

In the matter between:

SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT (SAIDS)

and

GORDON GILBERT (The Athlete)

**In re: ALLEGED VIOLATION OF ANTI-DOPING RULE IN TERMS OF ARTICLE 2.1
OF THE 2016 ANTI-DOPING RULES OF THE SOUTH AFRICAN INSTITUTE FOR
DRUG-FREE SPORT (SAIDS)**

ANTI-DOPING TRIBUNAL FINDINGS AND SANCTION

A INTRODUCTION

1. These proceedings are governed by the South African Institute for Drug Free Sport Anti-Doping Rules 2016. Federations and athletes are subject to the jurisdiction of SAIDS in terms of Article 1 of the Anti-Doping Rules 2016 and must comply with the Anti-Doping Rules in terms of Section 10(1)(e) of the South African Institute for Drug-Free Sport Act No 14 of 1997.
2. The Athlete is a professional cyclist (MBT) and brand ambassador for Biogen at mountain bike events. He is a former professional football player. The Athlete competed in the Sani2c event when he was tested in-competition on 13 May 2016 at an event under the jurisdiction of Cycling South Africa (CSA) and, as such, was subject to the rules of CSA, the South African Sports Confederation and Olympic Committee and the South African Institute for Drug-Free Sport (SAIDS). At this event, the Athlete was requested to provide a urine sample for an in-competition test in accordance with South African Institute for Drug-Free Sport Anti-Doping Rules 2016.
3. An Independent Doping Hearing Panel was convened by SAIDS in terms of Article 8.1 of the Anti-Doping Rules 2016 in order to determine whether, in this case, a doping

violation in terms of the SAIDS Rules and as embodied in the charge set out below, was committed by the Athlete.

4. The Athlete was advised that a doping hearing would be convened for **Wednesday, 28 June 2017** to hear the charges against him. He was also advised that he was entitled to be legally represented.
5. The Doping Hearing Panel comprised of:
Prof Rian Cloete, Chairperson
Prof Yoga Coopoo, Sports Administrator Representative
Dr Rob Collins, Medical Doctor

B THE HEARING

6. The hearing was initially convened on **Wednesday, 28 June 2017** at 17h00 at the Holiday Inn Express, the Zone, Oxford Road, Rosebank, Johannesburg and later reconvened on **Monday 7 August 2017** at 17h00 at the same venue. The matter was postponed on **28 June 2017** to allow the Athlete to call witnesses he intended to rely on as corroborating evidence in this matter. The hearing was as far as possible conducted in an informal manner.
7. SAIDS was represented at the hearing by Ms Wafeekah Begg (Prosecutor), who was charged with the duty of prosecuting the Athlete.
8. The Athlete was represented at the hearing by Ms Estee Mamman (Attorney) and Mr Anthony Van Vuuren (Advocate).
9. There were no witnesses present at the hearing on **28 June 2017** for either SAIDS or the Athlete. Dr MJ Van der Merwe (Director: South African Doping Control Laboratory) did present expert evidence telephonically on behalf of SAIDS. The hearing proceeded in the presence of the members of the Tribunal, the Prosecutor, the Athlete and his representatives. When the matter was reconvened on **7 August 2017**, the Athlete called Ms Lariza Gilbert (his wife) as a witness.
10. Evidence tabled before the Tribunal consisted of:
 - 10.1 The notification of the adverse analytical finding (sample number 4014223) dated 2 March 2017;
 - 10.2 Adverse Analytical Finding;
 - 10.3 The Doping Control Form dated 13 May 2016;
 - 10.4 Analytical Test Report Urine: A sample Analysis;
 - 10.5 The Chain of Custody Form;
 - 10.6 A bundle of documents containing certificates of analysis, product information of supplements, research articles, Biogen sponsorship agreement, record of Dischem purchases, meal plans, curriculum vitae of the Athlete and the exchange of email correspondence between the Athlete and SAIDS marked as PART 1. A second bundle of documents were tabled when the hearing

reconvened marked as PART 2. This bundle contained *inter alia* supplement information, email and WhatsApp correspondence, photographs of products, Biogen advisory and product information.

