BEFORE THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

ANTI DOPING DISCIPLINARY COMMITTEE

Case number: SAIDS / 2016 / 51

In the matter between:-

SAIDS

and

JAMES DRUMMOND

DETAILS OF HEARING

Dates of Hearing:	27 February, 15 May, 6 and 9 June and 10 July 2017
Athlete:	Mr. James Drummond
Tribunal Chairperson:	RGL Stelzner SC
Tribunal Member:	Dr Jason Suter
Tribunal Member:	Mr. Hasie Ismail
Legal Representative For SAIDS:	Ms. Wafeekah Begg
Athlete's Legal Representative:	Mr. Barend Kellerman of Attorneys Kellerman Hendrickse Inc

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TRIBUNAL DECISION

Introduction

1. James Drummond (hereafter "the Athlete") is a twenty two year old university student who was tested in-competition at a national hockey tournament held under the auspices of the South African Hockey Association ('SAHA') to which the anti-doping rules of the South African Institute for Drug Free Sport ("SAIDS") applied.

2. He provided his urine sample after taking part in the semi-final of the PHL hockey tournament in Johannesburg on 24 September 2016.

3. The urine sample was submitted for analysis to the WADA accredited Doping Control Laboratory Qatar in Doha, which returned an adverse analytical finding in respect of two prohibited substances which were found in his urine sample, a simulant, Ephedrine as well as the cannabis metabolite Carboxy – THC. The levels of Ephedrine and Carboxy – THC were recorded in the initial test report as having been "estimated higher than twice the respective Threshold levels". [1]

4. The Athlete did not have his B-sample tested. He has furthermore acknowledged the correctness of the sampling and testing procedures by SAIDS since being notified of the adverse analytical finding, promptly admitted having contravened the Code, apologised unreservedly and it appears sincerely undertook to exercise greater vigilance in the future. [2]

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[1] Dr Jeroen Swart gave evidence that upon further enquiry he established that the level of Ephedrine in the Athlete's urine had been measured at 29 ug / ml, when the threshold as set out below for Ephedrine is 10 ug / ml.

[2] He and his mother both made written representations to SAIDS shortly after receiving the report in which the contents thereof were accepted (SAIDS Bundle pp 18 – 23). There was an early and prompt admission of guilt by the player, one which comes across as expressing sincere regret at what transpired.

5. The Athlete accordingly pleaded guilty to breaching Article 2.1 of the SAIDS Anti-Doping Rules ("the rules"). The issue before the tribunal is that of an appropriate sanction.

6. The tribunal is indebted to the parties' representatives for their detailed written submissions. The submissions are comprehensive, most helpful and have given the members of the panel much food for thought.

7. Reference to the relevant Articles, definitions, comments and case law are all contained therein. The most important aspects are repeated herein.

8. In addition extensive evidence, both oral and written, from a number of witnesses, many of them experts, was presented over a number of days (spread over a period of some months, the hearing having been adjourned from time to time to afford the parties, including the Athlete, *inter alia* an opportunity to gather further evidence in support of their contentions).

9. The evidence ranged from laboratory evidence as to the alleged source of the Ephedrine to the Athlete's personal circumstances. The transcript of the proceedings records the evidence of the witnesses:

   9.1. Dr Holger Wellman whose CV is at pp 35 – 38 of the bundle of exhibits and report at p 39;
   9.2. The Athlete ;
   9.3. Mr Malcolm Taylor ;
   9.4. Mr Matthew de Souza ;
   9.5. Mr Cameron MacKay ;
   9.6. Dr Jeroen Swart ;

9.7 Mr Taylor (who was recalled to give evidence on 10 July 2017 of further tests conducted by him).

10. A comprehensive psychiatric report from Dr Larissa Panieri-Peter was filed, which provided the panel with insight into and an appreciation for the effect the trauma of losing his father at the age of 15 has had on the Athlete, the important role hockey has played in his life and the extreme effect the adverse analytical finding and this hearing have already had on him and his psyche at the youthful age of 22.

11. Although strictly speaking not directly relevant to the charges themselves (and on this ground the objection in respect of the relevance of the report by SAIDS was noted) the panel has taken cognisance of the contents thereof, are concerned about the outcome of this matter for the Athlete and trust that, as indicated by him to his psychiatrist, he will be able to learn from this experience too and, maybe with the support and assistance of SAIDS, turn this unfortunate experience into something positive.

12. This aspect will be returned to at the end of this determination.

13. The panel is indebted to the parties' representatives and the witnesses for their wide ranging and helpful investigations in this regard too.

