

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

INDEPENDENT DOPING HEARING PANEL

HELD AT HOLIDAY INN ROSEBANK (JOHANNESBURG)

In the matter of: Mr Wessel Mostert

Date of Hearing: 21 February 2018

RULING

1. INTRODUCTION

- 1.1 The South African Institute for Drug Free Sports ("SAIDS") brought charges against Mr. Mostert ("the athlete") for Adverse Analytical Findings.
- 1.2 The hearing was held on 21 February 2018 at Rosebank Johannesburg and the athlete was legally represented by Advocate Scheepers instructed by J.W Botes Incorporated.

2. COMPOSITION OF THE PANEL

- 2.1 The Independent Hearing Panel ("the Panel") was appointed by SAIDS, a statutory body created by section 2 of South African Institute for Drug-Free Sport Act 14 of 1997, as amended in 2005 when SAIDS accepted the World Anti-doping code.
- 2.2 The Panel was Appointed in terms of Article 8.1 of the SAIDS Rules. The Article states that:

"The Registrar shall appoint an independent Doping Hearing Panel consisting a minimum of, but not being limited to, three (3) members to hear and adjudicate cases. The Hearing Panel should consist of at least the following:

- a) A Legal practitioner who shall act as a chairman;*
 - b) A medical practitioner and/or a person with analytical and /or forensic pharmacology or endocrinology; and*
 - c) Either a second person from category (a) or (b) or an additional member who shall be, or has previously been, a sports administrator or an athlete."*
- 2.3 The appointment of the Panel complied with Article 8.1 in that the Panel consisted of the following members:

Mr. Mandla Tshabalala (A Legal Practitioner; Chairperson); Dr. Rob Collins (Sports Physician) and Mr Leon Fleiser (Sports Administrator),

- 2.4 The pro-forma prosecutor for SAIDS was Ms Wafeeka Begg.

3. JURISDICTION

- 3.1 The Panel had to determine whether it has jurisdiction to adjudicate on this matter, and in doing so we were guided by the SAIDS Anti-Doping Rules 2015.

- 3.2 in terms of Article 1.3 of the Rules the Panel will have jurisdiction to adjudicate and shall apply to the following:

"1.3.1 These Anti-Doping Rules shall apply to the following persons (including minors), in each case, whether or not such Person is a national of or resident in South Africa:

All Athletes and Athletes Support Personnel who are member or licence holders of any National Federation in South Africa, or of

any member or affiliate organisation of any National Federation in South Africa (including any clubs, teams, associations or leagues); all Athlete and Athlete Support Personnel who participate in such capacity in Events, Competitions and other activities organised, convened, authorised or organised by any Federation in South Africa or by any member or Affiliate organisation of any National Federation in South Africa (including any clubs, teams, associations or leagues), wherever held;

any other Athlete or Athlete support Person or other who, by virtue of an accreditation, a licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of any National federation in South Africa (including any clubs, teams, associations or leagues), for purposes of anti-doping;

all Athlete and Athlete Support Personnel who participate in any capacity in any activity organised, held, convened, or authorised by the organiser of a National Event or of a national league that is not affiliated with a National Federation; and

all Athletes who do not fall within one of the foregoing provisions of this Article 1.3.1 but who wish to be eligible to participate in International Events or National Events (and such Athletes must be available for testing under these Anti-Doping Rules for at least six (6) months before they will be eligible for such Events).

1.3.2 These Anti-Doping Rules shall also apply to all other Persons over whom the Code gives SAIDS Jurisdiction, including all Athlete who are nationals of or resident in South Africa, and all Athletes who are present in South Africa, whether to compete or to train or otherwise.

1.3.3 Persons falling within the scope of Article 1.3.1 or 1.3.2 are deemed to have accepted and to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of SAIDS to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules, as a condition of their membership, accreditation and/or participation in their chosen sport".

3.3 The Athlete competes in the sport of Mix Martial Art and therefore SAIDS Rules are applicable to him.

4. APPLICABLE RULES

4.1 The Athlete was charged in terms of the SAIDS Anti-Doping Rules and as such the applicable rules to dispense with in this matter shall be the SAIDS Anti-Doping Rules and Regulations.

