

SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

PLAYER: MR STEAN PIENAAR

SPORTS FEDERATION: SOUTH AFRICAN RUGBY UNION (SARU)

DATE: 4 APRIL 2017

PLACE OF HEARING: SAIDS Offices, Sports Science Institute of South Africa, Newlands

DISCIPLINARY PANEL ("PANEL") MR ANDREW BREETZKE (CHAIRPERSON)
DR KAREN VAN HELDEN (MEDICAL REPRESENTATIVE)
MR NORMAN BROOK (SPORTS ADMINISTRATOR)

PROSECUTOR: MS WAFEEKAH BEGG

PLAYER REPRESENTATIVE: ADV FRANCOIS VAN ZYL (SC), instructed by MR ULRICH ROUX of BDK ATTORNEYS

MINUTE TAKER: MS THINJIWE FUNDA

ANTI-DOPING RULE VIOLATION: ANTI-DOPING RULE VIOLATION IN TERMS OF REGULATION 21.2.1 of the 2016 WORLD RUGBY ANTI-DOPING REGULATIONS

INTRODUCTION

SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended). SAIDS has formally accepted the World Anti-Doping Code (WADC) adopted and implemented by the World Anti-Doping Agency in 2003.

World Rugby adopted the WADC in June 2004. Following an international review of the WADC a new WADC was agreed and implemented as of 1 January 2015. The mandatory provisions and principles of the WADC have been adopted and incorporated into the World Rugby Regulation 21.

In terms of a Delegation of Powers Agreement entered into between the Executive Council of the SARU and SAIDS (July 2012), SARU has ceded and assigned all rights and delegated all its powers and obligations vested in it by virtue of the Regulation 21, with the responsibility to perform all such functions and duties to comply with the requirements of SARU in terms of the said Regulations.

It is by virtue of this delegation that the Panel has been constituted to preside over the Anti-Doping Rule Violation as set out.

PROCEDURAL MATTERS

The Panel received a bundle of documents from SAIDS, as well as an affidavit deposed to by the Player.

The affidavit of the Player was admitted into evidence.

SUMMARY OF EVIDENCE AND ARGUMENT

The charge against the Player was set out in written correspondence addressed to him on the 16 March 2017. The charge against the Player reads as follows:

You have been charged with an anti-doping violation in terms of Regulation 21.2.1 of the 2016 World Rugby Anti-Doping Regulations.

On 5 December 2016, you provided a urine sample (4012870) during an out-of-competition test. Upon analysis the Doping Control Laboratory Ghent reported the presence of a prohibited substance in your urine sample. The substance identified in your sample was Letrozole and its metabolite Bis-(4-cyanophenyl). Letrozole is categorised under Class S4 Hormone and Metabolic Modulators on the World Anti-Doping Code 2016 Prohibited List International Standard.

The Player elected to have the B-sample tested. The test confirmed the presence of the prohibited substance Letrozole.

The evidence of the Player was presented by way of affidavit and confirmed by way of oral evidence.

The Player was a highly successful sportsman at school level, and on completing matric he was offered a contract by the Lions Rugby Union. As a professional sportsman, he followed a strict diet and also utilised supplements. In sourcing supplements the Player only purchased items from Dischem or Chrome, and enquired about what substances were prohibited. This included Google searches. During his matric year he started using SSn TEST RX, a testosterone booster. On joining the Lions he also utilised USN supplements, and was warned by the Lions management that if he was to use other supplements he was to ensure that they contained no prohibited substances and that he could ask the Lion's doctor for assistance in this regard.

He started utilising the testosterone booster again in February 2016. However, by June 2016 he had started suffering from severe acne, swelling of the breasts, and sensitive and painful nipples. He was unaware that this could be a side effect of the testosterone booster.

The Player had been training at a Virgin Active gym in Pretoria North, and he discussed his physical condition with a Dr Tros Bekker (Bekker), who also trained at the gym. Bekker informed him that his testosterone levels were probably too high and that he should cease using the testosterone booster and take an oestrogen blocker. Bekker being aware of the Player's status as a professional sportsman, advised him that he could not utilise oestrogen

blockers normally prescribed due to them containing prohibited substances, but advised him to use Letrozole as it was not prohibited.

The Player also engaged with an acquaintance at the gym, Mr Marnus Ferreira (Ferreira), who had also previously struggled with severe acne. He confirmed that he had used Letrozole and that it would be of assistance to the Player. Ferreira confirmed that he could source the drug for the Player. The Player purchased a bottle of Letrozole from Ferreira for R400 in November 2016.