The substances

14. Ephedrine is a specified substance under Class S.6 of the 2016 World Anti-Doping Code Prohibited List. [3]

[3] Class S6 b: Specified Stimulants. Including, but not limited to: 4-Methylhexan-2-amine (methylhexaneamine); .... Ephedrine***; *** Ephedrine .... Prohibited when the concentration ..... in urine is greater than 10 micrograms per millilitre The applicable provisions of the Code [3]

15. Carboxy – THC is a specified substance under Class S8 of the World Anti-Doping Code Prohibited List. [4]

16. A quantitative threshold is specifically identified in the Prohibited List for Ephedrine. But for that threshold the presence of any quantity of the prohibited substances in the Athlete's sample would have constituted an anti-doping rule violation. [5]

17. The adverse analytical finding was to the effect that the levels of both substances in the sample were relatively high, in the case of the Ephedrine roughly three times that of the permitted threshold, which is 10 micrograms per millilitre.

The Athlete's case

18. The Athlete was informed of the adverse analytical finding on 1 November 2016.

19. He immediately withdrew from all forms of hockey and has effectively been suspended from the sport since 7 November 2016.

20. The Athlete identified a Sunlife Energy Drink as the source of the Ephedrine.

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[4] Class S* Cannabinoids Prohibited: • Natural, e.g. cannabis, hashish and marijuana, or synthetic Δ9-tetrahydrocannabinol (THC). (The panel was unable to find the threshold specification SAIDS relied on in argument)

[5] Article 2.2 The significance of the threshold will become apparent hereinafter when evaluating the evidence of alleged contamination of an energy supplement identified by the player as being the source of the Ephedrine.

21. He admitted to having smoke marijuana socially sometime before the tournament and claimed this to have been the source of the cannabinoid.

22. In respect of the Ephedrine the Athlete's case (before the panel) essentially is that a Sunlife energy drink tablet (which is soluble in water), similar to the one which he had tested subsequently, was the source of the Ephedrine. [6]

23. The argument was that that tablet had Ephedrine in excess of the threshold and his taking of the supplement containing this unwittingly gave rise to the violation (as far as the Ephedrine was concerned).

24. The Athlete's case was further that the product did not indicate the existence of Ephedrine on the packaging at all when in fact an element of Ephedrine (albeit within the threshold) was detected in similar tablets which were tested by the Athlete.

25. The Carboxy – THC levels were attributable, according to the player, to his having smoked marijuana socially some time prior to the competition – it was therefore not used for purposes of the sporting event.

26. For cannabinoids (such as THC), an athlete may establish no *significant* fault of negligence by clearly demonstrating that the context of use was unrelated to sport performance.[7]

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[6] Previously, in his written representation to SAIDS, he had presented a range of possible sources. After a process of elimination the Athlete and his representatives settled on the Sunlife product being the claimed source of the Ephidrene

[7] Rules p. 116: The Comment under the definition of "No significant Fault or Negligence"

27. At the time that he smoked the marijuana, the Athlete claims he was unaware that he had been invited to play in the PHL tournament. The Athlete claimed he smoked the marijuana purely for recreational purposes and with no intention to enhance his sport performance.

SAIDS' case

28. SAIDS on the other hand has argued for the Athlete to be suspended from the sport of hockey for four years on the basis that he had used both the Ephedrine and cannabis intentionally within the meaning of the Code (which as is set out hereafter includes recklessly).

Relevant provisions of the Code

29. The relevant Articles of the 2015 WADA code for present purposes are the following:

> 10.2.1 The period of Ineligibility shall be four years where: .....
>
> 10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the antidoping rule violation was intentional.
>
> 10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.
>
> 10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted 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 disregarded

that risk. [8] An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. [9]

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6. 10.5.1.1 Specified Substances
Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.1.2 Contaminated Products [10]

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance [11]came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault

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[8] I.e includes what is known in South African law as *dolus eventualis* See for example the definition in *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd 2008 (3) SA 425 (SCA)* at para [11]

[9] The significance hereof is that if the Athlete proves the cannabinoid *in casu* was used out of competition the onus shifts to SAIDS to show to the comfortable satisfaction of the panel that it was intentional. See also the comment to No Significant Fault or Negligence: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.

[10] Contaminated Product: A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search

[11] Prohibited Substance: Any substance, or class of substances, so described on the Prohibited List. Prohibited List: The List identifying the Prohibited Substances and Prohibited Methods

Applying the Code to the facts

30. In order to show no Significant Fault or Negligence, the Athlete must not only establish his negligence, [12] when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, [13] for any violation of Article 2.1 [14] the Athlete must also establish how the Prohibited Substance entered his or her system (referred to hereafter as "the source") (emphasis supplied).

31. In order for the Athlete to argue for a reduction in the prescribed sanction of two years' ineligibility in a matter such as the present the Athlete is accordingly required to prove on a balance of probabilities the manner in which the prohibited substance entered his body and that the Athlete exhibited no significant degree or fault in his ingesting thereof (in this case the manner in which the prohibited substances entered his body).

32. In order to be able to argue whether this constituted gross or no significant negligence on his part, it is therefore necessary for the Athlete to first prove that the Sunlife energy tablets which he has identified as being the source of the larger quantity of Ephedrine than that which is permitted were indeed the source of the Ephedrine detected in his urine.