5. CHARGE

5.1 The charge favoured by SAIDS against the Athlete is contained in a letter of 26 January 2018, which letter was addressed to the Athlete. The charge preferred against the Player reads 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 15 October 2016 you provided a urine sample (4004752) during an in-competition test. Upon analysis, the Anti - Doping Laboratory

Qatar reported the presence of a prohibited substance in your urine sample. The substance identified in your sample was Methylphenidate and its metabolites, Ritalinic Acid. Methylphenidate is categorised under Class S6 - stimulants on the World Anti-Doping Code 2017 Prohibited List International Standard."

6. PLEA

6.1 The Athlete pleaded guilty to the charge.

7. COMMON CAUSE ISSUES

7.1 **The following were issue of common cause:**

7.1.1 That the anti-doping rule violation involved a specified substance;

7.1.2 That there was no intention on the part of the athlete to enhance his performance;

7.1.3 That Rule 10.2.2 should be applicable.

8. PLEA EXPLANATION

8.1 The Athlete presented a report prepared by one Dr Shabeer A Jeeva (specialised psychiatrist) and Dr Marlene Arndt (Clinical Psychologist) which report was not disputed by SAIDS.

8.2 The Athlete stated that he suffered from ADHD from the age of 8 and that from primary school he was placed in a class of special need students.

8.3 He further stated that he did not receive any treatment in his young age and only when he was older that is when he received treatment.

8.4 The Concerta was only prescribed to him in his adulthood which assist in controlling his ADHD.

- 8.5 According to the Dr's the Athlete requires pharmacological and psychological treatment in order to function optimally. Without any intervention the Athlete is most likely to deteriorate psychologically and physically.
- 8.6 The Dr then concluded by stating that "Concerta is a central nervous system stimulant that affects chemicals in an individual's brain. Concerta is used to treat persons suffering from Attention Deficit Disorder (ADD) and Attention Deficit Hyperactive Disorder (ADHD), with the aim to bring the concentration level of individuals with these disorders on par with that of the average person".

9. BURDEN OF PROOF

- 9.1 The SAIDS places a burden of proof on the prosecution to prove to the comfortable satisfaction of the hearing panel, that the Athlete violated an anti-doping rule. In terms of Article 3.1 of SAIDS anti-doping Rules:

"The SAIDS shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt. Where these Anti-Doping Rules places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rules violation rules to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability".

- 9.2 Article 3.2 outlines the methods of establishing facts and presumption, and Article 3.2 (a) specifically states that:

"WADA accredited laboratories and other laboratories are presumed to have concluded sample analysis and custodial procedure in accordance with the international standard for Laboratories. The Player or other Person may rebut this presumption by establishing that a departure from the International Standard 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 occurred which could reasonably have caused the Adverse Analytical Finding, then the Board or its Union of Tournament Organiser shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

9.3 A Sample of the Athlete was tested by a WADA accredited Laboratory in Qatar.

10. THE LAW

10.1 The charge against the Athlete constitutes a breach of Article 2.1 of the SAIDS anti-doping Rules, which is headed "The presence of a prohibited substance or its Metabolites or Makers in the Player's sample." Article 2.1 (a) specifically states that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Makers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1"

10.2 Now the question is how does SAIDS prove the presence of the banned substance in the body of the Athlete, and the answer to the question is found in Article 2.1.2 which states that:

"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 metabolite 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 Player's B Sample confirms the presence of the Prohibited substance or its Metabolites or Markers found in the Player's "A" Sample."

- 10.3 Article 2.2 which is headed "Use or attempted Use by an Athlete of a Prohibited Substance or a prohibited Method". In particular Article 2.2.1 states that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or prohibited Method."

- 10.4 The above provision is founded on strict liability that is applicable to anti-doping violations.
- 10.5 Athletes are required to adhere to a standard set by the anti-doping rules and regulations on the basis that they could be held accountable for what enters their systems and the rules do not in any way accept ignorance of the anti-doping provisions or prohibited list.
- 10.6 The laboratory analysis report on Athlete's urine sample A, shows presence of a prohibited substance. Sufficient proof of an anti-doping rule violation has therefore been established in accordance with Article 2.1.

11. ELIMINATION OR REDUCTION OFF PERIOD OF INLEGIBILITY

- 11.1 Having pleaded guilty to the charges and if the Panel have to discharge a sanction based on the admissions and confession of the Athlete, the

Panel would pose a sanction as contained in Article 10.2 which is headed: Ineligibility for Presence, Use or attempted use, or possession of a prohibited substance or prohibited method.

