SA INSTITUTE FOR DRUG-FREE SPORT (SAIDS)

ANTI-DOPING TRIBUNAL HEARING

ATHLETE:	MR NTANDO KEBE
SPORTS FEDERATION:	SOUTH AFRICAN RUGBY UNION (SARU)
DATE:	28 AUGUST 2017 & 27 SEPTEMBER 2017
PLACE OF HEARING:	SPORT SCIENCE INSTITUTE OF SOUTH AFRICA, NEWLANDS
DISCIPLINARY PANEL:	MR LUC DU PLESSIS DR NASIR JAFFER MR YUSUF ABRAHAMS
PROSECUTOR:	MS WAFEEKAH BEGG
PLAYER REPRESENTATIVE:	MR B KELLERMAN
ANTI-DOPING RULE VIOLATION:	ANTI-DOPING RULE VIOLATION IN TERMS OF REGULATION 21.2.1 of the 2016 WORLD RUGBY ANTI-DOPING REGULATIONS

In the matter between:

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

and

NTANDO KEBE **ATHLETE**

RULING

INTRODUCTION

1. SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended).

2. SAIDS has formally accepted the World Anti-Doping Code (WADC) adopted and implemented by the World Anti-Doping Agency (WADA) in 2003 (and revised in 2015) and has adopted its Anti-Doping Rules in accordance with its responsibilities under the WADC.

3. 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 (WRR) 21.

4. 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 Regulation 21 to SAIDS, with the responsibility to perform all such functions and duties to comply with the requirements of SARU in terms of the said Regulations.

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

NOTIFICATION AND CHARGE

6. On 7 July 2016, the Athlete was issued with a notice advising him *inter alia* that:

"*the analytical report received from the Laboratory confirmed the presence of the prohibited substance and constitutes an adverse analytical finding and prima facie breach of Regulation 21.2.1 ("an ADRV")"*

7. The charge against the Athlete was set out in written correspondence to him on 2 August 2017, which read as follows:

"*You are formally charged with 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).*

On the 1st March 2016, you provided a urine sample (3928495) during an out-of-competition test. Upon analysis, the Doping Control Laboratory Gent, reported the presence of prohibited substances in your urine sample. The substances identified in your sample were Stanozolol and its metabolites 3'-hydroxystanozolol, 16b-hydroxystanozolol and 4b-hydroxystanozolol in your A sample (sample number 3928495). Stanozolol is categorised under Class S1–Anabolic Agent on the World Anti-Doping Code 2016 Prohibited List International Standard."

8. The sample resulted in an adverse analytical finding in that it was discovered that Stanozolol and its metabolites were present in the sample which he provided.

9. Stanozolol is an anabolic steroid that is a non-specified substance and is prohibited at all times, both in- and out-of-competition (see WADA Prohibited List).

10. The Athlete pleaded guilty to breaching Regulation 21.2.1 (see below) and committing an Anti-Doping Rule Violation. He did not dispute the adverse analytical finding and he admitted that the sample was collected properly, he admitted the chain of custody and the validity of the testing procedure conducted by the anti-doping laboratory.

11. It therefore only necessary for the Panel to deal with the issue of appropriate sanction.

PROCEDURAL ISSUES

12. The Athlete was in attendance, and was assisted by his attorney, Mr Kellerman.

13. The rights of the Athlete were explained to him, and he acknowledged that he understood the process and his rights.

14. The charge against the Athlete was read into the record as per paragraph 7 above and the parties proceeded to lead their respective evidence.

15. The proceedings took in Cape Town on 28 August and 27 September 2017.

ATHLETES TESTIMONY AND EVIDENCE

In summary the Athlete lead the following evidence:

16. The Athlete explained to the Panel that he did not take the prohibited substance intentionally. He contends that he must have ingested it from a supplement he had taken prior to the sampling of the urine.

17. He brought to the hearing over 6 containers of different supplements he claims he was taking such as Ripped EFX, Bok Pulse, Powerade (powder form), Creatine Transport, Creatine Supreme, USN Creatine HCL, Multi- Nutritech supplement.

