

RECORD OF DECISION

of

THE SOUTH AFRICAN INSTITUTE OF DRUG FREE SPORT "SAIDS"

ANTI-DOPING DISCIPLINARY

HEARING COMMITTEE

comprising of

John Bush	lawyer member and chairperson
Nicolas Theron	doctor member
Johan Volsteedt	administrator member

In the matter between

SAIDS

and

Joseph Mphuthi

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

In the matter of

JOSEPH MPHUTHI

A. INTRODUCTION – BACKGROUND & CONTEXT

1. Joseph Mphuthi (“Mphuthi”) competed in and completed the Loskop Marathon on 12 April 2014.
2. On that day Mphuthi, chaperoned by Christina G Classens, provided an in-competition urine sample during a sample collection process which commenced at 8:51 and was conducted by Robert Phiri, the doping control officer appointed by the South African Institute for Drug Free Sport, (“SAIDS”).
2. The Doping Control Form 5502 issued under Test Mission Code 04/14 reveals that Mphuthi was 38 years of age having been born on 4 October 1976 and lived at 5662 Phomolong (Township) in Frankfort (Free State).
3. The urine sample, sample number 2822518M, provided by Mphuthi was subsequently tested for substances on the World Anti Doping Agency “WADA” 2014 Prohibited List at the South African Doping Control Laboratory, “SADoCoL”, which issued an analytical report dated 17 February 2015 to SAIDS.
4. The report nr 17021501 provided that the A sample analysis was found to contain 19-norandrosterone & 19-noretiocholanolone, both metabolites and/or precursors of the anabolic agent Nandrolone. The concentration of norandrosterone was >15ng/l. This is greater than the WADA decision limit of 2.5ng/l.
5. SAIDS issued a notification of the adverse analytical finding (“AAF”) to Mphuthi by letter addressed to him dated 12 March 2015.
6. The notice informed Mphuthi that
 - 6.1 such finding amounted to a breach of Article 2.1 - “presence of a Prohibited Substance or its metabolites or Markers in a Player’s sample” - of the SAIDS Anti-Doping Rules
 - 6.2 the possible consequence for a first violation was two year period of ineligibility.
7. The notification also provided, inter alia, that Mphuthi
 - 7.1 had the right to respond to the assertion that an anti-doping rule had been violated through a written submission to SAIDS by 18 March 2015;
 - 7.2 was entitled to have his “B” sample analysed;
 - 7.3 face a disciplinary hearing if he did not waive his right to such a hearing under Article 8.3.4.

8. Mphuthi chose to have his B-sample analysed and was present when this occurred.
9. The test report nr 26031501 issued by SADOCoL for such analysis of sample number B2822518(M), confirmed the results of the analysis for Mphuthi's A sample. SAIDS provided this report to Mphuthi under cover of a SAIDS letter dated 26 March 2015..
10. It was thus that on 8 July 2015 that the disciplinary hearing into the following charge against Mphuthi as contained in SAIDS' letter to him dated 19 June 2015 was duly arranged.

B. THE CHARGE

"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 the 12 April you provided a urine sample (2822518) 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 19-norandrosterone & 19-noretiocholanolone, metabolites and/or precursors of the anabolic agent Nandrolone. Nandrolone is categorised under class S1- Anabolic Agents on the World Anti -Doping Code 2014 Prohibited List International Standard.

C. HEARING

1. The hearing was convened for 18h00 on Wednesday 8 July 2015 at Southern Sun, corner Nelson Mandela and Melville Roads, Bloemfontein.
2. The hearing commenced at 19h10 and was completed at 22h40 following a break for dinner between around 20h40 to 21h20.

D. THE ANTI-DOPING DISCIPLINARY COMMITTEE, PROSECUTION, DEFENCE, WITNESSES, ATTENDEES & RECORDAL OF PROCEEDINGS

1. The Anti-Doping Disciplinary Committee, "the Panel", appointed by SAIDS, consisted of

John Bush (Chairperson)
Dr Nicolas Theron
Johan Volsteedt

(Reference to the Panel throughout this record shall mean the Panel represented by the Chairperson, unless the context or reference to specific members requires otherwise.)

2. The Prosecution appointed by SAIDS was represented by Advocate Nic Kock as Prosecutor who will be referred to in this record as "the Prosecutor" or "Prosecution", as determined by the context, unless referred to by name.
3. Although Mphuthi did not have any legal representation his sponsor and manager Moses Phale and Daniel Mokhati, a paramedic by profession and his coach, were present and in attendance throughout the hearing.

4. The entire proceedings were recorded with the support of Mr Sam Mahiya, of Veritas International Transcribers and Digital Services, who was in attendance throughout the proceedings. The transcription, which ran into a record of some 104 pages, was produced by typists employed by such entity.

E. JURISDICTIONAL FRAMEWORK - LEGISLATIVE & LEGAL

The Panel's rights – duties and responsibilities - and thus jurisdictional competence to have heard this matter as an anti-doping disciplinary committee arose as follows.

1. SAIDS is a corporate entity 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, such as Athletics South Africa ("ASA") subject to its jurisdiction.
5. The applicable Anti-Doping Rules as published by SAIDS in 2009, ("the Rules") incorporate the mandatory provisions of the Code as well as the remaining provisions adapted by SAIDS in conformance with the Code.
6. ASA is the national federation governing the athletics in South Africa.
7. It has been assumed that ASA **had** adopted and implemented "the Rules" upon which the charge and proceedings relating to this matter were based.
8. The Rules recognise SAIDS as the National Anti-Doping Agency/Organisation, ("NADO"), with primary authority and responsibility to adopt and implement anti-doping rules, direct sample collection, the testing of samples and the management of test results.
9. The Panel accepted that it had the necessary jurisdiction to conduct the disciplinary hearing. This, notwithstanding the fact that no evidence was placed before the Panel and it is certainly not apparent from the websites for of both ASA and Mpmulanga Athletics, if ASA and/or Mpumalanga had formally adopted the Rules, whether under their respective Constitutions and /or by written or oral agreement with SAIDS and /or through the directives issued by or through SASCOC – the South African Sports Confederation and Olympic Committee;
10. The Panel was nevertheless satisfied that absent such direct evidence it still had the necessary jurisdiction to conduct the hearing. The reasons for this being
 - 10.1 primarily due to Mphuthi's prior conduct concerning the AAF and his express consent to submit to the Panel's jurisdiction for the purposes of disciplinary hearing

through his attendance, willingness to conduct his own defence and be bound by the outcome thereof;

10.2 it being highly improbable that ASA and/or Mpumalanga Athletics through ASA, would not have agreed to be bound by the Rules, which SASCOC had made obligatory for all National Federations;

10.3 Mphuthi having entered and participated as a registered ASA athlete in the Loskop Marathon on the condition "*run under the Rules of ASA and Athletics Mpumalanga*" as stipulated on the 2014 entry form. The Panel took 'judicial notice' of this as fact from the Loskop Marathon website following the hearing;