C THE CHARGE

11. On 31 May 2017, Mr Gordon Gilbert, a cyclist who competed in the MTB Sani2c cycling race, was served a written charge as follows:

*“On the 13th May 2016, you provided a urine sample (4014233) during an in-competition test. Upon analysis, the Anti-Doping Laboratory Qatar reported the presence of prohibited substances in your urine sample. Since the Anti-Doping Laboratory Qatar is not accredited to conduct IRMS analysis, the sample was sent to the Federazione Medico Sportivo Italiana Anti-Doping Laboratory in Rome, a WADA accredited laboratory, for confirmation of Testosterone and its metabolites. Testosterone is categorised under **Class S1 – Anabolic Agents** on the World Anti-Doping Code 2016 Prohibited List International Standard.”*

12. Testosterone and its diols are prohibited substances in terms of article 4.1 of the Rules read with the 2016 WADA List of Prohibited Substances and Methods (the WADA List) and are listed under category S1 Anabolic Agents and as such, do not constitute Specified Substances in terms of article 4.2.2 of the Rules.
13. The Athlete was notified of the adverse analytical finding on 2 March 2017 and further informed that he was entitled to have his “B” Sample analysed.
14. The adverse analytical finding of the “A” sample was never disputed by the Athlete before the hearing and an analysis of the “B” sample was not requested.
15. In order to establish the anti-doping rule violation, it is necessary to set out herein Article 2.1 of the Rules which read as follows:

“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 any 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 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 the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

16. In order to secure a guilty verdict from the Doping Hearing Panel, the Prosecution needs to discharge the burden of proof as contemplated in Article 3.1 of the Rules. It states the following:
“3.1 Burdens and Standards of Proof
SAIDS shall have 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. The standard of proof in all cases is *greater than a mere balance of probability but less than proof beyond a reasonable doubt*.
17. A Doping Control Form (67462) was handed into evidence with test mission code 633/16 by SAIDS for the in-competition testing of the Athlete. This form was signed by the athlete on the 13th of May 2016 acknowledging that he had read the notice, been notified of his selection, and gave permission for his sample to be used for anti-doping research purposes.
18. The Athlete did not declare the use of the supplement Biogen *Testoforte* on the Doping Control Form. The Athlete only declared *DripDrop*, *PeptoPro*, *Enduren* and *Panado* on the Doping Control Form.
19. The Anti-Doping Laboratory Rome reported on 17 January 2017 the presence of a prohibited substance in the urine sample (4014223) of the Athlete. The substance identified in his sample were Testosterone and its metabolites. This substance is categorised under **Class S1 – Anabolic Agents** on the World Anti-Doping Code 2016 Prohibited List International Standard.
20. In terms of Article 3.2.2 of the Anti-Doping Rules 2016 it is presumed that WADA accredited laboratories conducted sample analysis and custodial procedures in accordance with the international standard for laboratories.

D THE VERDICT

21. The presence of the substances identified as *Testosterone* and its metabolites were proven. The Doping Hearing Panel is satisfied that the Athlete is indeed guilty of violating Article 2.1 of the 2016 Anti-Doping Rule of the South African Institute for Drug-Free Sport (SAIDS) as particularised in the charge sheet served on the Athlete on 31 May 2017.

E DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

22. The remaining question is the nature of the sanction which should be imposed in respect of the violation of Article 2.1.1 of the Rules. Article 2.1.1 reads as follows:
It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body, Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