18. He claims that Ripped EFX was given to him by his former team mate of the Southern Kings, Monde Hadebe in January 2016 in Port Elizabeth at Summerstrand Hotel, this is supported by Mr Hadebe's evidence. Both confirmed the description and the nature of the contents of the substance, Ripped EFX.

19. To his knowledge, Monde had retired from rugby when he was at the Sharks in 2016 due to a back injury. He claims he did not know that Monde had also been banned from the sport for testing positive for a prohibited substance. He claims Monde that he never alerted him as to his positive test, prior to the Athlete's own notification of an Adverse Analytical Finding (AAF). (see paragraph 31)

20. He has been playing rugby for 16 years, since the age of 12. His career kicked off at University of Fort Hare where he studies Librarian Information Science. He has played for Border u/ 19 and u/21's from 2007 – 2009; Border Bulldogs first team between 2010– 2012. He then moved over to Boland Cavaliers in 2013 for a year. 2014 he was contracted to Griquas. 2015 he went back to Border Bulldogs and then on loan to Southern Kings on loan so that he may play in the Super Rugby. He has played 12 Super Rugby games and has played for the SA 'A' Rugby Team.

21. He earned R35,000 playing for the Southern Kings.

22. The Athlete had only listed the supplements Creatine, Bok Pulse and Ganic-F on the duly signed Doping Control Form (DCF).

23. When questioned by the Panel and his attorney why he had only put 3 supplements on his DCF, he claims this was because the Doping Control Officer allegedly informed him to right down only the supplement he took on that day.

24. He claims he never received anti-doping education. However, he did mention that he received a pamphlet of sorts from SAIDS when MyPlayers came through.

25. He confirmed that he does not research the supplements he takes as he doesn't see the point.

26. He only spoke to the team doctor Dr. Konrad van Hogen after he received the notification. Prior to that he never made any enquiries.

27. He made it known that he knows how to purchase supplements such as Ripped EFX online, as he did so after notification of the AAF.

28. Under cross-examination, he confirmed that when he was in the SA 'A' side he had come accustomed to signing agreements and he confirmed that does not read contracts before he signs.

29. Under cross-examination, he confirmed he was aware of Chiliboy Ralapelle and Bjorn Basson, the rugby players who had been previously banned for doping.

30. He confirmed he has never approached his team doctors, physiotherapist, personal doctor or manager for advice pertaining to taking supplements or medication.

31. He claims he never knew Monde Hadebe had tested positive for Stanozolol, or that he was banned, only until round about July 2016. Despite Monde being informed since April, that he was suspended. He only called Monde when he received his notification from SAIDS. He also confirmed when he had spoken to Monde that Monde had still not informed him that he received a notification from SAIDS. He claims that there were rumours that Monde had tested positive.

32. After being questioned by the Panel, the Athlete did say that he sees the team doctor for injuries and flu like symptoms. He confirmed that the doctor says anyone that has medical issues must come see him before taking anything as there might be banned substances.

33. Mr. Kebe says that the Ripped EFX was finished at the beginning of February and he didn't think to buy another container because it wasn't working.

34. At the time the Athlete was notified of the AAF, he no longer had the benefit of testing all the supplements that he was taking during that time (except Ganic F, which there still some left).

35. The Athlete could only have containers of the supplements that he had been using tested and had to obtain a new container of the Ripped EFX on the off chance that samples from other batches may have contain traces of stanolozol.

36. The test results all proved negative. This was confirmed by the tests authorised by SAIDS on all supplements by the laboratory.

