty gelatin capsules so as to avoid the taste of the sodium.
6. As he had no gelatin capsules, the Athlete went to a pharmacy in Durban¹ to purchase empty capsules. The pharmacy informed him on the 5 February 2014 that they did not have stock of the capsules, and that after sourcing the capsules they would contact him. Later the same day, he received confirmation that he could collect the capsules. The Athlete attended at the pharmacy between 16h45 and 18h00 and watched the pharmacist dispense 20 gelatin capsules using a pill-counter in the dispensary.
7. On the evening of the 5 February 2014 the Athlete dispensed the sodium bicarbonate into the capsules.
8. On the morning of the 6 February 2014 (day of the time trial) the Athlete consumed the gelatin capsules containing the sodium bicarbonate in accordance with team instructions.
9. The Athlete won the time trial event.
10. The Athlete was informed of the adverse analytical finding on the 23 June 2014 by Mr William Newman (CSA). He was in Spain at the time, and returned to South

¹ Although the identity of the pharmacy and the pharmacist were disclosed to the Panel, the evidence was provided on condition that the said identity was not disclosed in the public finding.

Africa in an attempt to resolve what he believed was a mistake. He requested an analysis of his B-sample.

11. In an attempt to determine how the substance had entered his system, the Athlete spent considerable time retracing his steps and activities.
12. In undertaking this process, the Athlete found out that tablets containing probenecid had been dispensed by the pharmacy where he had purchased his gelatin capsules, and that it was these tablets that had contaminated the gelatin capsules.
13. The positive test had placed the Athlete under considerable strain, and resulted in significant financial loss due to him missing the Tour de France as well as the Tour of Spain.

The witness statement of the owner of the pharmacy in Durban set out the events of the 5 February 2014. The key evidence being as follows:

1. On the 5 February 2014 at 14h59, the relief pharmacist dispensed 60 Proben tablets (500mg) (of which probenecid is the active ingredient) to a customer on a repeat prescription for a chronic condition. A copy of the tax invoice confirming the purchase was presented. The medication was not dispensed to the Athlete.
2. The bottle of Proben was emptied into the pill counter, and 60 tablets were dispensed for the customer. Photographs of the pill counter were presented.
3. Approximately 2 hours later, the Athlete attended at the pharmacy to collect his gelatin capsules.
4. These capsules were dispensed by the relief pharmacist utilising the same pill counter that had been used to dispense the gelatin capsules.

5. The pharmacist stated that it was possible that the gelatin capsules were contaminated by the left-over residue of the Proben tablets, especially given that these tablets were powder-coated.
6. The standard operating procedures of the pharmacy dictate that the pill-counter be cleaned with cotton wool and a brush prior to every act of dispensing; he was not certain if this had been done.
7. Proben had previously been dispensed to the same customer on the 12 January 2014.

A witness statement was presented in respect of a pharmacist, Ms Franciska Jordaan, who undertook a mock dispensing of Proben tablets in a pill counter. Her statement confirmed that a white residue was clearly visible on the pill counter. In her opinion, it was quite probable that the gelatin capsules could have been contaminated by the residual Proben powder, even if the pill counter had been cleaned. Photographs of the pill counter with a clear white residue were presented.

A pharmacokinetic evaluation report was presented on probenecid in the urine of a cyclist, prepared by Dr Jolanta Piszczek, a Clinical Pharmacy Specialist in Infectious Diseases and Antimicrobial Stewardship for the Vancouver Island Health Authority. The report was prepared on request of the legal representative of the Athlete. Dr Piszczek responded to a number of specific queries:

1. What is the difference between coated and uncoated tablets?

Many tablets are coated after being pressed. The reason for this is to ensure the tablet survives handling, disguise unpleasant smells etc. Uncoated tablets have no further treatment after compression and can suffer from chipping, shedding, abrasion and breakage.

2. Are probenecid tablets coated or uncoated?

Probenecid tablets are often coated, although certain manufacturers still produce uncoated tablets. The tablets in question were uncoated.

3. Can cross-contamination of medicines occur in a pharmacy?

Cross contamination occurs where elements or fragments of one substance are inadvertently transferred to another substance or surface.

4. Is it possible that the probenecid detected in the Athlete's sample originated from cross-contamination of the gelatin capsules during the pill counting process?

Yes, this is possible.