Ferreira had confirmed to the Player that Letrozole was not prohibited, but also undertook to research this issue further. Ferreira confirmed by WhatsApp that it was not prohibited. The Player confided in his father, Jacques Pienaar (Pienaar), who conducted an internet search to determine whether Letrozole was a prohibited substance. The searched covered Google, Wikipedia and www.drugs.com. Wikipedia and Google confirmed that Letrozole is a non-steroidal substance. Pienaar also conducted a search on the WADA website, but in so doing incorrectly spelt Letrozole by inserting an “a” and not an “o” i.e. Letrazole.

Given the above research the Player was satisfied that Letrozole was not a prohibited substance.

The Player used Letrozole for seven days. It tasted foul and did not assist with his swollen breasts and sore nipples.

The Player gave evidence that he was too embarrassed to approach the medical doctor of the Lions – the doctor is female, and he was not comfortable having a discussion about his medical predicament with a female practitioner. He was however, satisfied with the advice he had received from Bekker and Ferreira, which was backed up by the internet search of Pienaar. The Player admitted however that on reflection and advice of his legal advisor, the searches undertaken by Pienaar and himself to determine whether Letrozole is a prohibited substance or not, were not sufficient. The Player admitted he was negligent, but denied that such negligence amounted to significant fault or negligence as per Regulation 21.10.5.2.

Under cross examination from SAIDS, the Player confirmed that he had never been tested prior to the test of 5 December 2016. He was however aware of the dangers of prohibited substances and had attended anti-doping education sessions. The Lions had advised him to

be careful of utilising prohibited substances, and he had also participated in a session by SAIDS at a SA u20 camp in January 2017.

The Player confirmed that he had starting using the testosterone booster when he was 18 years of age. It had been recommended to him by the sales representative at Dischem. He had relied on the information from Bekker and Ferreira, and did not feel it necessary to consult his own general practitioner. The Player acknowledged that in future he would direct queries to the Lions medical team, and that he had been a “bit negligent” in dealing with Letrozole.

On questioning from the Panel, the Player confirmed that it was his legal representative who had noted the fact that the spelling of Letrozole was incorrect when the initial internet search was undertaken. He furthermore confirmed that he was comfortable with the fact that he purchased drugs from an acquaintance in the gym, given that Bekker had advised him to take the drug.

Pienaar, the father of the Player, confirmed the content of his supplementary affidavit. He gave evidence that he had supported his son throughout his son’s sporting career. He confirmed that his son had approached him in June 2016 complaining about his breasts and skin. He had advised his son to stop taking the testosterone booster. His son then approached him in November 2016 and informed him about the discussions with Bekker and Ferreira. He proceeded to “search” Letrozole on the internet and was able to establish that it was a non-steroidal substance. He did not notice that on spelling Letrozole incorrectly, the option to correct the search was visible on the screen. He was convinced that Letrozole was not a prohibited substance.

Under cross examination Pienaar stated that he was not aware that a prescription was required to obtain Letrozole, and had undertaken no further investigation into the nature of the drug.

In closing, SAIDS noted that the presence of the prohibited substance in the urine of the Player had been established, and that he was therefore guilty of the charge as set out. The Player, despite having had an opportunity to approach the team doctor, avoided this route and took a more complicated and unreliable approach to determine whether Letrozole was a prohibited substance. As a participant in a widely followed, professional sport in South Africa,

he did receive anti-doping education and had access to anti-doping material. SAIDS argued that he was reckless and negligent in this regard and that the period of ineligibility should be 4 years as per Rule 21.10.2.1.2, or in the alternative the provisions of Regulation 21.10.2.2 be considered.

In closing, counsel for the Player argued that the evidence before the tribunal was very clear – that Player had used a testosterone booster, had developed a medical problem with his skin and breasts; had sought advice from Bekker and Ferreira; undertook research on the substance with his father; started using Letrozole believing it not to be prohibited. It was emphasised that the Player was a young and did not approach this in an intelligent manner. However, he took the drug to alleviate a medical condition, and not to cheat. He had relied on others for advice, and was in this regard negligent. As such, it was argued that “intent” could not be proven.

In considering the issue of negligence, it was argued that the facts should be considered in totality, and that the Player was “stupid” in how he managed this issue. There was no significant fault or negligence on his part.

