IN THE MATTER BETWEEN:

CASE NO.: SAIDS/2017/06

SOUTH AFRICAN INSTITUTE FOR DRUG – FREE SPORT **COMPLAINANT**

And

INUS VERMEULEN **RESPONDENT**

RULING BY TRIBUNAL

THE PARTIES

The Complainant is South African Institute for Drug-Free Sport (SAIDS) a public entity established in terms of Act No. 14 of 1997 its objective is to promote participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance.

1. SAIDS has accepted the WADA Code and implemented its anti-doping rules in accordance with the Code. The rules apply to South African Rugby Union (SARU), World Rugby and to the Respondent by virtue of being a registered player of SARU member.

2. The Respondent is Mr Inus Vermeulen, a provincial under 19 rugby player for the Leopards Rugby Union.

    2.1 Leopards Rugby Union is an affiliate of SARU and consequently World Rugby.

INTRODUCTION

3. On 10 September 2016, the Respondent provided "A" and "B" urine sample ("3980305") during an in-competition test for testing in accordance with SAIDS rules.

4. The Respondent's urine sample was submitted for analysis to Anti-Doping Lab Qatar – Doping Analysis Lab, a world Anti-Doping Agency (WADA) Accredited Laboratory.

5. The Laboratory provided the test results of the urine sample (3980305) with Adverse Analytical Finding. As a result of the prohibited substances found in the urine sample.

6. Set out below is the relevant facts and allegations based on the parties' written submissions, oral evidence adduced, and various correspondence and documents, legal arguments which the Panel considered in coming to its conclusion on the matter.

BACKGROUND FACTS

The doping test on 10 September 2010

7. On 10 September 2016, the Respondent participated in a match representing Leopards Rugby Union against the Blue Bulls Rugby Club in Potchefstroom. The event took place under the auspices of South African Rugby Union.

8. Immediately after the aforesaid match, the Respondent was informed by Doping Control Officer from SAIDS, Mr Andrew Ramakgapola that he had been selected for a Mandatory Doping Control Test.

9. According to the Doping Control Form completed by Mr Ramakgapola, the Respondent was informed of the Mandatory Doping Control Test at 12h52 and arrived at the Doping Control room at 12h53. The urine sample was provided at 13h04.

10. A Doping Control Form ("the Form") must be completed during every mandatory doping control collection process. The Form was signed by Mr Ramakgapola from SAIDS and the Respondent. The Form indicates that the doping control processes was completed at about 13h26 on 10 September 2016.

11. On the Form under "comments by the athlete", the Respondent stated the words "Great". According to the Form, the volume of the urine provided by the Athlete was 163 ml.

12. The Respondent's Urine Sample ("3980305") was sent for testing and analysis at Anti-doping Lab Qatar – Doping Analysis Lab in Doha, Qatar, which is a World Anti-Doping Agency accredited Laboratory. The Laboratory received the sample on 26 September 2016.

13. On 12 October 2016, the Laboratory issued a Certificate stating that the Urine "A" Sample ("3980305") had Adverse Analytical Finding as a result of the presence of two

substances identified as 16B – hydroxystanozolol a metabolite of Stanozol and methylhexaneamine (Dimethylpentylamine).

14. Both these substances are Prohibited Substances and are categorized under class S.1, Anabolic Agents and S.6 stimulants under the 2016 World Anti – Doping Agency (WADA) prohibited list which is incorporated in the World Rugby Anti – Doping Regulations.

15. On 3rd November 2016, the Respondent, was issued with a written notice advising him amongst others that: -

15.1 The test results on his Urine "A" Sample ("3980305") received from the Laboratory confirmed the presence of the Prohibited Substances and constitute an Adverse Analytical Finding which is a *prima facie* violation of Article 21.2.1. of the 2016 World Rugby Anti-Doping Regulations.

15.2 He was to inform SAIDS whether he wanted his "B" sample analyzed by Friday 11 November 2016.

15.3 Should he elect to have his "B" sample analyzed then he had to do the following: -

15.3.1 Before close of business on the date for notification request a "B" sample analysis in writing to SAIDS indicate in writing if you and/or your representative if any, will attend the opening and verification of the "B" sample or not;

15.3.2 If SAIDS has not timeously received a written request including the information referred to above by the date for notification that you wish to have your "B" sample analyzed, SAIDS will assume that you have waived your right to have your "B" sample analyzed;

15.3.3 Should the assumption be that you have waived your right to have your "B" sample analyzed, then SAIDS will rely on the Analytical Report received from the Laboratory in respect of your "A" sample as evidence of the Anti – Doping Rule violation.