5. The statement of Dr Piszczek dealt extensively with the issue as to whether the probenecid detected in the Athlete's sample originated from the cross-contamination of the gelatine capsules during the pill-counting process. By taking into consideration the physical characteristics of the Athlete and the pharmacological characteristics of probenecid, a likely dosage of 2.54mg of probenecid would return a finding in line with that of the Athlete's sample. Given that the amount of probenecid residue left on a standard pill-counter following the counting process can be between 5-10mg for 30 Proben tablets, it is entirely possible that the probenecid detected in the sample of the Athlete originated from contaminated gelatine capsules.

A report from Dr Michael Schachter (Senior Lecturer in Clinical Pharmacology at the Faculty of Medicine, Imperial College, London) was submitted. Dr Schachter stated that in his opinion the very low concentration of probenecid detected in the sample of the Athlete could have resulted in the consumption of as little as 1mg to 5mg of residue – such levels falling well within the range that one would consider being contaminant-level. Furthermore, these levels would be consistent with the low levels of probenecid in the Athlete's system.

A review of the Athlete's Biological Passport Data was provided by Paul Scott (President and Chief Science Officer of Scott Analytics INC), in which Mr Scott confirmed that there was no evidence of blood manipulation in the profile of the Athlete.

In conclusion, the bundle contained a polygraph test (undertaken by CSI Africa, Private Forensic Investigation), which indicated that the Athlete was truthful in denying that he had “knowingly” ingested probenecid.

The evidence as presented by the Athlete was not contested by SAIDS. Adv Lubbe confirmed that SAIDS had undertaken their own investigations into the matter, which included an investigation by an independent expert and on the basis of these investigations were able to agree to the evidence as presented by the Athlete. Adv Lubbe submitted that it was the duty of SAIDS to vigorously pursue anti-doping rule violations within its jurisdiction, but that in doing so it must also act fairly towards the Athlete.

Advocate Miltz argued that on the basis of the evidence as agreed, that the Sanction on the finding of Guilty should be that there was No Fault or Negligence on the part of the Athlete, as envisaged in Article 10.5.1 or in the alternative, that a reprimand would be appropriate in terms of Article 10.4 (*Elimination of Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*).

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 probenecid. The Athlete has argued that there are exceptional circumstances which justify the elimination of the period of ineligibility as set out in article 10.5.1

As such, it is for the Panel to determine the appropriate sanction given the evidence and argument as presented. 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.

Article 10.5 sets 2 conditions for the elimination 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

For the Athlete to be able to establish that he bears No Fault or Negligence, he must first establish on a balance of probabilities how the prohibited substance entered his system. Undisputed evidence was presented by way of witness statements in this regard:

1. The Athlete had purchased gelatin capsules from a pharmacy in Durban;
2. The pharmacist confirmed that two hours earlier the pharmacy had dispensed Proben tablets to a customer, which tablets were dispensed from the same pill-dispenser later used to dispense the gelatin capsules;
3. A statement by Franciska Jordaan (pharmacist) confirmed that gelatin capsules could be contaminated by Proben residue on the pill-counter;
4. Dr Jolanta Piszczek (Clinical Pharmacy Specialist) reviewed the volume of probenecid in the sample of the Athlete relative to the possibility that the volume was as a result of cross-contamination, and concluded that it was entirely possible that the probenecid detected in the urine sample was due to gelatin capsules contaminated with Proben residue during the counting process;
5. Dr Michael Schachter (Senior Lecturer in Clinical Pharmacology) confirmed that it was possible that residue of probenecid on the pill-counter could have bound itself to the gelatin capsules, and this would be consistent with the low levels of probenecid in the Athlete's system.

In reviewing the evidence as presented, the Panel is satisfied that the Athlete has fulfilled the first requirement of establishing how the Prohibited Substance entered his system.

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*:

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.

From this definition 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*).

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.

As stated, the onus on the Athlete to succeed with an argument of No Fault or Negligence is difficult, and there are a limited number of cases where this argument has succeeded. In such a case the circumstances giving rise to the adverse analytical finding must be truly exceptional. In the matter of *International Tennis Federation v Gasquet (CAS 2009/1/1930)*, the Athlete ingested a small quantity of cocaine from kissing a stranger. It was held that he could not reasonably have suspected that he could be contaminated in this matter – the player had therefore acted with no fault or negligence. In the matter of *Adams v Canadian Centre for Ethics in Sport CAS 2007/A/1312*, the athlete was held to bear no fault or negligence as an unknown woman had placed cocaine on his lips while he pretended to be sleeping at a bar. In a South Africa context, a parallel can be drawn with the matter of *SARU and Chiliboy Ralepelle, Bjorn Basson (27 January 2011)* where the athletes tested positive for Methylhexanamine after imbibing a contaminated supplement supplied to them by team management. The supplement had been tested by team

management prior to it being given to the athletes, the contamination was not detected. This was found by the panel to constitute exceptional circumstances.

