

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

ANTI-DOPING HEARING PANEL

HELD AT HOLIDAY INN ROSEBANK (JOHANNESBURG)

In the matter of: Mr David Watson

Date of Hearing: 04 February 2016

RULING

1. INTRODUCTION

- 1.1 The South African Institute for Drug Free Sports ("SAIDS") brought charges against the Athlete Mr. David Watson ("the athlete") for Adverse Analytical Findings.
- 1.2 The hearing was held on 04 February 2016 in Johannesburg and the athlete represented himself.

2. COMPOSITION OF THE PANEL

- 2.1 The Hearing Panel was appointed by SAIDS a statutory body created by section 2 of South African Institute for Drug-Free Sport Act 14 of 1997, as amended in 2005 when SAIDS accepted the World Anti-doping code. The SAIDS Anti-doping Rules which were published by SAIDS are applicable to the present proceedings. ("**the Rules**")

2.2 The SAIDS Anti-doping Hearing Panel ("**the Panel**") has been Appointed in terms of Article 8.1 of the Rules. The Article states that:

"The Registrar shall appoint an independent Doping Hearing Panel consisting a minimum of, but not being limited to, three (3) members to hear and adjudicate cases. The Hearing Panel should consist of at least the following:

- a) A Legal practitioner who shall act as a chairman;*
- b) A medical practitioner and/or a person with analytical and /or forensic pharmacology or endocrinology; and*
- c) Either a second person from category (a) or (b) or an additional member who shall be, or has previously been, a sports administrator or an athlete".*

2.3 The appointment of the Hearing Panel complied with Article 8.1 in that the Hearing Panel consisted of the following members:

Mr. Mandla Tshabalala (A Legal Practitioner; Chairperson);
Dr. Sello Motaung (A Medical Practitioner) and Mr Joe Carrim(Sports Administrator).

2.4 The pro-forma prosecutor for SAIDS was Mr. Farai Razano.

3. JURISDICTION

3.1 The Panel had to determine whether it has jurisdiction to adjudicate on this matter, and in doing so we were guided by the SAIDS Anti-Doping Rules 2015.

3.2 in terms of Article 1.3 of the Rules the Panel will have jurisdiction to adjudicate and shall apply to the following:

“1.3.1 These Anti-Doping Rules shall apply to the following persons (including minors), in each case, whether or not such Person is a national of or resident in South Africa:

All Athletes and Athletes Support Personnel who are member or licence holders of any National Federation in South Africa, or of any member or affiliate organisation of any National Federation in South Africa(including any clubs, teams, associations or leagues); all Athlete and Athlete Support Personnel who participate in such capacity in Events, Competitions and other activities organised, convened, authorised or organised by any Federation in South Africa or by any member or Affiliate organisation of any National Federation in South Africa(including any clubs, teams, associations or leagues), wherever held;

any other Athlete or Athlete support Person or other who, by virtue of an accreditation, a licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of any National federation in South Africa (including any clubs, teams, associations or leagues), for purposes of anti-doping;

all Athlete and Athlete Support Personnel who participate in any capacity in any activity organised, held, convened, or authorised by the organiser of a National Event or of a national league that is not affiliated with a National Federation; and

all Athletes who do not fall within one of the foregoing provisions of this Article 1.3.1 but who wish to be eligible to participate in International Events or National Events (and such Athletes must be available for testing under these Anti-Doping Rules for at least six (6) months before they will be eligible for such Events).

1.3.2 These Anti-Doping Rules shall also apply to all other Persons over whom the Code gives SAIDS Jurisdiction, including all Athlete who are nationals of or resident in South Africa, and all Athletes who are present in South Africa, whether to compete or to train or otherwise.

1.3.3 Persons falling within the scope of Article 1.3.1 or 1.3.2 are deemed to have accepted and to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of SAIDS to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules, as a condition of their membership, accreditation and/or participation in their chosen sport".

3.3 The athlete is member of the Ice Hockey National Team of South Africa and therefore SAIDS Rules apply to him.

4. APPLICABLE RULES

4.1 The prosecutor presented to the panel and the athlete that the rules to dispense with during the proceedings shall be those of SAIDS.

