CAS 2018/A/5990 World Anti-Doping Agency (WADA) v. South African Institute for Drug-Free Sport (SAIDS) & Ruann Visser

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Markus Manninen, Attorney-at-Law in Helsinki, Finland

in the arbitration between

World Anti-Doping Agency (WADA), Montreal, Canada

Represented by Mr Ross Wenzel and Mr Anton Sotir, Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

South African Institute for Drug-Free Sport (SAIDS), Cape Town, South Africa

Represented by Ms Wafeekah Begg, Legal Manager, Cape Town, South Africa

First Respondent

Ruann Visser, Meyerton, South Africa

Represented by Mr Jean-Marc Reymond and Ms Yasmine Sözerman, Reymond & Associés, Lausanne, Switzerland, and Mr Hendrik S. Nolte, Nolte Inc. Attorneys, Meyerton, South Africa

Second Respondent

I. THE PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is the independent international anti-doping agency constituted as a private law foundation under Swiss law with its seat in Lausanne, Switzerland, and headquarters in Montreal, Canada. Its aim is to promote and coordinate the fight against doping in sports internationally.

2. The South African Institute for Drug-Free Sport ("SAIDS" or the "First Respondent") is a public entity established by a South African Parliamentary Act, with its seat in Cape Town, South Africa, to promote the participation in sport free from prohibited substances or methods intended to artificially enhance performance. SAIDS has, *inter alia,* statutory drug-testing powers and the authority to conduct and enforce anti-doping programmes nationally according to the SAIDS Anti-Doping Rules adopted to implement SAIDS's responsibilities under the World Anti-Doping Code (the "WADC").

3. Mr Ruann Visser (the "Athlete" or the "Second Respondent"), born in 1990, is a South African professional heavyweight boxer. At the time of the key events of this case, he was the holder of the South African Heavyweight Title.

4. WADA, SAIDS, and the Athlete are referred to as the "Parties". SAIDS and the Athlete are referred to as the "Respondents".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced. Additional facts and allegations found in the Parties' written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 23 February 2018, on the occasion of the title fight in Vanderbijlpark, Gauteng, South Africa, the Athlete underwent an in-competition doping control.

7. The analysis of the A sample revealed the presence of 3'OH-stanozolol glucuronide, a metabolite of stanozolol. Stanozolol is a non-specified exogenous anabolic androgenic steroid prohibited at all times under S1.1a of the 2018 Prohibited List.

8. The analysis of the B sample confirmed the presence of stanozolol metabolites.

9. On 16 April 2018, SAIDS notified the Athlete of the positive finding and provisionally suspended him.

10. On 27 September 2018, following oral hearings before the Independent Doping Hearing Panel of SAIDS (the "IDHP"), SAIDS informed the Athlete that it would be withdrawing the charges against him and would inform the IDHP accordingly.

11. On 5 October 2018, the IDHP rendered a decision (the "Appealed Decision"), whereby the Athlete was acquitted of the anti-doping rule violation ("ADRV").

12. On 8 November 2018, the Athlete underwent an out-of-competition doping control.

13. On 14 December 2018, the WADA-accredited laboratory in Lausanne reported the results of a DNA cross-check analysis regarding samples collected on 23 February 2018 and on 8 November 2018 (the "Lausanne DNA Analysis"). According to the report, the two samples came *"from the same male individual"*.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 6 November 2018, WADA filed a Statement of Appeal with the CAS in accordance with Article R48 of the CAS Code of Sports-related Arbitration (2017 edition) (the "CAS Code"). WADA requested that the matter be submitted to a panel of three arbitrators.

15. On 9 November 2018, the CAS Court Office initiated the present arbitration and specified that it had been assigned to the CAS Appeals Arbitration Division and will therefore be dealt with in accordance with Articles R47 *et seq.* of the CAS Code. The CAS Court Office invited the Appellant to submit an Appeal Brief stating the facts and legal arguments giving rise to the appeal with all exhibits and other evidence upon which it intends to rely. Furthermore, the CAS Court Office invited the Respondents to jointly nominate an arbitrator from the list of CAS arbitrators.

16. On 16 November 2018, the First Respondent objected to being a party to these proceedings because the case related to proceedings arising out of a hearing from an independent tribunal.

17. On 20 November 2018, the CAS Court Office invited the Appellant to inform the CAS Court Office whether it maintains its appeal against the First Respondent.

18. On 21 November 2018, the Second Respondent submitted that SAIDS was properly cited by WADA as a Respondent.

19. On 27 November 2018, the Appellant confirmed that it maintains its appeal against the First Respondent.

20. On 3 December 2018, the Respondents jointly nominated an arbitrator from the list of CAS arbitrators.

21. On 6 December 2018, the Second Respondent informed that he is not in a position to pay his share of the advance of costs in this matter.

22. On 10 December 2018, the CAS Court Office drew the Respondents' attention to the fact that the Appellant has announced that in case of non-payment by one or both of the Respondents of their respective shares of the advance of costs, the Appellant would request that the matter be referenced to a sole arbitrator. Therefore, the CAS Court

Office invited the First Respondent to inform the CAS Court Office of whether it intends to pay its share of the advance of costs.

23. On 12 December 2018, the First Respondent informed the CAS Court Office that it is currently in a position to pay only a certain amount of the advance of costs.

24. On 17 December 2018, the Appellant filed its Appeal Brief with the CAS Court Office.

25. On 19 December 2018, the CAS Court Office invited the Respondents to submit an Answer to the CAS containing a statement of defence, any defence of lack of jurisdiction, any exhibits or specification of other evidence upon which the Respondents intended to rely, and the names of any witnesses and experts whom they intend to call. The CAS Court Office advised that if the Respondents failed to submit an Answer by the given time limit, the sole arbitrator could nevertheless proceed with the arbitration and deliver an award.

26. On 14 January 2019, the CAS Court Office invited the First Respondent to inform the CAS Court Office of whether it intends to pay the remaining part of its share of the advance of costs in this matter. On the same day, the Second Respondent requested an extension of the time limit for the filing of the Second Respondent's Answer until 26 February 2019.

27. On 17 January 2019, the Appellant informed the CAS Court Office that it does not object to the Second Respondent's request for extension of time, but also that it would not agree on any further extension.

28. On 18 January 2019, the First Respondent informed the CAS Court Office that it does not object to the Second Respondent's request for extension of time and that it is not in a position to pay the remaining part of its share of the advance of costs.

29. On 28 January 2019, the CAS Court Office informed the Parties that the Respondents had not paid their shares of the advance of costs and that the CAS Court Office understands the Appellant to be requesting a sole arbitrator in the given circumstances. The CAS Court Office informed that in the absence of any other information or indication by the Appellant, the name of the sole arbitrator would be communicated to the Parties in a further CAS Court Office letter.

30. On 29 January 2019, the Second Respondent informed the CAS Court Office that it does not agree to the appointment of a sole arbitrator and requested a time limit of two days to furnish the CAS with a reasoning on why the default arrangement of three arbitrators should apply in the case. On the same day, the CAS Court Office granted the Respondents an opportunity to comment on the Appellant's request for a sole arbitrator.

31. On 1 February 2019, the Second Respondent filed his submission regarding the number of arbitrators.

32. On 22 February 2019, the Second Respondent requested a further extension of the time limit for filing his Answer until 31 March 2019.

33. On 25 February 2019, the CAS Court Office advised the Parties that the President of the CAS Appeals Arbitration Division had confirmed her position on the appointment of a sole arbitrator in this matter and that the name of the sole arbitrator would be communicated in due course. The CAS Court Office also invited the Appellant and the First Respondent to state their position on the Second Respondent's request on the extension for filing an Answer.

34. On 28 February 2019, the Appellant informed the CAS Court Office that it does not agree to the requested extension and noted that if any extension is granted, the Appellant reserves its right to seek provisional measures against the Second Respondent. On the same day, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Mr Markus Manninen to act as the sole arbitrator (the "Sole Arbitrator").

35. On 6 March 2019, the Second Respondent requested written reasons for the CAS's decisions to appoint a sole arbitrator and to appoint Mr Manninen as the Sole Arbitrator. On the same day, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to grant the Second Respondent an extension of the time limit to file his Answer until 12 March 2019.

36. On 7 March 2019, the Second Respondent requested a stay of the time period to file his Answer.

37. On 11 March 2019, the Second Respondent reiterated his request of 7 March 2019.

38. On 12 March 2019, the Second Respondent sent a letter to the CAS Court Office in which it, *inter alia,* requested a reasoning for the appointment of a sole arbitrator, commented on the appointment of Mr Manninen as the Sole Arbitrator, and requested a stay of the proceedings.

39. On 13 March 2019, the CAS Court Office sent a letter to the Parties, referred to Articles R50(1) and R54 of the CAS Code, and invited the Second Respondent to clarify whether his observations on Mr Manninen should be understood as a Request for Challenge in the sense of Article R34 of the CAS Code.

40. On 15 March 2019, the Second Respondent again requested an exhaustive list of reasons regarding the decision to appoint a sole arbitrator and requested the Sole Arbitrator to make a full disclosure on a number of issues. In addition, pending the information and disclosures sought in the letter, the Second Respondent requested a stay of the proceedings.

41. On 20 March 2019, the CAS Court Office informed the Parties that the Second Respondent's letter would be transmitted to the President of the CAS Appeals Arbitration Division for her consideration, and also to the Sole Arbitrator. In addition, the CAS Court Office granted the Appellant and the First Respondent an opportunity to comment on the Second Respondent's request for a stay of the proceedings.

42. On 22 March 2019, the Sole Arbitrator made a disclosure on the issues raised by the Second Respondent. On the same day, the Appellant objected to the Second Respondent's request for a suspension of the proceedings.

43. On 28 March 2019, the CAS Court Office provided the Parties with a letter by the President of the CAS Appeals Arbitration Division and the disclosure by the Sole Arbitrator.

44. On 1 April 2019, the Appellant requested the Sole Arbitrator to order the Second Respondent to disclose his competition schedule. According to the Appellant, this information, which is not publicly available, is relevant to the present proceedings as it may be necessary for the Appellant to apply for provisional measures.

45. On 4 April 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had found no reasons to stay the proceedings at that stage of the procedure. Furthermore, the CAS Court Office noted the Sole Arbitrator's observation that the Second Respondent had not submitted any Answer within the prescribed deadline. Notwithstanding that, the Second Respondent was granted a time limit until 9 April 2019 to file his Answer. In addition, the Sole Arbitrator ordered the Second Respondent to disclose his competition schedule regarding any upcoming fights on or before 8 April 2019.

