

**BEFORE THE ANTI- DOPING APPEAL TRIBUNAL OF SOUTH AFRICA**

**HELD IN CAPE TOWN**

(Instituted in terms of section 17(2)(a) of Act No. 14 of 1997, as amended by Act No. 25 of 2006)

In the matter between: -

Case No: SAIDS 2017/06/A06

**TIAAN SMIT (The Athlete)**

(APPELLANT)

*Versus*

**SOUTH AFRICAN INSTITUTE FOR**

**DRUG- FREE SPORT (SAIDS)**

(RESPONDENT)

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**DECISION**

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1. This is an Appeal against the sanction imposed by the Disciplinary Panel of SAIDS at a hearing which took place on the 5<sup>th</sup> July 2017.
2. In attendance were the following persons:
  - 2.1 the Appellant;
  - 2.2 Franklin Webster, attorney for the Appellant;
  - 2.3 Alan Newton, Appellants Advocate;
  - 2.4 Wafeekah Begg, for SAIDS;
  - 2.5 Fahmy Galant and Natalie St Cyr Clarke, observers.
3. The Appellant was found **GUILTY** of an anti-doping rule violation in terms of Article 2.1 of the 2016 SAIDS Anti-Doping Rules, in that, on the 22<sup>nd</sup> April 2017 he provided a urine sample during an in-competition test and upon analysis, the Doping Control Laboratory Gent reported the presence of a prohibited substance in his urine sample. The substance so identified was **Clenbuterol** which is categorised under **Class S.1, Anabolic Agents**, and therefore regarded as a "Non-Specified" Prohibited Substance.

4. The panel found that the Appellant failed to show to their comfortable satisfaction that the use of the substance was not intentional and imposed a sanction of **Four (4) years' ineligibility.**
5. The Rules provide that where an athlete is found to have contravened Article 2.1, the sanction shall be a period of ineligibility of 4 years where the violation does not involve a Specified Substance unless the Athlete can establish that the Anti-Doping Rule Violation was not intentional. If the Athlete does establish that the violation was not intentional then the period shall be 2 years ineligibility.
6. Article 10.2.3 defines "intentional" for the purposes of Article 10.2.1 as meaning "to identify those players who cheat". It goes on to explain the term as follows:

*"The term, therefore, requires that the Player or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk".*
7. The word "cheat" has many definitions depending on the context in which it is used. In the context of sport, it is generally used for the breaking of rules to gain an unfair advantage in a competitive situation (Wikipedia)
8. There are two parts to the definition of "intention", namely:
  - 8.1 Direct Intention to cheat: and
  - 8.2 Imputed Intention to cheat or *dolus eventualis*.
9. In order to establish either of these types of intention one must have regard to:
  - 9.1 the evidence of the Player relating to his state of mind and;
  - 9.2 the relevant circumstantial evidence placed before us in order to establish whether he had the intention to cheat, or
  - 9.3 whether he knew there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk and in so doing developed an intention to cheat
10. In terms of Article 3.1 of the Rules the standard of proof required by the Athlete to discharge the burden placed on him is on a balance of probabilities.
11. Subsequent to the noting of the Appeal both parties exchanged documents which formed part of the record before us.

## **SUBMISSIONS BY THE ATHLETE**

12. There are a number of submissions made in the documents filed by the Athlete which were not dealt with in argument and seemingly abandoned.
13. The main submissions made on behalf of the Athlete was that he has proved on a balance of probabilities that he had no intention to cheat and that the sanction of 4 years ineligibility should be set aside and replaced with a sanction of 2 years ineligibility.
14. In support of this submission the Athlete advanced the following factors:
  - 14.1 He accepted that the substance he ingested was prohibited as soon as he was so informed by SAIDS and indicated that he did not require the B sample to be tested;
  - 14.2 He did not use the substance to enhance his performance but for weight loss purposes;
  - 14.3 He admitted that he made a mistake by not checking the WADA website;
  - 14.4 He is prepared to take full responsibility for his mistake and apologises for it;
  - 14.5 It was never his intention to cheat but he was negligent;
  - 14.6 He competed in two other events while using Clenbuterol and it did not enhance his performance;
  - 14.7 He did not mention the Clenbuterol on the Doping Control Form because he stopped using the substance more than 7 days before he was tested;
  - 14.8 Although he did not do much research when he looked at Google, all he saw was that it increases ones' metabolic rate and that it is a fat burner;
  - 14.9 He saw no warnings that the substance was illegal. The only warnings were about side effects such as increased heart rate, sleepless nights and shakiness etc;
15. The Athlete furthermore submits that there is no adverse finding made by the Panel regarding his credibility, in fact the panel finds that he was open and

forthcoming as to how he heard of and bought Clenbuterol, he was remorseful and admitted being very negligent.