33. Only then can one enter the next level of the argument, i.e. as to the degree of negligence.

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[12] That he was negligent has been conceded on behalf of the Athlete
[13] Which the Athlete is not, the age of minority in terms of the Code being 18
[14] Which applies to the present matter

34. If this hurdle (threshold requirement) is not crossed, the remaining arguments cannot be considered – not only because the Code requires proof of this but also as a matter of logic: without knowing what the source was, one cannot begin to evaluate the circumstances in which that source was used. [15]

35. It is accepted by the panel that the Athlete proved that he did not use the cannabis for the purposes of enhancing his sports performance.

36. There is no evidence to contradict his say so in this regard, even though there appears to be some confusion as to the dates when it was used and whether he had already been informed of the tournament and his selection for the tournament when he used it, it is accepted that on balance the cannabis was used by him (and given the levels possibly (although there is no evidence to support such a conclusion) more often than claimed.

37. There is in any event no evidence that the use thereof is performance enhancing for the sport of hockey and the argument of SAIDS was more along the lines that the use thereof was contrary to the Code and contrary to the good image of sport in general. As set out above the Code itself provides for a reduction in the period of ineligibility in circumstances such as those which in all probability pertain in the present matter.

38. In addition it appears to be common cause between the parties that the charge against the player should be seen as a single one arising from the same test after the match of 24 September 2016. This aspect will be returned to, as will the fact that the Athlete has been serving a period of

[15] By the same token SAIDS will have difficulty as a matter of logic proving an intentional contravention of the Code without being able to show the manner in which this was done.

voluntary suspension since 7 November 2016, shortly after being informed of the adverse analytical finding.

39. It is the claimed source of the Ephedrine which now requires consideration.

40. In the panel's view and adopting a purposive interpretation of the Code, in the case of Ephedrine, and any other substance which has a permitted threshold for use, the Athlete is required to prove how the amount of the Prohibited Substance (i.e in excess of the threshold) entered his system.

41. It is in the panel's view not sufficient for the Athlete to show that a minor quantity of the substance (within the permitted limits) could be detected in the substance (which would have been permissible) when the use thereof is only prohibited in the case of amounts above the threshold.

42. Put differently Ephedrine within limits is permitted and is not prohibited. It is only when it is above the threshold that Ephedrine is prohibited. [16] The athlete is accordingly required to prove on a balance of probabilities how the excessive amount of Ephedrine, which was detected, entered his system. It is not sufficient for the Athlete to prove that the tablets which were tested contained some Ephedrine.

43. It is accordingly for the Athlete to prove on a balance of probabilities that the Sunlife tablet he claims to have used on the day of his urine sample being taken was the source of the excessive amount of Ephedrine detected

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[16] See Article 2.1.3 - "Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation."

in his urine, i.e. Ephedrine in excess of the threshold and not just any Ephedrine entered his body through the use of this energy supplement.

Burden of proof

44. This case raises the issue as to the burden and standard of proof most directly.

45. Where the Code places the burden of proof upon the Athlete alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, as in this matter with reference to the source, the standard of proof shall be by a balance of probability.

46. The Athlete may not have been a satisfactory witness in all respects (and in this regard his psychiatrist's report provides some insights into what was possibly his confused state of mind at the time of his having for example to explain to the Doping Control Officer when he had taken the various items listed on the form).

47. However, the proper test at this stage of the enquiry is not whether the witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells and the case which is presented on his behalf is to be accepted as being more probable than not.

48. This is not a case where the panel has to decide between two conflicting versions and where, therefore, the credibility and reliability of the one witness vis-à-vis the other need to be evaluated.

49. This is a case where the Athlete is required to rebut the imposition of a two year sanction by establishing that it more likely as not that the Sunlife tablets in issue were the source of the excessive amount of Ephedrine detected in his urine.

50. Where the probabilities of that which is being argued by both sides are evenly balanced in the sense that it could as likely as not have been these tablets which caused the excessive amount of Ephedrine to be detected in his urine, the Athlete has not discharged the onus which is on him and the prescribed sanction cannot be "rebutted" or avoided or minimised on grounds which would then need to be separately and additionally established.

51. The panel was referred to *inter alia* the decision in the matter of *WADA v International Weightlifting Federation and Yenny Fernanda Alvarez Caicedo*[17] where the CAS panel said the following on whether the athlete had discharged her onus of proving the source of the prohibited substance on a balance of probabilities at para 52:

> "*To establish the origin of the prohibited substance, CAS and other cases make it clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the Athlete took contained the substance in question.*"

[17] CAS 2016/A/4377 – a matter dealing with whether the athlete had discharged her onus of proving that she had not intentionally ingested boldenone, a steroid

52. We were also referred to the CAS decision in Meca-Medina v Fina[18], the panel stated that "[t]*he raising of an unverified hypothesis is not the same as clearly establishing the facts*".

