

THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORTS
DOPING DISCIPLINARY HEARING

Case Number: 2020/04

In the matter between:

THE SOUTH AFRICAN INSTITUTE
FOR DRUG-FREE SPORTS

COMPLAINANT

AND

LYNETTE BURGER

RESPONDENT

DISCIPLINARY PANEL:

Dr Christa Janse van Rensburg
Mr Leon Fleiser
Adv Craig Cothill (Chairperson)

PROSECUTOR:

Mrs Wafeekah Begg-Jassiem

AWARD

- 1 In September 2018 Lynette Burger (the **Athlete**), a well-known professional South African cyclist, was involved in a cycling accident. Approximately 7 months after her accident, on 26 May 2019, and as a professional cyclist, she won the Tshwane Diamond Classic cycling race, and in October of the same year she competed in three other cycling races where she came first, second and fourth.
- 2 On 1 November 2019 the Athlete was asked to provide the South African Institute for Drug-Free Sports (**SAIDS**) with a urine sample for testing. Her

A-sample tested positive for the presence of 19-norandrosterone and 19-noreticholanolone, class S1 unspecified substances prohibited in and out of competition (the **prohibited substances**).

- 3 On 26 November 2019 SAIDS formerly charged the Athlete, provisionally suspended her, informed her of the right to have her B sample tested, and of the right to dispute the Anti-Doping Rule Violation (the **ADRV**).
- 4 The reply from the Athlete on 4 December 2019 was in an email in which she denied the use of the prohibited substances, but also alluded to the possibility that the prohibited substances were administered to her whilst in hospital after her accident in September 2018, over a year before the ADRV.

PROCEDURAL ISSUES

- 5 These facts culminated in SAIDS convening this panel on 17 March 2021 in accordance with its Rules (the **Rules**), which hearing the parties agreed to conduct *via* the Microsoft Teams video conferencing platform where the Athlete participated and was assisted by her attorney.
- 6 The jurisdiction of SAIDS to convene the hearing is not in dispute.
- 7 Prior to the enquiry, the panel requested both parties to make available opening statements which proved useful because many of the issues fell by the wayside.
- 8 Whilst the initial hearing bundle contained many documents and potential disputes, the issues crystallised to a very narrow enquiry. Ultimately the Athlete admitted the presence of the prohibited substances, but sought to

persuade this panel that the usual period of ineligibility of four years ought to be reduced.

- 9 The Athlete asserted that the use of the prohibited substances on the basis that it improved her mental well-being, but, SAIDS put up an expert report from a doctor which convincingly explained why the Athlete's contention is simply incorrect. At the hearing the Athlete and her legal representative accepted the correctness of the expert report made available by SAIDS.

ISSUES OF INTENT¹

- 10 Whilst the Athlete has conceded the presence of the prohibited substances in her system, it remains necessary to deal with some of the aspects of her evidence, which were proffered to provide us with reasons to reduce the period of ineligibility.
- 11 The evidence from the Athlete suggested that, at times the prohibited substances were, without her knowledge, administered whilst she was receiving medical care as a result of the accident she had experienced in September 2018. This unconvincing explanation does not, in our view, overcome the presumption of indirect intent associated with knowledge of a

¹ It is for the Athlete to establish the absence of her intent to administer the banned substances. This presumption is onerous to overcome because, for example, Article 2 of the Rules places the responsibility on the Athlete to know what constitutes an anti-doping rule violation and what substances are classified as prohibited

significant risk that the Athlete's conduct might result in an anti-doping rule violation and manifestly disregarding that risk.²

12 It is well known that the presumption of intent facing this Athlete is a heavy burden³ and taking into account the paucity of her evidence surrounding this topic, we reject the Athlete's explanation that the prohibited substances were administered to her without her knowledge during the course of the medical treatment she received as a result of the accident. As a general rule doctors do not administer any drug into a patient without their consent, and we cannot find any reason to accept the Athlete's version. The Athlete's explanation also does not explain the presence of the prohibited substances more than a year after the accident.