ATHLETE'S SUBMISSIONS

Mr Kellerman, the attorney for the Athlete, provided to the Panel a pre-hearing brief of the written submissions, as well as further final submissions at the hearing on 27 September 2017 ("the Submissions"). In summary the Submissions assert and submit:

37. He contends that he did not the prohibited substance intentionally;

38. He starting taking the Ripped EFX in January 2016 after receiving it from Mr Hadebe (the container was already open);

39. He finished the Ripped EFX before or after the first game of the seasons, which was the Saturday before the day of the urine sampling;

40. That is it is more likely than not, that the Ripped EFX was the source of the Stanozolol, if both the Athlete's and Mr Hadebe's evidence are accepted at face value;

41. According to Dr Wellman, Stanozolol due its anabolic androgenic and exogenous nature and with a high oral bio-availability, makes it ideal to be added to nutritional supplements;

42. Although the Athlete did not take any precautionary measures, there was no significant fault or negligence on his part as he could not have perceived a significant risk with the knowledge available to him at the time of ingestion of the Ripped EFX obtained from Mr Hadebe;

43. Although he was paid to play, he lacked the resources, education on doping and the support staff and he came from an impoverished community therefore the Panel should be cautious of judging the degree of risk that he would have perceived when determining intent;

44. When determining no (significant) fault or negligence in terms Regulation 21 that Panel should consider the peculiar circumstances of the Athlete, including his experience, whether he is a minor and the level of care and investigation exercised in order to determine the risk.

45. Similarly when determining no significant fault or negligence, he asks the Panel to look from a perspective of an Athlete who had no doping education;

46. He exercised the judgement to take the supplement, with the knowledge and experience that he had attained at that point in his life, viewed objectively;

47. In the context of these peculiar circumstances, for the Athlete to have reconciled himself with the risk that what he bought and drank could be a prohibited substance, he would had to have known what we know about doping. He says he did not;

48. There should be no reason not to accept the Athlete's evidence that he did not know there was a risk when he took supplements;

49. The evidence points to the likelihood of Ripped EFX being the source of the Stanozolol;

50. The Panel should treat him with mercy because he had limited knowledge at the time he committed the offence;

51. There was no significant fault or negligence as he could have perceived a significant risk with the knowledge available to him at the time that he made the judgement call;

52. Based on the Athlete's degree of fault and in the circumstances he found himself in and the knowledge he had at the time, the Athlete should be entitled to a reduction of the period of ineligibility in accordance with Regulation 21.10.5 (more particularly 21.10.5.1.2, alternatively 21.10.5.2).

SAIDS'S SUBMISSIONS

Ms Begg, prosecutor for SAIDS, provided to the Panel a pre-hearing brief of the written submissions, as well as further final supplementary submissions after the hearing on 29 September 2017 ("the Submissions"). In summary the Submissions assert and submit:

53. The Athlete's conduct displayed significant degree of fault and/or considerable fault and at most negligence in his thoughts and actions;

54. He is found to have clearly violated the Rules as the Rules are applied in terms of strict liability. Being educated and knowledgeable about anti-doping and a national South African rugby player, he knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk;

55. However, only his attorney has set out to make the Panel believe it is highly probable that it could be contamination. Contamination has not be proven;

56. Mr. Kebe said himself he doesn't know where it come from. SAIDS submitted that he is lying;

57. Stanozolol is banned in South Africa. If Stanozolol is banned, then how does it reach into supplements? There is absolutely no anti-doping cases in South Africa on Stanozolol.

58. The Athlete purchased Ripped EFX on the web, which came from outside of the country. If Ripped EFX is popular among rugby players and was potentially contaminated, SAIDS would have had many similar cases to Monde Hadebe and Mr. Kebe;

59. Mr. Kebe has not exercised "the greatest vigilance" or "utmost caution". The sanction of four (4) years should be implemented with no opportunity for further reduction of the sanction;

60. If you look at the Ripped EFX photo in the bundle you will see it's noted as a stimulant blend. If ever a positive had to arise from being tested, it would be highly probable that an Athlete would test positive for a stimulant first before a steroid;

61. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample;

62. The Athlete failed to prove or establish what it was that he took that in fact lead to the AAF. Why must we believe it came from a supplement when it can be purchased from the internet?