46. On 4 April 2019, the Second Respondent requested that the present proceedings be suspended until the receipt of a notification of the Swiss Federal Tribunal's (the "SFT") decision on the decision of the President of the CAS Appeals Arbitration Division to submit this case to a sole arbitrator. In addition, the Second Respondent expressly challenged the appointment of Mr Manninen as the Sole Arbitrator and requested that he be granted a deadline to justify his challenge should the SFT reject the appeal. Moreover, the Second Respondent requested that he be granted a new deadline to file an Answer once the proceedings resume, reserving a right to request that the Panel preliminarily rules on the issue of jurisdiction.

47. On 5 April 2019, the Second Respondent requested the CAS Court Office to take a position on the Second Respondent's letter of 4 April 2019 and to suspend the deadlines granted to the Second Respondent to disclose his competition schedule and to file an Answer.

48. On 8 April 2019, the CAS Court Office invited the Appellant and the First Respondent to state their position on the Second Respondent's requests.

49. On 10 April 2019, the Appellant filed a letter with the CAS Court Office and noted that it is opposed to any further extension, suspension, or other delay in these proceedings. In addition, the Appellant amended paragraph 5 of its request for relief regarding the disqualification of the Second Respondent's competitive results.

50. On 12 April 2019, the CAS Court Office noted that the First Respondent had not stated its position with respect to the Second Respondent's requests and that the Appellant's comments would be transmitted to the Sole Arbitrator for consideration. On the same day, the First Respondent sent an e-mail to the CAS Court Office and opposed everything requested by the Second Respondent.

51. On 17 April 2019, the Second Respondent sent a letter to the CAS Court Office and disputed the content of the First Respondent's letter of 12 April 2019. On the same day, the CAS Court Office informed the Parties that it had not received the Second

Respondent's Answer. In addition, the CAS Court Office invited the Parties to inform whether they prefer a hearing to be held in the matter. Moreover, the CAS Court Office informed that the Sole Arbitrator had noted that the Second Respondent had not disclosed his competition schedule, that the Sole Arbitrator had decided not to suspend the present proceedings despite the challenge before the SFT, and that no request for challenge had been filed within the 7-day deadline of Article R34 of the CAS Code. Finally, the CAS Court Office invited the Respondents to submit their comments on the Appellant's request for amendments of paragraph 5 of its prayers for relief.

52. On 18 April 2019, the Second Respondent challenged the appointment of Mr Manninen as the Sole Arbitrator pursuant to Article R34 of the CAS Code and requested that the ICAS Board stay the current proceedings until a decision on the challenge has been made and until a notification of the decision by the SFT has been received.

53. On 23 April 2019, the Appellant informed the CAS Court Office that it prefers that a hearing be held in the matter and noted that neither of the Respondents had filed an Answer.

54. On 24 April 2019, the First Respondent informed the CAS Court Office that it prefers that the Sole Arbitrator issue an Award based solely on the Parties' written submissions. In addition, the First Respondent informed that it is open to agreeing to the request for the amendment of the Appellant's request for relief. On the same day, the Second Respondent requested that a hearing be held in the matter. Moreover, the Second Respondent disputed the Appellant's standing to sue and the CAS's jurisdiction and opposed the amendment of the Appellant's requests for relief.

55. On 2 May 2019, the Appellant filed a letter with the CAS Court Office and submitted that the Second Respondent's objections to the Appellant's standing and the CAS's jurisdiction are not admissible and that they shall be dismissed in any event. On the same day, the First Respondent also opposed the Second Respondent's views on the Appellant's standing to sue and the CAS's jurisdiction.

56. On 10 May 2019, the Second Respondent filed a letter regarding the Appellant's right of appeal and the CAS's jurisdiction with the CAS Court Office.

57. On 18 July 2019, the Challenge Commission of the International Council of Arbitration for Sport ("ICAS"), after examination of the Parties' respective submissions on this issue, dismissed the challenge brought by the Second Respondent against the appointment of Mr Manninen as an arbitrator.

58. On 25 July 2019, the CAS Court Office informed the Parties that the Appellant's standing to sue, the CAS's jurisdiction, and the Appellant's amendments of the request for relief will be addressed at the hearing and in the final Award. On the same day, the Second Respondent requested that the CAS issue a preliminary Award on the question of jurisdiction, declare that the CAS has no jurisdiction to hear the appeal, and declare the appeal filed by the Appellant inadmissible. Yet on the same day, the Second Respondent filed another letter and requested that he be granted a time limit to file an Answer.

59. On 30 July 2019, the Appellant reiterated that the Second Respondent had, for a second time, allowed his Answer deadline of 9 April 2019 to expire, and there were no exceptional circumstances justifying the granting of a new deadline. The Appellant submitted that the question of whether the Second Respondent is entitled to submit an Answer has already been decided by the Sole Arbitrator.

60. On 31 July 2019, the Second Respondent reiterated that he should be given a further opportunity to file an Answer at least three weeks prior to the hearing date to be set, but not earlier than at the beginning of September.

61. On 1 August 2019, the First Respondent objected to the Second Respondent being allowed to file an Answer.

62. On 7 August 2019, the Second Respondent contested the arguments put forth by the Appellant and the First Respondent. He submitted that filing an appeal with the SFT, requesting the suspension of the CAS proceeding and the extension of his deadline to file an Answer, and subsequently refusing to continue the proceeding shall be recognised as exceptional circumstances as per Article R56 of the CAS Code.

63. On 21 August 2019, the Appellant maintained that the Second Respondent allowed his Answer deadline to expire twice and that there are no exceptional circumstances justifying the grant of a new deadline. On the same day, the First Respondent objected to the filing of the Second Respondent's Answer.

64. On 22 August 2019, the CAS Court Office informed the Parties that the hearing would be held on 26 September 2019.

65. On 28 August 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to deny the Second Respondent's request to file an Answer pursuant to Article R56 of the CAS Code as the arguments put forth by the Second Respondent did not constitute exceptional circumstances within the meaning of said article. The Second Respondent had already been granted significant extensions, which he failed to obey. Furthermore, filing an appeal with the SFT and requesting a stay of the arbitral proceedings did not remove the need to file an Answer, if the Second Respondent wished to do so in the first place. Moreover, the appeal before the SFT did not justify a later filing, even if the appeal before the SFT had succeeded. In addition, the CAS Court Office sent an Order of Procedure for the Parties' signatures. The Appellant signed the Order of Procedure on the same day.

66. On 29 August 2019, the Second Respondent filed a letter, witness statements, and more than 350 pages of exhibits, which had been produced before the IDHP with the CAS Court Office.

67. On 2 September 2019, the Appellant submitted that the Second Respondent had foregone his right to file an Answer, but that he was now seeking to adduce exhibits and witness statements and call witnesses and experts to provide testimony at the hearing. According to the Appellant, the Second Respondent was ignoring the order of the Sole Arbitrator stipulating that he was not entitled to file an Answer. The Appellant requested confirmation that the exhibits and witness statements would be struck from the record

and that the Second Respondent's experts and witnesses would not be entitled to testify at the hearing.

68. On 3 September 2019, the Second Respondent challenged the admissibility of the DNA cross-check analysis done by the Appellant without his consent and in violation of his right to due process. Subject to admitting the Appellant's DNA cross-check analysis, the Second Respondent filed an expert report by Professor Pillay. The Second Respondent submitted that it is possible that the sample collected from him on 23 February 2018 had been manipulated and mixed with the urine of another human being. On the same day, the First Respondent filed a signed Order of Procedure with the CAS Court Office.

69. On 4 September 2019, the Second Respondent commented on the Appellant's submission of 2 September 2019. The Second Respondent submitted that even though the Sole Arbitrator had ruled against the Second Respondent with regard to the filing of an Answer, it is imperative that the Sole Arbitrator permit the calling of witnesses and experts by the Second Respondent and the filing of witness statements and expert reports. On the same day, the Second Respondent filed another letter with the CAS Court Office and noted that he cannot sign the Order of Procedure because (1) the CAS does not have jurisdiction to hear the appeal filed by the Appellant, (2) the submission of the proceedings to a sole arbitrator and the appointment of Mr Manninen are disputed by the Second Respondent, (3) the Second Respondent contests that he did not submit an Answer within the prescribed deadlines, and (4) the result of the Second Respondent's procedural objections and the Sole Arbitrator's rulings is that the Second Respondent's case cannot be fairly presented with the aim of obtaining a just decision based upon the true and relevant facts. Yet on the same day, the Appellant reiterated its request for a confirmation that the report of Professor Pillay should not be admitted to the record and that he should not be permitted to be heard as an expert.

70. On 13 September 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided that all the exhibits and witness statements filed, and also the witnesses and experts nominated by the Second Respondent, including Professor Pillay, are admitted and the identified persons will be examined at the hearing. On the same day, the Appellant submitted that due to the Sole Arbitrator's decision, the hearing date must be vacated so that the Appellant and its experts and witnesses have time to review the new evidence and, if necessary, seek a leave to file a further submission.

71. On 18 September 2019, the Second Respondent informed the CAS Court Office that it does not object to a postponement of the hearing.

72. On 20 September 2019, the CAS Court Office informed the Parties that the hearing scheduled on 26 September 2019 would be cancelled. In addition, the CAS Court Office provided the Parties with the Sole Arbitrator's reasoning to admit the Second Respondent's exhibits and witness statements and witnesses and experts. First, the Appellant had already filed a number of exhibits filed by the Second Respondent in the present proceedings. Second, many documents filed by the Second Respondent were rules or other documents produced by the Appellant and well known by the Appellant and anti-doping organisations, such as the First Respondent. Third, a significant part of the documents filed by the Second Respondent had been included in the file of the first

instance. The Appellant had received the Appealed Decision and other elements from the case file by courier on 16 October 2018. Thus, the First Respondent had had all such documents in its use for a significant amount of time, and the Appellant had had at least some of the first instance documents in its use from 16 October 2018 onwards. Furthermore, according to Article R57 of the CAS Code, a sole arbitrator may request communication of the file of the federation, association, or sports-related body whose decision is subject to the appeal. Fourth, the Sole Arbitrator deemed that the documents filed by the Second Respondent could assist and be relevant in the adjudication of the case. The documents related to the issues addressed in the Appellant's Appeal Brief and the transcripts of the first instance hearing, filed by the Appellant, make specific references to a number of documents filed by the Second Respondent. In summary, admitting the documents, witnesses, and experts submitted by the Second Respondent does not compromise the position of the Appellant or the First Respondent, also taking into account the fact that the hearing has been postponed, and ensures a meaningful and fair hearing. There are exceptional circumstances for admitting the documents, witnesses, and experts.

