

BEFORE THE DISCIPLINARY PANEL FOR SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT (PANEL).

(Institute in terms of section 1792)(a) of Act N. 14 of 1997, as amended by Act No.25 of 2006)

CASE NO: SAIDS/2019/18

In the matter between:

SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT (SAIDS)

Appellant

versus

MAHLATSE “CHILIBOY” RAPELLE

Respondent

DECISION ON INELIGIBILITY

1. HEARING

1.1. This is a unanimous decision of the Panel established by the South African Institute for Drug-Free Sport (“**SAIDS**”) in respect of the disciplinary hearing and sentence in the case of Mahlatse “Chiliboy” Rapelle (“**Athlete**”).

1.2. The Panel established by SAIDS is still comprised of the following members, -

1.2.1. Mr Metja Ledwaba (Chairperson and legal practitioner);

1.2.2. Prof Yoga Coopoo (Sports administrator); and

1.2.3. Dr Dimakatso Ramagole (Sports Physician).

1.3. This decision is in relation to the sanction following the decision of the Panel on the merits which was delivered to the parties dated 10 March 2020 (“**Decision on the Merits**”).

1.4. Following the hearing that took place in the three hearing sessions that are referred to in the Decision on the Merits¹, the Panel:

1.4.1. found that the Athlete to have been in contravention of the guilty of doping violation,

¹ Decision on the Merits, paragraph 1.3

following the presence of Zeranol in the Athlete's A and B urine Sample (sample number 4342091) which was taken from the Athlete on 17 January 2019, in an Out of Competition testing and analyzed by the Doping Laboratory in Bloemfontein; and

- 1.4.2. the Parties decided to submit written submission on the appropriate Ineligibility period, without leading further evidence in addition to what was submitted as part of the three seating sessions leading to the decisions on the merits.
- 1.5. The decision of the Panel, effectively upholds the SAIDS submission that Athlete is in contravention of the World Rugby Anti – Doping Rules, Regulation 21 (“**WRA Regulation 21**”) section 21.2.1, for presence and for use of a prohibited substance, Zeranol, which is categorized under Class S1 Anabolic Agents, on the World Anti-Doping Code 2019 Prohibited List of International Standards.
- 1.6. The Parties have each delivered their written submissions on the appropriate ineligibility period, which have been duly considered by the Panel. The SAIDS submission is dated 7 April 2020 (“**SAIDS Submission**”) and the Athlete's submission is dated 17 April 2020 (“**Athlete's Submission**”).
- 1.7. This decision is the unanimous decision of the Panel on the appropriate sanction to be imposed in relation to the Respondent's contravention of Regulation 21.2.1 of the WRA Regulation 21.

2. SUMMARY OF THE SUBMISSIONS

- 2.1. In considering the sanction, the Panel took full cognizance of the submissions that were made by the parties.
- 2.2. The SAIDS's submission is essentially that:
 - 2.2.1. the Athlete should be sanctioned for an eight years Ineligibility period, for the reasons that this is his third anti-doping rule violation;
 - 2.2.2. the Panel is bound in terms of Regulation 21.7.2 of the WRA Regulation 21 to impose a period of Ineligibility of eight years in relation to a third Anti-doping Rule Violation (“**ADRV**”)²; and

² SAIDS Submission, paragraph 42

2.2.3. SAIDS is not required to prove anything more than presence and no factors have been advanced by the Athlete that would suggest there is a basis for reducing the period of Ineligibility.

2.3. The Athlete on the other hand, effectively submits that:

2.3.1. the applicable sanction in the Athlete's case is the one relevant to a second ADRV and not the third ADRV as contended for by SAIDS³;

2.3.2. in the light to the fact that there is absence of Intent and lack of Significant Fault an appropriate and proportional sanction would be Ineligibility period of between two to three years

3. REGULATORY FRAMEWORK

3.1. SAIDS has premised its submission on the basis of the World Rugby Rules, pertaining to sanctions whereas the Athlete on the other hand has used the World Anti – Doping Code – 2015 with 2019 amendments (“**WADA Code**”), to formulate his submission.