5. CHARGE

5.1 The charge favoured by SAIDS is contained in a letter dated 22 December 2015, which letter was addressed to the athlete. The charge preferred against the athlete reads as follows:

“You are formally charged with an anti-doping rule violation in terms of Article 2.1 of the 2015 Anti – Doping Rules of the South African Institute for Drug-Free Sport (SAIDS). On 07 August 2015, you provided a urine sample (3923230) during an in-competition test. Upon analysis, the Deutsche Sporthochschule Koln institute fur Laboratory in Cologne, Germany reported the presence of prohibited substances in your urine sample Methylhexaneamine (Dimethylpentylamine). This substance is categorised under Class s6-stimulants on the World Anti-Doping Code 2015 Prohibited List international standard”.

5.2 The above charge emanate from an Adverse Analytical Finding from the Deutsche Sporthochschule Koln institute fur Laboratory in Cologne, Germany. The report of the finding was communicated and addressed to the Athlete on 26 November 2015.

6. PLEA

6.1 The Athlete pleaded guilty to the charge.

7. PLEA EXPLANATION

7.1 It was explained to the Athlete that the period of ineligibility for the violation of the Anti-Doping Rules is a period of four years.

7.2 It was further explained to the Athlete that he has an opportunity to address the Panel on the circumstances that might lead to the reduction of the period of ineligibility, to which the athlete took an opportunity to do same¹.

¹ See Article 10.4, 10.5 and 10.6 of the SAIDS Rules.

- 7.3 The Athlete submitted to the Panel that he has been playing professional Hockey for a period of twenty (20) years and for the past eight (8) years he has been a prominent member of the Ice Hockey men national Team, and further that he was previously tested and has never tested positive for any banned substance.
- 7.4 He believes that the likely source of the banned substance is in a fat-burning supplement (Fat Smack) he consumed a few days before he was tested.
- 7.5 He said he bought this substance over the counter and was advised by the sales person that the substance is safe.
- 7.6 During the cross-examination, the Athlete was asked as to what criteria is used to select players for the National Team and he said that it was through performance
- 7.7 Then it was put to him that he took the substance purely for performance enhancement so that he could be selected to the national team which allegation the Athlete refuted.
- 7.8 The Athlete admitted that the reliance on the sales person was detrimental to his career as he has not attended any workshop or any form of awareness about the banned substances, he however confirmed that he once had a book that deals with banned substances and that he never read it.
- 7.9 The Athlete further stated that he went back to the shop where he bought the substance and was told that the sales person has left the employment.
- 7.10 The Athlete then submitted that he took the substance not for performance enhancement but to keep his stomach flat.

- 7.11 The prosecution argued that the Athlete had the intentions to use the substance to enhance his performance alternatively that the Athlete was grossly-negligent.
- 7.12 The Athlete in his argument stated that he did not take the substance during the competition but stopped taking it 2 – 3 days prior to the competition.

8. BURDEN OF PROOF

- 8.1 The SAIDS rules places a burden of proof on the prosecution to prove to the comfortable satisfaction of the hearing panel, that the athlete violated an anti-doping rule. In terms of Article 3.1 of the SAIDS anti-doping rules:

“SAIDS has the burden of establishing that an anti-doping 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 reasonable doubt. Where the Anti-Doping rule places 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 balance of probability, except as provided in Article 10.4 and 10.6 where the athlete must satisfy a higher burden of proof”.

- 8.2 Article 3.2 outlines the methods of establishing facts and presumption, and Article 3.2.2 specifically states that:

“WADA accredited laboratories and other laboratories approved by WADA, are presumed to have concluded sample analysis and

custodial procedure in accordance with the international standard for Laboratories. The Athlete or other person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred, which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, the SAAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

9. THE LAW

- 9.1 The charge against the athlete constitutes a breach of Article 2.1 of the South African Institute for Drug-Free Sport, which rule states that "The presence of a prohibited substance or its Metabolites or Makers in the Player's sample." Article 2.1.1 specifically states that:

"It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Makers 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"

- 9.2 Now the question is how does SAIDS prove the presence of the banned substance in the body of the Athlete, and the answer to the question is found in Article 2.1.2 which states that:

"Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a prohibited substance or its metabolite or Markers in the Athlete's A sample where the Athlete waives analysis of the B Sample and the B Sample is not

analysed or where the Athlete's B Sample is analysed 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; or, where the Athlete's B Sample is split into two (2) bottles and analysis of the second bottle confirms the presence of the prohibited substance or its Metabolites or Markers found in the first bottle".

- 9.3 Article 2.2 which is headed "Use or attempted Use by an Athlete of a Prohibited Substance or a prohibited Method". In particular Article 2.2.1 states that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or prohibited Method."