73. On 30 September 2019, the Appellant filed a complementary report by Dr Castella and Mr Jan in response to Professor Pillay's expert report.

74. On 2 October 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to admit Dr Castella's and Mr Jan's complementary report to the file and that the Respondents would be granted an opportunity to file a submission or counter-evidence limited to the issues raised in the aforesaid report. After such submissions, no further submissions will be allowed without a specific permission from the Sole Arbitrator in exceptional circumstances.

75. On 17 October 2019, the Second Respondent filed a second report by Professor Pillay with the CAS Court Office.

76. On 26 November 2019, the Appellant and the Second Respondent informed the CAS Court Office that they could not fully agree on a hearing schedule and submitted their respective proposals for a schedule. On the same day, the CAS Court Office invited the First Respondent to comment on the Second Respondent's suggestion to hear Mrs Begg of the First Respondent as a witness. Yet on the same day, the First Respondent objected to Mrs Begg being called as a witness: Mrs Begg is the legal representative for the First Respondent, and she is not involved in the merits of the case.

77. On 27 November 2019, the Second Respondent commented on the Appellant's and the First Respondent's submissions concerning the hearing schedule and the examination of Mrs Begg as a witness. On the same day, the CAS Court Office advised the Parties that the Sole Arbitrator had decided not to allow Mrs Begg to be called as a witness at the hearing. She was not nominated as a witness within the stipulated time limits and does not have any first-hand information on the merits of the case.

78. On 29 November 2019, the hearing took place at the CAS Headquarters located in Lausanne, Switzerland. The Sole Arbitrator was assisted by CAS Counsel Fabien Cagneux. The following individuals attended the hearing:

For the Appellant:
Mr Ross Wenzel (Kellerhals Carrard, Counsel, in person)
Mr Anton Sotir (Kellerhals Carrard, Counsel, in person)
Mr Nicolas Zbinden (Kellerhals Carrard, Counsel, in person)
Mr Narainsamy Pongum (Witness, by video)
Professor Peter Van Eenoo (Expert witness, by video)
MSc Nicolas Jan (Expert witness, in person)
Dr Vincent Castella (Expert witness, in person)

For the First Respondent:
Mrs Wafeekah Begg (Legal Manager at SAIDS, by video)
Mr Khalid Galant (CEO of SAIDS, by video)
Mr Lyrique du Plessis (Attorney, by video)
Ms Christina Skhosana (Assistant, by video)

For the Second Respondent:
Mr Jean-Marc Reymond (Reymond & Associés, Counsel, in person)
Ms Yasmine Sözerman (Reymond & Associés, Counsel, in person)
Mr Ruann Visser (Athlete, by video)
Mr Johannes Corneulius Visagie (Witness, by video)
Mr Andries Albertus van Aswegen (Witness, by video)
Mr Etienne van Rensburg (Witness, by video)
Mrs A. C. Salamon (Expert witness, by phone)
Dr Tim Laurens (Expert witness, by video)
Professor Tahir S. Pillay (Expert witness, by video)

79. At the hearing, the Appellant and the First Respondent confirmed that they did not have any objection with respect to the constitution of the Panel. The Second Respondent reiterated his position that the Panel should be composed of three arbitrators and that Mr Manninen should not serve as an arbitrator in the case. In addition, the Second Respondent reiterated the issues of partial Award on jurisdiction, the right to examine Mrs Begg, and the amendment of the Appellant's request for relief.

80. At the end of the hearing, the Appellant and the First Respondent confirmed that they had had the opportunity to present their case and that they were satisfied that their right to be heard had been respected. In addition to the previously raised issues, the Second Respondent noted that due to poor connections, it was difficult to hear some of the testimonies.

81. At the end of the hearing, the Appellant requested the CAS to render the operative part of the Award without any further delay considering the duration of the proceedings and the fact that the Second Respondent was not provisionally suspended. The Second

Respondent objected to the rendering of the operative part of the Award prior to the reasoning.

82. On 12 December 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided not to communicate the operative part before the full Award.

IV. SUBMISSIONS OF THE PARTIES

83. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in his deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to these arguments in the following outline of their positions and the ensuing discussion on the merits.

84. WADA submits, in essence, the following:

Presence of a Prohibited Substance in the Athlete's Sample

- The Athlete underwent an in-competition doping control on 23 February 2018. The analysis of the sample revealed the presence of 3'OH-stanozolol glucuronide, a metabolite of stanozolol. Stanozolol is a non-specified anabolic androgenic steroid prohibited at all times under S1.1a of the 2018 prohibited list.

- The Athlete does not dispute the analytical results of this sample conducted by the Ghent WADA-accredited laboratory. The Athlete has committed an ADRV under Article 2.1 of the South African Institute for Drug Free Sport Anti-Doping Rules 2016 effective as of 1 September 2016 (the "SAIDS ADR").

Alleged Departures from the International Standard for Testing and Investigations

- Within the context of the proceedings before the IDHP, the Athlete challenged the conformity of the sample collection procedure with the WADA International Standard for Testing and Investigations (January 2015 edition, the "ISTI").

- First, he alleged that the statement of facts provided by Mr Pongum, who acted as doping control officer ("DCO") during the doping control on 23 February 2018, was untruthful and erroneous.

- Second, the Athlete alleged that departures from the ISTI took place during sample collection and that such departures could reasonably have caused the adverse analytical finding (the "AAF") and, in any event, amounted to a fundamental breach of the Athlete's rights, which invalidated the ADRV.

- Third, he alleged that the sample tested by the Ghent laboratory did not belong to him or, alternatively, that it had been manipulated.

- The DNA analysis conducted by the Lausanne laboratory confirms that the sample analysed by the Ghent laboratory belongs to the Athlete. This renders any discussion of the alleged departures from the ISTI moot. In any event, no departures from the ISTI had occurred and the analytical results should remain intact, as none of the alleged departures could reasonably have caused the AAF.

- It transpires from the DCO's affidavit that there was no deviation from the standard procedures provided by the ISTI when he collected the sample from the Athlete. There is no reason to call into question the account of the DCO: (1) The Lausanne DNA analysis confirmed that the Athlete's samples collected on 23 February 2018 and 8 November 2018 come from the same male individual, i.e. the Athlete. This excludes any allegation made by the Athlete in his affidavit that the sample does not belong to him. (2) The DCO's version of facts is supported by the doping control form (the "DCF") signed by the Athlete and his representative, Mr Visagie. (3) The Athlete did not raise any concern about the sample collection process and actions of the DCO until he became aware that his sample had tested positive for a prohibited substance. (4) Unlike the Athlete, the experienced DCO has no interest in concealing the facts or altering them in order for the Athlete to be found guilty of an ADRV.

- The Athlete has alleged a number of departures from the ISTI. However, most of them are purely clerical in nature and none could reasonably have caused the AAF.

- The wording of Article 3.2.3 of the 2015 WADC does not impose absolute standards from which any deviation will necessarily result in an annulment of the analytical results. Rather, the article requires a shift in the burden of proof whenever an athlete establishes that one or more such departures have occurred that could reasonably have caused the AAF. In other words, the athlete must establish a causative link between the ISTI departure and the presence of a prohibited substance in their sample.

- The only two theoretical possibilities that could have resulted in stanozolol metabolites entering the Athlete's sample are accidental contamination and intentional manipulation. There is no evidence of either of these, and thus both scenarios can be excluded.

- In terms of manipulation, Professor Van Eenoo confirmed that the seals of both the A and B sample bottles were intact. This was also confirmed by the Athlete's representative during the B sample opening. The discrepancy between the urine volumes recorded on the DCF and the volumes estimated by the Ghent laboratory is not surprising. The Ghent laboratory explained that the volumes are only estimates, which may be influenced by the frozen status of the sample and the thickness of the glass of the Berlinger bottles. Professor Van Eenoo further explained that the volumes in the A and B sample bottles are estimated on-sight and that there is at least a 5 mL possibility of error on the laboratory's part for each bottle. Moreover, when transferring urine from a collection vessel into the bottles, a small quantity is retained in order to complete a

specific gravity test, which can make up for a few mL as well. Additionally, when the DCO measures the volume, the urine is warm, with the consequence that there will always be a higher volume at time of collection than in cases where the laboratory gets a cold urine sample.

- In any event, there is no doubt that the sample analysed by the Ghent laboratory belongs to the Athlete based on the Lausanne DNA analysis.

- It is not disputed that the Athlete's sample contained so-called second phase metabolites of stanozolol. These second phase metabolites can only be produced by metabolisation in the body and not *in vitro* if, for example, stanozolol is added to urine.

Fundamental Breach

- The essence of the fundamental breach concept is that, where an athlete is deprived of the right to attend (or be represented at) the opening and analysis of the B sample, the breach is to be considered so fundamental that the B sample results are automatically invalidated without any need for the athlete to demonstrate how the breach could have caused the analytical results.

- The Athlete has invoked the fundamental breach concept based on alleged departures from the ISTI, which have nothing to do with attending the opening and analysis of the B sample.

Determining the Sanction – Intentional Violation

- The Athlete has not established the origin of the stanozolol metabolites in his system. The debate on whether there may be limited circumstances in which intention may be rebutted without origin being established is moot, as there are clearly no exceptional circumstances surrounding the facts of this case.

- The Athlete is required to prove the origin of the prohibited substance on the balance of probabilities. In this case, the Athlete has not put forward any written explanation as to how stanozolol may have entered his body. During the oral hearing before the IDHP, the Athlete's legal counsel suggested a scenario that the stanozolol metabolites could have entered the Athlete's body from second-hand boxing gloves. The Athlete's explanation is mere speculation, and he has not satisfied his burden to establish the origin of stanozolol in his system. Therefore, the ADRV must be deemed intentional and the Athlete sanctioned with a four-year period of ineligibility.

85. In the light of the above, WADA submits the following prayers for relief in its Appeal Brief, as amended by WADA on 10 April 2019:

"(1) The Appeal of WADA is admissible.

(2) The decision dated 5 October 2018 rendered by the Independent Doping Hearing Panel of SAIDS in the matter of Ruann Visser is set aside.

(3) Ruann Visser is found to have committed an anti-doping rule violation.