The dream of the Player to be a professional rugby player has been shattered, and it was argued that a sanction less than 2 years would be appropriate.

FINDING ON THE CHARGE

The presence in the urine sample of the Player of the prohibited substance identified as *Letrozole* was not in dispute. The Player is Guilty of the offence as set out, and is in violation of Regulation 21.2.1 of the 2016 World Rugby Anti-Doping Regulations.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

Regulation 21.2.1 of the Rules reads as follows:

It is each Player’s personal duty to ensure that no Prohibited Substance enters his or her body. Players 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 Player's part be demonstrated in order to establish an anti-doping violation under Regulation 21.2.1.

This Regulation 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 Players are required to adhere to and it is on this basis that they are held accountable. Ignorance of the anti-doping provisions and/or prohibited list cannot be accepted as an excuse. The responsibility that rests on the Player is therefore clear, and the liability that rests on the Player *in casu* has been established. The Player acknowledge his responsibility in this regard.

The Player has been found guilty of a doping offence in respect of the substance identified as Letrozole. Letrozole is categorised under Class S4 Hormone and Metabolic Modulators on the World Anti-Doping Code 2016 Prohibited List International Standard.

Regulation 21.10.2 provides that the period of ineligibility for a violation of Regulation 2.1 shall be as follows:

21.10.2.1 The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specific Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

21.10.2.3 As used in Regulations 21.10.2 and 21.10.3, the term "intentional" is meant to identify those Players who cheat. The term therefore requires that the Player or 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.

The offence *in casu* relates to a Specified Substance and as such the onus is on SAIDS to establish "intent" in respect of Regulation 21.10.2.1.2. Regulation 21.10.2.3 states that the

term “intentional” is meant to identify those Players who cheat. The term, therefore, requires that the Player engaged in conduct which he 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. SAIDS must prove this intention on a balance of probabilities.

SAIDS has argued that the Player knew the risks in taking Letrozole and it would be difficult to accept that he has not been reckless or negligent in his behaviour, and as such his actions meet the measure of being a “*significant risk*” that his “*conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*”. As such, on a balance of probabilities “intent” has been established.

The Player contends that his anti-doping rule violation was not intentional as he was utilising the Letrozole for purposes of his medical condition – namely acne, swollen breasts and sore nipples. No evidence was presented to prove that he was attempting to enhance performance; the evidence to be considered focused on him wanting to treat his medical symptoms. He had no intention to “cheat” as envisaged in the Regulation and as such it was argued that “intent” has not been established.

There is no dispute on the evidence that the Player did not take Letrozole to “cheat”. He took Letrozole to assist in the various physical ailments that he was suffering from and there is no evidence to suggest he gained an athletic advantage or benefit from the use the drug. Furthermore, it cannot be said that he manifestly disregarded the risk in taking Letrozole – he was aware of the risk of prohibited substances being present in the drug, and did take steps to mitigate the risk, albeit insufficient steps. Had the Player taken no steps to attempt to ascertain the status of Letrozole, his actions would have been reckless. SAIDS has therefore not met the onus of proving that the anti-doping rule violation was intentional, and therefore at a maximum, the Player may only be subject to a two-year period of ineligibility.

It is therefore incumbent upon the Panel to determine whether the Player is subject to a further reduction of the period of ineligibility under Regulation 21.10.5.1. If Regulation 21.10.5.1 is applicable, the sanction for the anti-doping rule violation can range from a reprimand with no period of ineligibility and a two-year period of ineligibility based on the Player’s degree of fault.

SAIDS argued that the Player had the opportunity to seek advice from the team doctor, and similarly decided not to approach his general practitioner. His actions in engaging with Bekker and Ferreira at the gym were complicated and unreliable, regardless of how embarrassed he felt about his ailments.

Counsel for the Player argued that in determining whether the Player bears no significant fault or negligence one had to view the totality of circumstances. He was wrong in relying on Bekker and Ferreira as he should have consulted a doctor. The evidence that the Player was embarrassed to approach the female doctor of the Lions could not be disregarded, given his age and circumstance. It was argued that there was no significant fault or negligence on his part.

As stated, it is for the Panel therefore to determine:

1. How the Prohibited substance entered his system;
2. That there was no intent or recklessness on the part of the Player;
3. The degree of fault on his part so as to determine an appropriate reduction in terms of Regulation 21.10.5.1.1

It is common cause that the Prohibited substance entered the system of the Player through his use of Letrozole. Furthermore, it has been determined that there was no intent or recklessness on the part of the Player. The question to be answered therefore relates to his degree of fault or negligence.