53. And to, *CCES v Lelievre* where the tribunal said the following regarding this requirement:

> "*While recognising that obtaining such evidence might be difficult, if not impossible, mere speculation as to what may have happened will not satisfy the standard of proof required.*"

54. In the matter of *IBAF v Pedro Lopez*[19] the panel commented as follows:

> "*In this case, the Athlete's suggestion that one or more of the medications or supplements that he took must have contained the Boldenone is nothing more than speculation, unsupported by any evidence of any kind. He has not shown that Boldenone was an ingredient of any of those substances, nor has he provided any evidence (for example) that the supplements he took were contaminated with Boldenone. Such bare speculation is not nearly sufficient to meet the Athlete's burden under Article 10.5 of establishing how the prohibited substance got into his system.*"

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[18] CAS 99/A/234 and 235

[19] IBAF 09-003 – I referred to in the Caicedo decision, footnote 9 above, at par. 55 of the decision

Applying the test to the facts

55. The tests done by the Athlete reveal the tablets in question had levels of Ephedrine within permissible limits.

56. The level in the Athlete's urine was far in excess of these.

57. Although the existence of the Ephedrine was not disclosed on the product and that that to that extent the product was "contaminated" within the meaning of the Code, this still does not mean that that product was the source of the excessive levels of Ephedrine.

58. It remains a factual question – what caused the Athlete to have the excessive levels of Ephedrine?

59. It could not have been a product which had permissible levels of Ephedrine in it (even though the existence of these permissible levels of Ephedrine had not been indicated on the product itself).

60. It had to be a product with excessive levels of Ephedrine in it and then not only that by three times the threshold permitted by WADA.

61. The evidence of Dr Swart in this regard is transcribed at pp 200 – 211 of the transcript of the proceedings on 15 May 2017 (and his report at p 53 of the SAIDS supplementary bundle).

62. Dr Swart explained the difference between his pharmacological approach to analysing the concentration of Ephedrine in the urine to Dr Wellman's

analysis based on the respective masses. A list of questions was subsequently produced for Dr Swart by the Athlete's representative, answered by him and included in the SAIDS supplementary bundle at pp 54 – 61 by agreement between the parties. It does not appear from this that Dr Swart's evidence (including his expert opinion recorded at p 207 of the transcript) can be really challenged by the Athlete.

Did the Athlete prove on a balance of probabilities how the prohibited amount of Ephedrine entered his system?

63. The question remains, was the Sunlife tablet the Athlete claims to have ingested on the day (in soluble form) the source of the excessive level of Ephedrine?

64. In the panel's view and for the reasons which follow, by showing that there is some Ephedrine in those tablets which were tested the Athlete has not proven on a balance of probabilities that another tablet of the same product was used on the day in question and that that one, on a balance of probabilities, contained the far larger dosage of Ephedrine which was detected in the Athlete's urine.

65. The Athlete's most recent investigations focussed on the Sunlife tablets in order to prove that these supplements were "contaminated" with Ephedrine.

66. The investigations and tests done on the Athlete's behalf revealed levels of Ephedrine in some of the tablets which were tested but not at the prohibited amounts (the threshold levels) and nowhere near that which was detected in the player's urine.

67. The Athlete's own first test of the product detected Ephedrine at a concentration of 44.6ug/g or / 189 ug/ tablet, the second at 87.2ug/g or / 370 ug/tablet. They do indicate significant variance in amounts of ephedrine tested in the two tablets but both results are below the thresholds.

68. The WADA accredited laboratories tested for levels above this threshold as did the Sunlife appointed Eurofins laboratory in Hamburg, hence their finding no Ephedrine in the second set of sample tablets. Their tests were aimed at detecting Ephedrine above the threshold (of 100 ug / g, 10 micrograms per millilitre or as it is reflected in the report at p 95 of SAIDS supplementary bundle – "<0.1 mg / kg = Below indicated quantification level")

69. It not necessary for the panel to have to decide between what at first appeared to be conflicting versions of various agencies' tests in respect of the product in question.

70. Having regard to the varying sensitivities of the tests and instruments and solvent used in doing these tests, the conclusion to be reached in this regard is that levels of Ephedrine, below the WADA threshold, are to be found in the product (potentially even in many tablets).

71. The WADA agencies do not test for such low levels, but other laboratories, more specifically the one appointed by the Athlete, the University of Stellenbosch's Central Analytical Facilities (CAF), using different methods and solvents would be able to pick up such low levels in the product, as was done by Mr Taylor of CAF.

72. The levels of Ephedrine which the Athlete proved to be in the sample tablet are therefore firstly below the prohibited ones and secondly do not account for the levels of Ephedrine which was found in the Athlete's urine.