11.2 The above provision states that:

"The period of ineligibility for the violation of Article 2.1, .2.2, or .2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 and 10.6"

11.3 If the prosecution is able to prove the aforesaid to the comfortable satisfaction of the Panel, a period of ineligibility would be imposed.

11.4 Such period of ineligibility is contained in Article 10.2.1 which states that:

"The period of ineligibility shall be four years."

11.5 However, to be able to address the Panel and to be successful in reducing or eliminating the period of ineligibility, the Athlete needed to address the Panel on Article 10 of the SAIDS Anti-Doping Rules which deals with sanctions on individuals.

11.6 Specifically, if the athlete wants to be successful in his quest for elimination or reduction of period of ineligibility, the athlete must address the Panel on Article 10.4 which deals with elimination or reduction of the period of ineligibility on the grounds of No Fault or Negligence.

11.7 Article 10.4 Specifically states that:

"If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated".

11.8 We have since established that the anti-doping violation consist of a specified substance and that there was no intention on the Athlete to enhance his performance.

11.9 The provisions of Article 10.4 places the onus on the Athlete to establish that he bears No fault and Negligence.

11.10 The other provision which the Athlete may argue and to reduce the period of ineligibility based on No Significant Fault or Negligence is Article 10.5.1 which states that:

"Reduction of Sanctions for specified substances or contaminated products for violation of Article 2.1, 2.2 and 2.6".

11.11 because we are dealing with a specified substance in this matter, Article 10.5.1.1 states that:

"where the anti-doping rule violation involves specified substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at maximum, two (2) years of ineligibility, depending on the athlete's or other Person's degree of Fault."

11.12 For the Athlete to be able to reduce the period of ineligibility, he must be able to establish no Significant Fault or Negligence.

11.13 The criterion of No fault or negligence is defined under the WADC as requiring that an athlete did not know or suspect or could not reasonably have known or suspected even with the exercise of utmost caution, that he or she used the prohibited substance.¹

11.14 It was found in the case of Dominique v JADCO that:

¹ CAS 2013_A_3361 Dominique Blake v JADCO at par 925

*"the athlete fault is measured against the fundamental duty that he or she had under the programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substance."*²

11.15 In the recent case of *Maria Sharapova v International Tennis Federation*³ the tribunal unpacked the word "fault" and "Significant Fault and Negligence" in details.

11.16 The tribunal found fault to mean the following:

*"Fault is a 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 includes, for example, the Player 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 perceived level of risk. In assessing the Player or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Player or other Person's departure from the expected standard of behaviour"*⁴

10.11 It is evident from the medical report of the two Doctors that the Athlete was not at fault as the substance he ingested was prescribed to him in order to deal with his ADHD and the fact that the medication stabilises him on equal the average person.

² See above at par 926.

³ Arbitration CAS 2016/A/4643

⁴ See above at par 74.

10.12 The Athlete admitted that there was an element of negligence on his side, however that his negligence was not significant to warrant the sanction of a period of two (2) years.

11 RULING

11.11 The common cause issued raised by both parties, assisted the hearing panel to narrow the issues.

11.12 The hearing panel focused its attention on article 10 of the SAIDS Anti-Doping Rules which deals significantly with the reduction of a period of ineligibility.

11.13 The hearing panel, and with the assistance and guidance of Dr Collins, admitted the reports of the Psychiatrist and the Clinical Psychologist to be authoritative as the two doctors are specialist qualified to deal with the disorder suffered by the Athlete.

11.14 We agreed with the Athlete that there was an element of negligence, which in our finding we found it to be not so significant, however we could not find any fault on the part of the Athlete to warrant a sanction of a period of ineligibility of two (2) years.

12 SANCTIONS

12.1 The Hearing Panel imposed the following sanctions against the Player:

12.1.1 A period of ineligibility shall be six (6) months

12.1.2 The Athlete shall serve the period of ineligibility from the date of voluntary suspension which is the 15 January 2018.

Date: 07 March 2018

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end. The signature is written above a solid horizontal line.

Mr. Mandla Tshabalala

**For and on behalf of
Dr Rob Collins and Mr Leon Fleiser**