15.3.4 He had the right to dispute the assertion of an Anti-Doping Rule violation and should you elect to do so you must give notice of the dispute in writing within

seven (7) days of the date of the Notice, or should you have requested that "B" Sample be analysed, within seven (7) days of notification of the result of the B sample analysis;

15.3.5 Should you dispute the assertion of an Anti-Doping Rule Violation you are required to set out precisely what it is that you dispute and to provide such information and/or arguments as are relevant to the matter to enable SAIDS to understand the nature of your dispute and to ensure that the appropriate matters are investigated and placed before a Tribunal if necessary.

15.3.6 Should you not give timeous Notice of such dispute and in such Notice state precisely what is it that you dispute you will be deemed to have admitted the Anti – Doping Rule Violation, to have waived the right to a hearing and accept the consequences that are mandated by the code.

15.3.7 You are entitled to admit the Anti – Doping Rule violation and to place relevant facts and circumstances before SAIDS or a Tribunal.

15.3.8 Should you choose to place facts and circumstances before SAIDS on the question of consequences, you should provide SAIDS with written submissions within seven (7) days of the date of the Notice, or, should you have requested "B" sample to be analyzed, within seven (7) days of notification of the "B" sample result analysis.

15.3.9 Regulation 21.7.9.1 of the code, obliges SAIDS to implement a provisional suspension in consequence of the adverse analytical finding and you are consequently provisionally suspended from competing and participating in any authorized or organized sport by any amateur or professional league or any national or international level event as from the date of this notification.

16. The Notice was also served upon SARU, World Rugby and the World Anti – Doping Agency. Mrs Vermuelen, the athlete's mother responded to Mr Fahmy Galant from SAIDS (General Manager) on 8th November 2016, whereby she acknowledged receipt of the email and confirming that she is the legal Guardian of the Respondent.

17. On the 11th November 2016, Mrs Vermeulen advised that all communication should be through their attorney, Mr Johan Le Grange.

18. The attorney made contact with SAIDS on 11th November 2016, requesting an extension until 21 November 2016 with regards to obtaining instruction on the analysis of the "B" sample.

19. On 1st December 2016, Mr Le Grange advised that the Respondent does not request a "B" Sample analysis and dispute the anti-doping rule violation.

20. On 16th February 2017, Mr Le Grange advised SAIDS that the Respondent intends pleading not guilty for the following reasons: -

    20.1 His client denies he ever took any illegal substances;
    20.2 The sample was either sabotaged or contaminated during the sampling process;
    20.3 The urine sample was left open, exposed and unattended for periods of time.

21. The Respondent was requested to advise whether he required any information and/or documentation to prepare for the hearing in addition to the information and documentation sent to him and/or whether he will provide additional documentation by Friday 2nd June 2017 by close of business at 16:30.

22. Furthermore, whether the Respondent will not be calling any witnesses to testify on his behalf and that he will not be providing any additional documentation.

Proceedings Before The Panel

23. On 24th May 2017, the Respondent was formally charged for violating anti – doping regulation 21.2.1.

24. The hearing was convened for Tuesday 13th June 2017 at 17h00 at the Holiday Inn Express the Zone, 187 Oxford Street, Rosebank.

25. The hearing Panel constituted of Sunny Nameng as the Chairperson, Dr Dimakatso Ramagole and Professor Yoga Coopoo as panel members.

26. The case was prosecuted by Wafeekah Begg.

27. The Respondent was represented by Mr Johan Le Grange and Dr T Kirsten of Johan Le Grange Attorneys.

28. On 13th June 2016, the hearing proceeded at Holiday Inn Express, the Zone, Rosebank with all the parties duly represented.

29. Just prior to the commencement of the hearing, the Chairperson of the panel read Article 7.10.1 to the parties which states as follows: -

- *An athlete or other person against whom an anti-doping rule violation is asserted may admit that violation at any time, waive the right to a hearing, and accept the consequences that are mandated by the Anti – Doping Rules or (where some discretion as to consequences exist under these Anti – Doping Rules) that have been offered by SAIDS.*

30. The Respondent through his legal representative confirmed that he was prepared to proceed with the hearing.

31. At the hearing, SAIDS called Mr Andrew Ramakgapola as a witness and the Respondent didn't call any witness.

32. The Parties gave oral evidence at the hearing, including under cross – examination.

The issues for determination by the panel

33. Whether the Respondent violated Regulation 21.2.1 after Prohibited Substances were found in his Urine Sample (3980305);

34. If so, whether the appropriate penalty to be imposed for ineligibility should be four (4) years in accordance with Regulation 21.2.1 and/or two (2) years ineligibility penalty accordingly.