73. The case of the Athlete in this regard is that because some Ephedrine (within the legal limit) was detected in some of the tablets tested on his behalf subsequently, he has shown on a balance of probabilities that the tablet which he took on the day (of the same product) was the source of the far larger concentration of Ephedrine.

74. This does not prove on a balance of probabilities that the Sunlife tablet which the Applicant says he took on the day of the test was the source.

75. The further problem for the Athlete is that the tablets which were tested were from a different batch / lot of product to the one which the Athlete claims to have used on the day of his sample having been taken.

76. In addition, it does not appear as if the Athlete himself believed (or suspected) the tablets in question to have been the source of the excessive amount of Ephedrine on the day.

77. A number of products were listed on the Doping Control Form. The form requires medication and nutritional supplements taken during the past seven (7) days" to be disclosed.

78. In his statement made to SAIDS a number of possible sources are claimed to be the source for the Ephedrine, in the alternative it appears. The Athlete does not claim that it was a combination of them. Here for the first time

mention is also made of Sudafed and an inhaler as a possible source of the Ephedrine. These contentions have not been persisted with.

79. It appears the Athlete either did not know what the source of the Ephedrine was or cast the net as wide as he could in the hope that one of these products could later be identified to have been a possible source.

80. It is to be noted in this regard further that the cannabis, which was found in his urine was not listed on the initial control form, although it was disclosed in his initial statement to SAIDS. It could be because it had not been used in the preceding 7 days or that it was not specifically required in terms of the form (but there is space for the athlete volunteering this information under comments).

81. One mustn't confuse proof with the measure of proof. [20]

82. Where there is no evidence from which to draw any inference or where there is no probability either way there is simply no proof of anything (regardless of the measure by which you measure it).

83. Unless one simply believes the Athlete, who himself, as set out above, was unable to identify the source from his own knowledge, until then the chances of the source being the Sunlife tablets or some other source (which has either not been disclosed or of what which the Athlete similarly has no knowledge) remain evenly balanced.

84. And where this is the case, the finding must be that the burden of proof resting on the Athlete has not been discharged.

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[20] See African Eagle Life Assur Co Ltd v Cainer 1980 (2) SA 234 (W) at 238 ff

85. Where the probabilities are evenly balanced, a finding of credibility might well be the determining factor.

86. But where however the person giving the evidence himself does not know what transpired, it becomes more difficult to weigh up the probabilities – in order to decide what is probable and what is not probable as regards the particular individual situated in the particular circumstances in which he was.

87. The issue can in those circumstances not be decided on credibility alone.

88. And where the evidence which was given was somewhat contradictory in certain respects the task of discharging the onus becomes even more difficult, in this case insurmountable.

89. The generalised suggestion in oral argument (without evidence to support this) that many ("up to 20%" of) supplements may be contaminated with prohibited substances, does not address the issue of the exceedingly high level of contamination which is claimed to have been the case here, but of which there is simply no proof – there is no proof as to what the source of the excessive levels of Ephedrine were.

90. The Athlete has failed to provide any logical explanation as to why the Ephedrine which was measured in his urine was three times the threshold permitted by WADA.

91. The tablets which were tested were insufficient, assuming for the moment that the one which was imbibed on the day in question, was a similar one.

92. The Athlete could also not explain why the dates he supplied to the doping control officer were in the form they were (at first he could also not confirm that he had supplied the officer with these dates), exactly when he had had the dinner party at his commune at which he had smoked the cannabis as claimed by him, exactly when he was notified of his selection to participate in the PHL tournament.

93. He was furthermore not able to adequately explain the high levels of both the Ephedrine and the Cannabinoids Carboxy – THC in his urine sample.

94. According to the doping control form, the Athlete took a number of different medications and supplements, on various dates prior to 24 September 2016 (accepting for the moment that the "10" in the date was intended to be a "9" for the 9th month), the Sunlife Energy product being only one of these.

95. In his evidence, he also mentioned Sudafed and the unknown asthma inhaler and in his correspondence to SAIDS he suggested these (together with the Sunlife Energy) may have been the source of the Ephedrine.

96. The Athlete's explanation as to why the Sudafed and asthma inhaler were not on the form is simply that he forgot.

97. The omission of the cannabis usage on the form can also probably be ascribed to the fact that the form does not expressly require this, but on the

other hand if the Athlete was concerned about any possible contravention of the Code, he could (and should) have volunteered this evidence.

98. The omission to declare his use of cannabis and the unexplained discrepancies in the dates on the form (which rendered them largely nonsensical) may point to anxiety on his part, rather than confusion (given his level of education), but still reveals a failure to take the officer completely into his confidence at the time. Something he made up for when the results came out and he relatively soon thereafter admitted contravening the Code (but still raising questions of credibility or at least reliability as to his recollection of events).

99. He may have had experienced flu-like symptoms during and immediately prior to the PHL tournament and he may have been treating the symptoms himself. He may also have taken Sudafed in an effort to clear his nasal congestion.