F. THE HEARING

F1 PRELIMINARY & PROCEDURAL MATTERS

1. The Prosecutor, who had a preliminary discussion with Mphuthi and his supporters - for the purpose of curtailing the proceedings through clarifying issues and any concerns prior to start of the hearing - first read the charge to Mphuthi.
2. He then proceeded to obtain Mphuthi's consent to the introduction into evidence of the following documentation as exhibits, being

EXHIBIT

A1-A2	SAIDS letter to Mphuthi dated 19 June	2 pages
B1-B2	SAIDS letter to Mphuthi dated 12 March	2 pages
C	Doping Control Form 55052	
D	Analytical Test Report (2822518 - A sample)	
E	SAIDS letter to Mphuthi dated 26 March	
F	Analytical Test Report (B 2822518 – B sample)	
G	Doping Control Form (repeat)	
H	Chain of Custody Form (Test mission number 04/14)	
	(staged acceptance - see paragraph 6 below	
I	SAIDS notification from Internal Review Committee dated 3 March	
J	ASA notification letter as signed by Mphuthi	

3. In doing so the Prosecutor dealt with Mphuthi's concern regarding the different serial numbers A099156 and A099155 on the Chain of Custody Form. He explained to Mr Mphale's and thus Mphuthi's satisfaction that this related to the need to
 - 3.1 break the seal of the bag which contained sealed urine samples (A099156) in order to access the chain of custody form
 - 3.2 re-seal the bag with a new seal (A099155) once the signed form had been placed back into it.

He stated that this was not necessary when the sealed courier bag had a side pocket with the chain of custody form in it.

4. Mr Kock then provided an explanation for the delay in the laboratory only informing SAIDS of the adverse analytical finding - "AAF" on 18 February 2015. He later read from the SADOCoL letter which stated these reasons as follows

“During 2014 the laboratory experienced a number of challenges that affected the operational efficiency of the turnaround time of results of samples. Although these challenges did not adversely affect the integrity and quality of the sample analysis, they did prolong the turnaround time of the result because of staff shortages. In 2014 the laboratory experienced the sudden death of a senior analyst and the retirement of the laboratory director and the departure of two analysts. The laboratory was operating at 50% capacity which resulted in a backlog of sample analysis and this backlog was only resolved in early March 2015 hence the delay in the reporting of some positive or adverse analytical findings.”

5. He noted that after the completion of the SAIDS internal review on 12 March ASA had been informed and that ASA had in turn then called and advised Mphuthi about the AAF on 12 March 2015.
6. It was agreed that
 - 6.1 the ASA letter which Mphuthi had signed - confirming that he had received such telephone call from Pieter de Jager of ASA notifying him of the AAF and his receipt of the correspondence from SAIDS - which the Prosecutor had displayed on his laptop – as shown to Mphuthi be accepted into evidence as Exhibit J;
 - 6.2 the letter dated 3 March from the SAIDS Internal Review Committee be accepted into evidence as Exhibit I.
7. Mphuthi stated he was not worried by the delay but shocked when he received the call from Pieter de Jager and the notification of the AAF from SAIDS.
8. Although he was comfortable to proceed with the hearing in English Mphuthi was made aware by the Panel that
 - 8.1 if he did not understand anything he was to make this known to the Panel;
 - 8.2 it was entitled to set its own procedure in adjudicating on the charge in the process of seeking information through the establishment of facts in seeking the truth to get to a solution.
9. The Panel then invited Mphuthi to tell his story in providing information in particular on how the prohibited substance had entered his body and the source or origin thereof to enable the Panel to reach a decision.

F2 MATTERS FOR ADJUDICATION

1. The Panel identified the central matters in the case for decision as being, whether or not on the evidence led by Mphuthi in his Defence, and/or, any evidence led or rebutted by the Prosecution, Mphuthi could have established on a balance of probability, that
 - 1.1 he had not committed the anti-doping rule violation under Article 2.1 of the Rules for which he had been charged

- 1.2 failing this whether- within the ambit of Article 10.5 of the Rules – Mphuthi could have similarly established - for the possible elimination or reduction in any period of ineligibility based on exceptional circumstances -
 - 1.2.1 *how* the prohibited substance had entered his system;
and if so
 - 1.2.2. that he bore either no fault or negligence, or no significant fault or negligence, on his part.
2. In addition the Panel was faced with determining whether Mphuthi’s participation in the 2015 Comrades Marathon (or any other event in which he had run for that matter) whilst seemingly under provisional suspension was sanctionable or excusable, having regard to
 - 2.1 the totality of the evidence provided by Mphuthi, or led and/or rebutted by the Prosecution - in accordance with the onus of proof which rested upon them under the Rules;
 - 2.2 the applicable Articles in the Rules relating to Notification After Initial Review Provisional Hearings and Suspensions and/or the Consequences of Anti-Doping Rule Violations (as defined). See in this regard - Articles 7.3.4, 7.6, 9, 10.8 and 10.10 read with the Definitions under the Rules.

F3 THE EVIDENCE – DEFENCE SUBMISSIONS

Of the evidence provided by Mphuthi the Panel found the following relevant concerning

1. The Doping Control Form - “DCF”

- 1.1 he did not use any banned substances;
- 1.2 he had been among the prize winners at the Loskop Marathon and tested for three years in a row;
- 1.3 when he reached the Doping Control Officer he was asked to give him the names of anything he had taken in the last 7 days;
- 1.4 he had seen a doctor /dentist who had given him 8 injections – four inside and four outside his mouth – two weeks before the event;
- 1.5 he took that which is mentioned on the DCF ie the Panamol, Oxygen VO2 tablets, Energade and Multivitamins within such 7 day period.

2. Participation as a top level athlete

- 2.1 National level as a junior;
- 2.2 International level in the 2013 50km World Championships.

3. Exposure to information about drugs / prohibited substances

- 3.1 had knowledge of some that could not be taken, but not others;
- 3.2 bought supplements and asked whether they were right for athletes;
- 3.3 also asked whether they contained any banned substances;
- 3.4 relied on the advice he received as he knew nothing;
- 3.5 tried his level best not to use anything that was banned ..he was shocked;

4. Use of other products not named on DCF / treatment

- 4.1 had used USN Creatine up to two weeks before the event- bought at chemist;
- 4.2 his teeth / molars had been extracted at the Frankfort Hospital 2 weeks before;
- 4.3. had taken Panamol for the pain and swelling;
- 4.4 he told the DCO Mr Phiri about the injections administered to him;
- 4.5 not noted on DCF as not within 7 days and DCO did not know what they were;
- 4.6 he had not received any other medication for his teeth;
- 4.7 he had used the Creatine for two weeks before event before and after am run;
- 4.8 he stopped this 10 days before the event because it was almost finished;
- 4.9 he told the DCO about the injections and the Creatine supplement he had used;
- 4.10 not on the DCF as DCO knew that he used them before the 7 days.