3.2. The Athlete does make the observation that provisions of the WADA Code are mirrored in article 10 of SAIDS' Anti-doping Rules and regulation 21.10 (and subsections) of the WRA Regulation 21⁴.

3.3. The Panel has in the Decision on the Merits used the World Rugby Rules as the applicable rules and basis of determining and deciding on the presence and use of prohibited substance, noting as well that it was common understanding between the parties in the hearing that they will apply in relation to the hearing in this case⁵. The Panel also had regard to the other regulatory instruments as relevant to the issues forming part of the merits hearing.

3.4. The Panel will for purposes of decision on the sanction continue to do so with reference to the WRA Regulation 21 and other regulatory instruments where relevant.

3.5. In terms of Regulation 21.8.2.8 of the WRA Regulations, the Panel is required to impose sanctions on the Athlete in accordance with Regulation 21.10.

³ Athlete's Submission, paragraphs 11, 12 and 58

⁴ Athlete's Submission, paragraph 3

⁵ Decision on the Merits, Annexure B – Regulatory Framework, paragraph 4.2

- 3.6. Regulation 21.10.2 of the WRA Regulations regulates the period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).
- 3.7. Regulation 21.10.2.1.1, provides for the period of Ineligibility of four years in the case of ADRV which does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.
- 3.8. Regulation 21.10.2.1.2, regulates cases where ADRV involves a Specified Substance, which is not the case in this hearing. Specified Substance is defined in Regulation 21.4.2.2 as follows –

“For purpose of the application of 21.10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. The category of Specified Substances shall not include Prohibited Methods”. [Emphasis added]

- 3.9. The effect of the distinction between Regulations 21.10.2.1.1 and 21.10.2.1.2, being that in the case of ADRV involving a Specified Substance, then the sanction is 4 years if SAIDS can prove intent and where it does not involve Specified Substance, then the sanction is 4 years unless the Athlete can show that the violation was not intentional. In essence, in cases of (i) an ADRV involving Specified Substance, the default period of Ineligibility is two years unless SADIS can establish Intention on the part of the Athlete, and (ii) an ADRV not involving Specified Substance, the default period of Ineligibility is four years unless the Athlete can provide absence of Intention on his or her part.
- 3.10. In terms of Regulation 21.10.2.2, where Regulation 21.10.2.1 does not apply, then the period for Ineligibility shall be 2 years.
- 3.11. For purposes of Regulation 21.10.2.1, WRA Regulation 21 defines intent as follows –

“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. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall

not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”. [Emphasis added]

- 3.12. Regulation 21.10.4 provides for a complete elimination of an Ineligibility period where the Athlete establishes that he or she bears No Fault or Negligence. No Fault or Negligence, is defined in the WRA Regulations in Appendix 1 as follows –

“No Fault or Negligence: The Player 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 Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system.” . [Emphasis added]

- 3.13. Regulation 21.10.5, also provides for reduction of the Period of Ineligibility based on “No Significant Fault or Negligence”, to include in the following instances:

3.13.1. in terms of Regulation 21.10.5.1, where the ADRV involves a Specified Substance, and the Player 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 a maximum, two years of Ineligibility, depending on the Player's or other Person's degree of Fault.

3.13.2. In terms of 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. In such an instance 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:

- (a) the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable; and
- (b) if the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Regulation may be no less than eight years.

- 3.14. No Significant Fault or Negligence in Annexure 1 is defined to mean that

“the Player 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, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system". [Emphasis added]

It is important to note that to establish No Significant Fault or Negligence, a player would have to establish how the Prohibited Substance entered his or her system.