(4) Ruann Visser is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension effectively served by Ruann Visser before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

(5) All competitive results obtained by Ruann Visser (i) from and including 23 February 2018 until the date of provisional suspension on 16 April 2018, and (ii) from 10 April 2019 until the date on which the CAS award enters into force are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(6) The arbitration costs shall be borne by SAIDS or, in the alternative, by the Respondents jointly and severally.

(7) WADA is granted a significant contribution to its legal and other costs."

86. Although duly invited, the Respondents did not file Answers to WADA's Appeal Brief within the prescribed time limits. Pursuant to Article R55 of the CAS Code, the Sole Arbitrator can nevertheless proceed to make an Award in relation to WADA's claims against the Respondents. Despite the lack of a formal written Answer from the Respondents, the legal analysis below will take into account all available relevant information and is not restricted to the submissions of WADA.

V. JURISDICTION

87. WADA maintains that the jurisdiction of the CAS and WADA's standing to sue derive from Articles 13.1.3 and 13.2.3 of the SAIDS ADR. According to WADA, it has a right of appeal against the Appealed Decision directly to CAS if no other party appeals the final decision within the SAIDS process. To WADA's knowledge, no appeal has been filed within the SAIDS process. Therefore, WADA is entitled to appeal the Appealed Decision to CAS.

88. SAIDS has not contested the jurisdiction of the CAS or WADA's standing. Instead, SAIDS has confirmed the jurisdiction of the CAS by signing the Order of Procedure and again at the hearing. SAIDS has presented grounds for its view in its letter dated 2 May 2019.

89. The Athlete has expressly challenged the jurisdiction of the CAS and WADA's standing to sue essentially on the following grounds. Pursuant to Article 13.2 of the SAIDS ADR, "a decision" that no ADRV has been committed is subject to a right of appeal. The purpose of the CAS appeal jurisdiction is to hear cases about decisions taken by first-instance tribunals. An "appealable decision" within the meaning of Article R47 of the CAS Code is a normative act and the conclusion of a discussion or a deliberation, entailing the creation or the suppression of a right by the authorities or competent bodies, and not a simple finding by a competent body. It requires an *animus decidendi*. In the present matter, SAIDS withdrew the charge filed against the Athlete and lifted his provisional suspension, which resulted in the conclusion of the proceedings before the IDHP. The IDHP did not assess the relevant facts of the case. There was no discussion or deliberation and no *animus decidendi*. The IDHP did not render a decision on the merits; it merely took note of the withdrawal of the complaint and closed the procedure, which had become without object. There was no decision that no ADRV had been committed within the meaning of Article 13.2 of the SAIDS ADR and no appealable decision within the meaning of R47 of the CAS Code.

90. On 2 May 2019, WADA replied to the Athlete's challenge of the jurisdiction of the CAS by noting that the Athlete's objection is time barred per Article R56 of the CAS Code, as the deadline to file an Answer had expired. Furthermore, WADA referred to the grounds presented in its statement of appeal. At the hearing, WADA submitted that the Appealed Decision was a final decision by the IDHP. Pursuant to the Appealed Decision, *"the Panel rules that the [Athlete] is acquitted of a violation of Article 2.1 of the Rules"*.

91. The first issue to be decided by the Sole Arbitrator is whether the challenge on the CAS's jurisdiction was presented belatedly and whether it may be examined.

92. Pursuant to Article R55 of the CAS Code, any defence of lack of jurisdiction shall be raised in the Answer. The Second Respondent's time limit to file an Answer originally expired on 27 January 2019. Thereafter, the time limit was extended until 26 February 2019, and again until 12 March 2019. This time limit was not suspended or extended by the CAS. However, the Athlete was granted yet another time limit until 9 April 2019 to submit an Answer. The Athlete did not file an Answer by said time limit. The Athlete challenged the jurisdiction of the CAS on 24 April 2019.

93. The aforementioned facts lend support for a finding that the Athlete should have presented his defence of lack of jurisdiction on 9 April 2019 at the latest. It follows that the challenge of the CAS's jurisdiction is not admissible. However, for the sake of completeness and in the interest of utmost fairness to the Athlete, the Sole Arbitrator also notes as follows.

94. As noted above, the Athlete has put forth that the IDHP did not issue a decision within the meaning of Article R47 of the CAS Code. The first paragraph of Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has

exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

95. The Sole Arbitrator notes that pursuant to established CAS case law, the term "decision" must be interpreted in a broad manner so as not to restrain the relief available to the persons affected. Even letters addressed from a federation to an athlete may qualify as appealable decisions if they affect the legal situation of the addressee. A communication qualifies as a decision if it contains a ruling intending to affect the legal state of the addressee. Even a decision of a judicial body of a federation not to open a disciplinary procedure against a third party and a negative decision not to entertain a case constitute appealable decisions. (Despina Mavromati & Matthieu Reeb: The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials (2015) pages 383-385.)

96. The content of a "decision" and its relation to *animus decidendi* has been summarised in CAS 2014/A/3744 & CAS 2014/A/3766 (para. 191) as follows:

"(...) according to CAS jurisprudence, a decision is a communication of a federation, association or sports-related body that is not just of a mere informative nature but also contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee. In other words, it is a communication that contains an animus decidenci, i.e. by its objective content (and irrespective of its form), it conveys to the addressee(s) the will of the sports body to decide on a matter."

97. In the present case, on 27 September 2018, SAIDS informed the Athlete that it would be withdrawing the charges against him. On the same day, SAIDS informed the IDHP that it had decided to withdraw the charge. On 5 October 2018, the IDHP issued a document entitled *"Ruling"*, in which the IDHP made a *"[f]inding on anti-doping rules violation"*, *"[i]n view of the decision by [SAIDS] to withdraw the charge"*. Consequently, the IDHP ruled *"that the [Athlete] is acquitted of a violation of Article 2.1 of the [SAIDS ADR]"*.

98. The Sole Arbitrator concludes that the IDHP has clearly made an independent decision to acquit the Athlete of the ADRV. The decision of the IDHP, which it issued in the form of a "Ruling", has affected the legal situation of the Athlete and is not merely of informational nature. The Sole Arbitrator does not accept the Athlete's contention that the IDHP did not discuss or deliberate the case. Thus, the ruling issued by the IDHP on 5 October 2018 fulfils the prerequisites of a decision within the meaning of Article R47 of the CAS Code. In the following, the Sole Arbitrator will examine whether the ruling is a decision that can be appealed by WADA under the SAIDS ADR.

99. The Sole Arbitrator observes that the relevant parts of Articles 13.1 and 13.2 of the SAIDS ADR provide as follows:

"13.1 Decisions Subject to Appeal
Decisions made under these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards. (...)"

"13.1.3 WADA Not Required to Exhaust Internal Remedies.

Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision within SAIDS' process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in SAIDS' process."

"13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction

A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); (...) a decision by SAIDS not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, (...) a decision that SAIDS lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences (...) may be appealed exclusively as provided in Articles 13.2 – 13.7."

"13.2.3 Persons Entitled to Appeal

In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (...)

(f) WADA.

In cases under Article 13.2.2, the following parties, at a minimum, shall have the right to appeal: (...)

(f) WADA. (...)"

100. The Sole Arbitrator finds that the decision of the IDHP clearly fulfils the prerequisites of an appealable decision described in the SAIDS ADR as well. The ruling *"that the [Athlete] is acquitted of a violation of Article 2.1 of the [SAIDS ADR]"* constitutes a decision that no ADRV has been committed. The IDHP made the decision in view of the decision by SAIDS to withdraw the charge. Even if the IDHP's decision was considered to be based solely on the withdrawal of the charges by SAIDS, it would obviously qualify as an appealable decision because, in such case, it would be considered a decision that the ADRV proceedings cannot go forward for procedural reasons. As shown by the language of the SAIDS ADR, an appealable decision does not need to be a decision on merits.

101. With regard to WADA's standing to sue, Article 13.2.3 of the SAIDS ADR contains a clear provision pursuant to which WADA has the right to appeal against the decisions of the IDHP to the CAS.

102. Based on the foregoing, WADA has standing to sue and the CAS has jurisdiction to adjudicate and decide the present matter.

103. The present case must be dealt with in accordance with the appeals arbitration rules. Under Article R57 of the CAS Code and in line with the consistent jurisprudence of the CAS, the Sole Arbitrator has full power to review the facts and the law. The Sole Arbitrator has therefore dealt with the case *de novo*, evaluating all facts and legal issues involved in the dispute.

VI. ADMISSIBILITY

104. Article R49 of the CAS Code provides in its relevant parts as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."

105. The relevant parts of Article 13.7.1 of the SAIDS ADR provide as follows:

"The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party. (...)

The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:

(a) Twenty-one (21) days after the last day on which any other party in the case could have appealed; or

(b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision."

106. The IDHP did not notify the Appealed Decision to the Parties until 5 October 2018. Therefore, SAIDS and the Athlete could have appealed the Appealed Decision until 26 October 2018. It follows that WADA's deadline to file its appeal cannot have been earlier than 16 November 2018. WADA filed its Statement of Appeal on 6 November 2018, i.e. within the 21-day time limit set forth under Article 13.7.1 of the SAIDS ADR.

107. The Sole Arbitrator concludes that WADA has adhered to the applicable time limit. The Respondents have not argued to the contrary and the Sole Arbitrator deems the appeal admissible.

VII. APPLICABLE LAW

108. WADA submits that the SAIDS ADR are the applicable rules in this matter. The Respondents have not disputed WADA's position with regard to the applicable rules.

109. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-

related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

110. This provision is in line with Article 187, paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected."*

111. Based on the above and considering that the IDHP, i.e. the sports-related body who issued the Appealed Decision within the meaning of Article R58 of the CAS Code, has applied the SAIDS ADR in adjudicating the present case, the Sole Arbitrator will decide this dispute in accordance with the SAIDS ADR. To the extent necessary, the Sole Arbitrator will apply South African law, the law of the country in which SAIDS is domiciled. However, the Sole Arbitrator underlines that no provision of South African law was invoked or submitted for application by the Parties in this arbitration.

VIII. PRELIMINARY ISSUES

112. Before addressing the merits of the appeal, the Sole Arbitrator has to deal with some issues of preliminary nature that arose during the arbitration either in the Parties' written or oral submissions or in correspondence.