5. Panel intervention

5.1 At this juncture Dr Theron stated

The problem with that information is that there's no logical reason why the substance you've tested positive for would be related in any way to a dental tooth extraction. It's not part of the normal medical treatment plan for a tooth extraction. So, it's, the drug you've tested positive for is not something you're going to find in a normal government hospital or a private hospital for that matter. It's not a legal drug in South Africa, so the availability is not, you know, part of the picture and the chances of getting it with a tooth extraction is highly unlikely. So, we need to find some other explanation as to the source of this drug.

- 5.2 The Chairperson then noted that it appeared that the explanations given for the presence of the Nandrolone related to, either
 - 5.2.1 the injections administered to him (at the time he had his teeth extracted); or
 - 5.2.2 the USN Creatine which was in a 1kg container which was finished on the 10 days before the event (the Wednesday in the week before the Loskop Marathon)

6. Prosecutor's questioning

Mr Kock then questioned Mphuthi and in doing so elicited the following further evidentiary matter

Personal /running

- 6.1 Mphuthi matriculated at Falisizwe High in Frankfort in 1998;
- 6.2 he started making money from races in 2008;
- 6.3 represented Free State in cross country as a 15 year old junior in 1991;
- 6.4 this was 6km at the South African Championships;
- 6.5 he also ran 3000m
- 6.6 works at home as a fashion designer and sews/ mends clothes.

Knowledge and information about doping

- 6.6 Mphuthi was initially advised about what to take by his coach – Petrus Tsotsitsi;
- 6.7 would take supplements to the coach and get advice on what to use or not;

- 6.8 he was aware that he needed to be careful as there was stuff is supplements;
- 6.9 he was told about what to take and not to take was at training (camp – perhaps);
- 6.10 he had not known about SASSCOC workshops or events about doping;
- 6.11 initially previous coach would buy the supplements and mix these in a container;
- 6.12 before the Loskop Marathon he bought supplements at the Frankfort pharmacy;
- 6.13 at the time he bought these he would ask the pharmacist if they were okay;
- 6.14 he told the pharmacist he was an athlete and they would also read the labels;
- 6.15 he had been tested 6 times: 3 - Loskop; 1 - Vaal; 1 - SA Marathon; 1-Comrades;
- 6.16 this was the first time he had tested positive.

Reasons for use of supplements & medication stated on DCF

Mphuthi used

- 6.17 Panamol - for pain (after teeth molars extracted)
- 6.18 Oxygen VO2 - for more oxygen so as not to faint and breathe all right
- 6.19 Energade - normally
- 6.20 Multivitamins - for the body; taken if not eating vegetables
- 6.21 Creatine - to build up muscles, bought 1kg, had used this before

Mphuthi bought supplements when he had the money to do so. He did not take anything from his running mates or anybody else.

Competing at Comrades after notification of Adverse Analytical Finding “AAF”

- 6.22 Mphuthi received a call from Pieter de Jager of ASA 12 March;
- 6.23 he was told he had been tested positive and would receive a letter;
- 6.24 he signed that he received the SAIDS letter dated 12 March on 15 March;
- 6.25 he competed at Comrades because this was the first time he was involved with doping believing that he had to wait for the hearing to tell him if he would be punished and then stop (if he had to).

Notification process

- 6.26 the letter from ASA along with the SAIDS letter was first sent to Athletics Free State;
- 6.27 Hilda du Plessis of Athletics Free State brought these to him at the Sibanye Club;
- 6.28 Benjy Moyane - his boss - was there at the time he received them;
- 6.29 he signed for the letter and he checked it at home but did not read it to his boss;
- 6.30 this was because Hilda said it was confidential and not supposed to “go abroad”;
- 6.31 although some words were difficult to understand he read the SAIDS letter at home;
- 6.32 did not ask anyone to help him with the difficult words because of what Hilda said;
- 6.33 Hilda had said he should sign the copy of the top (ASA) letter;
- 6.34 reiterated that Hilda had said the (SAIDS) letter was confidential & he read it alone.

Contact with SAIDS office

- 6.35 he thinks it was Tsepo of SAIDS who called him on 26 March;
- 6.36 she had called to tell him she was sending other papers;
- 6.37 he asked what he must do - he was shocked it took 11 months - normally 3 months;
- 6.38 she told him about the B-sample and advised that he might be called to a hearing.

7. Panel questioning

Mphuti provided the following further evidence on being questioned by the members of the Panel, namely -

- 7.1 he only told his coach he had tested positive on the weekend after Pieter de Jager's call and his having received the package with the ASA and SAIDS letters from Hilda du Plessis;
- 7.2 he did not talk to anyone about the SAIDS letter he just followed the rules in doing what the letter said.
- 7.3 by "go abroad" he meant that he should not tell anyone;
- 7.4 he took part in the Comrades in 2015 because he was were not aware of the fact, did not understand and did not know that he was not supposed to be taking part – after he had signed the letter;
- 7.5 he did not know what Nandrolone was, that it was injectible and what it was supposed to do;
- 7.6 the SAIDS letter (exhibit B1-B2) which provided for Mphuthi to have the B-sample analysed did not state he was suspended – it stated
"you continue to be suspended from competing and participating in any authorised or organised amateur or professional league or any national or international level event organiser as per Article 10.10 "Status During Ineligibility";
- 7.9 although he had read the letter he did not inquire about the meaning of this when talking about the B-sample with Tsepho. He stated that this was because
 - 7.9.1 he thought the hearing would determine this;
 - 7.9.2 he did not know that his suspension had (seemingly) started when the letter was sent to him;
- 7.10 Another reason for this was that as Mr de Jager had told him that if he did not do the B-sample he would be suspended. He therefore felt he was forced to go through with the analysis of his B-sample or be automatically suspended. He also felt that the B-sample analysis would show that there had been a mistake because he did use anything (else);
- 7.11 After he had received the results of his B-sample Mphuthi was waiting to be called for the hearing to tell him whether he would be suspended;
- 7.12 He did not feel that he took a chance when he ran Comrades.

Panel's notes /observations/guidance

1. The Panel found it difficult to understand why Mphuthi had failed to inquire about the suspension referred to in the SAIDS letter Exhibit B when he spoke with Tshepo on 26 March 2015.
2. Dr Theron pointed out that

“Nandrolone is a predominantly injectable substance in which one shouldn’t really find in Creatine anyway and the Creatine mentioned is a product from USN which is again a reputable company. So, if it’s a reputable supplier then one doesn’t really question it too much. If it was an unknown brand of an unknown product from an unknown pharmacy, then we can start looking deeper into that.