3.15. Regulation 21.10.7, deals with multiple violations and regulates instances where a Player is in their second ADRV and third or more ADRV. These instances are regulated as follows:

3.15.1. in Regulation 21.10.7.1 for a Player's second ADRV, in terms of which the period of Ineligibility shall be the greater of:

- (a) six months; or
- (b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Regulation 21.10.6; or
- (c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Regulation 21.10.6.

The period of Ineligibility as provided above in relation to the second ADRV, may be further reduced by the application of Regulation 21.10.6⁶ and

3.15.2. in Regulation 21.10.7.2, for a Player's third ADRV, in terms of which a third anti-doping rule violation will always result in a lifetime period of Ineligibility, except if the third violation fulfils the condition for elimination or reduction of the period of Ineligibility under Regulation 21.10.4 or 21.10.5, or involves a violation of Regulation 21.2.4. In these particular cases, the period of Ineligibility shall be from eight years to lifetime Ineligibility.

3.16. Regulation 21.10.7.3 provides that an anti-doping rule violation for which a Player or other person has established No Fault or Negligence shall not be considered a violation for purposes of this Regulation.

⁶ Regulation 21.10.6, deals with Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault. It does not find relevance in this current matter.

- 3.17. Regulation 21.10.7.5, requires that in the case of multiple violations, each one of the ADRV must take place within the same 10 year period.

4. PANEL DECISION ON SANCTION

- 4.1. From our consideration of the scheme of Regulation 21.10 with regard to sanctioning and period of Ineligibility, it is our understanding that:

4.1.1. they are structured to regulate three scenarios pertaining to the sanctioning for ADRV such as the one that the Athlete has been found guilty of in the Panel's Decision on the Merits, being in the case of either first, second or third ADRV;

4.1.2. the period of Ineligibility in the case of a first ADRV, is regulated in terms of Regulation 21.10.2, which provides in Regulation 21.10.2.1.1 and 21.10.2.1.2, the default period of Ineligibility is 4 years in ADRVs that do not involve Specified Substances, as is the case in the current proceedings. The period of four years will in terms of Regulation 21.10.2.2 be reduced to two years, where the Athlete can show that the violation was not intentional;

4.1.3. the period of Ineligibility in the case of a second ADRV, is regulated in terms of Regulation 21.10.7.1, in terms of which the period of Ineligibility can be the greater of (i) six months, (ii) half the period of the Ineligibility imposed for the first anti-doping rule or (iii) twice the period of the Ineligibility in the case of a second ADRV, treated as if it were the first violation; and

4.1.4. the period of Ineligibility in the case of a third ADRV, is regulated in terms of Regulation 21.10.7.2, in terms of which it will always result in a lifetime period of Ineligibility, unless where violation fulfils the conditions of elimination or reduction of the period of Ineligibility under Regulation 21.10.4 or 21.10.5.

4.2. In addition to regulating the three instances as pertains to the first, second and third ADRV, Regulation 21.10, further provides for elimination or reduction of the period of Ineligibility. This can found in (i) Regulation 21.10.4 which provides for a complete elimination of an Ineligibility period where the Athlete establishes that he or she bears No Fault or Negligence, (ii) Regulation 21.10.5 which provides for reduction of the Period of Ineligibility based on No Significant Fault or Negligence and (iii) Regulation 21.10.6 which provides for "Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault". The instances

covered in Regulation 21.10.6, would not be applicable to the current matter and deals with cases of (a) "Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations", and (b) "Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence".

4.3. Finally with regard to the scheme of Regulation 21.10, pertaining to the three categories of ADRV, where in an ADRV a player established No Fault or Negligence, such ADRV shall not be considered to be a violation for purposes of determining multiple violations in terms of Regulation 21.10.7.