SAIDS's Standing to Be Sued

113. First, as noted above, SAIDS has objected to being a party to the present proceedings *"due to the fact that the hearing related to proceedings arising out of a hearing from an independent tribunal"* (SAIDS's letter dated 16 November 2018). WADA and the Athlete have objected to SAIDS's position and noted that the Athlete's acquittal followed the withdrawal by SAIDS of the charge filed against the Athlete. In addition, WADA and the Athlete have referred to recent CAS case law where SAIDS has been found responsible for the decisions of the IDHP.

114. The Sole Arbitrator notes that the Appealed Decision was rendered by the independent IDHP but in a case for which SAIDS had the result management responsibility under Article 7.1 of the SAIDS ADR. It has been established in CAS case law that a decision by the IDHP can be considered a ruling for which SAIDS has the responsibility (CAS 2017/A/5260 para. 123 and CAS 2017/A/5369 para. 121). The Sole Arbitrator accepts the position adopted by the sole arbitrator in the previously mentioned CAS awards. Consequently, the Sole Arbitrator confirms that SAIDS was properly named as a Respondent in this arbitration by WADA, which seeks the annulment of the Appealed Decision. Therefore, SAIDS cannot be removed from the proceedings.

Admissibility of the DNA Cross-Check Analysis

115. Second, the Athlete has submitted that WADA did not have the right to have a sample collected from him to perform DNA testing. He has put forth that he *"did not authorise the taking of a urine sample from him for purposes of DNA testing"* and that he *"challenges the admissibility of the DNA cross-check analysis done by WADA (...)*

without his consent and in blatant violation of his right to due process". The Athlete elaborated his position at the hearing by referring to the European Convention on Human Rights. According to the Athlete, at the time of the sample collection on 8 November 2018, DNA testing was never mentioned to him.

116. WADA has objected to the Athlete's position and referred to the content of the SAIDS ADR allowing DNA analyses.

117. The Sole Arbitrator observes that Article 5.2.3 of the SAIDS ADR reads as follows:

"WADA shall have In-Competition and Out-of-Competition Testing authority as set out in Article 20.7.8 of the Code."

118. Article 20.7.8 of the WADC stipulates as follows:

"20.7 Roles and Responsibilities of WADA

(...)

20.7.8 To conduct, in exceptional circumstances and at the direction of the WADA Director General, Doping Controls on its own initiative (...)"

119. Article 6.2.1 of the SAIDS ADR reads as follows:

"Samples shall be analysed to detect Prohibited Substances and Prohibited Methods (...); or to assist in profiling relevant parameters in an Athlete's urine, blood or other matrix, including DNA or genomic profiling; or for any other legitimate anti-doping purpose. (...)"

120. The Sole Arbitrator notes that the SAIDS ADR and the WADC specifically allow sample collection by WADA for purposes of DNA profiling, which in the present case is considered a legitimate anti-doping purpose. The purpose of the DNA cross-check analysis was to investigate whether the sample analysed by the Ghent laboratory contained the urine of the Athlete (only). Therefore, WADA has adhered to the applicable anti-doping rules by which the Athlete was bound himself. WADA has not breached the rights of the Athlete, and the DNA cross-check analysis is deemed admissible as evidence in the present matter.

Admissibility of WADA's Amendments of Paragraph 5 of its Request for Relief

121. Third, the Athlete has disputed the admissibility of WADA's amendments to its request for relief submitted on 10 April 2019. WADA has justified its request by putting forth that when the Statement of Appeal was filed on 6 November 2018, *"WADA was not expecting the Athlete to delay the proceedings to such an extent that no Answer would have been submitted five months later."* WADA has continued that *"the Athlete is delaying these proceedings in order to exploit (...) his erroneous acquittal by SAIDS. In any event, it is undeniable that the effect of the Athlete's procedural conduct is that he is delaying the adjudication of WADA's appeal, whilst continuing to compete."* At the hearing, WADA added that it does not typically request for a disqualification of an athlete's results for the duration of the CAS proceedings when an athlete is acquitted.

Based on the foregoing, WADA has requested leave to amend its prayers for relief by adding the following to paragraph 5 of its requests concerning the disqualification of the Athlete's results: *"and (ii) from 10 April 2019 until the date on which the CAS award enters into force"*.

122. The Athlete has put forth that such an amendment is not justified by exceptional circumstances. Even if the Athlete had filed an Answer within the 20-day deadline, the CAS Award would not have been rendered or entered into force by April 2019. The Athlete considers WADA's request an attempt to rectify its poorly formulated requests for relief.

123. Article R56 of the CAS Code provides as follows:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument (...) after the submission of the appeal brief and of the answer."

124. The Sole Arbitrator notes that at the time WADA filed its Appeal Brief on 17 December 2018, the Athlete had not yet indicated that he would request for an extension of 30 days to file his Answer. When agreeing to the extension, WADA already pointed out that the Athlete was eligible to compete and that WADA would not agree on any further extension. Subsequently, but before WADA requested leave to amend its prayers for relief, the Athlete, *inter alia,* requested another extension for the filing of his Answer and a suspension of the CAS proceedings and challenged the appointment of the Sole Arbitrator. Moreover, the Athlete refused to disclose his competition schedule in spite of the Sole Arbitrator's order of 4 April 2019. After WADA's request for leave to amend its prayers for relief was filed, the Athlete submitted a considerable number of documents shortly before the agreed hearing date, leading to the postponement of the hearing.

125. The Sole Arbitrator finds that the Athlete's exceptional procedural conduct has caused the CAS proceedings to last significantly longer than what could have been reasonably expected. All this time, the Athlete has been eligible to compete and has, in fact, competed. The Sole Arbitrator finds that the principle of fair play and the protection of athletes subjected to ADRV proceedings support WADA's approach not to automatically seek the disqualification of the results of an athlete who has been acquitted in the first instance. Such an approach is in the interest of the athlete, as it removes the risk of double jeopardy in the form of a combination of a disqualification period with an ineligibility period. As a *quid pro quo*, an athlete may not abuse the proceedings and WADA must have a possibility to adapt to the circumstances of each individual case in exceptional circumstances and to amend its prayers for relief.

126. The Sole Arbitrator deems that the special characteristics of the present proceedings constitute exceptional circumstances in the meaning of Article R56 of the CAS Code. It follows that WADA is held authorised to amend its prayers for relief as requested by WADA on 10 April 2019.

IX. MERITS

127. Considering all Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete violate Article 2.1 of the SAIDS ADR? In particular, was there a fundamental departure from an applicable international standard or anti-doping rule or policy, or a departure that could reasonably have caused the AAF?

B. If the first question in A is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete violate Article 2.1 of the SAIDS ADR?

128. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the case at hand.

129. The relevant parts of Article 2 of the SAIDS ADR read as follows:

"The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

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

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: (...) where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample (...)

130. The essential parts of Articles 3.1 and 3.2 of the SAIDS ADR read as follows:

"3.1 Burdens and Standards of Proof

SAIDS shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules 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 a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

(...)

3.2.2 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete (...) may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred, which could reasonably have caused the Adverse Analytical Finding. If the Athlete (...) rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then SAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.3 Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or these Anti-Doping Rules, which did not cause an Adverse Analytical Finding or other anti-doping rule violation, shall not invalidate such evidence or results.

If the Athlete (...) establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then SAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

131. The Sole Arbitrator observes that, in its attempt to establish the ADRV of the Athlete under Article 2.1 of the SAIDS ADR, WADA relies on the AAFs in the Athlete's A and B samples collected on 23 February 2018. The Athlete has not disputed the AAFs as such. However, he has put forth that there have been grave departures from the applicable rules and regulations, including the international standards, which have been serious to the extent that his sample should be held invalid. In any case, the departures could reasonably have caused the AAFs. Therefore, he cannot be considered having committed an ADRV.

132. Fundamentally, it is the Athlete's position that the sample analysed by the Ghent laboratory is not his at all or has at least been manipulated by adding another person's urine containing stanozolol metabolites to the sample.

133. Before assessing the Athlete's individual allegations, the Sole Arbitrator deems it necessary to address the relevant rules on burden of proof in cases of alleged departures from applicable international standards and other anti-doping rules.

134. According to the Athlete, the nature of the deviations is serious and there is a probability that they could have resulted in the AAFs because of tampering, for instance. The Sole Arbitrator notes that, in principle, a breach of the applicable international standards does not automatically invalidate the analytical results. This follows from Articles 3.2.2 and 3.2.3 of the WADC, and in this case the identical Articles 3.2.2 and 3.2.3 of the SAIDS ADR, pursuant to which an athlete must establish that a departure could reasonably have caused the AAF. Pursuant to the language of Articles 3.2.2 and 3.2.3 of the SAIDS ADR, an athlete must establish a specific departure or departures and a causality between such departure(s) and the AAF.

135. However, certain international testing standards and anti-doping rules are considered so fundamental and central in ensuring integrity in the administration of sample collection that certain departures therefrom could result in the automatic invalidation of the test results. This has been confirmed in a number of CAS awards. As the Sole Arbitrator put it in CAS 2014/A/3639 (para. 68), *"certain departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing and adjudication process to such an extent that it is impossible for the Sole Arbitrator to be comfortably satisfied that a doping violation occurred."* (See also CAS 2014/A/3487 para. 142-152.)

136. The Sole Arbitrator observes that pursuant to established CAS case law, an athlete's right to attend the opening and analysis of their B sample is fundamental and, if not respected, the B sample results must be disregarded. This has been consistently confirmed in, for instance, CAS 2002/A/385 (para. 26-34), CAS 2008/A/1607 (para. 25-29), and CAS 2010/A/2161 (para. 9.8-9.9). In addition to the right to attend the opening and analysis of the B sample, the other benchmark question is whether a breach or breaches, together or alone, reach *"a level which may call into question the entire doping control process"* (see CAS 2001/A/337 para. 68), after which *"it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred"* (see CAS 2014/A/3487 para. 152 and CAS 2016/A/4707 para. 85).

137. The inherent question now is whether the Athlete has established, on a balance of probabilities, that there are departures from the ISTI or other applicable standards or rules and whether such departures are material to the extent that the Athlete's samples should be held invalid and cannot be used as evidence of an ADRV. If the answer to this question is in the negative, the question becomes whether such departures could have reasonably caused the AAFs.

138. According to the Athlete, a number of departures occurred with respect to the different aspects of the doping control procedure. In his witness statement, the Athlete has identified no less than approximately 30 alleged departures. However, the Athlete has not elaborated many of these arguments during the CAS proceedings. While the Sole Arbitrator has considered all of the Athlete's contentions, he will expressly address in this Award the Athlete's most focal defences only. The Sole Arbitrator will now turn to address the most important issues raised by the Athlete.