35. Whether the Respondent took any prohibited substances and whether testing procedure was followed in accordance with the required standards for testing.

36. Whether the Urine Sample (3980305) was sabotaged and contaminated, if so, no penalty should be imposed.

The Relevant Rules

37. The Anti – Doping Rules deal with anti-doping violations and have application to Federations, such as World Rugby and SARU, and Athletes, such as the Respondent.

38. As the Regulation puts it *"Doping is fundamentally contrary to the spirit of sport and values of Rugby"*. The Regulations must of course be read with the Prohibited List which are incorporated into the Regulations.

39. **Article 2.1 provides as follows: -**

Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

39.1 *It is each Player'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 Players part be demonstrated in order to establish an anti-doping rule violation under article 2.1.*

39.2 *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 analyzed; or where the Athlete's B sample is analyzed and the analysis of the Athlete's B sample confirms that 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 in two (2) bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance of its Metabolites or Markers found in the first bottle.*

39.3 *Excepting those substances for which a quantitate threshold is specifically identified in the Prohibited List, the presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample shall constitute an anti – doping rule violation.*

40. Regulation 21.10.2 provides as follows: -

The period of ineligibility for a violation of Regulations 21.2.1 ***shall*** *be as follows, subject to* ***potential*** ***reduction or suspension*** *pursuant to Regulations 21.10.4,*

21.10.5 or 21.10.6:

*40.1 The period of Ineligibility **shall** be four years where:*

40.1.1 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.

40.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union can establish that the anti-doping rule violation was intentional.

*40.1.3 If Regulation 21.10.2.1 does not apply, the period of ineligibility **shall** be two years.*

*40.1.4 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.***

The Wada World Anti - Doping Code

41. The WADA World Anti-Doping Code (the "WADA Code") establishes international standards and rules regulating anti-doping testing and enforcement. The contents of the WADA Code are binding on SARU.

42. The Introduction to the WADA Code identifies the purposes of the World Anti -Doping Program and Code as follows: -

"The purposes of the World Anti -Doping Program and the Code are:

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus, promote health, fairness and equality for Athletes worldwide; and*

- *To ensure harmonized, coordinate and effective anti – doping programs at*

the international and national level with regard to detection, deterrence and prevention of doping".

43. The introduction also identifies the 'main elements' of the World Anti – Doping Program. These include: 'Level 2: International Standards'. The Code proved for mandatory compliance with International Standards:

- *"International Standards for different technical and operational areas within The anti – doping program will be developed in consultation with the Signatories and governments and approved by WADA. The purpose of the International Standards is harmonisation among Anti-Doping Organisations responsible for specific technical and operational parts of the anti-doping programs. Adherence to the International Standards is mandatory for compliance with the Code. The International Standards may be revised from time to time by the WADA Executive Committee after reasonable consultation with Signatories and governments. Unless provided otherwise in the Code. International Standards and all revisions shall become effective on the date specified in the International Standard or revision."*

Article *5.2. Standards for Testing*

Anti-Doping Organisations with Testing jurisdiction shall conduct such Testing in conformity with the International Standard for Testing".

44. Section 7.4.1 requires the Doping Control Organisation to collect urine samples from athletes in accordance with procedure in Annex D ('Collection of urine samples'). These include:

- *To collect an Athlete's urine Sample in a manner that ensures: …c) The Sample has not been manipulated, substituted, contaminated or otherwise tampered with in any way".*

Submission of the Parties

The Respondent

45. The Respondent pleaded not guilty and submits that Anti-Doping procedure was not followed in full as his Urine Sample (3980305) was left opened when he was washing his hands.

46. The Doping room had other athletes and other personnel.

47. Under the circumstances, there should not be any sanction against him.

48. The Respondent didn't make any written submissions.

Prosecutor

49. SAIDS submits that the Respondent is guilty of having violated Regulation 21.2.1.

50. The Respondent's A sample test results from the Laboratory show the present of the two Prohibited Substances, namely 16β-Hydroxystanozolol, metabolite of Stanozolol and Methylhexaneamine. *Prima Facie* there is consequently, contravention of Regulation 21.2 of the Anti – Doping Rules.