3. Later in the hearing (pages 80-82 of the transcript of the proceedings) in response to questions from Daniel Mokhathi (Mphuthi’s coach) regarding (the position of) Nandrolone on the drug schedule, its onset action (effect) and duration, as well as supply, Dr Theron advised that
 - 3.1 *It’s not available in South Africa at all, so it’s not on the scheduled list. I’d have to speak under correction for the other steroids, it’s a, I’d be inclined to say that it’s probably Schedule 4 or 5 at least.*
 - 3.2 *(effect is) virtually immediate when you inject it.*
 - 3.3 *(it) helps with recovery and muscle building. So, it’s not a stimulant that you’re going to feel an immediate effect, but the anabolic nature of it will be as soon as you inject it*
 - 3.4 *The half-life is about two weeks....*
 - 3.5 *You’re going to pick it up longer (than two weeks). The half-life means when you inject it, half of it has metabolised by that date and after another half-life another half has metabolised. So, it slowly gets less and less and less. So, you will pick it up in the body for longer than two weeks”.*
 - 3.6 *But not as a legal drug. So, I cannot get it in 10 the chemist. I cannot prescribe it to you. It’s not available in the legal system. So any Nandrolone which you find is brought in illegally and supplied illegally. It’s not brought in by the recognised pharmaceutical suppliers.*

8. *Training and competing in race events after the Loskop Marathon and the date of notification of the AAF*

Mphuthi advised that

- 8.1 he competed in races up until October 2014;
- 8.2 ran the Legends 68k Marathon in a PB – personal best finishing 7th;
- 8.3 he raced again in January 2015;
- 8.4 after receiving the AAF he stopped running training for 2 weeks dealing with the shock;
- 8.5 he then recommenced training concentrating on preparation for Comrades, which was his first race after that.

As regards the race events run by Mphuthi it needs to be noted that

- 8.6 The transcript of the proceedings regarding Mphuthi’s participation in race events after the Loskop Marathon is confusing.

- 8.7 The transcript records, inter alia, that Mphuthi ran “68 PB, “the Legends Marathon” or “Regents Marathon” or in “PE” and “came in position seven”.
- 8.8 In order to make sense of this the Panel conducted its own investigation – being entitled to take ‘judicial notice’ of the ASA race event calendar and results. This resulted in the Panel establishing
- 8.8.1 there were no Legends or Regents marathons run in January 2015;
 - 8.8.2 Joseph Mphuli, 39 of the Sibanye Beatrix A featured in the results of the Mielie Marathon held in Welkom on 24 January 2015 in which he is recorded as having finished 2nd in the time of 2:19:07 (2hrs 19 minutes 7 seconds.) The sponsors of the race are AEL Mining Services;
 - 8.8.3 with the support of Mr Kock, who had then spoken to Mphuthi in order clarify the position, it was established that Mphuthi had in fact participated in 5 races since the Loskop. These were
 - 8.8.3.1 the Comrades 2014 which he did not finish;
 - 8.8.3.2 the Legends in which he ran a PB (personal best) for 68 kms and came 7th possibly 8th in 4hrs 17:34 (results still provisional);
 - 8.8.3.3 the Mielie Marathon on 24 January 2015, as set out in 8.9.2 above, although his name was incorrectly spelt as Mphuli;
 - 8.8.3.4 the Vaal Marathon on 1 March 2015 which he won in 2hrs 30:09;
 - 8.8.3.5 the Comrades 2015 in which he finished in the gold medals in 6th position in 5hrs 54:29.
- 8.10 Mphuthi’s Manager Mr Phale confirmed that Mphuthi had not run any other races between January and Comrades. They had given him money to go to his (Mphuthi’s) place to train.
- 8.11 Mphuthi informed the Panel that
- 8.11.1 he ran over 250kms a week when he felt good;
 - 8.11.2 he had no injuries over the previous 12 month period which included the period of his training for Comrades;
 - 8.11.3 he had not seen a doctor, physiotherapist or biokineticist. He was not aware what a biokineticist was and needed this to be explained to him.

F4 FINAL SUBMISSIONS

1. DEFENCE

Mphuthi’s final submissions were made in response to the Panel’s further questions and guidance following the Prosecution’s submissions set out below.

- 1.1 He was truthful when he said that the only things he took were written on the DCF, the Creatine and the injections when his teeth were removed. He never used any banned substances
- 1.2 He had told the truth.
- 1.3 He was willing to accept the Panels' decision.
- 1.4 With regard to possible forfeiture of results and prizes that "if he had to lose it, he had to lose it",
- 1.5 If he was found guilty there he was nothing he could do with regard to forfeiture concerning his Comrades result.

2. PROSECUTION

Mr Kock then made the following final submissions.

- 2.1 Mphuthi had two hurdles to overcome.
 - 2.1.1 Firstly, he had to prove how the Nandrolone entered his system.
 - 2.1.2 The Prosecutor believed that the Athlete (Mphuthi) had been truthful and frank with the Panel.
 - 2.1.3 The Panel had to decide whether that obstacle had been cleared.
 - 2.1.4 In the case which involved Mr McDermott, in the United Kingdom, the National Anti-Doping Panel determined that he
 - 2.1.4.1 had failed to establish how the substance in question entered his system on a balance of probability and to the (indistinct) satisfaction of the Panel as, in terms of our rules
 - 2.1.4.2 was therefore not entitled to any reduction of any period of ineligibility.
 - 2.1.5 If the Panel was not comfortably satisfied as has to, how the substance entered Mphuthi's system in terms of precedent and the Rules, the Panel was compelled to apply the mandatory sanction.
- 2.1.2 Secondly because of the delay with the (Loskop) race having been run on 12 April 2014 Mphuthi had run two races prior to notification (of the AAF on 12 March 2015) with one run after notification, the Panel was required to consider Article 10.8 of the Rules which provided for the disqualification results in competitions subsequent to sample collection or commission of the Anti-Doping Rule violation.
 - 2.1.2.1 Article 10.8 read as follows,

"In addition to the automatic disqualification of the results in the competition which produced the positive sample under Article 9, Automatic Disqualification of Results (covering the Loskop race event) all other competitive results obtained from the date a positive sample was collected (whether in or out of competition), or other anti-doping rule violation 5 occurred, through the commencement of any provisional suspension or period of ineligibility, shall, unless fairness requires otherwise, be disqualified with all the resulting consequences including forfeiture of any medals, points and prizes."

2.1.2.2 Article 10.8.1 provided

As a condition of regaining eligibility after being found to have committed an anti-doping rule violation the Athlete must first repay all prize monies forfeited under this Article.