4.4. Thus we consider that the following logical process should unfold in applying Regulation 21.10, in determining the appropriate period of Ineligibility, being:

4.4.1. to first establish in which of the three categories would the ADRV relating to the Athlete's case fall, i.e., first, second or third. There is a dispute between the parties as to whether the Athlete's ADRV falls within the second or third ADRV. We will thus have to decide on this point;

4.4.2. having established the appropriate category in which the ADRV falls, to then apply the provisions relevant to the sanction for such a violation; and

4.4.3. determine the extent to which, if any at all, such a sanction falls to be eliminated or reduced or suspended in terms of the applicable provisions of Regulation 21.10.

4.5. With regard to the category in which the ADRV of the Athlete falls, the difference between the parties is whether it is a second or third ADRV. The confusion seems to stem from the fact that the Athlete has tested positive on two prior occasions i.e. during 2010 ("the 2010 AAF") and 2014 ("2014 AAF"). SAIDS considered the two previous positive findings to constitute previous violations, whereas the Athlete argues that the first positive tests, i.e. the 2010 AAF, does not count as a previous violation for purposes of determining sanction.

4.6. The Athlete's argument has been founded on the 2014 AAF decision, which the Athlete submits that it has found that the 2010 AAF determined that neither the Athlete nor the other Athletes were at fault for consumption of the prohibited substance in question⁷.

⁷ Athlete's Submission, paragraph 16

- 4.7. We have considered the 2014 AAF decision which is included as part of the bundle⁸ and have noted that it has decided in relation to the first violation of the Athlete i.e. the 2010 AAF, applying the WRA Rules at the time, i.e. Regulation 21.22.4. This regulation dealt with No Fault or Negligence and it specifically provided that in the event that Regulation 21.22.4 is applied and period for Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations.
- 4.8. It appears that the regulated basis of determining multiple violations in Regulation 21.22.4, is similar to what is regulated in Regulation 21.10.7.3, which we have referred to in paragraph 3 above, as part of the discussion of the Regulatory Framework. In applying Regulation 21.22.4 as it was then, the 2014 AAF and found that decision in relation to the 2010 AAF did find that there was no fault on the part of the Player⁹ and applied its decision on the Regulation 21.22.4, on the basis that the first AAF does not count for determining the multiple violation. The 2014 AAF hearing decided that the second AAF would for purposes of sanctioning constitute the first violation¹⁰.
- 4.9. It appears from the above that on proper consideration of the 2014 AAF decision and the provisions of 21.10.7.3, the 2010 AAF does not count for purposes of considering the multipurpose violation relating to the Athlete, the second AAF has already been decided in the 2014 AAF hearing to be counting as the first violation for purposes of sanctioning and as such the current violation for which the Athlete has been found to be guilty of in the Decision on the Merits, counts as the second violation. The Panel agrees with the Athlete's Submission in this regard.
- 4.10. In the circumstances, the determination of the period of the Ineligibility must be considered in terms of 21.10.7.1, i.e. the greater of (i) six months, (ii) half the period of the Ineligibility imposed for the first anti-doping rule or (iii) twice the period of the Ineligibility in the case of a second ADRV, treated as if it were the first violation.
- 4.11. The Athlete's approach has made submission to address the above factors but considering them from the perspective of Article 10.7.1 of the WADA Code¹¹.

⁸ Bundle A, page 184 to 191

⁹ Bundle A, page 185 to 186, paragraph 135, and page 43 to 44, at paragraph 144.

¹⁰ Bundle A, page 190, paragraph 145.