63. Athletes have a responsibility to ensure that prohibited substances do not enter their system. Mr. Kebe did not meet that responsibility. The failure to make basic enquiries from the resources mentioned at his disposal and not disclosing same onto the doping

control form is reckless and negligent, especially from someone who is playing in a sport that is popular for doping let alone playing at professional level;

64. Mr. Kebe is required to show us how Stanozolol entered his system. SAIDS believes that he has failed to demonstrate this. He has not provided any evidence or proof that his sample or supplements were contaminated;

65. Mr. Kebe 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;

66. Mr. Kebe did not show the duty of care or exercise “utmost caution” to ensure that whatever it is he actually took could contain ingredients that were not on the prohibited list. He is an experienced rugby professional having represented South Africa “A”;

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

68. He is aware of anti-doping and what is expected from him, yet he still did not disclose all the supplements on his doping control form;

69. He did not provide substantial proof that he conducted internet researches to assist him in his enquiries. Even if he did follow this route, he did not take reasonable steps to enquire that there might be a possibility that products that contain herbal blends or complex botanical materials could give rise to findings of steroidal precursors or contamination;

70. He failed to demonstrate how the sample concentration in his urine is determined by the dosage or amount he consumed;

71. SAIDS is not required, in the circumstances, to prove anything more than presence and no factors have been advanced by Mr. Kebe that would suggest there is a basis for reducing the period of ineligibility and doing so would be unfairly discriminatory towards other athletes;

72. There is no basis for SAIDS to conclude that he was NOT negligent in these circumstances;

73. He has to prove, on a balance of probabilities, that the ADRV was not intentional in order for a reduction in the period of ineligibility;

74. He was cheating by taking a substance that specifically enhanced his performance, leaving his competitors at a disadvantage;

75. Any reduction from 4 years would be unlawful and unfairly discriminatory in relation to other athletes who were subject to the Anti-Doping Code and entitled to expect fair and equal treatment under the law. It would thus not be fair to act arbitrarily or to depart from the Rules on a case by case basis;

76. The hearing panel is asked to make an appropriate determination by application of the Regulations in relation to Consequences to the facts. Consequently: -

- If the hearing panel determines that SAIDS has established that Mr. Kebe was reckless then the period of Ineligibility must be 4 years. There is no possibility of a reduction. This is our contention and the sanction that we want this Panel to hand down;

- However, 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;

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

- SAIDS is of the strong opinion Mr. Kebe will not be successful in convincing the panel that he is entitled to a reduction should the panel agree that he has displayed no intention to cheat or was reckless.

REGULATORY FRAMEWORK

77. Regulation 21.2.1 provides as follows: -

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

21.2.1.1 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 Players part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence).

21.2.1.2 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 Player's A sample where the Athlete waives analysis of the B sample and the B Sample is not analysed; or where the Player's B sample is analysed 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 Player's A Sample; or where the Player's B sample is split into 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.

22.2.1.3 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.

78. The period of ineligibility to be imposed for a violation of Regulation 21.2.21 (Presence of Prohibited Substance or its Metabolites and Markers) which does not involve a Specified Substance is four years for a first violation. The period of ineligibility can be reduced in certain circumstances. In the context of this hearing they include:

The Player establishing the anti-doping rule violation was not intentional (refer Regulation 21.10.2.1.1). If established, the period the period of ineligibility shall be reduced to two years.

The Player establishing exceptional circumstances as set out in Regulation 21.10.4 (No fault or negligence, in which case, the otherwise applicable shall be eliminated), or 21.10.5 (No significant fault or negligence, in which case the period of ineligibility shall be at a minimum of a reprimand and no period of ineligibility and at a maximum of two years of ineligibility depending on the Player's degree of fault).

79. The Player has the burden of establishing both of these matters. Pursuant to Regulation 21.3.1 the standard of proof shall be a balance of probability.