- 2.2 As the Prosecution did not think that the Panel would be comfortable with Mphuthi's explanation as to where the substance originated from, the mandatory sanction (a period of 2 years of ineligibility) needed to be applied along with forfeiture of all the results and prize money.
- 2.3 Such forfeiture (the disqualification of results and other consequences including the forfeiture of medals, points and prizes) after notification was quite clear if the Athlete had been notified (about the AAF).
- 2.4 The second leg to this was whether forfeiture ought to be applied for those races that the Athlete (Mphuthi) unintentionally participated in after his urine sample had been collected without knowing that he had tested positive.
- 2.5 Whilst it was the Prosecutors view that fairness required that forfeiture ought possibly not to be applied for such races, the Panel ought to consider this having regard to
- 2.5.1 the date of notification;
 - 2.5.2 the delay, and
 - 2.5.3 the nature of the substance.

FS APPLICABLE LAW - RULES, REGULATIONS & CONTRACT

The Articles of the Rules applied by the Panel in considering and reaching the Panel's findings and decision in the matter are as follows.

1. Article 2.1

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 rule violation under Article 2.1*

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* where the *Athlete* waives analysis of the *B Sample* and the *B Sample* is not analyzed; or, where the *Athlete's B Sample* is analyzed and the analysis of the *Athlete's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's A Sample*.

2. Article 3.1

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.

3. Article 7.3

7.3 Adverse Analytical Findings

7.3.1 Initial Review

- 7.3.1.1 Upon receipt of an *Adverse Analytical Finding*, SAIDS shall review for any irregularity all of the documentation relating to the *Sample Collection Session* (including the Doping Control Form, Doping Control Officer Report and other Records), and the laboratory analysis.
- 7.3.1.2 If there are any irregularities in the documentation, SAIDS shall determine whether the irregularity can be considered to undermine the validity of the *Adverse Analytical Finding*.
- 7.3.1.3 If irregularities are reasonably considered to undermine the validity of the *Adverse Analytical Finding*, SAIDS shall declare the test result void.
- 7.3.1.4 If a test is declared void due to an irregularity, it is recommended that SAIDS schedule an additional test on the *Athlete* at a later time.
- 7.3.1.5 If SAIDS declares a test result void, it shall immediately inform the *Athlete*, the *Athlete's* International Federation, *National Sporting Federation* and WADA.

7.3.2 Follow-up Investigations

- 7.3.2.1 If the *Sample* shows the presence of a *Prohibited Substance* (for example endogenous substances) where further investigations are required to determine an Anti-Doping Rule Violation, SAIDS may conduct an investigation before issuing a notice to an *Athlete* asserting that an Anti-Doping Rule Violation has occurred,
- 7.3.2.2- 7.3.2.6.....
- 7.3.2.7 If SAIDS determines that the investigation establishes evidence of an Anti-Doping Rule Violation, then SAIDS shall follow these Anti-Doping Rules with respect to the *Adverse Analytical Finding*.

7.3.3 TUEs

7.3.4 Notification After Initial Review

- 7.3.4.1 Once SAIDS has determined that the *Adverse Analytical Finding* is not due to any irregularity that undermines its validity and that there is no applicable *TUE*, then SAIDS shall ensure that the *Athlete* is notified in

writing of the *Adverse Analytical Finding*. The notice shall include the following details:

- a) *Athletes* name, country, sport and discipline;
- b) *In-Competition* or *Out-of-Competition* control and date of the collection;
- c) Confirmation that the *A Sample* has returned an *Adverse Analytical Finding* and the details of the *Prohibited Substance* identified in the *A Sample*;
- d) The anti-doping rule asserted to be violated in accordance with the SAIDS, International Federation and/or *National Sports Federation* rules;
- e) The possible *Consequences of the Anti-Doping Rule Violation*;
- f) The *Athlete's* right to promptly request the analysis of the *B Sample* or, failing such request, that the *B Sample* analysis may be deemed waived and the *A Sample* finding used as evidence of the Anti-Doping Rule Violation;
- g) The scheduled date, time and place for the *B Sample* analysis if the *Athlete* or SAIDS chooses to request an analysis of the *B Sample*;
- h) The opportunity for the *Athlete* and/or the *Athlete's* representative to attend the *B Sample* opening and analysis within the time period specified in the *International Standard* for Laboratories if such analysis is requested;
- i) The other parties that will be notified of the *A Sample Adverse Analytical Finding*;
- j) The *Athlete's* right to request copies of the *A* and *B Sample* laboratory report which includes information as required by the *International Standard* for Laboratories;
- k) The *Athlete's* right to respond to any assertion that an anti-doping rule had been violated;
- l) In cases where a *Provisional Suspension* is to be imposed in accordance with Article 7.6 below, details of that *Provisional Suspension*, the provisional hearing and/or expedited hearing as applicable; and
- m) The *Athlete's* right to waive their right to a hearing by acknowledging the Anti-Doping Rule Violation asserted and the identified *Consequences of the Anti-Doping Rule Violation*.

7.3.4.2 SAIDS shall also notify the IF and WADA. If SAIDS decides not to bring forward the *Adverse Analytical Finding* as an anti-doping rule violation, it shall so notify the *Athlete*, the IF and WADA.

7.3.4.3 In an *Event* where a *Provisional Suspension (Article 7.6)* is to be imposed or other instances where time dictates, the above details may be given to the *Athlete* and other relevant organizations verbally in the first instance and followed up by notice in writing as soon as possible.

7.3.5 B Sample Analysis

7.3.5.1 Should the *Athlete* and/or SAIDS decide to have the *B Sample* analysed SAIDS shall contact the laboratory and confirm the date and time for analysis of the *B Sample*.

- 7.3.5.2 SAIDS shall notify the *Athlete* of the time for the B *Sample* analysis, which should be no later than 5 working days after the *Athlete* requests that it be analysed.
- 7.3.5.3 The time for analysis of the B *Sample* may be extended by mutual agreement between the *Athlete*, SAIDS and the laboratory.
- 7.3.5.4 The *Athlete* or the *Athlete's* representative has the right to attend the identification, opening and analysis of the B *Sample*.
- 7.3.5.5 Where neither the *Athlete* nor his/her representative attends the identification, opening and analysis of the B *Sample*, SAIDS or the laboratory shall appoint an independent *Person*.
- 7.3.5.6 The B *Sample* must be performed at the same laboratory and shall be tested by a different analyst than the A *Sample*.
- 7.3.5.7 If the B *Sample* analysis does not confirm the A *Sample* analysis, SAIDS shall notify the *Athlete* that the *Sample* has been declared negative and that no further action will occur. In circumstances where a *Provisional Suspension* has been imposed, refer to Article 7.6.4.
- 7.3.5.8 If the B *Sample* analysis does confirm the A *Sample Adverse Analytical Finding*, SAIDS shall continue to follow these Anti-Doping Rules with respect to the *Adverse Analytical Finding*.