23. This Article is the foundation of the strict liability principle that is applicable to anti-doping violations. There is a clear and definitive standard of compliance that all athletes are required to adhere to and it is on this basis that they are held accountable. The responsibility that rests on the Athlete is clear and the liability that rests on the Athlete *in casu* has been established.
24. The Athlete has been found guilty of a doping offence in respect of the substance identified as *Testosterone* which is categorised under **Class S1 – Anabolic Agents** on the World Anti-Doping Code 2016 Prohibited List International Standard.
25. Article 10.2 of the Rules is headed “***Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance and Prohibited Method***”
Article 10.2.1 of the Rules provides that the period of *Ineligibility* shall be four (4) years where:
 - 10.2.1.1 The anti-doping rule violation does not involve a 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 involves a Specified Substance and SAIDS can establish that the anti-doping rule violation was intentional.
 - 10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two (2) years.
26. Article 10.5.1.2 provides for a reduction of the period of ineligibility where the prohibited substance involved came from a contaminated product and the Respondent can establish that there is no significant fault or negligence.
27. The substances found to be present are Testosterone and its metabolites and are not Specified Substances for purposes of the Anti-Doping Rules in terms of Article 4.2.2 of the 2016 SAIDS Anti-Doping Rules read with the Prohibited List prohibited substances under the 2016 Prohibited List World Anti-Doping Code.
28. Where the violation does not involve a specified substance the burden of proof is placed on the athlete. Under Article 2.1.1 it is the Athlete’s personal duty to ensure that no prohibited substance enters his body, and the Athlete is responsible for any prohibited substance found to be present in his body.
29. SAIDS argued that the anti-doping rule violation was intentional for purposes of Article 10.2.3 and that Article 10.2.1 should apply. SAIDS further submitted that the period of *Ineligibility* should be four (4) years in terms of Article 10.2.1.1.
30. In a matter to which Article 10.2.1.1 applies the evidential burden is on the Athlete to prove that the conduct which resulted in a violation was not intentional. The Panel considered all relevant evidence in assessing whether the violation was intentional and finds that the anti-doping rule violation was not intentional, as contemplated in article 10.2.1.1 of the Rules.
31. In this regard it is important to note that article 3.1 of the Rules provides that where the Rules place the burden of proof upon the athlete to establish specified facts or circumstances, the standard of proof shall be by balance of probability.

32. To this end, the Athlete denied that he had knowingly taken any prohibited substance. He ascribed his success to the fact that he followed a healthy lifestyle, took good care of his body and trained very hard. The Athlete explained that as an endurance athlete he was not able to get sufficient nutrients from his meals to sustain his intense training. For this purpose, the Athlete took a variety of vitamin, mineral and other supplements. These included *DripDrop*, *PeptoPro*, *Enduren*, *Biogen Beta-ZMA*, *Biogen Tribulus 400* and *Biogen Testoforte*.
33. The Athlete explained that he was sponsored by Biogen, an international company which produce various vitamin and supplements products. In terms of this relationship, Biogen would pay the Athlete a monthly retainer to promote the Biogen brand and provide the Athlete with a monthly allowance that he could spend on Biogen products at any Dischem outlet. Biogen assured the Athlete that their products were safe to use and that they did not contain any prohibited substances listed on the WADA List.
34. The Athlete testified that he suffered from irritability and anxiety, hair loss and a low testosterone count. For this reason, Brandon Fairweather, a personal friend of the Athlete and a representative of Biogen, advised the Athlete to use *Biogen Testoforte*.

F REDUCTION OF THE PERIOD OF INELIGIBILITY: CONSIDERATIONS IN MITIGATION

35. As such, it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. Article 10.5 of the Rules is headed “**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 ...

10.5.1.2 **Contaminated Products**

In cases where the Athlete or other Person can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and a maximum, two (2) years *Ineligibility*, depending on the *Athlete’s* or other *Person’s* degree of *Fault*.

36. Before a reduction of the ineligibility period can be applied on an athlete following a finding of guilty for the anti-doping violation, the athlete must first and foremost establish how the Prohibited Substance entered his body, and secondly, the athlete must establish that he bears No Fault or Negligence, or No Significant Fault or Negligence.
37. The Athlete has submitted in evidence that the prohibited substance entered his system by way of a contaminated supplement, namely *Biogen Testoforte*. The Athlete conceded during the hearing that he never listed the supplement on his Doping

Control Form. The Athlete testified that he did not list the supplement since he did not use the supplement in the week before the Sani2c event.