16. Notwithstanding those findings the Panel applies the incorrect standard of proof, namely, “the comfortable satisfaction of the Panel” and wrongly finds the Athlete used the substance intentionally and refers to it as a steroid.

### **SUBMISSIONS BY SAIDS**

17. The submission by SAIDS is simply that the Athlete has failed to prove on a balance of probabilities that the anti-doping rule violation was not intentional because:

- 17.1 He knows about doping in sport. He has been tested before.

- 17.2 If he did a proper Google search he would have seen that Clenbuterol comes from Liquid Pharmaceuticals and more importantly he would have seen that it is an unlawful drug in South Africa and the USA, it is an anabolic agent and that there are warnings about side effects;

- 17.3 He did not consult his doctor, he did not consult SAIDS nor did he check the WADA or SAIDS websites.

18. He therefore knew there was a significant risk that his conduct in taking Clenbuterol might constitute or result in an anti-doping rule violation and he manifestly disregarded that risk.

### **EVALUATION OF THE EVIDENCE**

19. At the centre of the Appellant’s argument, is the issue whether his conduct was, on a balance of probabilities, intentional (as defined in Article 10.2.3 of the SAIDS Rules), thus warranting a 4-year ineligibility sanction (per Article 10.2.1.1 of the SAIDS Rules). His contention is that the appropriate sanction should be 2 years (per Article 10.2.2 of the SAIDS Rules), on the basis that he did not ingest the prohibited substance with the intent to cheat/ gain unfair competitive advantage, but ingested it to lose weight.

20. There was no direct evidence adduced at the appeal hearing that persuasively refuted the Appellant’s contention that his intention, by digesting the product, was to lose weight (and not to cheat).

21. In our view, the test in determining whether the Appellant's conduct was intentional or otherwise (and what the concomitant sanction should be), squarely hinges on whether his conduct did or did not satisfy the definition of intention as contained in Article 10.2.3 of the SAIDS Rules, notably:
- 21.1 Whether he engaged in conduct which he knew constituted an anti-doping rule; or
  - 21.2 Whether he engaged in conduct for which he knew there was a significant risk that such conduct might result in an anti-doping rule violation, and manifestly disregarded the risk.
22. The totality of the evidence adduced at the appeal hearing does point to the first leg of the test having been passed by the Appellant. However, the second leg thereof requires closer examination. Unrefuted evidence before the appeal hearing is that:
- 22.1 The Appellant is a competitive athlete who competes at a highest level;
  - 22.2 The Appellant opted to buy/ obtain the substance he ingested from the black market (these are the words he used). Upon being asked why he opted for buying this in the black market, he stated that it was because it was cheaper and easily accessible (presumably implying that a chemist or doctor would have been less accessible and costlier);
  - 22.3 The Appellant took a decision not to inform his coach or doctor that he obtained and ingested the so-called fat-burning substance. His reason is that he deemed it unnecessary to check with them in the same way as a person that takes supplements would not;
  - 22.4 The Appellant did not undertake any extensive, deep research on the risks associated with the ingestion of that substance (except a cursory google search). He conceded that it did cross his mind that such a substance could be illegal.
  - 22.5 Even upon experiencing side-effects from the ingestion of the substance, he still kept his use thereof to himself and never informed his coach or his doctor.