3. Article 7.6

7.6 Provisional Hearings and Suspensions

- 7.6.1 Once the *Athlete* has received notification following the initial review as set out in Article 7.3.4 above, SAIDS and/or applicable International Federation may impose a *Provisional Suspension* on the *Athlete*.
- 7.6.2 Where a *Provisional Suspension* is imposed on an *Athlete*, the *Athlete* must be given either:
 - a) A provisional hearing prior to the imposition of the *Provisional Suspension*;
 - b) A provisional hearing as soon as possible (within 10 days) after the imposition of the *Provisional Suspension*. Extensions can be granted upon written notification; or
 - c) An expedited hearing as soon as possible after the imposition of the *Provisional Suspension*.
- 7.6.3 All provisional hearings or expedited hearings must be conducted in accordance with Articles 7.5 and 8 of the *Code*. Separate guidelines for hearings may also be applicable.
- 7.6.4 Where a *Provisional Suspension* has been imposed in relation to an A *Sample Adverse Analytical Finding*, the *Athlete* has requested that the B *Sample* analysis be conducted and the B *Sample* analysis does not confirm the A *Sample* analysis, then the *Provisional Suspension* shall be rescinded immediately.
- 7.6.5 Where a *Provisional Suspension* has been imposed in relation to a Doping Control Officer Report and/or related documentation showing a possible Anti-Doping Rule Violation and SAIDS determines, following the *Athlete's* submission, that there has been no Anti-Doping Rule Violation, then the *Provisional Suspension* shall be rescinded immediately.
- 7.6.6 Where the *Athlete* or the *Athlete's* team has been removed from a *Competition* or *Event* following a *Provisional Suspension* and the *Provisional Suspension* is then rescinded in accordance with Article 7.6.4 or 7.6.5 above, and it is still possible for the *Athlete* or team to be reinserted without otherwise affecting the *Competition*

or *Event*, the *Athlete* or team shall be allowed to continue to take part in the *Competition* or *Event*.

7.6.7 If SAIDS declares that there has been no Anti-Doping Rule Violation, it shall immediately inform the *Athlete's* International Federation, *National Sports Federation*, National Anti-Doping Organization and WADA.

4. Article 7.7

7.7 Assertion of an Anti-Doping Rule Violation

7.7.1 Where there has been an *Adverse Analytical Finding* and:

- a) The test has not been declared void due to an irregularity in accordance with Article 7.3.1;
- b) The presence of the *Prohibited Substance* is not consistent with a *TUE* that has been granted in accordance with Article 4;
- c) The *Athlete* has not requested that the *B Sample* be analysed, or the *B Sample Analysis* has been conducted and confirms the *A Sample Adverse Analytical Finding* in accordance with Article 7.3.5;
- d) Any follow-up investigation conducted that has led to the conclusion of a possible Anti-Doping Rule Violation in accordance with Article 7.3.2; and
- e) The *Athlete* has not provided any information or evidence on the validity of the test that requires further investigation, then SAIDS shall assert that there has been an Anti-Doping Rule Violation.

7.7.2 Where SAIDS asserts that there has been an Anti-Doping Rule Violation, SAIDS shall notify the *Person*, the *Person's* National Anti-Doping Agency, International Federation, *National Sports Federation* and WADA in writing of this assertion.

7.7.3 Where SAIDS asserts that there has been an Anti-Doping Rule Violation, SAIDS shall notify the SAIDS *Anti-Doping Disciplinary Panel* of the assertion, for a hearing to be conducted in accordance with Article 8 and any applicable guidelines. SAIDS shall provide the SAIDS *Anti-Doping Disciplinary Panel* with all of the documentation relevant to the assertion.

7.7.4 The *Person* is also entitled to copies of all of the documentation relevant to the assertion that there has been an Anti-Doping Rule Violation, and SAIDS shall provide this to the *Person* or his/her representative upon request.

5 Article 8

ARTICLE 8 - DISCIPLINARY PROCEDURE refer SAIDS Rules

6. Article 9

ARTICLE 9 - AUTOMATIC *DISQUALIFICATION* OF INDIVIDUAL RESULTS

An anti-doping rule violation in *Individual Sports* in connection with an *In-Competition* test automatically leads to *Disqualification* of the result obtained in that *Competition* with all resulting *Consequences*, including forfeiture of any medals, points and prizes.

7. Article 10.5

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.

8. Article 10.8

10.8 *Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*

In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9 (*Automatic Disqualification of Individual Results*), all other competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.

10.8.1 As a condition of regaining eligibility after being found to have committed an anti-doping rule violation, the *Athlete* must first repay all prize money forfeited under this Article.

10.8.2 Allocation of Forfeited Prize Money.

Unless the rules of the International Federation provide that forfeited prize money shall be reallocated to other *Athletes*, it shall be allocated first to reimburse the collection expenses of the *Anti-Doping Organization* that performed the necessary steps to collect the prize money back, then to reimburse the expenses of the *Anti-Doping Organization* that conducted results management in the case, with the balance, if any, allocated in accordance with the International Federation's rules.

9. Article 10.9

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.

10. Article 10.10

10.10 Status During *Ineligibility*

- 10.10.1 No *Athlete* or other *Person* who has been declared *Ineligible* may, during the period of *Ineligibility*, participate in any capacity in an SASCOC *Team*, *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory*, *Signatory's* member organizations, including a *National Sports Federation*

or a club or other member organization of a *Signatory's* member organization, including a *National Sports Federation*, or in *Competitions* authorized or organized by any professional league or any international or national level *Event* organization.

11. Definitions

Adverse Analytical Finding: A report from a laboratory or other approved *Testing* entity that identifies in a *Sample* the presence of a *Prohibited Substance* or its *Metabolites* or *Markers* (including elevated quantities of endogenous substances) or evidence of the *Use of a Prohibited Method*.

Consequences of Anti-Doping Rules Violations:

An *Athlete's* or other *Person's* violation of an anti-doping rule may result in one or more of the following: (a) *Disqualification* means the *Athlete's* results in a particular *Competition* or *Event* are invalidated, with all resulting consequences including forfeiture of any medals, points and prizes; (b) *Ineligibility* means the *Athlete* or other *Person* is barred for a specified period of time from participating in any *Competition* or other activity or funding as provided in Article 10.9 of the *Code* (Status During *Ineligibility*); and (c) *Provisional Suspension* means the *Athlete* or other *Person* is barred temporarily from participating in any *Competition* prior to the final decision at a hearing conducted under Article 8 of the *Code* (Right to a Fair Hearing).

- 1.1 the Defence could rebut the presumption contained in Regulation 21.3.2 that
- 1.2 the Prosecution would have the burden to establish that such departure had not caused the Adverse Analytical Finding

F6 EVIDENTIARY BURDEN OF PROOF & FINDINGS

- 1. The primary onus with regard to the charge against Mphuthi was such that was required to adduce evidence to show that on a balance of probability he had not committed any anti-doping violation.