51. Regulation 21.3.2.2 deals with the methods of establishing facts and presumptions. It provides that: -

51.1 WADA-accredited laboratories, and other laboratories approved by WADA, **are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories.**

51.2 The Player or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. If the Player or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical finding…

51.3 The Respondent has alleged contamination and tampering of his sample in the testing station. However, he has not provided any proof of these

allegations. Furthermore, 3 other athletes were also tested, 2 from the Blue Bulls and another from the Leopards. All 3-sample analysis came back negative. There is no basis for any consideration of any of these matters in this instance. That being the case, and in accordance with Regulation 22.1.2, sufficient proof of ADRV has therefore been established.

52. The Respondent is a rugby player. As such he has the benefit of participating in a very public and widely followed sport in South Africa. No – one is in any doubt that the rugby union is regulated, that World Rugby is an organized and professional body. The same is true of SARU.

53. The World Rugby website has an Anti-Doping Handbook that is detailed, it is helpful, and it can be found by simply googling the topic in relation to the rugby union. From the Introduction, the TUE provisions, the guidelines on Dietary Supplements, the case studies, and the consequences summary, there are stark reminders of the responsibilities and the risk.

54. We are dealing here with a Specified Substance as well as a Non – Specified Substance. That being the case the burden of persuasion is upon the Respondent to establish intent as contemplated in the Regulations. If the Independent Doping Hearing Panel finds that he acted with intent or recklessly then the period of ineligibility mandated is four years and there is no question of any reduction.

55. If the Independent Doping Hearing Panel is not satisfied that the athlete had intent then the period of ineligibility must be two years, subject to potential reduction. The provisions that make such reduction possible are Regulations 21.10.4 and /or 21.10.5.

56. Regulation 21.10.4 only finds application in the most exceptional cases. It has no application here, with respect. Strict liability applies principally to the question whether there has been an anti-doping rule violation but it impacts consequences by requiring very, careful scrutiny when it comes to what is expected of an athlete. This is because it is "*principally the sole duty of the individual athlete to ensure that no prohibited substance enters his body".*

57. Assuming intent has not been established and Regulation 21.10.4 is not applicable Then the period of ineligibility will be 2 years' subject to potential reduction in terms of

Regulation

57.1 for the hearing panel to reduce the period of ineligibility it will need to be satisfied that The Athlete has established on a balance of probabilities, the following:

(a) How the Prohibited Substances ended up in his system;
(b) That there was no intent or recklessness;
(c) The degree of fault on his part so that an appropriate reduction can be arrived at.

58. When one refers to the definition of Fault factors to be taken into consideration in assessing an Athlete or other Person's degree of fault include whether the athlete was a minor, his / her experience, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk. In assessing his/her degree of fault, the circumstances considered must be specific and relevant to explain the Athlete 's or other Person's departure from the expected standard of behavior.

59. In terms of the definition of No Fault or Negligence it takes that the Athlete or other Person's establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti – doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

60. The definition of No Significant Fault or Negligence, for ease, is as follows: -

The Athlete or other person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances, and taking into account the criteria for no fault or negligence, ***was not significant in relation to the anti-doping rule violation.*** *In case of a Minor …* ***the Athlete must also establish how the Prohibited Substance entered his or her system.*** (The emphasis and underlining is added).

61. The Tribunal in *P v ITF* held that "While it is understandable for an athlete to trust his/her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence. It is of little

relevant to the determination of fault that the product was prescribed with "professional diligence" and with a clear therapeutic intention". *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigation substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules (own emphasis)"*

62. In Czarnota's book "The World Anti – Doping Code, the athlete's duty of 'utmost caution' and the elimination of cheating" argued that "In assessing whether an athlete's Fault or Negligence was "significant," the WADA imposes an onerous "duty of utmost caution to avoid any prohibited substance entering his or her body." This duty requires athletes to "leave no reasonable stone unturned, "although the "taking [of] reasonable steps should be sufficient [as] 'one can always do more.' "Czarnota stated in his article that "The duty of "utmost caution" requires athletes to know what constitutes a doping offence and what substances and methods are included on the WADA prohibited list, follow health care and nutrition guidelines set by governing bodies, review a product's packaging, refrain from ingesting any products without consulting a "competent medical professional." Refrain from ingesting products from "unreliable sources," and avoid places with an "increased risk of contamination."