Intention

80. Regulation 21.10.2.3 defines the term "intentional" as used in Regulation 21.10.2.1.1. The Regulation provides:

"… the term intentional is meant to identify those Players who cheat. 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 that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

No Significant Fault or Negligence

81. We refer to the definition of the term "No Significant Fault or Negligence" as defined (own emphasis in bold):

"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****. Except in the case of a Minor…****the Athlete must also establish how the Prohibited Substance entered his or her system****."*

82. Regulation 21.10.5.1.2 provides:

"Contaminated Products

In cases where the Player 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 at a maximum, two years Ineligibility, depending on the Player's or other Person's degree of Fault (Comment 31)"

83. Comment 31 states: "*In assessing that Player's degree of Fault, it would, for example, be favorable for the Player if the Player had declared the product which was subsequently determined to be contaminated on his Doping Control form*."

84. It is important to note that a contaminated products is defined in Appendix 1 as "*A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.*"

85. Regulation 21.10.5.2

"*If a Player or other Person establishes in an individual case where Regulation 21.10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Regulation 21.10.6, the otherwise applicable period of Ineligibility may be reduced based on the Player or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Regulation may be no less than eight years. (Comment 32)"*

MAINS ISSUES

86. Given the submissions made by the parties and evidence adduced, the following are the main issues (points *in limine*) which arise during the proceedings and which the Panel needs to consider:

a. In order to establish the absence of intent, it is necessary for the Athlete to establish how the prohibited substance came to be in his system ("Proof of Source");

b. If it is necessary, has the Athlete established the source of the Stanozolol present in his sample? ("Source of Stanozolol");

   i. And if so, were the pills contained in the Ripped EFX the most likely source?

c. Has the Athlete established his lack of intent? ("Proof of Lack of Intent").

d. if the Panel is satisfied that there is no intent, then the Athlete can adduce evidence as to his degree of culpability with a view to eliminating or reducing his period of suspension. ("(No Significant) Fault")

87. If the Panel did not accept that the Player had no Significant Fault or Negligence, than the Panel should at least find that the ingestion of Stanozolol was not intentional and, therefore, the Player should benefit from Regulation 21.10.1.1, read with 21.10.2.2 have his sanction cut in half from 4 years to 2 years.

88. In this regard it is important to note that where the Regulations place the burden of proof upon the Athlete alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability.

89. We are dealing here with a Non-Specified Substance. That being the case the burden of persuasion is upon the Athlete to establish a lack of intent as contemplated in the Regulations.

A. PROOF OF SOURCE

90. The Athlete contended that he never intended to cheat. The Panel closely assessed the assertion which considers that if an athlete did not knowingly engage in conduct which lead to anti-doping offence then his violation should not be regarded as

intentional, in particular the Athlete's reliance on amongst others, CAS 2016/A/4676, *Arijan Ademi v. UEFA* case and its applicability.

91. The Prosecutor differs and contends that the Athlete bears the burden of proof regarding the source in order to enjoy a reduced sanction. In this instance the Prosecutor contends that the Athlete has failed to prove the source and accordingly, it should be impossible for the Panel to determine the degree of fault committed by the Athlete.

92. In this regard there is a consistent line of jurisprudence that suggests that an athlete must first prove how the prohibited substance came to present in his system, absence of such proof then he/she cannot show that the ADRV was not intentional.[1]

93. Furthermore, proof of precisely how and when the substance got into the athlete's system is a strict requirement of establishing fault (or lack thereof) see, e.g., Alabbar v FEI, CAS 2013/A/3124, at para 12.2, quoting with approval WADA v. Stanic & Swiss Olympic Association, CAS 2006/A/1130, at para 39:

"*This precondition is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances in which an athlete ingested a prohibited substance would undermine the strict liability underlying (…) the WADC, thereby defeating their purpose*".