The **Panel's finding** in this regard is that other than question the seals on the container in which the sealed samples had been couriered to SADOCoL as Mphuthi failed to lead any evidence in defence of such charge Mphuthi is accordingly guilty of the anti-doping rule violation as charged.

- 2. The secondary onus which rested upon Mphuthi with regard to an applicable sanction was to lead evidence which would provide the Panel with comfort on a balance of probability as to how the prohibited substance – Nandrolone - had entered his system.

The Panel's findings, following the precedents of the UKAD case of Mc Dermott and the SAIDS case of Olivier in this regard, is that by introducing two highly speculative possibilities not probabilities, being

- 2.1 the injections received at the Frankfort Hospital at the time his molars were removed two weeks before the Loskop Marathon;
- 2.2 the USN Creatine which he had taken up to 10 days before the Loskop Marathon,

without any real evidence

- to establish which it was which would have been more likely to have contained the Nandrolone;
- thereby to support and sustain any one of such apparently highly improbable propositions;

Mphuthi faced the mandatory 2 (two) year period of ineligibility which the Panel was obliged to give him through his having failed to have satisfied the Panel on a balance of probability how the Nandrolone entered his system.

3. The Prosecutor sought to have the Panel apply the provisions of Article 10.8 in addition to the sanction of the mandatory 2 year period of ineligibility. He submitted that Mphuthi because Mputhi had participated in the Comrades Marathon whilst seemingly under a notice of provisional suspension pending the outcome of the hearing he be disqualified from the results and forfeit any medals or prizes which he received.

With this in mind a continuing onus rested with the Prosecutor, to have demonstrated to the comfortable satisfaction of the Panel that SAIDS had indeed fully complied with SAIDS' prescribed obligations under the Rules, in particular

- 3.1. Notification of the AAF;
- 3.2. Provisional Hearings and Suspensions;
- 3.3. The Assertion of an Anti-Doping Rule Violation for which Mputhi had been charged and now found guilty.

The Panel's finding in this regard is that SAIDS did not fully comply with such obligations and that as a consequence thereof Mphuthi's purported suspension was null and void.

Note:

The full and further reasons for the finding in 3 are set out in paragraph F8.

F7 EVALUATION OF THE EVIDENCE & FINDING ON MPHUTHI'S CREDIBILITY

1. The Panel's task with regard to the evidence led or placed before the Panel was made simpler through

- 1.1 the admissions made by Mphuthi;
 - 1.2 his tacit acceptance of the sample collection, chain of custody and laboratory testing procedures;
 - 1.2 the issues for adjudication being limited as described in F2;
 - 1.3 no other witnesses being called to corroborate or rebut any evidence which Mphuthi provided;
 - 1.4 the transcript of the recorded proceedings provided shortly after these had been completed;
 - 1.4 the Prosecutor's acceptance of Mphuthi having been truthful and frank.
2. Notwithstanding this the Panel adopted a cautionary approach in assessing the reliability and thus Mphuthi's credibility of all his testimony (which was not given under any oath or affirmation) as a single witness to the veracity thereof within the light of totality of the evidence placed before the Panel.
 3. The Panel did so with reference to own notes, the exhibits and the transcript of the recorded proceedings, although this was somewhat complex and even confusing at times at times due to there being noted interventions, as well as indistinct and inaudible parts and difficulties with interpretation as far as language went.
 4. These were matters of minor concern. The following were noted as more concerning, however, namely
 - 4.1 the obvious lack of corroboration:
 - 4.2 Mphuthi's failure to adduce evidence in support of any possible reduction or elimination of any period of ineligibility, through simply not being able to show how the prohibited substance entered his system.

This needs to be emphasised as it was made clear to him that the Nandrolone was injectible and highly improbable that it could have entered his system when he was injected at the time he had his teeth removed at the Frankfort hospital ;
 - 4.3 his unsatisfactory explanations for failing to deal with the "difficult language" and clarify the issue of his "continued suspension" in Exhibit B1-B2 when he spoke to Tsepo at the SAIDS office on 26 March;

This and the fact that he did not involve his coach and /or manager or any other person to assist him with regard to such matters as it was "confidential", "not to spoken about with anyone" even after he had the result of his B-sample anyalysis and was present at the laboratory for such analysis.
 - 4.4 any missed opportunity the Prosecutor had to have called either Pieter de Jager and/or Hilda du Plessis to 'test" the veracity of Mphuthi's testimony at the time he had the conversations with them.
 5. **The Panel's finding** as regards Mphuthi's testimony and credibility as a witness - in spite of these concerns – is that
 - 5.1 Mphuthi was
 - 5.1 indeed truthful and frank;
 - 5.2 fully and pleasantly co-operative;

- 5.3 humbly willing to accept the Panel's decision whatever the impact on him;
- 5.4 a satisfactory and credible witness.
- 5.2 Mphuthi's testimony – as uncorroborated and untested as it was in the circumstances - ought to be believed and relied upon.

F8 PANEL'S REASONS FOR NOT APPLYING ARTICLE 10.8 OF THE RULES

(DISQUALIFYING RESULTS IN COMPETITIONS SUBSEQUENT TO SAMPLE COLLECTION OR COMMISSION OF AN ANTI DOPING VIOLATION)

1. The Panel's reasons for not applying Article 10.8 arise from the contents of Exhibit B1 – B2 "the SAIDS letter" - addressed to Mphuthi , dated 12 March 2015.
2. This was delivered to Mphuthi at the Sibanye Club by Mrs Hilda du Plessis of Athletics Free State on 15 March 2015, at the same time that Mphuthi accepted the contents of and signed the undated ASA letter which she had presented to him - Exhibit J.
3. The Panel's consideration of the contents of the SAIDS letter reveals that the purported suspension of Mphuthi - upon which the Prosecutor sought to rely upon in calling for the application of Article 10.8 - was covered in the bold and underlined paragraph 7.

This paragraph reads as follows

7. Please note that you continue to be suspended from competing and participating in any authorised or organised sport by any amateur or professional league or any national or International level event organiser as per Article 10.10 "Status during Ineligibility".