In so doing the Panel must consider the circumstances that influenced the Duty of Care of the Player, such as the level of the Player, age of the Player, anti-doping environment and education, the organised nature of the sport, and the research undertaken by the Player.

The Duty of Care of the Player is significant, as set out in the matter of **P. v. Fédération Internationale de Volleyball (FIVB)**¹ where the CAS stated:

Nevertheless, the Panel considers that the arguments exposed by the Appellant to require the reduction of the period of ineligibility must be analysed in the light of the normative standard

¹ CAS 2013/A/3431

of “duty of care” which is claimable of all Players regarding substances that they freely decide to ingest. In this regard, as one of the main principles in the context of anti-doping control in sport, it is abundantly clear that all Players must be extremely careful with the food contents, fluids, and in general, with any products that he or she may ingest, either for nutrition or therapeutic purposes, as they may contain some substance identified on the WADA Prohibited List. As has been expressly established by CAS jurisprudence: “In each case, the Player’s fault is measured against the fundamental duty which he or she owes under the Program and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance” (CAS 2011/A/2518).

A determination on the degree of fault requires a balancing of this duty of care against the totality of the circumstances of the case, as evidenced in CSA case law:

In the matter of **WADA v. Jessica Hardy & USADA**² the CAS Panel reduced the two year sanction to twelve months where the standard of No Significant Fault or Negligence was applicable. The Player had taken several precautionary steps to satisfy her as to the permitted use of the relevant nutritional supplements. The Player obtained the samples directly from the manufacturer (and not from a shop specializing in nutritional products or an unknown source), used the supplements for eight months without an adverse finding, and obtained an indemnity from the manufacturer with respect to its products. Moreover, the Player consulted both a nutritionist and her coach about the products prior to ingestion. In **Dimitar Kutrovsky v. International Tennis Federation**³ the Player received a 15 month suspension where the Player, who had no anti-doping education, compared each ingredient on the label of the supplement to the Prohibited List but found no matches because the label only listed a synonym for methylhexanamine (which was not on the Prohibited List), but did not research the product on the internet or consult a doctor/trainer. In **WADA v. Judo Bond Nederland, Dennis de Goede & Dopingautoriteit**⁴ (18 months suspension) the Player, an experienced competitor, did not conduct any internet research into the product or its substances, and simply relied on his brother’s statements that the product was “safe” and “could do no harm.”

The approach in determining the degree of fault was further summarised in the matter of **Sharapova v. ITF**⁵:

² CAS 2009/A/1870

³ CAS 2012/A/2804

⁴ CAS 2012/A/2747

⁵ CAS 2016/A/4643

“First, a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the “utmost caution” are truly exceptional, and not in the vast majority of cases. However, in the Panel’s opinion, the “bar” should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the Player left some “stones unturned”. As a result, a deviation from the duty of exercising the “utmost caution” does not imply per se that the Player’s negligence was “significant”; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances. It is in fact clear to this Panel that a Player can always read the label of the product used or make Internet searches to ascertain its ingredients, crosscheck the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, a Player cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless.”

Further guidance as to the determination of the degree of fault can be found in the matter **of Marin Cilic v. International Tennis Federation**⁶ (as referenced in **Robert Lea v. USADA**⁷) which was decided under Article 10.4 of the 2009 WADC ("Elimination or Reduction of the Period of Ineligibility for Specified Substances Under Specific Circumstances"), which is the corresponding (but not identical) predecessor to the Regulation in question.

“The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault:

- a. Significant degree of or considerable fault.*
- b. Normal degree of fault.*
- c. Light degree of fault.*

Applying these three categories to the possible sanction range of 0 – 24 months, the Panel arrive at the following sanction ranges:

⁶ CAS 2013/A/3327

⁷ CAS 2016/A/4371

a. Significant degree of or considerable fault: 16 – 24 months, with a “standard” significant fault leading to a suspension of 20 months.

b. Normal degree of fault: 8 – 16 months, with a “standard” normal degree of fault leading to a suspension of 12 months.

c. Light degree of fault: 0 – 8 months, with a “standard” light degree of fault leading to a suspension of 4 months.

In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.”

It is also important to note that the delegation by a Player of the responsibility to a third party to determine whether a substance is prohibited or not, does not exonerate the Player from his obligations in terms of the Regulations. Any failure/error on the part of the third party is commensurate with the Players personal fault or negligence.