¹¹ Athlete Submission, paragraph 59

- 4.12. The Athlete's approach in relation to the second limb/ factor of one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Regulation 21.10.6, is that it will in this case be 12 months¹². We have confirmed from the in the 2014 AAF, that the tribunal imposed a period of two years of Ineligibility¹³, and agree with the Athlete with regard to the imposed period in the 2014 AAF hearing.
- 4.13. For purposes of the third limb/factor, it is the Athlete's submission that the relevant period for the Ineligibility, in this case when treated as first violation would have to be two years, under Article 10.2.2 of the WADA Code¹⁴. The equivalent to Article 10.2.2 of the WADA Code, would be Regulation 21.10.2.2, i.e. where the equivalent provisions to Regulation 21.10.2.1¹⁵ do not apply.
- 4.14. When regard is had to the Athlete's Submission, we understand the scheme of the Athlete's submission to be as follows:
- 4.14.1. it places reliance on lack of "Intent" to reduce the otherwise four years Ineligibility period as prescribed in WRA Regulation 21.10.2.1.1 (WADA CODE Article 10.2.1.1), from four to two years;
- 4.14.2. concedes that the Athlete would not be able to place reliance on No Fault or Negligence to eliminate or reduce the applicable sentence, this being in terms of Regulation 21.10.4 (WADA CODE Article 10.4)¹⁶;
- 4.14.3. seeks to rely on the presence of No Significant Fault or Negligence and secure a further reduction of the period of Ineligibility from the two years that it contends to be applicable, this being in terms of WRA Regulations 21.10.5.2 (WADA CODE Article 10.5.2)¹⁷. To this end, the Athlete spends considerable effort on proportionality considerations.
- 4.15. The question then arises as to whether in the current case the Athlete has shown that

¹² Athlete Submission, paragraph 59

¹³ Bundle A, page 191, paragraph 149

¹⁴ Athlete's Submission, paragraph 59 and 60

¹⁵ We refer only to 21.10.2.1, having established earlier that the Athlete's case does not fall under 21.10.2.1.2, in that the does not involve a Specific Substance.

¹⁶ Athlete's Submission, page 10, paragraph 33, page 14 paragraph 43 to page to 18, paragraph 50

¹⁷ Athlete's Submission, page 10, paragraph 33, page 18 paragraph 51, to page 21 paragraph 57

the violation was not Intentional, to warrant the calculation of the Ineligibility Period as being two years as opposed to being four years. As can be seen from the definition of "intentional" which we cited in paragraph 3.11 above, for purposes of demonstrating that violation was not intentional, the Athlete will have to show (i) in relation to the conduct that he engaged in resulting in the an anti-doping violation, that he did not know that it constituted an anti-doping rule violation or (ii) that he did not know that there is significant risk that the conduct might constitute or result in anti-doping rule violation which he manifestly disregarded.

- 4.16. The difficulty in the current case is that the Athlete could not identify the conduct that he engaged in which resulted in the presence of Zeranol in his test results. His evidence was that he does not know how it got into his system. It is this lack of knowledge that the Athlete's Submission seeks to place heavy reliance on, amongst others, as suggesting that the ADRV was not Intentional and further that it establishes No Significant Fault or Negligence. We are not persuaded that this evidence on the part of the Athlete would suffice to discharge the burden required of the Athlete to demonstrate that the violation was not "intentional". We return further to this point when we discuss the CAS decision that the Athlete relies on and the Athlete's submission.
- 4.17. We read the required test of "Intentional", to place a burden on the Athlete to lead evidence to show that his conduct was not intentional. If the Athlete is not able to do so, then he will not be able to discharge the required burden on him to proof that the violation was not "intentional".
- 4.18. We proceed in the paragraphs below to deal with the above scheme of the Athlete's submission as well as some of the CAS decisions that the Athlete seeks to place reliance on.
- 4.19. The Athlete's case on lack of Intent, finds significant reliance on the CAS decision CAS 2017/A/5178, evidently to rely on the part of the decision¹⁸ that stated that "*Whilst the route of the ingestion of a prohibited substance is an important factor in order to establish whether or not an athlete acted intentionally, it is not a mandatory condition to prove lack of intent.*". It is important to properly consider this aspect of the decision, i.e. what it was intended to convey and the context in which this part of the decision was made.

¹⁸ CAS 2017/A/5178, paragraph 80.