94. CAS has held that "...*the requirement of showing how the prohibited substance got into one's system must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent such occurrence"*[2]

---

[1] UK Anti-Doping Limited v Songhurst, SR/00001120248; UK Anti-Doping Limited v Graham, SR/0000120259; UK Anti-Doping Limited v Hastings, SR/0000120256

[2] CAS 2007/A/1399 WADA v FILA & Stadnyk

95. The Panel agrees that where an athlete cannot prove the source it leaves the "narrowest of corridors" through which such Athlete must pass to discharge the burden which lies upon him.[3]

96. Similarly, World Rugby refers to this as the 'route of ingestion' criterion as the "preliminary threshold". If the Athlete succeeds on this ground, then second, he can then move on to establish that he bears no fault or negligence (Regulation 21.22.4) or no significant fault or negligence (Regulation 21.22.5).

97. Although there is no express requirement for the Athlete to prove means of ingestion (Regulation 21.10.2.3 as used in Regulations 21.10.2 and 21.10.3) there remains an evidential burden to explain how the violation occurred. If the Athlete puts forward a credible explanation then the Panel will focus on that conduct and determine on the balance of probabilities whether the Athlete provided the cause of the violation and he did not act intentionally.[4] The Athlete must do so by providing specific and convincing evidence, rather than mere speculation. See IRB v. Keyter, CAS 2006/A/1067: "*One hypothetical source of a positive test does not prove to the level of satisfaction required that such explanations are factually or scientifically probable*."

98. In the present case, the Athlete has tried to discharge that burden by saying that it was most probably though taking the supplement and the pills contained therein, Ripped EFX.

99. CAS case law consistently requires the source be established to show an absence of fault "*in order to ensure that one does not rely merely on speculation or matters which are entirely made up and which would undermine the strict liability rules*".[5] This jurisprudence is applicable here in which the absence of intent is in question.

[3] CAS 2016/A/4534 Mauricio Fiol Villanueva v. FINA
[4] UK Anti-Doping v Buttifant (SR/NADP/508/2016)
[5] *Ademi* CAS award at [71].

Ademi Case

100. In the Ademi case, the award confirmed that it has been interpreted into legal doctrine as offering panels the "flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the a violation was not intentional is warranted," even though the source of the substance is an "important, or even "critical" element of the factual basis to establish an Athlete's level of Fault.[6]

101. *In casu*, even though the Panel was not persuaded that the product M in question was the likely source of the banned substance Stanozolol, the Panel found on the balance of probability (primarily through reliance on the Player's own testimony) that the anti-doping rule violation was not intentional.

102. The Panel found that it could not impose a sanction of less than 2 years since it determined that the Player did not establish the likely source of the banned substance Stanozolol, which would have qualified him for a reduction under Article 10.02(a)(ii) under the UEFA Regulations. For this reason, the Panel imposed the lowest sanction possible of 2 years while making it clear that the Player was not a cheat or someone who had used a prohibited substance intentionally.

103. Similarly, in the CAS 2016/A/4439 Tomasz Hamerlak v. International Paralympic Committee, the Panel didn't consider it mandatory for the athlete to establish how the prohibited substance got into his system in order for him to show that the ADRV was not intentional.

104. The Panel is conscious here that the CAS panel in Ademi appeared to have reached different conclusions as to the more likely source of the substance in different stages of its decision. Ultimately, what is clear to this Panel is that, although it is not the ultimate requirement, the ability of an athlete to establish the source of a positive test

[6] *Ademi* CAS award at [70] *quoting* Rigozzi A, Haas U, Wisnosky E, and Viret M, *Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code*, International Sports Law Journal, 2 June 2015.

will increase the prospects of establishing that the anti-doping rule violation was not intentional.

B. THE SOURCE OF STANOZOLOL

105. The second question that the Panel then needs to consider, is has the Athlete provided a credible explanation as to the source ADRV i.e. has he established that, more likely than not, the Stanolozol in his sample came from the pills found in the Ripped EFX?

106. In the first instance, the Athlete tries to advance the theory of contamination, specifically of the Ripped EFX pills used by him. The Athlete's theory must prove more than a mere possibility of the occurrence of his theory.