63. In the matter of CAS 2008/A/1565 WADA V CISM & Federico Turrini the tribunal set out the circumstances- "The Athlete is a professional swimmer. It is the professional duty of the Respondent to consult the rules and be well-aware of all the duties and the Respondent has to fulfil, among others to ensure that no Prohibited Substances enters his body. As said to the Commentary to the WADA, the Athlete cannot rely on advice from his personal physician in these matters, especially when the doctor is no expert on sport medicine... The Athlete in this case admits that he did nothing to ensure that the medication did not contain any forbidden substances...He simply relied on his doctor to warn him if the medication did not contain anything on the Prohibited List" In the Turrini matter the CAS tribunal held that "... that the Athlete, in order to fulfil his or her duty according to Article 2.1 of the WADA, has to be active to ensure that a medication that he or she uses does not contain any compound that is on the Prohibited List. In the present case, the Respondent has not done anything to ensure this. The Panel is of the view that the Athlete has not established that he bears No Significant Fault or Negligence. *It is therefore no grounds to reduce the sanction* according to Art 10.5.1 or 10.5.2 of the WADA... (own emphasis)"

64. If the hearing panel finds that the Respondent has met the requirements as set out above in paragraph 57.1 above "a", and "b", then "the period of ineligibility shall be, at a minimum, a reprimand and on period of ineligibility and at a maximum, two (2) years of ineligibility **depending on the Respondent or other person's degree of Fault.** (The emphasis is added). So, what is required is that the facts be placed before the panel by The Respondent.

65. SAIDS submits that the Respondent is required to show how Stanozolol and Methylhexanaemine entered his system. SAIDS believes that he failed at demonstrating this. He has not provided any evidence that his sample was contaminated or that there was a break in the chain of custody. It is highly unlikely or basically improbable that one could contaminate or tamper with a sample which would in effect reflect these two (2) substances.

66. Furthermore, the prescriptions from Dr. A Cato, i.e. Voltaren and Tramacet are not medications that are found on the Prohibited List. Neither of these medications contain the substances found in his sample analysis.

67. The Respondent is required to establish before the Tribunal that his *Fault* or *Negligence* when viewed in the totality of the circumstances was not significant in relationship to the anti-doping rule violation. He has failed to establish this.

68. The Respondent did not show the duty of care or exercise "utmost caution" to ensure that whatever he actually took were not on the prohibited List;

69. Did not take reasonable steps to enquire what constitutes a doping offence;

70. Consequently, If the hearing panel determines that SAIDS has established that Mr. Vermeulen was reckless then the period of ineligibility must be 4 years. There is no possibility of a reduction;

71. If the hearing panel finds he was not reckless or without intent within the meaning of Regulation 21.10.2.3 the period of ineligibility should be 2 years and there is the possibility of a reduction.

72. For a reduction to apply Mr. Vermeulen must first overcome the hurdles put in place by the Regulations in respect of No Significant Fault or Negligence. If he can establish then the hearing panel will evaluate the degree of Fault in this particular instance.

Evidence of the Respondent

73. He explained to the Panel that prior to the date of in-competition test which was on 10 September 2016,he had consulted a Medical Doctor on 26 August 2016 as he was sick and was booked off sick for two (2) weeks. During this period he took some medication which was prescribed to him. He also testified that he has a heart condition which at times enlarges.

74. On the 10 September 2016, despite being sick, the team Manager and the Coach of Leopards Rugby Union fielded him in the match between Leopards and Blue Bulls.

75. He explained that he had drunk a Hyper Excel drink before the testing which was left unattended in the locker Room.

76. On the procedure which was followed by a Doping officer to test him, he testified that the officer called him, requested him to go to the Doping Office as he was to attend a Mandatory Anti-Doping test,

77. He went into the Doping room at the Stadium and was provided with a container by the Officer, who requested him to go into a toilet to pass urine into the container which was provided to him.

78. After he passed the urine, he went back into the Doping room which has a basin, placed the urine on the table and washed his hands at the basin which was also inside the Doping room. He testified that the container was not closed at the time when he washed his hands.

79. He said there were other people in the Doping room which included the testing officials and other Rugby players, however, his mother was waiting outside.

80. He testified that her mother is a professional nurse employed at Medi – Clinic in Potchefstroom. The mother explained to him the danger of taking other substances because of his medical condition.

81. On the day of the testing, he requested his mother to write down the list of the medication he was taking as he was not familiar and/or would not know the names of such medication and because the mother is a professional nurse would be of assistance. He provided the list to the Doping Officer.

Cross -examination of the Respondent

82. During cross-examination, the Respondent testified that he has attended classes and/or workshops which provide councelling on anti-doping. However, the classes are conducted in English and he is Afrikaans speaking and he does not understand, he ended up playing with his phone.