Alleged Departures from the Anti-doping Rules

139. As noted above, the Athlete's position is that his sample has been swapped or manipulated. Therefore, in particular the following arguments by the Athlete that were addressed at the hearing and that directly relate to the allegedly compromised identity and integrity of the sample are of special importance: (1) The Doping Control Station was not secure and doping control items were left unattended. The Athlete was not offered a choice of collection vessels, the collection vessel used was not sealed prior to use by the Athlete, it was not closed or sealed before the Athlete left the bathroom, and the Athlete did not retain control of the collection vessel until the sample was sealed. (2) The DCO used Berlinger kits that can be opened and re-closed. (3) The Athlete's signatures on the DCF are forged. (4) The lead DCO did not deliver the sample to SAIDS immediately after the sample collection but kept it at his home for the weekend and then at his workplace for one day.

140. The Athlete has also put forth that the difference of 17 mL in the urine volume between the quantities recorded by the DCO on one hand and by the Ghent laboratory on the other hand and the difference in the concentration of stanozolol between the A and B samples show that the identity and integrity of the sample has been compromised.

Sample Collection Session

141. The Athlete has challenged the correctness of a number of aspects and circumstances of the sample collection session. In addition to the Athlete's own testimony, Messrs Pongum, Visagie, van Aswegen, and van Rensburg testified on the circumstances and events at the doping control.

142. Among other issues, the Athlete testified that he had not been read his rights or allowed to select a collection kit or a sample kit. In addition, the Athlete has contended that at the sample collection of 23 February 2018, the kits had not been in plastic bags, he had not seen any bar code stickers, and he had not been given a copy of the DCF. He also testified that he had given a sample of 85 mL and had not been asked to sign the DCF. Mr Visagie testified that it had been his first time serving as a witness in a doping test. He stated that when he had cut the wraps off the Athlete's hands, he had faced, for most of the time, backwards in relation to the desk where the collection vessel had been located. In addition, he confirmed that the Athlete had not been asked to sign the DCF. Mr van Rensburg testified having seen a tray with a number of tubes filled with urine in the vicinity of the doping control station ("DCS") soon after the Athlete's fight had ended.

143. Mr Pongum's (the DCO) testimony collided with the Athlete's and Mr Visagie's testimony with regard to many different issues. For instance, the DCO testified that he had read the Athlete's rights to him twice, that the sample collection vessel had been under the Athlete's control at all times, and that both the Athlete and Mr Visagie had signed the DCF. The DCO also testified that there had been a security guard in the area, which was supervised at all times. The DCO confirmed that he had put the bar code sticker on the DCF before the Athlete had signed it.

144. In summary, the Sole Arbitrator notes that he is faced with different reports of how the doping control was arranged and conducted. As such, the Sole Arbitrator notes that he

does not have a reason to suspect the testimony of Mr Pongum, who is a very experienced DCO, serves as a high-ranked police officer at the South African police force, and has no personal interest in the outcome of this arbitration, unlike the Athlete. The credibility of Mr Visagie's testimony, on the other hand, is weakened by the fact that he is the Athlete's friend and served as a witness at a doping control for the first time.

145. Furthermore, the Sole Arbitrator cannot attach any relevance to Mr van Rensburg's testimony. First, the Athlete was the first boxer to be tested on that evening. Therefore, the correctness of Mr van Rensburg's observation regarding alleged unattended urine samples can be seriously questioned. Second, because the Athlete had not been tested at that time, any urine sample allegedly left unattended could not have been his. Third, the Sole Arbitrator notes that if someone wanted to spike a sample with "dirty" urine, such urine would hardly have been kept on a tray visible to others.

146. The Sole Arbitrator concludes that he is not able to find, by a balance of probability, that there has been a departure from the mandatory applicable anti-doping rules with regard to the general setting and conduct at the doping control. In any case, even if there had been a departure, it has not been such a serious departure that it would invalidate the sample as such. For the reasons explained elsewhere in this Award, the alleged departures could not have reasonably caused the AAF either. Indeed, the evidence shows that the sample could not have been contaminated, spiked, or swapped.

The Use of Berlinger Kits

147. As the Athlete has noted, it has been established in other contexts that Berlinger kits used in the present case can be opened and closed after the initial sealing without leaving marks visible to the naked eye. However, the mere use of such Berlinger kits does not constitute a departure from the applicable anti-doping rules, let alone a departure that would automatically invalidate the sample.

148. The opening and resealing of the Berlinger bottles requires specific skill and tools, and such manoeuvring will leave marks that can be detected with a microscope. In the present matter, there is no indication that the sealed samples had been opened and resealed. The Athlete has not established that the use of Berlinger kits could reasonably have caused the AAF.

The Athlete's Signatures on the DCF

149. The Athlete has submitted an expert report by Mrs Salamon, Specialist Forensic Handwriting Examiner, in support of his allegation that his signatures on the DCF have been forged. She has analysed the signatures on the DCF by comparing them to the Athlete's confirmed signatures. Mrs Salamon has concluded that the Athlete had not written the two signatures, which had allegedly been written by him on the DCF. She has noted that *"Significant construction and stroke formation inconsistencies indicative of forgery is observed among the [Athlete's alleged signatures on the DCF]. I.e. the formation of [Athlete's alleged signatures on the DCF] are not only inconsistent with those of the [Athlete's standard signatures], but are also inconsistent with one another."*

150. In the hearing, Mrs Salamon confirmed her conclusions. However, she admitted that, for instance, environmental and physical factors may affect a signature. She also accepted that the size of the space where the signature has been written may affect it, and that it would be preferable to have original signatures as a comparison and to have more than four comparison signatures. Moreover, she accepted that there is variation even within the Athlete's standard signatures to which she compared the signatures on the DCF.

151. While the Sole Arbitrator highly appreciates Mrs Salamon's expertise and acknowledges that handwriting examination requires special education and skill, the Sole Arbitrator is not convinced that the signatures claimed to have been written by the Athlete on the DCF would not be his. As indicated in many places of Mrs Salamon's report, even she cannot be certain that the examined signatures were fabricated. Considering that the Athlete's signatures presented to the Sole Arbitrator in different documents are rather different and that the signing in question has occurred in very exceptional circumstances, the Sole Arbitrator is not able to place significant weight on the differences between the signatures identified by Mrs Salamon. The signee, i.e. the Athlete, had shortly before the signing had a boxing fight of seven rounds, where he had hit his opponent with his fists and used a lot of energy. In addition, he had just triumphed the South African championship. Put differently, the Athlete's physical and mental condition at the time of signing the DCF is not comparable to a regular signing of a document.

152. The Sole Arbitrator also notes that the Athlete has not established any motive for the DCO or another person to fabricate his signature or to frame him. The Athlete has only noted, on a very general level, that significant amounts of money are involved in boxing and that someone may be jealous of him, wishing to end a talented boxer's career. The Athlete's father has presented in his witness statement a conclusion that *"the boxer was framed because he represented a threat to the interests of other boxing promoters in South-Africa"*.

153. The Athlete's and his father's views have been purely speculative without any supporting evidence. It follows that they are not sufficient to establish a motive for the DCO, the lead DCO, or any other person who possibly had access to the DCF to forge the Athlete's signature.

154. Finally, it is important to note that even if the Athlete's signatures were forged, it still would not mean that the sample has been manipulated. The Athlete has not established a causal link between the allegedly forged signature and the allegedly false AAF. The Sole Arbitrator acknowledges that a fabricated signature could have significance if the identity of the person whose sample has been analysed remains unreliable. In such a case, it could be possible to connect one person to another person's sample through a fabricated DCF. However, in the present matter, this theory can be ruled out as explained elsewhere in this Award.

Storage of the Sample

155. With regard to the sample storage at the lead DCO's home for the weekend and at his workplace on the following Monday, the Sole Arbitrator observes that Article 9.3.2 of the ISTI reads as follows:

"Samples shall always be transported to the laboratory that will be analyzing the Samples using the Sample Collection Authority's authorised transportation method, as soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations."

156. The ISTI also contains the following comment on Article 9.3.2:

"Anti-Doping Organizations should discuss transportation requirements for particular missions (e.g., where the Sample has been collected in less than hygienic conditions, or where delays may occur in transporting the Samples to the laboratory) with the laboratory that will be analyzing the Samples, to establish what is necessary in the particular circumstances of such mission (e.g., refrigeration or freezing of the Samples)."

157. The Sole Arbitrator notes that Article 9.3.2 of the ISTI does not impose an absolute deadline within which a sample must be delivered to the laboratory. Instead, the ISTI sets out an obligation to transport samples to the laboratories *"as soon as practicable"*. The Sole Arbitrator concurs with the Panel in CAS 2010/A/2110, when it noted that *"the phrase undoubtedly implies that transportation should be made at the first reasonable opportunity"*. In addition, it transpires from the ISTI's comment on Article 9.3.2 that the rules take into account the possibility of the transportation of a sample to the laboratory being delayed.

158. In the present case, the sample collection session was completed on Friday, 23 February 2018 at 22.54 pm, and the lead DCO couriered the sample to SAIDS in the afternoon on Monday 26 February 2018. The sample arrived at SAIDS on 27 February 2018. SAIDS kept the sample at its premises until 7 March 2018, when it shipped the sample with other samples to the Ghent Laboratory.

159. The Sole Arbitrator finds that the sample had been delivered to the SAIDS as soon as practicable after the sample collection session, taking into account the fact that the sample had been collected late on a Friday night. Furthermore, it is a standard practice that DCOs take samples to their homes in case they are not able to immediately take or send them to an ADO or a laboratory. Considering that the samples are in sealed bottles, which cannot be opened and resealed without exceptional skill and particular tools, the samples are not jeopardised even if they are occasionally kept at DCOs' homes. Thus, there has been no departure from the ISTI in the form of a long transportation time or insecure storage.

Disparity in the Urine Volumes

160. The Athlete has fiercely invoked the disparity in the urine volumes reported by the DCO and by the Ghent Laboratory. WADA has submitted that the disparity in the volumes is likely to have been caused by a misreading.

161. Both WADA and the Athlete have appointed their own experts to argue on the possible explanations for the disparity in the volumes. In summary, Dr Van Eenoo has testified

that his laboratory frequently sees disparities in the urine volumes and the reasons for this include, but are not limited to, the fact that the volume is estimated, not measured, both by the DCO and the laboratory. Dr Laurens has opposed Dr Van Eenoo's testimony and found it unconvincing that a difference of 17 mL could be explained by an estimation error.