- 4.20. One needs to look further than just the cited part of the CAS 2017/A/5178 decision. If regard is had to what the Panel in the CAS 2017/A/5178 decision further goes on to say in paragraph 89, at page 24 of the decision, it is clear that the context of the section of the decision relied on by the Athlete is that the lack of evidence of how the prohibited substance entered the body of the Athlete does not exempt the Panel from examining all other facts. In other words lack of intent can still be proved on other factors even when the Athlete has not been able show how the prohibited substance entered into his or her system. We must at this stage emphasize CAS 2017/A/5178 does not establish authority to a proposition that the lack of knowledge suffices to establish lack of Intent. It must also be borne in mind that the Panel in the CAS 2017/A/5178 decision, also recognized that "*route of the ingestion of a prohibited substance is an important factor in order to establish whether or not an athlete acted intentionally.*".
- 4.21. Having found that the route of the ingestion of a prohibited substance is not a mandatory condition to prove lack of intent, the Panel looked at the other factors that the athlete in that case sought to find reliance on, which can be described as follows¹⁹:
- 4.21.1. assertion that it did not make any sense for the athlete to dope because he was enrolled in the IWF testing pool. This submission was not found to be convincing, with the Panel stating that "*The history of the fight against doping is replete with examples of athletes that were included in an international federation registered testing pool and committed an international ARDV.*". We surmise from this a recognition by the CAS decision that an athlete's knowledge that they might be testing is not a convincing fact to suggest that they will not intentionally engage an activity that results in an ARDV²⁰;
- 4.21.2. athlete's claims, *inter alia*, (i) that he had various negative anti-doping tests, and (ii) his awareness that there would be many anti-doping tests. The Panel found that these factors do not establish on a balance of probability that the athlete lacked Intention when committing the ADRV²¹;
- 4.21.3. the athlete's stressed emotional and financial situation, as having caused the athlete not to consider the negative consequences of using unmarked ampoules. The

¹⁹ CAS 2017/A/5178, page 24 paragraph 89 to page 26 paragraph 26.

²⁰ CAS 2017/A/5178, page 24 paragraph 90

²¹ CAS 2017/A/5178, page 24 paragraph 91

athlete submitted in this regard that he would have never risked his livelihood and sporting career by doping. The Panel stated in relation to this assertion by the athlete that *“the fight against doping is full of examples of athletes gambling in order to obtain an (undue) advantage. Of course no athlete will dope if he knows in advance that he will be caught.”*²²; The Panel further proceeded to observe that²³:

“It is common knowledge that a considerable number of athletes, however, are not caught by the net cast by the anti-doping authorities. It is in the belief that there are or may be loopholes in the anti-doping system that some athletes can feel the irrational and speculative incentive to dope. Thus, the harsh consequences that the Appellant had to endure after the AAFs were discovered are no indication that the latter did not act intentionally at the time. They flow from and are the consequences of the Athlete’s act itself.”;

- 4.21.4. the assertion by the athlete that it would not have made any sense for him to dope at the relevant games because his participation at this event was only intended as a training ground for the Olympic Games in Rio 2016. This argument was also found by the Panel not to be convincing on balance of probabilities that the Athlete did not dope.

Apart from similarities with some of the Athlete’s submissions in this case, which we will reference to below, it is important to consider these submission and observe the extent to which the Panel does not easily find persuasion on the balance of probabilities that an athlete did not intent to dope, in considering the other factors when the Athlete has not been able show how the prohibited substance entered into his or her system.

- 4.22. The Athlete in this case, relies on the following factors to try and establish on the balance of probabilities that he did not have Intent, in relation to the ADVR that he has been found guilty of by the Panel²⁴. We also in each of the factors discuss our views and findings regarding the same:

- 4.22.1. the Athlete denies taking Zeranol intentionally and of having any knowledge of how he may have ingested it. He only became aware of it as a result of the AAF in this case and lacked knowledge of its benefits. We have already expressed our view above that the CAS 2017/A/5178 does not establish authority to a proposition that the lack of knowledge suffices to establish lack of Intent. It is not correct for the