In reviewing the evidence and argument presented the following facts are material to the determination of the degree of fault:

1. As a top Player and professional rugby player, the Player was acutely aware of the dangers of prohibited substances, and the possibility of utilising supplements that could be contaminated/contain prohibited substances. He had sought advice from consultants when purchasing supplements.
2. The Player is participating in a professional sport in South Africa. It is a highly organised environment where the possibility of anti-doping tests are known to all players.
3. He had received anti-doping training. The Lions Franchise had cautioned all players against prohibited substances.

4. The Player is young.
5. The Player sought advice from a doctor whom he met in a gym, and who referred him to Letrozole, advising that it was not prohibited. This was confirmed by an acquaintance he met at the gym.
6. The acquaintance at the gym sourced the Letrozole for the Player, despite it being a drug that required a prescription.
7. The father of the Player searched the internet for information as to whether the Letrozole was a prohibited substance. This search was not successful, as a spelling error was made in the undertaking the search.
8. The Player did not consult with his general practitioner.
9. The Player did not consult with his team doctor.

As per the objective assessment as set out in *Cilic*, there is no doubting that the Player was negligent – he failed to act with the standard of care of the prudent Player. He acknowledged as such, and stated that were he in the same position again, he would consult the team doctor at the first instance. The investigation by the Player as to the status of the Letrozole focused on Bekker, Ferreira and his father. Bekker, a general practitioner, advised him that Letrozole was not prohibited and this was confirmed by Ferreira. His father followed up with an internet search that was inconclusive, and complicated by the error in spelling Letrozole. He then purchased the drug without the requisite prescription. It is evident that his actions did not meet the requirement of acting with “utmost caution”, but this in itself does not necessarily mean that his negligence was “significant”.

Case law supports the position that Players cannot be expected to carry out every investigation as to whether a substance is prohibited or not.

There are five key factors that speak to the significance of the fault:

1. The Player had direct access to a team doctor. This would have been at no cost, and would have resulted in him being able to consult a specialist in sports medicine.

Although one can have empathy for the embarrassment he felt, this was an obvious course of action for him. He failed to consult with her.

2. The Player had access to his own general practitioner, but elected not to.
3. The Player sought advice in an informal setting from a doctor. There was no formal consultation, medical assessment/diagnosis of his condition or a proper determination as to a course of action.
4. The Player sought advice from an acquaintance, and then purchased a prescription drug from this acquaintance.
5. The Player, despite the internet search of his father, failed to review the WADA Prohibited List which was freely available to him. Together with consulting with a professional, this should have been the first step in determining the status of Letrozole.

An objective review of the above facts supports the argument that the fault of the Player was significant. He had various legitimate options available to him to determine the true status of Letrozole, but failed to act on these options.

The Player is dedicated to the sport of rugby union, and stated that it “is his life” and his “dream”. This would correlate with his general concern as to prohibited substances and acknowledgement that he would never take any substance were he aware of it being prohibited – the consequences would be dire. His actions in how he responded to his medical condition, and his sourcing of a prescription drug, do not however accord with the dedication and seriousness with which he approaches his sport. Had he consulted with the team doctor, or formally with his general practitioner, he would not be on the predicament he now finds himself; or at the least, would have shown that he acted with no significant fault.

The Panel unanimously finds that the degree of fault on the part of the Player was significant, and that he has failed in proving No Significant Fault or Negligence as envisage in Regulation 21.10.5.1.1.

In determining the appropriate sanction, the following subjective factors are of relevance:

1. The Player is young. As a 19-year old, the Player continues to stay at home and rely extensively on his family support.
2. The Player is somewhat naïve and appears to be easily influenced. Rather than applying his own mind to his predicament, he allowed himself to be guided by individuals who had very little knowledge of his personal circumstances, and of anti-doping rules and regulations.
3. He recognises the significant impact that this anti-doping rule violation will have on his career.

SANCTION

In reviewing the above, the Panel has determined that the sanction on the finding of Guilty is as follows:

1. The Player is ineligible to participate in any organised sport, club or higher level or as envisaged in Regulation 21.10.2 of the Rules, for a period 20 months;
2. The Player was provisionally suspended on the 24 January 2017. The period of 20 months will be effective as of 24 January 2017, to terminate on the 23 September 2018 ;

This done and signed at Cape Town this 6 day of April 2017.



Mr Andrew Breetzke on behalf of Dr Karen van Helden and Mr Norman Brook