100. None of this explains the omissions and confusions referred to above, nor does any of it assist him in proving that the Sunlife product was the source.

101. The Sudafed and the inhaler are in any event red herrings, as is their omission from the list, the Athlete has pinned his colours to the mast of the Sunlife product in this matter.

102. The fact that the Athlete knew that he had smoked marijuana some time before the tournament (maybe even on more than one occasion which would explain the relatively high levels detected in his urine) and that it could still be detected would go some way to explaining his lack of forthrightness in completing the form.

103. This impacts adversely on any claim which is made before the panel that he now thinks the Sunlife product is the source of the excessive levels of Ephedrine (insofar as such a claim is being made).

104. The fact of the matter is he cannot claim this categorically and does not do so.

105. The fact of the matter is further that it was only after testing the Sunlife product that "it became apparent" that it was the source of the Ephedrine and it was only then that he decided to hitch his wagon to that star.

106. This is not the same as claiming (and disclosing) from the outset what the source of the Ephedrine was. This too impacts adversely on the probability (and veracity) of the explanation.

107. The omissions and confusions as to dates cannot be because the Athlete was rushed when completing the form or purely a result of human error. If this was the case he would not have inserted on the form (apparently with his own hand) that the whole process had been conducted professionally – "*Quick, easy, very professional*".

108. His allegedly not being "good with dates" as was argued on his behalf is also no explanation for the wholesale confusion in this regard.

109. The Sunlife "third possibility" was identified by the Athlete in his letter to SAIDS dated 14 November 2016 as a source of the Ephedrine - the 'pre-workout' drink that he ingested during the three matches he had participated in – became the one and only claimed source in the hearing. It is accepted the athlete did not have a container of the original of the Sunlife energy drink available and that it had been supplied to him by a teammate and that it was therefore practically impossible for the Athlete to do any more than he did in trying to identify the source. This does not however assist the panel in determining what the source was.

110. It is further accepted that the product is made with effervescent tablets which are freely sold in a tube branded "*power booster*", that the packaging states that the product contains Vitamins B2, B6 and B12, Niacin and Pantothenic Acid, its ingredients are listed as Taurine 1000 mg, Caffeine 34 mg, Niacin 9 mg, 56% Pantothenic acid 6 mg, 100% Vitamin B6 1.3 mg, 93% Vitamin B2 0.8 mg, 57% Vitamin B12 3.3 mg .and there is no reference to any Ephedrine. This may have been relevant to determining the degree of fault or negligence but at this stage of the enquiry, that is not the question.

111. The product is manufactured in Germany and freely available across the counter from a chain such as Clicks. We are advised that on Sunlife's website[21], one reads the following: "Sunlife is a producer as well as a supplier to renowned international trading partners in the food, retail and pharmacy sectors in over 70 countries." Once again this may have been

[21] www/sunlife-vitamine.de

relevant to determining the degree of fault or negligence but at this stage of the enquiry, that is not the question.

112. The substance tested positively for a quantity of Ephedrine below the WADA threshold according to test reports from CAF and Mr Malcolm Taylor.

113. After the proceedings of the 15th of May, tablets from a further sealed container also tested positive for Ephedrine and at a level higher than that at which the first (unsealed) container did. The first test detected Ephedrine at a concentration of 44.6 / 189 ug, the second at 87.2 / 370 ug, in both cases still below the WADA threshold.

114. It may have been established that similar tablets from another batch contain some Ephedrine (within permissible limits).

115. It is a giant leap to deduce or infer from this, as the Athlete wishes the panel to do, that the same supplement was the source of Ephedrine some three times above the limit.

116. Dr Swart's evidence, which was ultimately accepted by the Athlete, who also submitted written questions to Dr Swart which were answered in writing, was that the levels at which Ephedrine was detected by CAF in the Sunlife product which was first tested would not have been sufficient to have resulted in the levels at which the Athlete's urine sample tested positively for the substance.

117. His evidence was in fact that in order for those levels to have been achieved from ingesting the tablet in question some 30 of those tablets would have had to be ingested one hour before the sample was taken. Giving the Athlete every benefit and assuming the entire ingested dose of 180 ug of Ephedrine (which the first test showed was in the tablet) was absorbed and also entirely excreted in the 90ml doping control sample of urine (which is the minimum quantity of urine required for testing) the concentration of Ephedrine in the urine would have been 2.1 ug / ml. The levels measured in the Athletes urine (as confirmed by Dr Swart with SAIDS who confirmed this with the Doha laboratory) of 29 ug / ml was some 14 times higher.

118. The "concessions" made in a subsequent written request (paragraphs 7 – 9 thereof – SAIDS bundle of documents p 55) that it was possible that a 30 mg Sunlife tablet could contain 3.4 mg of Ephedrine and that if this was so, which is also possible given varying levels of Ephedrine in the two samples, one table could result in levels of Ephedrine was largely a mathematical one - and in any event made in the realms of possibilities. They do not assist the Department in determining the matter on a balance of probabilities.