²² CAS 2017/A/5178, page 25 paragraph 93

²³ CAS 2017/A/5178, page 25 paragraph 94

²⁴ Athlete’s Submission, page 14 paragraph 44

Athlete to place reliance on lack of knowledge about how a prohibited substance entered his system as establishing lack of Intent. More evidence is required than lack of knowledge itself;

- 4.22.2. prior to the AAF, the Athlete was not given a lot of opportunity to play for his then team, apparently due to differences between him and the coach. The only relevance we can surmise from this submission would be to try and suggest that the Athlete would not have had a reason to use prohibited substances because he was not at the time not as actively playing in the team. While it is so that the Athlete testified of his differences with the coach, he did not testify that the lack of game time would result in a disincentive on his part from trying to be actively playing for the team. This is simply being raised in the Athlete's Submission as a probability. We do not find that this is a persuasive probability. The converse is also true of this probability that the lack of game time would lead an athlete to taking whatever measure available to them to be in a position to be competitive. We had not understood the Athlete from his evidence about the issues with coach to suggest that he had given up on the prospects of playing for the team. This issue was raised by the Athlete as a speculation about being potentially targeted, from the tests that were done and resulting in the AAF;
- 4.22.3. he has been playing rugby for over 14 years and has been tested every 2 to 4 weeks. This submission falls right into the issue that was considered in the CAS 2017/A/5178 decision regarding an athlete's knowledge that they might be tested, as not being a convincing fact to suggest that they will not engage an activity that results in an ADRV. For reasons as advanced in the CAS 2017/A/5178 above²⁵, we do not find persuasion from this submission as a probability of lack of Intent on the part of the Athlete;
- 4.22.4. the exact quantity of the substance is undetermined. The Athlete's Submission suggest that this could thus have been a small amount of Zeranol. We do not see how quantity has anything to do with Intention. Maybe it has a bearing on proportionality but certainly bears no relevance on Intention. It would be illogical to say that there is absence of Intention where quantity is less than where there is more quantity;

²⁵ Refer to our observations in paragraph 4.18.6 (b) and (c) above

- 4.22.5. there is no evidence that the amount of Zeranol found in the Athlete's specimen could in fact or did enhance his performance. Like with the preceding argument, we do not see how the evidence of enhancement of performance points to the Intention of the Athlete one way or the other;
- 4.22.6. the Athlete was injured at the time of the AAF. As with the submission discussed in paragraph 4.19 above, the relevance we can surmise from this submission would be to try and suggest that the Athlete would not have had a reason to use a prohibited substances because he was not at the time not as actively playing. As with the submission that we discussed in 4.19 above, we do not find that this is a persuasive probability. SAIDS on the other hand does argue that the Athlete would have reason to use the prohibited substance because it assists with recovery. The Athlete's Submission attacks this submission by SAIDS is being unfounded and unproven speculation, *inter alia*, because he had only healed by the time of the hearing. This attack on the submission by SAIDS simply misses the point. The point raised by SAIDS is not about whether the use of the prohibited substance did assist with the healing, but rather that it is commonly used by athletes to recover from injury. One will thus have to look at the situation of the Athlete at the time of use and not by reference to the results of use;
- 4.22.7. the Athlete having suffered the consequences of a previous ADRV, expecting to be tested regularly, would not intentionally ingest a substance of this nature. This submission falls well within the ambit of the observations made in the CAS 2017/A/5178 decision that "*The history of the fight against doping is replete with examples of athletes that were included in an international federation registered testing pool and committed an international ARDV. Further that "It is in the belief that there are or may be loopholes in the anti-doping system that some athletes can feel the irrational and speculative incentive to dope."* It is for these reasons that we as a Panel are just as unconvinced by the submission proffered by the Athlete;

- 4.22.8. the Athlete's faith as a Christian and that he was adamant that he did not take Zeranol Intentionally. We have already made our findings about the lack of weight in the submission that the Athlete lacks knowledge of taking the prohibited substance, to suggest that there was no Intention. These findings on our part are in this case not affected one way or the other by the credibility of the Athlete in relation to knowing how substance got into his system.