83. He admitted that the Urine Sample which was taken was his Urine Sample.

84. He testified that he does not know whether the Prohibited Substance found in his Urine Sample were from the Hyper Excel drink he drank earlier,and or the medication he took and or whether the Hyper Excel drink was spiked and or whether the Urine Sample was contaminated. He told his mother not to write Hyper Excel on the Form because he knew he was not going to test positive.

85. He further testified that he had at all times carried the Urine Sample with him and there was no other Urine Sample on the table.

86. He explained that the Urine Sample was placed nearer or closer to him and he just turned towards the basin to wash his hands.The basin was also closer and or nearer to him.He actually turned his body from the urine sample to the basin and washed his hands.

87. He testified that the comments he made of the words "Great"as written on the Doping Control Form under "Athletes Comments" were written as the procedure was great and went fast and he didn't spend too much time in the Doping Control Room.

88. He testified that he didn't consult the team doctor when he was asked to particpate in the match because both the team coach and the team Manager had askem him to participate and he could not refuse.

89. On why he had to rely on the advice of his Coach and team Manager, he could only testify that he cannot question their decision as he trust them. When asked by Professor Coopo if the doping procedure was correct, he said yes.

90. He testified that the Urine Sample in the Container was his Urine, whether the Doping Officer was looking at him or not, he does not dispute the ownership thereof.

Evidence of Mr Andrew Ramakgapola for and on behalf of SAIDS

90. SAIDS called on Mr Ramakgapola to give evidence on its behalf as a person who was a doping officer representing SAIDS on 10th September 2016.

91. He testified that he has been a Doping officer for nine (9) years,and also explained the process followed in accordance with the required standards for testing.He testified that the Respondent was playfull at times but corporative during testing.

92. There were two (2) Doping stations as there were more than one players to be tested.

93. A temporary doping station was set-up and there was no basin in the temporary room. Mr Ramakgapola testified that he accompanied the Respondent to the toilet when the Respondent was to pass the urine.

94. He testified that it was only him and the Respondent in the testing room.He testified that there was no spilliage of the Urine Sample of the Respondent or any over flow as that could have came to his attention moreso regarding the amount of Urine Sample that could have been lost, which could have resulted in the required amount of Urine Sample being reduced.

95. He testified that at all times the Respondent carried his Urine Sample and the container was also sealed by the Respondent at the Doping station.

Undisputed facts

97. There are no disputes of facts between the Respondent and SAIDS with regard to the following: -

(a) The Respondent underwent a mandatory in-competition test at the Stadium on 10 September 2016.

(b) The Respondent's Urine Sample A and B collection was conducted by Mr Ramakgapola, an authorized doping officer.

(c) The Respondent's Urine Sample "A" (3980305) tested positive for 16β-Hydroxystanozolol and Methylhexaneamine (Dimethylpentylamine)Prohibited Substances in accordance with WADA's Prohibited list.

(d) The Laboratory that analysed the Respondent's sample is a WADA accredited facility.

(e) The Laboratory did not depart from any aspect of the WADA International

Standard for Testing Urine Sample.

ANALYSIS OF THE EVIDENCE

98. Given the submissions made by the parties and the evidence adduced, the Panel had to consider the following: -

(a) Whether the Respondent's Urine Sample was sabotaged or contaminated as a result of SAIDS having failed to comply with testing procedures as alleged by the Respondent.

(b) Deliberate consumption of the Prohibited Substance by the Respondent.

(c) Unintentional consumption of the Prohibited Substance by the Respondent.

99. Before dealing with the aforesaid possibilities, the Panel wish to first analyse and summarise the evidence as set out below.

100. The Respondent was represented by a firm of attorneys and in the panel's view he should have used the opportunity to obtain expert witness to mainly support his view of the events, more so that in his own testimony, he said he does not know whether the Hyper Excel drink he left in the Locker Room was spiked, whether the medication he listed on the Doping Control Form and taken by him contained a Prohibited Substance and/or whether his Urine Sample was contaminated.

101. The Prohibited Substances found in his Urine Sample was metabolized and it could have been to his own interest to ensure and prove to the Panel on how a metabolized prohibited substance ended in his urine sample, which in any event has not denied that the urine sample was his and he only left the Urine Sample unattended as alleged by him for a minute and a half.

102. From the written submissions made by SAIDS, there was other three Rugby players, two (2) from Blue Bulls and one (1) from Leopards who participated in the same match where the Respondent participated, who were also tested on the same date with the Respondent and their three (3) samples analysis came back negative.