107. The Athlete undertook a series of tests in order to establish the source of the Stanolozol, assuming that it originated from one of his supplements. However, none of the supplements remaining proved to have contained the prohibited substance.

108. The Panel turns to the rationale in CAS 2011/A/2384[7], in that it should, after carefully assessing all the alternative scenarios invoked by the parties as to the source of entry of the Prohibited Substance into the Athlete's system, (where) several of the alleged sources are deemed possible, they have to be weighed against one another to determine whether, on balance, the more likely source is the one invoked by the Athlete.

109. The Athlete needed to give the Panel some evidence which constitutes a probable source of the positive result. All the supplements tested proved negative, with no positive results of Stanozolol and unfortunately, we don't have insight into Monde Hadebe's intentions, we only have his ADRV (where he tested positive for both Stanozolol and Oxandrolone) and a confirmation that he gave the Ripped EFX container to the Athlete, before he returned to the Sharks.

[7] UCI v. Alberto Contador & RFEC / WADA v. Alberto Contador & RFEC

110. The Athlete relies on the broad assertion when it comes to supplements that: "*It is widely acknowledged that supplements are often contaminated either through trace elements that result from cross-contamination laboratories and manufacturing plants or through the intentional enhancement of the purported 15 properties of the safe supplement with prohibited substances*."

111. Furthermore, on the written and oral testimony of expert evidence Dr Wellman, maintains that Stanozolol, due its anabolic androgenic and exogenous nature and with a high oral bio-availability, makes it ideal to be added to nutritional supplements. The expert evidence corroborates the contention that the Stanozolol could still be present in the Athlete's urine despite the substance having being completed before the test on 1 March 2016. SAIDS did not bring expert evidence to refute this explanation, so to that extent this evidence remains largely unchallenged.

112. In UKAD v Warburton & Williams (SR/0000120227), the Panel referred us to the Contador case[8], in which the CAS panel observed that if an athlete raises a prima facie case as to how the Prohibited Substance came into his body, the anti-doping authority cannot simply sit back and say that the athlete has not proven it on the balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence. The same point was made in Mariano Puerta.

113. The Panel is conscious to accept uncorroborated assertions by the Athlete as to the means by which the prohibited substance entered his body, this is not sufficient to satisfy the test under Regulations.

114. The Athlete's submissions and evidence go beyond speculation and they are not merely firm denials, on the contrary the Athlete appears to offer a credible explanation as to how the prohibited substance may have entered his system, these are consistent with the nature of the substance, the timings of ingestion and the probability of

[8] *WADA & UCI v Alberto Contador Velasco*, CAS decision dated 6 February 2012

Stanolozol being present in his positive urine sample, confirmed by the testimony of the Athlete and that of the expert witness.

115. The Panel is entitled to find, on all the evidence, that in these unusual circumstances the probable source of the Stanolozol which gave rise to the ADRV, came from the pills contained in the Ripped EFX.

116. The Panel accepted that the pills found in the Ripped EFX were the most probable source of the Stanolozol based on the evidence that was lead during the hearing, as the actual source could never be accurately identified as the substance in question was completed.

C. PROOF OF LACK OF INTENT

117. By way of context, the Panel agrees that with the increase of the "standard" suspension under the 2015 version of WADC from 2 (two) years (under the 2009 version of WADC) to 4 (four) years (under the 2015 version of WADC), it was made clear that where was there was no intent, the sanction could be reverted to the "standard" 2 (two) years suspension. In this regard it was clarified that the term "intentional" was meant to identify those players who cheat.

118. 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 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.

119. Based on the extent of the Athlete's knowledge, his education (or lack thereof) on the risk of taking supplements and what he perceived were the potential consequences, the Panel is satisfied that the Athlete did not know the Ripped EFX contained the Prohibited Substance and furthermore, based on his circumstances and what he knew at that time, he could not have known that his conduct might constitute or result in an anti-doping rule violation

120. The Panel finds that it has been established on balance of probabilities that the Athlete did not intend to cheat and the ingestion of Stanozolol was not intentional.