When all of the factors discussed above are weighed up, we do not arrive at the conclusion that in the balance of probabilities favours the Athlete's lack of Intention.

- 4.23. We now proceed to consider the Athlete's submission with regard to "No Significant Fault or Negligence" coupled with the submissions relating to "Proportionality Considerations".
- 4.24. In our assessment of the Athlete's Submission, the Athlete, quickly concludes on No Significant Fault or Negligence, without properly exploring the definition of the phrase in the both WRA Regulation 21 and WADA CODE. Having quickly concluded on No Significant Fault or Negligence, the Athlete ventures into the submissions on "Proportionality considerations".
- 4.25. We do not think that the Athlete's approach as described in the preceding paragraph is correct. One must as part of considering No Significant Fault or Negligence, look at the definition of the phrase. We have referred to the definition of "No Significant Fault or Negligence" in paragraphs 3.12 and 3.13 above and have established that the definition entails that the Athlete would have to establish how the prohibited substance entered his or her system. Where the burden lies on an athlete to establish how the prohibited substance got into the body of the athlete, it will not suffice for the athlete to rely on lack knowledge as to how the prohibited substance entered such athlete's body. Our line of reasoning in this regard finds support from CAS decisions such as the one that was relied on by SAIDS, i.e. CAS 2014/A/3820²⁶. The Athlete in not having established how the prohibited substance got into his body, cannot find reliance on No Significant Fault or Negligence, for purposes of WRA Regulations 21.10.5.2 (WADA CODE Article 10.5.2).
- 4.26. Following our finding that the Athlete cannot find reliance on No Significant Fault or


²⁶ CAS 2014/A/3820, paragraph 79 to 83.

Negligence, it is in our view not necessary to determine the proportionality of the fault with reference to the sanction imposed.

- 4.27. Having regard to the foregoing, it is the Panel's decision that:
- 4.27.1. the Athlete has not established the lack of Intention for purposes of WRA Regulation 21.10.2.1.1; and
 - 4.27.2. the Athlete is not, without establishing how the prohibited substance got into his body able to rely on No Significant Fault or Negligence for purposes of WRA Regulation 21.10.4 (WADA CODE Article 10.4).
- 4.28. In the circumstances, the appropriate period of Ineligibility in terms of Regulation 21.10.7.1, is twice the period of the Ineligibility in the case of a second ADRV, treated as if it were the first violation (i.e. the sanction for the second Ineligibility Period). In the current case, in view of our finding that the Athlete has not established lack of Intention, the first violation is the default period of 4 years. When multiplied by 2, it equates to 8 years.
- 4.29. The Athlete has in the Athlete's Submission submitted that the period of Ineligibility should commence on May 2019, being the date on which his team terminated his contract and from which date he has not participated in rugby or any other sport²⁷. SAIDS have not made any submissions about the date of commencement of the period of suspension.
- 4.30. Having regard to the provisions of Regulation 21.10.11.1 of the WRA Regulations, the Panel does find that there were substantial delays in the hearing of the matter which cannot all be attributable to the Athlete and that there is a case to be made for commencing with the period of Ineligibility commencing at a date earlier than the date of the final hearing decision, as would have otherwise been the case in terms of Regulation 21.10.11. Regulation 21.10.11.1 does, under the circumstances, authorize the period of the Ineligibility to start at an earlier date commencing as early as the date of the Sample Collection.

²⁷ Athlete's Submission, paragraph 63.

4.31. In considering the Athlete's case, the Panel has decided on the period of Ineligibility to commence from the date of Sample Collection, being 17 January 2019.

A handwritten signature in black ink, appearing to read 'Metja Ledwaba', written over a horizontal line.

METJA LEDWABA
(Chairperson)

25 June 2020