103. If one considers the time frame from the period the Respondent was notified of the Mandatory testing, which was at 12:52, the arrival time at Doping Control Station at 12:53, the time the urine sample was provided which was at 13:04 and the completion time which

was at 13:26, it would be implausible that any person would have contaminated Respondent's Urine Sample.

104. What the Respondent has in fact placed before the Panel was denialism and ignorance. He participated in the match whilst he was fully aware that he was sick and on medication. He never bothered to consult a team Doctor despite the fact that he was fully aware he may also risk his life.

105. He was also fully aware that he relied on people who are not specialist on sport medicine.

106. He also confirmed during his testimony that he is aware of WADA and anti-doping workshops. However, because the workshops are conducted in English and he is Afrikaans speaking, he finds it difficult understanding and plays with his cell phone. What is of interest to the Panel is that the hearing was conducted in English and the Respondent never objected to that, he testified in English and was very conversant in English language.

107. Interestingly, the Respondent never testified about a second temporary Doping Control Station which SAIDS witness testified about and confirmed that there was a second Doping Control Station. It would be highly implausible for SAIDS witness who has nine (9) years' experience as a Doping Officer to mislead the Panel with regard to the existence of a second temporary Doping Control Station, whilst same did not exist.

108. In relation to the possibility as appears on sub-paragraph ("a") above, that the Urine Sample was sabotaged or contaminated as a result of SAIDS having failed to comply with testing procedures as alleged by the Respondent, the evidence of the Respondent was not convincing. The Respondent relied on speculation, without any factual basis. The Respondent has failed to place doubts on the evidence of Mr Ramakgapola who has more than nine (9) years as a Doping Control Officer.

109. It is still puzzling that the Respondent failed to call any witnesses including the Coach, the team Manager and his mother, who could have perhaps collaborated his evidence on the lack of intentional consumption of Prohibited Substances.

110. Considering and accepting the evidence of the Respondent as plausible would amount to a mockery to the same rules that are protecting the Respondent in respect of fair play. In fact, the conduct of the Respondent is more of "just deny, it's my word against yours"

111. Consequently, the Panel is of the opinion that the Respondent has failed to proof that his Urine Sample was sabotaged and contaminated in all respect and no evidence has been put forward to show that SAIDS failed to adhere to the required standard for testing.

112. With regard to the possibility in sub-paragraph (b) above, that there was a deliberate consumption of the Prohibited Substance, the Respondent in fact, in his own testimony stated that he does not know whether the Hyper Excel drink he left unattended was spiked, whether it was medication and/or his Urine Sample. The prosecutor, was in fact correct to state that the Respondent was "grasping at straws". The Respondent failed to take himself out of the situation and he could not assist the Panel to reach a different conclusion. Based on the submissions and evidence adduced, the Respondent failed to prove to the Panel that there was no deliberate consumption of the Prohibited Substances found in his Urine Sample.

113. In respect of possibility in sub-paragraph (c) above, that there was unintentional consumption of the Prohibited Substance, once again, the Respondent failed to provide plausible explanation. It was more of "I don't know, it's possible".

114. Having considered all the possibilities, the Panel is satisfied with the conclusion and findings it reached as stated below.

CONCLUSION

Given the facts before it and various authorities, the Respondent failed to prove any contamination of his Urine Sample by either a third party or environmental circumstances, breach of Doping procedure by the Doping Officer/SAIDS, unintentional consumption of the Prohibited Substance.

Under the circumstances, there is no evidence which suggest that the Respondent has not violated Article 21.2.1 of the 2016 World Rugby Anti – Doping Regulations.

RELEVANT CASE LAW

115. **The Panel in order to come to its conclusion considered the following cases: -**

115.1 ***In WADA v Wium, CAS 2005/A/9085*** *a DCO accidentally left the Respondent's urine sample at the Respondent's premises at the conclusion of the collection procedure. The sample was left unattended for 45 minutes in a sealed and tamper-proof 'Berlinger test kit'. The CAS held that departures from IST 'did not*

cast any doubt on the reliability of the test results', since the Panel 'cannot imagine any hypothesis under the given circumstances that would indicate that any other person, whether identified or not, might have used the period during which the samples were unattended, for any act of sabotage with a possible impact on the result of the laboratory analysis' (para 6.7).