4. Paragraph 8 is the only paragraph in which reference is made to provisional suspension. It provides
 8. Please refer to Article 7.6 of the SAIDS Anti-Doping Rules relating to the rules of the provisional suspension, the provisional hearing and/or expedited hearing in cases where a provisional hearing has been imposed.
5. The Panel is not satisfied that SAIDS has complied with strict provisions of Article 7.6.1. This provides that once notification has taken place in terms of Article 7.3.4 SAIDS may impose a Provisional Suspension of the Athlete.
6. The Panel's opinion is that SAIDS committed a fatal administrative flaw by stating in Paragraph 7 that ""you continue to be suspended" - with reference to Article 10.10 which relates to status during Ineligibility.
7. The reasons for this are that paragraph 7 of the SAIDS letter of notification
 - 7.1 is ambiguously vague and therefore capable of being misunderstood and misinterpreted;

- 7.2 is not in accordance with the peremptory provisions of Article 7.3.4 which require that the *notice shall include the following details** specified in Article 7.3.4.l) which provides for
- “in cases where a Provisional Suspension is to be imposed in accordance with Article 7.6 below, details for that Provisional Suspension, the provisional hearing and/or the expedited hearing as applicable;
- (own emphasis)
- 7.3 ought in the Panel’s view to have clearly and unequivocally stated that Mphuthi had been “provisionally suspended with immediate effect” and spelt out what the details of such Provisional Suspension and the related provisional and/or expedited hearing possibilities were.
- 7.4 read with Paragraph 8, simply cannot be deemed capable of having met the obligatory requirements which the Rules place upon SAIDS to ensure that Mphuthi was indeed properly and adequately informed by SAIDS strictly in accordance with the applicable Rules.
8. There appears to be a further fatal flaw in SAIDS not having complied with the Rules. There is no evidence of SAIDS having held any provisional or accelerated hearing in accordance with the provisions of Article 7.6.
8. It is the Panel’s view that these fatal flaws seen in the light of Mphuthi’s own evidence as to why he did not seek any explanation for the “continued suspension” referred to in clause 7 because he was waiting for the hearing as not only reasonable but also excusable.
9. **The Panel’s expanded findings**, based upon these reasons are
- 9.1 the fatal flaws in which SAIDS failed to comply with the Rules rendered any purported suspension of Mphuthi under the SAIDS letter as invalid, null and void from the start and incapable of being implemented and enforced against Mphuthi;
- 9.2 there is consequently no lawful basis to sustain the Prosecutor’s submission that the provisions of Article 10.8 should be applied against Mphuthi under which he be disqualified from the results and have to forfeit his medal and prize money as a result of his having finished in 6th position at the Comrades Marathon held on 31 May 2015.

F9 MITIGATION OF SANCTION

1. The Panel found that there was no basis for any reduction or elimination of any the period of ineligibility based on Article 10.5.
2. There had been an inordinate delay in this matter attributable to staffing issues arising from death, retirement and resignations at the laboratory which had been explained by the laboratory. It took 11 months for the AAF to be made known.
3. The Rules make provision in Article 10.9.3 for the period of ineligibility to start from the date of sample collection if there had been substantial delays in the hearing process not attributable to the Athlete - Mphuthi.

4. The Panel has the discretion to start the period of ineligibility at an earlier date.
5. Having regard to the delay in, this matter, which the Panel viewed as substantial, the Panel decided that the period of ineligibility was to run from the date of sample collection being 12 April 2014.

F10 PANEL DECISION & SANCTION

The Panel's decision is that Mphuthi

1. Is guilty of having committed the anti-doping violation for which he had been charged - (Article 2.1);
2. serve a 2(two) year period of ineligibility commencing on the date of sample collection being 12 April 2014 to run to 12 April 2016 – (Article 10.2) ;
3. is disqualified from the results of the Loskop Marathon and required to forfeit any medals and prizes; This shall include the disqualification from any results or forfeiture of medals or team prizes which may have been awarded to Mphuthi; (Article 9)
4. shall not be entitled (during such period of ineligibility) to participate in any capacity in an SASCOC *Team, Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory, Signatory's* member organizations, including a *National Sports Federation* or a club or other member organization of a *Signatory's* member organization, including a *National Sports Federation*, or in *Competitions* authorized or organized by any professional league or any international or national level *Event* organization - (Article 10.10);
5. be mindful of that as a condition of regaining eligibility at the end of such period he will be required to make himself available for out-of-competition testing by SAIDS, ASA (as the applicable National Sports Federation) and/or any Anti-Doping Organisation having testing jurisdiction, and shall, if requested provide current and accurate whereabouts information as provided in Article 5.5 – (Article 10.11);
6. or SAIDS or WADA , as well as all those other entities stipulated in Article 13.2 have the right to appeal this decision within 21 (twenty one days) of the date thereof.


Signed on
at

Johan Volsteedt

Signed on
at

Nicolas Theron

Signed on 20/8/2015
at Cape Town



John Bush

4. The Panel has the discretion to start the period of ineligibility at an earlier date.
5. Having regard to the delay in, this matter, which the Panel viewed as substantial, the Panel decided that the period of ineligibility was to run from the date of sample collection being 12 April 2014.

F10 PANEL DECISION & SANCTION

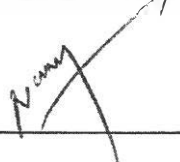
The Panel's decision is that Mphuthi

1. Is guilty of having committed the anti-doping violation for which he had been charged - (Article 2.1);
2. serve a 2(two) year period of ineligibility commencing on the date of sample collection being 12 April 2014 to run to 12 April 2016 – (Article 10.2) ;
3. is disqualified from the results of the Loskop Marathon and required to forfeit any medals and prizes; This shall include the disqualification from any results or forfeiture of medals or team prizes which may have been awarded to Mphuthi; (Article 9)
4. shall not be entitled (during such period of ineligibility) to participate in any capacity in an SASCOC *Team, Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory, Signatory's* member organizations, including a *National Sports Federation* or a club or other member organization of a *Signatory's* member organization, including a *National Sports Federation*, or in *Competitions* authorized or organized by any professional league or any international or national level *Event* organization - (Article 10.10);
5. be mindful of that as a condition of regaining eligibility at the end of such period he will be required to make himself available for out-of-competition testing by SAIDS, ASA (as the applicable National Sports Federation) and/or any Anti-Doping Organisation having testing jurisdiction, and shall, if requested provide current and accurate whereabouts information as provided in Article 5.5 – (Article 10.11);
6. or SAIDS or WADA , as well as all those other entities stipulated in Article 13.2 have the right to appeal this decision within 21 (twenty one days) of the date thereof.

Signed on
at

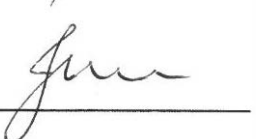
Johan Volsteedt

Signed on 19/8/2015
at 11h00



Nicolas Theron

Signed on 20/8/2015
at Cape Town



John Bush

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5. Having regard to the delay in this matter, which the Panel viewed as substantial, the Panel decided that the period of ineligibility was to run from the date of sample collection being 12 April 2014.

F10 PANEL DECISION & SANCTION

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6. or SAIDS or WADA , as well as all those other entities stipulated in Article 13.2 have the right to appeal this decision within 21 (twenty one days) of the date thereof.

Signed on 16 August 2015
at Bloemfontein

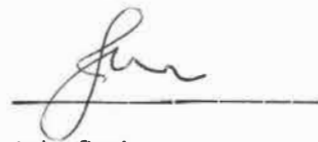
Signed on
at

Signed on 20/8/2015
at Cape Town



Johan Volsteedt

Nicolas Theron



John Bush