With reference to the substance probenecid, in the recent matter of ***Canadian Centre For Ethics in Sport (CCES) and Alec Page (July 2014)***, the athlete was given a one-month suspension for an anti-doping rule violation for the presence of probenecid. The degree of fault for the violation was regarded as being “low”.

Of more value to the discussion is the matter of ***Drug Free Sport New Zealand v Tom Wallace (ST 15/08)***. The Athlete tested positive for probenecid which he had been prescribed by his doctor. In dismissing the argument of the athlete that it was a matter of “no fault or negligence” the panel stated:

“It is only in exceptional circumstances that a finding of no fault can be made. The tribunal regrets that it cannot make such a finding in this case because there were two steps which could and should have been taken.”

The panel held that the athlete should have requested his doctor to determine whether probenecid was prohibited; and such a determination would have led to a second step which would have been a possible therapeutic exemption application. This could not be seen to be exceptional circumstances, and as such fault was present. It is therefore clear that where the athlete had alternative options available to him, which may have prevented the taking of a contaminated/prohibited substance, the presence of these options excludes the argument of exceptional circumstances.

The ***CAS 2005/C/976 & 986 FIFA & WADA Advisory Opinion (pgs 20-30)***, provides a discussion on the issue of the degree of fault relevant to determine the duration of the sanction:

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 that 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 marijuana). ...

*The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interests 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. (emphasis added)*

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

Do the facts as set out constitute exceptional circumstances, or were there steps that could have been taken by the Athlete? An important starting point in answering this question is to determine whether a gelatin capsule is a supplement or not.

SAIDS define 'Sports Supplements' as *sources of nutrients and/or other substances, marketed and sold as such in the field of amateur and/or professional sport, with a nutritional or physiological effect whose purpose it is to supplement the normal diet, directly or indirectly alter / enhance body composition, enhance sporting performance, and/or assist with recovery following sporting activity. (Position Statement of the South African Institute of Drug Free Sport (SAIDS) on the use of supplements in sport in ADULTS Compiled by Dr. Amanda Claassen, RD, Exercise Scientist, PhD)*

A supplement is therefore a "source of nutrients and/or other substances" and as such the gelatin capsule cannot be regarded as a supplement or any other type of dietary substance – it is merely a small shell of gelatin that is used to enclose medications and supplements.

This is an important fact as it is accepted that a contaminated supplement in itself would not constitute a basis for arguing no fault or negligence. Furthermore, this fact distinguishes this case from that of ***SARU and Chiliboy Ralepelle, Bjorn Basson***, as that case did involve a contaminated supplement.

Evidence was presented as to the Athletes knowledge of doping, extensive commitment to anti-doping, tests undertaken and his written undertakings to comply with anti-doping codes. He has acted with due care in anti-doping matters. It is the opinion of the Panel that to have expected the Athlete to have considered the possibility that the gelatin capsules were contaminated with a prohibited substance would constitute an unrealistic and impractical expectation on the Athlete. The circumstances that led to the contamination of the gelatin capsules, which gave rise to the adverse analytical finding, do constitute exceptional circumstances. The Athlete *did not know or suspect, and could not reasonably have known or suspected* that the gelatin capsules were contaminated.

The Panel therefore comes to the conclusion that the Athlete acted without fault or negligence as defined in the rules.

SANCTION

The sanction on the finding of Guilty is as follows:

1. The Panel determined that in terms of Article 10.5.1 of the Rules, the Athlete was able to prove that he bore no fault or negligence due to exceptional circumstances, and as such the applicable period of ineligibility is therefore eliminated.
2. The Panel confirms further that the provisional suspension placed on the Athlete, is also lifted.
3. The Athlete has been found Guilty of the offence as set out, and is in violation of Article 2.1 of the Rules. The guilty finding relates to the in-competition test that took place at

the South African Road Cycling Championships between 4 and 9 February 2014. In terms of Article 9 of the Rules, the results attained by the Athlete at the South African Road Cycling Championships are disqualified, including forfeiture of any medals, points and prizes.

4. On the grounds of fairness, Article 10.8 (Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Violation) will not be applicable to the Athlete.

This done and signed at Cape Town this 16 day of September 2014



Andrew Breetzke

Chairperson

On behalf of Dr Sello Motaung, Mr Mandla Tshabalala, Mr Leon Fleiser.