38. The Prosecutor justifiably questioned why the Athlete did not declare the use of these supplements on his doping control form. The Athlete replied that the urine sample was taken shortly after a very gruelling stage of the Sani2c and that he was exhausted and in some measure of pain due to his wrist injury. The Panel is satisfied that the Athlete has adequately explained the apparent omission on his doping control form. The Panel finds that the failure by the Athlete to disclose Biogen *Testoforte* on the Doping Control Form is not *per se* sufficient to conclude that there was an intention to enhance sport performance [see CAS 2011/A/2495].
39. After the adverse analytical finding, the Athlete sought to have his supplements analysed to determine whether any of his supplements contained any substance that could account for the adverse analytical finding. With the intervention of SAIDS, the supplements were submitted to the Doping Control Laboratory in Bloemfontein for analysis. This revealed that the Biogen *Testoforte* samples (Lot numbers 126360, 126359 and 103997) which was submitted for analysis, contained 4-Androstene-3, 17-dione. The presence of 4-Androstene-3, 17-dione in the supplements is consistent with the analytical finding that the urine sample of the Respondent revealed the presence of Testosterone and one of its diols.
40. Based on the totality of the evidence the Panel accepted the Athlete's assertions on a balance of probability that the banned substance entered his body as a result of the ingestion of a contaminated product, namely Biogen *Testoforte* (Lot number 103997).

G DEGREE OF FAULT

41. With that established, the Athlete's degree of fault is in the Panel's view the key issue. What degree of fault can be attributed to this Athlete?
42. Since the Athlete established that the adverse analytical finding resulted from the contaminated product and that he acted with No Significant Fault or Negligence based on Article 10.5.1.2, the applicable range for the period of Ineligibility would be reduced to a range of two (2) years to a reprimand.
43. In CAS 2014/A/3572 it was stated that "*while the bar for an athlete should not be set too low, equally it should not be set impossibly high. Requiring an athlete to secure a laboratory analysis before taking a supplement as the only means of fully satisfying an athlete's duty of care would be prohibitively expensive, hugely wasteful of time, and, in the end, might possibly be entirely inconclusive given that the ingredients of supplements can vary from batch to batch.*" [See also CAS 2011/A/2645 and CAS 2011/A/2495].
44. The Court of Arbitration (CAS) has on many occasions rejected the proposition that because an athlete has failed to submit a supplement to laboratory analysis before taking it, this by itself establishes that he or she has fallen short of an athlete's duty of care. This Panel respectfully concurs.

45. This Panel also repeats the point made in the commentary to the WADA Code that the consequences for an athlete of suspension from competition or his or her prior clean record are irrelevant to the issue of degree of fault.
46. This Panel is well aware of the decision in the matter of *SAIDS v Demarte Pena* which was heard on 25 May 2017 and accepts that sanctions should in principle be consistent (although correctness is more important than consistency). But this means no more than that in cases whose facts are identical (which will almost never be the case), or materially similar, different disciplinary bodies should seek not to come to discrepant decisions outside the limits within which reasonable persons can disagree. This Panel considered numerous cases in order to identify certain principles which are material in determining the Athlete's degree of fault:
47. In CAS 2013/A/3075, the athlete took a supplement that had a synonym on the label for a specified substance. His brother gave him the supplement telling him it "*could do no harm*". The athlete searched the supplement on the Internet, checking the ingredients on various websites and comparing the ingredients to the WADA Prohibited List. After completing his research and satisfying himself that the supplement was safe, the athlete ingested the product. However, the athlete missed the fact that one of the listed ingredients was a synonym for the specified substance. The Panel found that "*the fault [of the Athlete] is rather light and not significant*", reasoning that the athlete could have taken more steps to avoid ingesting a banned substance, but given what he had done, his negligence in not taking those steps was low. As a result, the Panel imposed a five month sanction.
48. In CAS A2/2011, the athlete purchased a supplement at a nutrition store. He examined the ingredients on the label against those identified on a banned list provided by the Australian Sports Anti-Doping Authority. After determining that none of the ingredients were identified on the prohibited list, the athlete ingested the product and subsequently tested positive for methylhexaneamine. The Panel recognized the athlete's efforts but noted that more inquiries could have been made and sanctioned the athlete with a six month period of ineligibility.
49. In CAS 2011/A/2645, the athlete took a prescription recommended by a trusted medical advisor that did not contain any warning of the presence of a banned substance. The product contained a banned substance and the athlete tested positive. The athlete did not consult with his trusted medical advisor immediately prior to using the product. The Panel noted that the athlete could have done more than he did to avoid the ingestion of a banned substance; he could have avoided taking the product at all, he could have tested the product before using it or he could have sought medical advice before taking it. However, the Panel concluded that such additional steps were not reasonable and the athlete was given a warning.
50. In CAS 2011/A/2518, the athlete displayed "*a serious lack of due diligence*" when he took a supplement wrapped only in a foil handed to him by a friend at his tennis club. The athlete conducted a 30 to 60 minute search on the internet, which was found to be "*insufficient*" since he failed to find a list of ingredients, which included the banned substance by name. The athlete had placed considerable reliance on the manufacturer's website which claimed that the supplement was "*approved by the*

World Anti-Doping Association". The CAS panel sanctioned the athlete for a period of eight months.