162. The Sole Arbitrator notes that under Article 7.1 of the ISTI, the sample collection session must be conducted *"in a manner that ensures the integrity, security and identity of the Sample"*. Moreover, pursuant to Article 7.4.5 p) of the ISTI, the urine volume and its specific gravity must be recorded as *"Required laboratory information on the Sample"*.

163. Also, the International Standard for Laboratories ("ISL") contains provisions regarding the integrity and identity of a urine sample. For example, according to Article 5.2.2.3 of the ISL, *"The Laboratory shall observe and document conditions that exist at the time of receipt that may adversely impact the integrity of a Sample"*. According to said provision, the irregularities noted by the laboratory include that the sample tampering is evident, the sample is not sealed with tamper-resistant device or upon receipt, or the sample identification is unacceptable.

164. The Sole Arbitrator notes that the discrepancy in the urine volumes does not amount to a departure from a specific rule or standard. There is no rule stipulating that the urine volume measurement recorded on the DCF must not be under or exceed the volume measured by the laboratory by more than a certain percentage. However, as the Athlete has pointed out, the disparity in the urine volumes may be an indication that two samples have been mixed – accidentally or intentionally – at some stage of the sample collection or analysis or that the sample has been manipulated. As such, nothing prevents an adjudicatory body from giving evidentiary weight to a discrepancy between the reported urine volumes. It goes without saying that if a sample turns out to be another person's sample, the athlete in question cannot be found guilty of an ADRV for the presence of a prohibited substance in their sample.

165. However, the Sole Arbitrator is mindful that the purpose of the urine volume information is not to secure the identity of a particular sample. It is also common knowledge that the sample collection does not always take place in optimal conditions enabling precise urine volume estimation. Therefore, the evidentiary value of volumes with regard to the identity of a sample is secondary in relation to, for instance, the sample code, whose particular purpose is to confirm the identity of a sample.

166. Returning to the present case, the Sole Arbitrator finds that the discrepancy between the reported urine volumes is not alone sufficient to establish by a balance of probability that the Athlete's sample has been swapped or manipulated, especially when more relevant facts addressed elsewhere in this Award support a finding that no switching or tampering has occurred. There are no established facts supporting a scenario of a deliberate or an inadvertent sample swapping or manipulation.

167. In light of the above, a remaining explanation for the as such disturbing discrepancy amounting to no less than 17 mL is a human error either in measuring or recording the urine volume at the sample collection session or at the laboratory. A combination of the

different inaccuracies and mistakes is possible as well. The Sole Arbitrator agrees with the Panel in CAS 2009/A/1752 & 1753 with regard to the following statement:

"Doping is an offence which requires the application of strict rules. If an athlete is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory working with it, has strictly observed the mandatory safeguards.

Strict application of the rules is the quid pro quo for the imposition of a regime of strict liability for doping offenses."

168. Having said that, the Sole Arbitrator also observes that according to the well-established CAS case law, purely technical errors do not invalidate the analytical results of a sample. In CAS 2014/A/3639, the Sole Arbitrator noted as follows:

"Such provisions of the IST and the NADA ADR cannot be strictly read in such a fashion where insignificant deviations therefrom (or typographical errors) are interpreted as having a significant or material impact on a testing result simply because a clerical mistake was made."

169. Furthermore, in CAS 2012/A/2779, the Sole Arbitrator noted that *"CAS jurisprudence is clear that errors and handwriting mistakes in identifying the code numbers of samples '(...) do not cast doubt on the reliability of adverse analytical findings which are clear from the other portions of the same Laboratory Documentation Package (...)'; and '(...) are merely typographical [and there existed no] other errors which contributed to the overall reliability of the results'"*.

170. The Sole Arbitrator concludes that the difference in the recorded urine volumes is not sufficient to establish that the Athlete's sample has been intentionally or unintentionally mixed or manipulated.

Disparity in the Stanozolol Concentrations

171. The Athlete has put forth that the disparity in the stanozolol concentrations between the A and B samples is indicative of tampering. WADA has objected such contention and stated that the concentrations are in fact very similar.

172. Dr Van Eenoo has testified that the concentration value is only an estimation based on signals in a qualitative method not intended to quantify, as stanozolol is a non-threshold compound. Therefore, the laboratory has only made a rough estimation of the stanozolol concentration. He has continued that actually, the rough estimations of 55 ng/mL and 78 ng/mL are very close considering the applied detection method. Finally, Dr Van Eenoo has noted that said concentrations are among the highest he has seen in a sample.

173. The expert appointed by the Athlete, Dr Laurens, has submitted a report in which he has criticised Dr Van Eenoo's explanation by noting that *"A claim that the two values 'are quite close' (55 ng/mL and 78 ng/mL) as was documented in this case, can (...) only be*

scientifically sound if it is supported by a well characterized measurement uncertainty / confidence interval. (...) if such a statement was made without experimental evidence it can be regarded as 'guesswork' which stands in stark contrast with sound scientific practice".

174. The Sole Arbitrator finds that the difference of 23 ng/mL between the A and B samples cannot be considered sufficient proof or even an indication that either sample has been manipulated. First, it is undisputed that the method to detect stanozolol is not quantitative but qualitative. Thus, the estimates given by the laboratory need not be and are not exact, which in and of itself frustrates any detailed conclusions based on the concentrations. Second, and for the sake of comparison, as testified by Dr Van Eenoo, according to the WADA Technical Document TD2017MRPL on the minimum required performance levels ("MRPL") for detection and identification of non-threshold substances, the MRPL for stanozolol is 2 ng/mL and the limit of detection is even lower than that. In light of this, the concentrations detected from the samples were in the same range.

175. On a separate note, the Sole Arbitrator observes in this context that according to Dr Van Eenoo, the metabolite of stanozolol detected in the sample cannot be produced *in vitro* but only in a human body. Dr Laurens confirmed this view in his testimony. The Sole Arbitrator also notes that the Athlete has not disputed the analytical results of the Ghent Laboratory but expressly confirmed their correctness. Taken together, these facts exclude any contamination of the sample by stanozolol and manipulation of the sample by adding stanozolol directly to it.

DNA Cross-check Analysis

176. Following the Athlete's contention that the sample is not his urine, WADA obtained a DNA cross-check in order to verify whether the sample number 4012846 analysed by the Ghent Laboratory contains the Athlete's (and nobody else's) urine. The DNA analysis confirmed that the urine samples A 4012846, collected on 23 February 2018, and A 4342143, undisputedly collected from the Athlete on 8 November 2018, matched each other at the 12 loci available for the comparison. The conclusion of the report signed by Dr Castella is that *"The results are consistent with the two samples coming from the same male individual."*

177. The Athlete has submitted an expert report of Professor Pillay dated 3 September 2019. Professor Pillay concludes as follows: *"The limited information provided in the report supports commonality or similarity between the samples but does not exclude the presence of additional DNA being present at lower levels in the first sample (...)"*

178. As a response to Professor Pillay's report, Dr Castella and M.Sc. Jan issued another expert statement, stating, *inter alia*, as follows: *"The two DNA profiles display the same allelic content on all 12 loci that are shared (...), which allows robust conclusions. Indeed, scientists consider that the weight of DNA evidence reaches its maximal when there is a correspondence on 10 loci or more. The weight of evidence does not increase with more loci provided that no inconsistencies are observed as it is the case here (...). From 10 loci in common, the value of the DNA results is a billion (i.e., the DNA results are a billion times more probable if the two urine samples come from the same person rather than if they come from two unrelated persons)."*

179. Professor Pillay has replied to Dr Castella and M.Sc. Jan's report and noted that *"(...) the question remains whether an extremely imbalanced admixture can be completely ruled out based on the conditions and results of the current genotyping."*

180. Generally, the examination of the experts in the hearing confirmed their positions. Dr Castella has stated that the DNA cross-check analysis has the maximum value and that the probability that the sample contains urine of more than one person is one in a billion. Professor Pillay has also reiterated that a mixture of DNA cannot be completely ruled out in this case. The Sole Arbitrator concludes that a mixture of third party urine in the Athlete's sample is extremely unlikely, and if it had occurred, the quantity of a third party urine has in any case been very low (less than 5%).

181. The Sole Arbitrator also notes that according to Dr Van Eenoo, assuming that the Athlete's urine did not contain stanozolol and that 10% of the urine of the sample was third party urine, the stanozolol concentration of the third party urine should have been extremely high. Dr Van Eenoo testified that he has never seen concentrations that high. Dr Van Eenoo also confirmed that the seals of the samples were intact and that the Athlete's representative confirmed this in the B sample analysis. Put differently, also this evidence indicates that the sample contained the urine that the Athlete had himself sealed upon providing it.

182. On a separate note, Dr Van Eenoo's credible testimony, which the Athlete has not been able to undermine, shows that the Athlete's argument that stanozolol may have ended up in his sample from second-hand boxing gloves that he allegedly used, is without merit. Even if the Athlete had been exposed to a third party's sweat through second-hand boxing gloves, the Athlete had not removed his wraps or washed his hands before having provided the sample, and the third-party sweat had therefore ended up in the collection vessel and had been mixed with the Athlete's urine, the quantity of sweat would not have been enough to contaminate the sample with 55 ng/mL or 78 ng/mL of stanozolol. For the sake of completeness, the Sole Arbitrator notes that there is no evidence of the gloves used by the Athlete on 23 February 2018 having been second-hand or contaminated or spiked with stanozolol.

183. In summary, the Sole Arbitrator is comfortably satisfied that the sample 4012846 contains only the Athlete's urine. It follows that stanozolol has metabolised in his body. The prerequisites of an ADRV set out in Article 2.1 of the SAIDS ADR are fulfilled.

184. As a final remark, the Sole Arbitrator notes that the above finding, combined with the facts that the laboratory results are not challenged and that the metabolite detected from the Athlete's sample cannot be produced *in vitro*, make any allegations regarding departures from the applicable anti-doping rules that may reasonably have caused the AAF moot. In the absence of any fundamental breaches of applicable rules, the Athlete must be found guilty of an ADRV.

Conclusions

185. Based upon the careful evaluation of the evidence, the Sole Arbitrator is comfortably satisfied that the Athlete has committed an ADRV in the form of presence of a prohibited substance in his sample collected on 23 February 2018. The Athlete has failed to establish, on a balance of probabilities, that the departures from the applicable rules

had occurred, let alone that a departure had been a fundamental breach invalidating the entire sample or that it could have reasonably caused an AAF.