119. The Athlete may have been able to establish :

119.1. that the two Sunlife tablets which were tested (from a different batch to those ingested) contained some ephedrine (within permissible limits) ;

119.2. the levels fluctuate (still within permissible limits) ;

119.3. a Sunlife tablet of 30 mg could (possibly) have contained 3.4 mg of ephedrine, which is what would have been required to result in the level at which the Athlete tested positively for the substance.

120. This does not however prove on a balance of probabilities that the Sunlife product was the source of the relatively large quantity of Ephedrine that was detected in the Athlete's urine sample.

121. There is for example no objective proof that the batch out of which that tablet came (nor for that matter any tablets out of any other batches) had the large amounts of Ephedrine which would have resulted in a finding of the magnitude in this matter.

122. The fact that the Athlete has shown by way of mathematical extrapolation that the required quantity of Ephedrine could be included in a tablet the size of the Sunlife tablet, does not show that on a balance of probabilities it was the Sunlife tablet the Athlete claims to have ingested on the day which was the source.

123. All the Athlete has shown (and even then there are questions to be asked) is that there is a possibility that the Sunlife tablet which he ingested on the day contained some Ephedrine, within permissible limits, i.e. below the WADA threshold.

124. It is not for the panel to speculate as to what else could have caused the adverse analytical finding for the Ephedrine, if not the Sunlife Energy drink. It is for the Athlete to prove on a balance of probabilities that this was the source.

125. The fact that the South African Doping Control Laboratory tested two samples of Sunlife, from the same batch as was tested by the Athlete's laboratory, CAF, in May 2017 and another random one purchased by SAIDS which did not detect "any ephedrine in the tablets" as claimed by the Athlete does not take the Athlete's case any further.[22] Different solvents were used and different methods producing results within different parameters.

126. In the absence of evidence on which the probabilities as to the source are to be determined and given that there are no mutually destructive versions to choose between, the Athlete's credibility and the reliability of his testimony cannot play much of a role, particularly when, as stated above, he has hardly been categoric in his assertion that the Sunlife product was the only possible source.

127. For the reasons set out above the panel finds the Athlete has not discharged the onus of proving the source – the evidence presented is insufficient in order for the source of the substance (*in casu* the excessive levels of Ephedrine) to be established on a balance of probabilities.

[22] See the tests reports on pp. 72 and 73 of the evidence bundle.

128. The panel accepts the Athlete is a young man who at a very early stage of what appears to be a budding future as a top class hockey player has had to deal with yet another setback.

129. It is also accepted that he assisted as best he could to try and support the thesis which has been presented to the panel as to the source of the adverse finding by *inter alia* :

129.1. volunteering information as to what appears to be widespread, indiscriminate and to a large extent unquestioning use of energy supplements at the IPL tournament ;

129.2. calling some of his team mates to give the panel (and SAIDS) further insight into the prevalence thereof ;

129.3. conceding he was negligent (although ultimately not for him to decide);

129.4. volunteering some information to SAIDS shortly after the finding was made known to him (although the various possibilities as to the source of the Ephedrine – which at the time was suggested to have been sipping on a variety of energy drinks of his friends, a claim which subsequently became one Sunlife energy tablet).

130. Credibility alone, in the absence of evidence proving the probable source, cannot be determinative of the matter.

131. And if the source cannot be proven, questions of fault, whether no "Fault or Negligence" or "No Significant Fault or Negligence" as defined, or degrees thereof with a view to establishing whether a reduced period of ineligibility is called for, do not enter into it.

SAIDS' claim for a four year period of ineligibility

132. SAIDS sought to argue on the grounds *inter alia* that the Athlete failed to provide concrete evidence as to what the actual source of the Ephedrine which was found in his urine sample was and that the use of the cannabis had been intentional that a period of ineligibility for four years should be impose

133. In terms of Article 10.2 of the rules, the period of ineligibility shall be a maximum of four (4) years where the violation was *intentional* (or a maximum of two (2) years where it was *not intentional*, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 of the rules).

134. Intentional in that sense would include recklessness as set out above which would require SAIDS to prove that there was (1) a realisation on the part of the Athlete that there was a real possibility that he would be contravening the rule and (2) a reconciliation by him with the occurrence of the eventuality, in the sense of a deliberate decision to proceed with the act, with indifference to its appreciated consequences. In order to do so, and as a matter of logic, SAIDS would first need to prove the manner in which the rule was contravened.

135. The measure of proof in this regard is further for the Anti-Doping Organization (*in casu* SAIDS) to establish the intentional anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which 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.

Conclusion

136. The panel finds the player intentionally smoked marijuana and admitted to it, which is a direct violation of the spirit of the Code.

137. The panel also finds the concentration levels of Carboxy – THC in his urine was high, more than double that which the WADA accredited laboratory referred to as the "respective Threshold level".