- 9.4 The above provision is founded on strict liability that is applicable to anti-doping violations.
- 9.5 Athletes are required to adhere to a standard set by the anti-doping rules on the basis that they could be held accountable for what enters their systems and the rules do not in any way accept ignorance of the anti-doping provisions or prohibited list.
- 9.6 The laboratory analysis report on Mr Watson's urine sample A, shows presence of a prohibited substance. Sufficient proof of an anti-doping rule violation has therefore been established in accordance with Article 2.1.2.
- 9.7 To be able to address the committee and to be successful in reducing the period of ineligibility, the Athlete needed to address the committee on Article 10 of the SAIDS anti-doping rules which deals with sanctions.

9.8 Specifically, if the athlete wants to be successful in his quest for elimination or reduction of period of ineligibility, the athlete must address the Panel on Article 10.4 which deals with elimination or reduction of the period of ineligibility for specified Substance under the Specific Circumstances

9.9 Article 10.4 Specifically states that:

"If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated".

9.10 The above provision places the onus on the Athlete to establish that he bears No fault and Negligence.

9.11 The other provision which an Athlete may argue and to reduce the period of ineligibility based on No Significant Fault or Negligence is Article 10.5.1 which states that:

"Reduction of Sanctions for specified substances or contaminated products for violation of Article 2.1, 2.2 and 2.6".

9.12 For the Athlete to be able to reduce the period of ineligibility, he or she must be able to establish no Significant Fault or Negligence and identify the source of the substance (in this case, an allegedly contaminated supplement).

9.13 If the Athlete is successful in establishing that the substance came from a contaminated product, the period of ineligibility shall be at a minimum reprimand or no period of ineligibility, and a maximum, two (2) years of ineligibility, depending on the Athlete's or other person's degree of fault.²

² Article 10.5.1.1 and 10.5.1.2 respectively.

9.14 However, the Prosecution's argument on the Sanctions leaned on Article 10.2 and specifically Article 10.2.1 which states that:

"the period of ineligibility shall be four (4) years".

9.15 However, the above provision contains two exception in Article 10.2.1.1 and 10.2.1.2.

9.16 The above exceptions states that:

"10.2.1.1 The anti-doping rule violation does not involve the specified substance unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional

10.2.1.2 The anti-doping rule violation involved is specified substance and SAIDS can establish that the anti-doping violation was intentional".

9.17 If the above provisions are being successfully argued by the respective parties and it is found that they are not applicable, the period of ineligibility shall be reduce to two (2) years.³

9.18 Firstly the Athlete must identify the Prohibited Substance and secondly the Athlete must prove that the very same Prohibited Substance was not used intentionally to enhance performance. As it was stated in the **Dimatar Kutrovsky v ITF**⁴ that:

"and athlete does not need to prove an intent to enhance his sport performance, since he cannot be said to this intent if he is not aware that the product he is taking contains specified substance."

³ Article 10.2.2.

⁴ CAS 2012/A/2804 Dimatar Kutrovsky v ITF, par 9.12.

- 9.18 Intention requires that the Athlete or other person engaged in conduct which he or she knew constitute an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregard that risk.⁵
- 9.19 In *casu*, we are dealing with an unidentified substance, one should take into account that the Athlete did not identify the substance he presented before the Panel, as a substance he took prior to competition, in the Doping Control Form.
- 9.20 At the same time the Prosecution failed to convince the Panel to its comfortable satisfaction that the Athlete used the substance intentionally to enhance his performance.
- 9.21 Therefore the Panel came to the unanimous finding that the prosecution failed to convince the Panel that the Athlete used the substance intentionally to enhance his performance.
- 9.22 Therefore the Athlete is found guilty for anti-doping violation as charged.

10 SANCTIONS

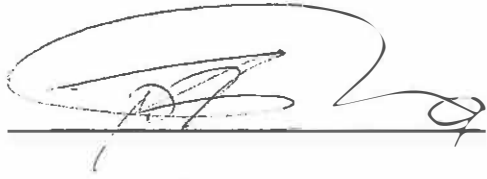
10.1 The Panel imposed the following sanctions against the Athlete:

10.1.1 A period of ineligibility shall be two (2) year in terms of Article 10.2.2.

10.1.2 The Athlete shall serve the period of ineligibility from the date of the hearing.

Date: 04 February 2016

⁵ Article 10.2.3 of the Rules.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Mr. Mandla Tshabalala

**For and on behalf of
Dr. Sello Motaung and Mr Joe Carrim**