D. FAULT

121. The Athlete relies on Regulation 21.10.5.1.2 and alternatively, Regulation 21.10.5.1.2 that if he can establish no significant fault or negligence, then the penalty may be reduced to the minimum of a reprimand with no period of ineligibility and a maximum of two years ineligibility depending on the degree of fault. This is substantially more generous to the Athlete than under Regulation 21.10.5.2 which, in other cases where the Athlete can establish no significant fault or negligence, the penalty may be reduced to a minimum of one half of the standard period of ineligibility, that is to say 2 years.

122. Nevertheless, in determining whether the Athlete has acted with No Significant Fault or Negligence, the Panel should take into account the definition of Fault, as defined the Regulations:

> **"***Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Regulation 21.10.5.1 or 21.10.5.2.*" (emphasis added)

123. The Panel is satisfied that the Athlete's conduct was not intentional. That is not however a sufficient condition for the finding of no significant fault or negligence. The definition of no significant fault or negligence requires, in addition to a lack of knowledge, the athlete could not reasonably have known or suspected even with the exercise of "utmost caution" that he had used a prohibited substance, thus importing an objective standard.

124. Despite the fact that the Athlete may have had very little anti-doping education, in determining "No Significant Fault or Negligence" the Panel agrees the following in aggravation:

- He was not uneducated or illiterate;
- He showed no concern at accepting and taking a substance from a third party which was already open;
- He demonstrated he could have researched the substance, by purchasing a batch of Ripped EFC after the fact;
- He had access to material which he could have used to enrich himself with anti-doping information;
- He was aware of the Chiliboy Ralepele and Bjorn Basson cases and why they had tested positive for banned substances;
- He would almost certainly have had anti-doping talks from his team doctor at Southern Kings;
- At no stage did he seek medical advices with regards to the use of supplements.

125. The standard of No Significant Fault or Negligence under the 2015 Code is not a one-size fits all concept; rather, it should be applied in a manner tailored to the facts of a given case and depends on the provision invoked.

126. In this regard the Athlete is not a minor, despite his background, he is an experienced athlete (he played for the South African "A" side), he should have acted with a higher degree of care, he should have been aware of prohibited substances and anti-doping rules and should have known better to accept an unsealed substance from a third party. Ultimately, very little care was taken by the Athlete when it came to taking supplements.

127. The tribunal in P v ITF[9] 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 relevance 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 investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules*

128. As recognized in CAS 2009/A/2012 "*whilst it is certainly desirable that a sports association should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body*"

129. Considering the totality of the evidence, the Athlete has not deemed to have met the requirements of "No Significant Fault or Negligence" and the details surrounding this contention were not established with enough accuracy to benefit from a reduction based on "No Significant Fault or Negligence." His actions were casual and not consistent with the obligations imposed on all athletes and he is found to have not exercised "the greatest vigilance" or "utmost caution".

---

[9] CAS 2008/A/1488 P.v. International Tennis Federation (ITF),

FINDING

130. After due consideration, the Panel hereby declares the Athlete, although shown on a balance of probabilities that he had not ingested the prohibited substance intentionally in terms of Regulation 21.2.1 of the World Rugby Anti-Doping Regulations, read further with Regulation 21.10.2.1.1 and 21.10.2.2, will be ineligible to participate in any competition or other activity as contemplated in Regulation 21.10.12.1 for a period of 2 (two) years with effect from 7 July 2016.

131. The Athlete should consequently receive a credit for the period of provisional suspension in the sense that the period of ineligibility should run from the date of his AAF notification (7th July 2016), in terms of Regulation 21.10.11.3.

132. No order is made on costs.

DATED AT CAPE TOWN ON FRIDAY, 13 OCTOBER 2017

DocuSigned by:
Luc du Plessis
59537052C2B943C...

10/13/2017

Mr Luc du Plessis (Chairperson)
For and behalf of
Dr Nasir Jaffer and Mr Yusuf Abrahams