138. It may be that the Athlete smoked it more recently than claimed, but as set out above it is accepted he did not do so in order to enhance his performance in the competition.

139. In terms of Article 10.2 of the Code, the period of ineligibility shall be a maximum of two (2) years where it was *not intentional*, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 of the rules.

140. The Code also permits potential reduction or suspension in cases of cannabis where the player proves that the use thereof was not to enhance his performance in the competition – by clearly demonstrating that the context of the Use was unrelated to sport performance.

141. In a very comprehensive analysis of past sanctions for the presence of cannabis the Athlete's attorney has shown the average sanction for the use of THC (and specifically marijuana) to be a period of ineligibility of 3 to 4 months with a maximum of 6 in certain exceptional cases.

142. Given *inter alia* the Athlete's prompt admission in this regard (once the results were made known) on the one hand and the relatively high level of concentration in his urine on the other, the panel would have considered a 4 month period of ineligibility to be appropriate for the use of the cannabis, had that been the only substance which was detected.

143. However given the level of Ephedrine and the Athlete's failure to prove the source of the Ephedrine the panel is compelled to impose a period of two (2) years' ineligibility.

144. Given that the two substances formed part of the same charge / violation arising from the same testing, the panel determines that these periods of suspension / ineligibility are to run concurrently.

145. Article 10.11.3 of the Code provides for a credit to be given for any period of Provisional Suspension or Ineligibility Served. The Athlete has respected his provisional suspension which was imposed on 6 November 2016 pursuant to Article 10.11.3.2 and which the Athlete accepted at the time.

146. He is accordingly entitled to a credit for this part of the sanction with the result that the Athlete is suspended from participating in the sport of hockey for a period of two years with effect from 6 November 2016 to 5 November 2018.

147. The Athlete is informed of his right of appeal in terms of Article 13.1.

148. The Athlete is furthermore informed of the provisions of Article 10.6 in terms of which in certain circumstances a reduction in the period of ineligibility can be obtained where substantial assistance is provided and Article 10.12.2 as to when the Athlete would be permitted to start training again.

149. **Article 10.6.1.1 provides for a reduction or suspension of a period of ineligibility for reasons other than fault. Article 10.6.1 provides that where an athlete provides substantial assistance in discovering or establishing anti-doping rule violations an Anti-Doping Organization with results management responsibility for an anti- doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or**

bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the AntiDoping Organization with results management responsibility. After a final appellate decision under Article 13 or the expiration of time to appeal, an AntiDoping Organization may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA and the applicable International Federation. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. No more than three quarters of the otherwise applicable period of Ineligibility may be suspended.

150. **Article** 10.6.1.2 provides further in order to further encourage Athletes and other Persons to provide Substantial Assistance to Anti-Doping Organizations, at the request of the Anti-Doping Organization conducting results management or at the request of the Athlete or other Person who has, or has been asserted to have, committed an anti-doping rule violation, WADA may agree at any stage of the results management process, including after a final appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of Ineligibility and other Consequences. In exceptional circumstances, WADA may agree to suspensions of the period of Ineligibility and other Consequences for Substantial Assistance greater than those otherwise provided in this Article, or even no period of Ineligibility, and/or no return of prize money or payment of fines or costs.

151. In this regard the panel notes that the evidence revealed that there appears to be a widespread, ongoing and what is considered by those who partake therein to be acceptable, use of firstly cannabis amongst young sport stars, at school and university level.

152. In addition there appears to be a large scale promotion of supplements and energy drinks such as *inter alia* the Sunlife products the Player thought was the source of the excessive level of Ephedrine amongst *inter alia* hockey players through product sponsorships of certain players.

153. In the case of Sunlife products this appears to be without the players being informed (and without any indication thereof being on the products themselves) that some of these products did or may contain an element of Ephedrine (albeit within the permitted threshold).

154. Nevertheless, even though this may be within permissible limits one would expect professional sportspeople to be informed thereof.

155. The Athlete, who is a well spoken and presentable young man, could in the panel's view be involved in and possibly become a spokesperson for anti – doping programmes, particularly at school and university level, highlighting the dangers of drugs and doping in sport and bringing the adverse consequences of contravening the WADA Code to the attention of these youths who may, it appears, not be aware of the serious repercussions for them and their future sporting careers in the case of contravention.

156. SAIDS itself could, it is recommended, bring the finding of the panel in this matter to the attention of not only the Athlete's sporting body, who in

turn would need to remind their members and affiliates of these dangers, but also the manufacturers of the products in question.

157. The conclusion reached by the panel is therefore as follows:

158. A two year period of ineligibility is imposed on the Athlete commencing on 6 November 2016.

159. There is no order as to costs.

SIGNED AT CAPE TOWN THIS 17th DAY OF JULY 2017

R G L STELZNER SC

DR J SUTER

MR H ISMAIL