51. This Panel however reiterates that each case must be determined on its own facts. The Panel recognizes that the Athlete did take a number of significant steps to minimize any risk associated with the taking of supplements. The Athlete stated that he searched each ingredient in turn and the information received was compared with the WADA Prohibited List. The Athlete also testified that he was a very thorough person. He always did research on supplements and read the labels of substances to ascertain the ingredients of those substances. He searched the Internet for any indications that any of the ingredients were on the WADA List, he consulted with fellow athletes to determine if they had any knowledge of the particular ingredients and he consulted his medical doctors to confirm that he was taking appropriate and safe supplements. He also noted the fact that Biogen had existing sponsorship agreements with various professional athletes. That gave him confidence that their quality control measures were adequate to ensure that the supplements were not contaminated with substances on the WADA List.
52. The Athlete kept meticulous records and was able to provide the Panel with a breakdown of all the supplements he had taken during the period 4 November 2015 – 4 March 2017. The Athlete further submitted his full meal plan that gave a detailed insight into the meals, energy drinks and supplements taken by the Athlete which shows that he takes great care in what he consumes during his preparation.
53. The concern of this Panel is that the Athlete in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. In his testimony, the Athlete stated that Brandon Fairweather recommended the additional supplements to him to improve his general health and wellness. He did not query whether Brandon Fairweather had any experience, let alone qualifications as a pharmacologist or nutritionist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List. The Athlete further failed to seek advice from SAIDS.
54. The Panel expected the Athlete to produce corroborating evidence sufficient to demonstrate that he did sought medical advice before taking the supplement. The Athlete testified that he has a personal doctor and access to a number of medical experts.
55. To this end, the matter was postponed to give the Athlete the opportunity to present the required corroborating evidence. The Athlete unfortunately failed to call any witnesses (apart from his wife, Lariza Gilbert) when the matter reconvened. The absence of Brandon Fairweather, Drs Van der Walt, Theron and Patricios cannot be ignored.

56. The Athlete only submitted a report prepared by Dr PE Van der Walt of the Clinpath Laboratory and a report by Dr Paul Theron. The Panel found these reports to be unreliable and the conclusions arrived at were not substantiated.
57. The Panel finds that the Athlete has therefore not presented the corroboration required to support his submissions.

H DECISION

58. After due consideration of the specific facts of this case, the Panel finds that the Athlete did fall short, if not excessively, of the high standards imposed on an athlete to exercise utmost caution to avoid even inadvertent ingestion of a prohibited substance.
59. The Panel rules that the Athlete be declared **ineligible for a period of six (6) months**. The period of ineligibility commenced on 2 March 2017 and ended on 1 September 2017.
60. The Athlete was provisionally suspended on 2 March 2017 and therefore Article 10.10.3.1 applies which provides that the Athlete shall receive a credit for such period of provisional suspension against any period of ineligibility.
61. The Athlete further forfeits any results, medals and prizes obtained in the Sani2c cycling event held in May 2016 in terms of Article 10.1 of the Rules.

Accordingly the Doping Hearing Panel's sanction is as follows:

"Having found the athlete, Gordon Gilbert, guilty of an Anti-Doping Rule violation in terms of Article 2.1 of the 2016 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS) as particularised in the charge sheet of 31 May 2017, the Athlete is hereby declared ineligible to participate in any competition or other activity as contemplated in Article 10.11.1 for a period of six (6) months with effect from 2 March 2017."

DATED at JOHANNESBURG this 30th day of AUGUST 2017.



PROF RIAN CLOETE



PROF Y COOPOO



DR R COLLINS