- 22.6 The Appellant is aware of the anti-doping regime in the country, and has been tested twice for the existence or otherwise of prohibited substances in his system.
23. Insofar as the performance enhancing qualities of the substance is concerned one must have regard to what is placed before us by both parties. SAIDS submitted a research paper which the Appellant alleges refutes the notion of performance enhancing. This is not so. In Annexure B to the SAIDS submission there is a statement that it is used illegally by some athletes for its "repartitioning effects" defined as the increase of lean muscle mass and the concomitant decrease of fat deposition.
24. On the other hand, the Appellant submitted two documents by a Dr Louwrens Erasmus. The first one seems to be a restatement of what the manufacturers say on their website. A cursory Google search reveals that it is used as a bronchodilator in Asthma and that the effects of Clenbuterol are amongst others, that it opens the airways and enables the individual to breathe. Asthma patients are primary beneficiaries but the same improved breathing could also prove useful to athletes.
25. In a further document from Dr Louwrens Erasmus dated 25<sup>th</sup> October 2017 he states the following:
- "As a B2 sympathomimetic, clenbuterol has also been used as a performance enhancing drug".*
26. It is concerting to note that in both documents submitted by Dr Louwrens Erasmus he fails to state that Clenbuterol is an illegal substance in South Africa.
27. The above-stated test places the onus on the Appellant, and not SAIDS to demonstrate/ prove on a balance of probabilities that he passed both legs of the test. In determining whether he passed the second leg, the following needs to be taken into account:
- 27.1 That the Appellant, a competitive athlete, opted to buy a substance from the black market as if there were no other fat-burning options circumstantially points to him having taken a risk that he could have avoided by either not buying from the black market or checking with his doctor whether it is fine to use such a substance;
- 27.2 The substance he used is illegal in South Africa. It is used for asthma patients and not for fat burning. It assists in breathing and is beneficial for athletes as well. Fat burning and building lean muscle are side effects and the substance is performance enhancing.

- 27.3 That the Appellant, a competitive athlete, opted not to share the ingestion of a substance obtained in the black market with his coach and doctor also points to him having taken a risk that he could have avoided by informing, or consulting with them;
- 27.4 That the Appellant chose to google the product, albeit cursorily, points to his knowledge and appreciation that the ingestion of such could be risky;
- 27.5 That the Appellant, being a competitive athlete that had been tested by SAIDS before, raised his duty to higher level of awareness and caution, and yet opted not to undertake a deeper research or even consult SAIDS itself, points to him having disregarded a risk which he had an option to manage.
28. The inquiry cannot end at what the Appellant “should have done” (although such is relevant and pertinent and points to his gross negligence, which the Appellant readily conceded to), but equally important for the inquiry to also take into account, is what the Appellant “failed to do” despite the circumstances around him which required him to do something/ take certain steps and thus avert risks associated with ingesting banned substances. **His failure/omission to do what he should have done, his motive for such failure/omission, and the unsatisfactory reasons advanced by him, calls for closer scrutiny as to his motive/ intent, and whether his failure was inadvertent, or deliberate. There is therefore a combination of gross negligence and intent.**
29. Evidence leaves us with no option but to draw an adverse inference which, circumstantially, points to an athlete (with his background) that clearly “engaged in conduct for which he knew there was a significant risk that such conduct might result in an anti-doping rule violation, and manifestly disregarded the risk”.
30. Competitive running is a regulated sporting activity. For any athlete who is not only aware of this fact but participates therein, to opt to source products from an unregulated environment, and in doing so keeps such a decision and conduct to himself despite having a doctor and a coach, points to a clear intentional disregard of risks inherent in ingesting such substances. He actually foresaw that risk (as evidenced by his cursory research) and yet disregarded same.
31. Had he taken measures to mitigate or even eliminate the risks by, for example, not keeping the acquisition and ingestion of the product a secret; by consulting on the product with professionals which were accessible to him; by doing a deeper research thereon; and by buying a fat-burning product that is recommended or sold

in regulated environments/ outlets, then he would have passed the second leg of the test. The Appellant therefore failed the second part of the test alluded to above.

32. For the record, the fact that the Disciplinary Panel applied the incorrect test, referred to the substance as a steroid, and found the Appellant to be negligent, has been noted but is irrelevant and has no effect on the outcome of this appeal.

### **FINDING**

33. The Appeal Tribunal, therefore finds, on a balance of probabilities that the Appellant, who is guilty of violating Article 2.1 of the Rules, ingested Clenbuterol with the intention of cheating by enhancing his performance.
34. The Appeal is dismissed and the sanction of the Disciplinary Hearing a quo is hereby upheld, namely, that the period of *Ineligibility* of the Athlete shall be four (4) years from the 25<sup>th</sup> May 2017.
35. We make no order as to costs.

Held at Newlands on 7<sup>th</sup> November 2017

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a long, sweeping horizontal stroke that ends in a small upward tick.

Alex Abercrombie

(Chairman)

Dr. Ismail Jakoet

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