B. If an ADRV Has Been Committed, What Is the Sanction?

a. Duration of the Ineligibility Period

186. Article 10.2 of the SAIDS ADR reads, in the relevant parts, as follows:

"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

(...)

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two (2) years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete (...) 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. (...)"

187. The Sole Arbitrator notes that the Athlete's A sample revealed the presence of 3'OH-stanozolol glucuronide, a metabolite of stanozolol. The B sample confirmed the A sample results. Because the Athlete's ADRV therefore involves a non-specified substance, Article 10.2.1.1 of the SAIDS ADR applies.

188. As stipulated in Article 10.2.1 of the SAIDS ADR, the basic duration of the ineligibility period is four years when the ADRV is based on a non-specified substance, such as stanozolol. However, if an athlete is able to prove on a balance of probabilities that the ADRV had not been intentional, the period of ineligibility will be two years, subject to a potential reduction or suspension.

189. Pursuant to the established CAS case law, apart from extremely rare cases (see e.g. CAS 2016/A/4534, CAS 2016/A/4676, and CAS 2016/A/4919), an athlete must establish how the prohibited substance had entered their system in order to discharge the burden of establishing the lack of intention (e.g. CAS 2016/A/4377, paragraph 51). To establish the origin of the prohibited substance, it is not sufficient for an athlete to merely protest their innocence. The standard of proof is the balance of probabilities, i.e. an athlete has

to show that the occurrence of the circumstances on which they rely is more probable than their non-occurrence.

190. Based on the above, the Sole Arbitrator must first consider whether the Athlete has established, on a balance of probabilities, the origin of the prohibited substances found in his body.

191. The Athlete's defence is built on the view that his samples had been switched or tampered with. The Sole Arbitrator has rejected this position and also noted that a contamination through alleged second-hand boxing gloves must be excluded. It follows that the Athlete has not established the origin of the substance found in his samples.

192. As noted above, pursuant to the CAS case law, an ADRV may be deemed unintentional even if an athlete has failed to prove the source of a prohibited substance. However, such a finding is only possible in extremely rare cases. According to the CAS case law, an athlete should in such a case establish a lack of intention with other robust evidence, such as the possibility that the prohibited substance came from a specific product, the athlete's credible testimony, or the implausibility of the scenario that the athlete had intentionally used prohibited substances. None of these elements is present in the current proceedings. Thus, it follows that the present matter is not one of the extremely rare cases in which a finding of no intent can be made without proof of the origin of the prohibited substances.

193. In conclusion, the Athlete has not met his burden of proof with regard to the unintentional ADRV. It follows that the ADRV must be deemed intentional and the Athlete will be sanctioned with a four-year period of ineligibility under the SAIDS ADR, subject to a potential reduction. However, the Athlete has not invoked any grounds for the reduction.

Commencement of the Ineligibility Period and Credit for Period of Ineligibility Served

194. With respect to the commencement date of the sanction, WADA has requested that the ineligibility period commence on the date on which the CAS award enters into force.

195. The Sole Arbitrator is guided by Article 10.10 of the SAIDS ADR titled *"Commencement of Ineligibility Period"*, which stipulates as follows:

"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed."

196. According to SAIDS ADR, delays not attributable to the athlete, timely admission by the athlete, and provisional suspension are the only justifications for starting the period of ineligibility earlier than the date of the final hearing decision.

197. The Sole Arbitrator notes that the Athlete has not put forth that the ineligibility period should be backdated. It follows that the period of ineligibility will start on the date of this Award.

198. However, the provisional suspension served by the Athlete will be credited to him. This is stipulated in Article 10.10.3.1 of the SAIDS ADR as follows:

"If a Provisional Suspension is imposed and respected by the Athlete (...), then the Athlete (...) shall receive a credit for such period of Provisional Suspension against any period of Ineligibility, which may ultimately be imposed."

199. The Sole Arbitrator notes that, according to the Appealed Decision and the SAIDS letters dated 16 April 2018 and 27 September 2018, the Athlete has been provisionally suspended from 16 April 2018 until 27 September 2018, when SAIDS notified the IDHP that it had decided to withdraw the charge. The provisional suspension imposed by SAIDS amounts to a total of approximately five months and 11 days. Consequently, the Sole Arbitrator determines that the Athlete's four-year period of ineligibility should be reduced accordingly.

Disqualification of Results

200. WADA has requested that all competitive results obtained by the Athlete between 23 February 2018, i.e. the date of the positive sample, and 16 April 2018, i.e. the date of commencement of his provisional suspension, and between 10 April 2019 and the date of the CAS award be disqualified. WADA has not elaborated its request concerning the first disqualification period. With regard to the second period, WADA has put forth the arguments that have been presented earlier in this Award. The Respondents have not submitted any claims or arguments with respect to the material aspects of the disqualification of results during the CAS proceedings.

201. Article 10.8 of the SAIDS ADR reads as follows:

"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes."

202. The Sole Arbitrator observes that the Athlete has been eligible to compete in two different periods after the date of the positive sample: first from 23 February 2018 until the imposition of the provisional suspension on 16 April 2018 and second from 27 September 2018, the date of SAIDS' letter notifying its intention to withdraw the charges, onwards. There are two pertinent issues to be resolved by the Sole Arbitrator: First, does the wording of Article 10.8 of the SAIDS ADR as such preclude the Sole Arbitrator from disqualifying the Athlete's results for the period starting on 10 April 2019, considering that he has served a period of provisional suspension, and the language of Article 10.8 refers to the provisional suspension and the ineligibility period as alternatives? Second, if the answer to the first question is in the negative, does fairness require that the Athlete's results from 10 April 2019 onwards remain untouched?

203. In general, CAS Panels have confirmed that the equivalents to Article 10.8 of the SAIDS ADR allow the disqualification of results from the period between the expiry of the ineligibility period and the imposition of an additional ban (e.g. CAS 2008/A/1470). Results may remain valid if fairness so requires in the circumstances of each case (e.g. TAS 2009/A/2014). The factors to be assessed in the fairness test include, but are not restricted to, the athlete's intent and degree of fault, as well as the length of the disqualification period.

204. As noted above, the Athlete has failed to establish on a balance of probabilities that the ADRV had not been intentional. As a starting point, no reason of fairness is engaged with respect to an athlete found responsible for an intentional ADRV. Additionally, considering that the Athlete has contributed to the delay of the CAS proceedings by seeking a number of extensions and by filing a significant number of documents shortly before the oral hearing thereby causing the postponement of the hearing, and that he has been able to compete, even if he should have been banned, the Sole Arbitrator does not find fairness to require a deviation from the main rule of Article 10.8 of the SAIDS ADR. Finally, the aggregate duration of the two separate disqualification periods is not unreasonably harsh even combined with a four-year ineligibility period.

205. Based on the above, the Sole Arbitrator considers it justified to disqualify all of the Athlete's results obtained between 23 February 2018 and 16 April 2018 and from 10 April 2019 until the entry into force of this Award (inclusive of the dates specified).

X. COSTS

206. Article R64.4 of the CAS Code provides as follows:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:
- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters.
The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

207. Article R64.5 of the CAS Code provides as follows:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection

with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

208. The Sole Arbitrator notes that WADA's appeal has been accepted in full. As a result, by any standard, WADA is the prevailing party.

209. The Sole Arbitrator observes that the content of the Appealed Decision had been affected by the fact that SAIDS decided to withdraw the charges against the Athlete after he had profusely defended himself in the IDHP proceedings. In other words, actions of both SAIDS and the Athlete had led to the Appealed Decision by the IDHP, which WADA had had to appeal. The Appealed Decision had been rendered by a tribunal established under the SAIDS ADR, for which SAIDS has the responsibility (see CAS 2017/A/5369 para. 172).

210. Having said that, the Sole Arbitrator notes that SAIDS had not filed an Answer, it had not requested a hearing, and it did not appoint any witnesses or experts to be heard by the Sole Arbitrator. In general, although SAIDS lost the argument regarding its standing to be sued, SAIDS has not caused significant extra costs through its conduct during the CAS proceedings.

211. The same does not apply to the Athlete, who has filed an exceptionally large number of letters with the CAS, presented a number of procedural requests and arguments, most of which have failed, and appointed various witnesses and experts. While parties to the CAS proceedings have the right to take measures as they see fit, with certain limitations, they also must bear the consequences for possibly causing extra work for the CAS, the Panel, and other Parties. With respect to the financial resources of the Parties, as an individual sportsman, the Athlete does not have the same means as the two anti-doping institutions.

212. In light of the relevant elements, the Sole Arbitrator finds it reasonable that SAIDS and the Athlete shall each bear 50% of the costs of this arbitration, as determined by the CAS Court Office at the end of the proceedings. In addition, taking into account all the relevant circumstances, the Sole Arbitrator holds that SAIDS and the Athlete shall pay the amount of CHF 5,000 (five thousand Swiss Francs) each to WADA as a contribution towards the costs, legal fees, and other expenses that WADA has incurred with respect to these arbitration proceedings. Finally, SAIDS and the Athlete shall bear their own legal fees and expenses.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 November 2018 by the World Anti-Doping Agency against the South African Institute for Drug-Free Sport and Mr Ruann Visser is upheld.

2. The decision rendered on 5 October 2018 by the Independent Doping Hearing Panel established under Article 8 of the SAIDS ADR is set aside.

3. Mr Ruann Visser is found to have committed an anti-doping rule violation and sanctioned with a four-year (4) period of ineligibility, starting from the date of this Award, with credit given for the provisional suspension already served by the Athlete (i.e. from 16 April 2018 to 27 September 2018).

4. All competitive results of Mr Ruann Visser between 23 February 2018 and 16 April 2018 and from 10 April 2019 until the entry into force of this Award (inclusive of the dates specified) are disqualified, with all resulting consequences (including forfeiture of medals, points, and prizes).

5. The costs of the arbitration to be determined and served to the Parties by the CAS Court Office shall be borne by SAIDS and Mr Ruann Visser in equal shares.

6. SAIDS and Mr Ruann Visser are ordered to pay CHF 5,000.00 (five thousand Swiss Francs) each to the World Anti-Doping Agency as a contribution towards its legal fees and expenses. SAIDS and Mr Ruann Visser shall bear their own legal fees and expenses.

7. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 19 February 2020

THE COURT OF ARBITRATION FOR SPORT

Markus Manninen
Sole Arbitrator