115.2 ***In IAAF v Da Silva, CAS 2012/A/2779**, the athlete provided a partial urine sample following a post-race anti-doping test. The anti-doping officials who conducted the test permitted the athlete to leave the doping control station carrying her unsealed sample bottle. The athlete then took pan in a media interview. During the interview, she placed the sample on the floor and covered it with a cloth. She then returned to the doping control station and provided the remaining portion of her sample. The sole arbitrator did not find that any departure from the IST had occurred. However, he held that, even if a departure had occurred, 'it is doubtful whether such departure led or would reasonably have led to the adverse analytical finding'. This was because: (i) the athlete was always in control of the sample .bottle during the media interview, (ii) she had signed the Doping Control Form indicating her satisfaction in the manner in which the sample had been collected, (iii) she 'did not summon any expert to rebut Prof. Christiane Ayotte's expert evidence which explained that even if the sample had been spiked with recombinant EPO, it would have been strikingly obvious at the time of the analysis because the analytical image would have been overloaded with recombinant EP (Y and (iv) the athlete 'has not summoned or adduced expert evidence proving that the unsealed Sample Bottle could still have been contaminated despite the fact that it was covered with a white cloth' (para. 210).*

115.3 ***In CAS 2010/M2277** the Appellant underwent an in-competition doping test. The sample obtained tested positive for a prohibited anabolic androgenic steroid. The Appellant claimed that the sample had been collected in violation of the IST relating to the collection of partial samples, since he had not been asked to check that his partial samples had been properly sealed before attending a medal ceremony, and had not been accompanied by a chaperone to the ceremony. The CAS rejected the appeal. The Panel accepted the evidence of the DCO as to the circumstances in which the Appellant's partial samples were collected, including the DCO's compliance with the relevant partial sample IST procedures under Annex F (para 4.8). The Panel then went on to explain that, even if there had been a departure from the IST (which the Panel did not accept there had been), the*

Appellant was unable to prove that the alleged departure could reasonably have caused the adverse analytical finding. The Appellant contended that, due to his attendance at the medal ceremony, 'the chain of custody had been broken' and there was therefore no proof the urine that was tested in the lab had come from him. The Panel rejected this submission on the basis that the argument 'amounts to mere speculation without any supporting facts'. The DCO had 'made it clear that there had always been at all times a DCO to supervise and to secure the samples, so that there has never been any break in the chain of custody'. The Appellant did not actually allege that the samples referred to in the Doping Control Form were not his own, and he admitted that there was no basis to argue that someone had deliberately sought to incriminate him. The Appellant had not presented any evidence that someone could have tampered with his sample, nor how such tampering could have occurred (para 4.10).

115.4. ***In Wilson v UK Anti-Doping (NADP Appeal Tribunal decision dated 19 January 2012)****, the Appellant's urine sample tested positive for two prohibited anabolic steroids. She challenged the finding of the NADP Tribunal that she had committed an anti-doping violation. The Appellant contended, inter alia, that the DCOs had failed to comply with the IAAF rules regarding the collection of partial samples. The alleged departures included instructing the Appellant to remove the strip sealing the partial sample container and leaving an unsealed partial sample in a shower room. The Appeal Tribunal noted that UKAD had established that none of the alleged departures had occurred (para 36.12). It further noted that, for adulteration to have taken place, the DCOs would have had to be involved in a conspiracy. The DCOs both denied adulterating the Appellant's sample and the Appellant disclaimed any suggestion that anyone at UK Athletics or UKAD had a motive to harm her (para 36.13'). In these circumstances, the UKAD Appeal Tribunal rejected all of the Appellant's grounds of challenge and upheld the finding of an anti-doping rule violation. Again, unlike in the present case, in Wilson the existence of an IST departure was rejected by the Appeal Tribunal. Nor was any evidence adduced regarding the possibility of inadvertent environmental contamination.*

FINDINGS

116. In light of the evidence adduced by the parties, documentary evidence, oral and written submissions and various authorities, the Panel found that the charges against the Respondent have been proven by SAIDS.

117. The Respondent is found guilty of having violated regulation 21.2.1 Rules for having Adverse Analytical Finding in respect of a Prohibited Substance in his Urine Sample (3980305).

SANCTION

118. The Respondent is sanctioned for a period of four years ineligibility, effective from the date of suspension being 3rd November 2016 to 3rd November 2020.

119. During this period of ineligibility, the Respondent will not take part and/or participate in any authorized sport be at International, national or local level.

120. *No order as to costs.*

DATED AT MELROSE NORTH, JOHANNESBURG ON THIS THE 10th DAY OF JULY 2017

CHAIRPERSON
SUNNY NAMENG

PANEL MEMBER
PROFESSOR YOGA COOPOO

PANEL MEMBER
DR DIMAKATSO RAMAGOLE