13 If we are wrong on the above-mentioned finding, the evidence from the Athlete in any event makes out a case of direct intent because she stated that at least on one occasion she had knowledge of and consented to the administration of the prohibited substances into her system. Significantly, the Athlete was not forthcoming on exactly when this incident took place. We thus find that the Athlete intentionally permitted the administration of the prohibited substances into her system.

² As per Article 10.2.3 of the Rules

³ This is the foundation on which the strict liability principle is based and expects of the Athlete to "*comfortably satisfy*" this panel that the rule violation was not intentional

- 14 Accepting the Athlete's evidence to be correct, that the prohibited substances improved her mental well-being (but which has been refuted by expert evidence), the substances nonetheless remain prohibited.
- 15 Additionally, the probabilities overwhelmingly point in a direction of the Athlete not being candid on this score. Had she genuinely subjectively believed that the prohibited substances were used as a means to improve her mental well-being it ought to have been disclosed in a Therapeutic Use Exemption. This must surely be so because the Athlete is a well-known experienced professional cyclist. However, the relevant authorities would have considered such a request (for the permitted use of an unspecified substance) with great scepticism taking into account that the prohibited substances are a popular banned substance amongst cyclists.

RULE VIOLATION

- 16 The Athlete is guilty of violating Article 2.1 of the Rules (presence of an unspecified prohibited substance), and has failed to overcome the presumption of at best indirect intent and at worst direct intent under Article 10.2.1 read with Article 10.2.3 of the Rules.
- 17 Accordingly, the Rules oblige this panel to impose a four-year period of ineligibility.

ISSUES OF FAULT

- 18 In considering the Athlete's plea for a reduction of the period of ineligibility, we are afforded a measure of discretion under Article 10.5.2 of the Rules because if the Athlete establishes an absence of fault or significant fault or

negligence, the applicable period of ineligibility may be reduced based on the Athlete's degree of fault, but the reduced period of ineligibility may not be less than one half of the period of ineligibility otherwise applicable.

19 As with Article 10.2.1.1, it is for the Athlete to comfortably satisfy this panel that she bears no fault or no significant fault or negligence, but the application of this rule applies in only exceptional circumstances.

20 It is also obvious that in applying the leniency afforded by Article 10.5.2 the presence of fault is not an issue, it is simply the Athlete's degree of fault to be determined by taking into account certain factors (discussed below) in deciding if there should be a reduction in the period of ineligibility. As with intent, the onus to establish the absence of any degree of fault lies with the Athlete. Again, this is a cornerstone of strict liability that we are obliged to apply.

21 The Athlete admitted to knowingly taking the prohibited substances. This, in our view is the beginning and the end of our enquiry into the Athlete's degree of fault. Subjectively, she may have thought that the prohibited substances improved her mental wellness, but objectively this Athlete is a professional athlete with significant anti-doping experience and must have known that the prohibited substances are a class S1, unspecified substance banned in and out of competition. When confronted with the proposition that her deteriorated mental wellness apparently caused by her accident in September 2018 did not seem to impact her race results in May and October of 2019, she had no answer.

- 22 Thus, we find the Athlete's fault to be considerable,⁴ particularly because the prohibited substances are performance enhancing, requiring the Athlete to *"be particularly diligent and, thus, the full scale of [the] duty of care"*⁵ must apply to her. We do not believe that the Athlete acted with any due care towards her responsibilities as a professional athlete.
- 23 It was contended for on behalf of the Athlete that as she elected not to have her B sample tested, she had promptly admitted to the ADVR and is thus eligible for a reduction under Rule 10.6.3. We do not agree. A decision to not have the B sample tested cannot of itself result in a prompt admission. In any event after having been notified of the ADVR on 26 November 2019, the Athlete's first response in an email on 4 December 2019 is by no means prompt, nor can the contents of that email be considered as an admission.
- 24 Additionally, a reduction under Rule 10.6.3 - even when an admission is prompt - remains subject to our discretion based on the seriousness of the violation and the Athlete's degree of fault. As already stated, we view the ADVR as serious and the Athlete's degree of fault as considerable.
- 25 Accordingly we do not find any reason to reduce the 4 year period of ineligibility.

SANCTION

⁴ CAS 2014/A/3335 Marin Cilic v ITF from para 69 onwards

⁵ Cilic at para 75 a

- 26 The Athlete is guilty of a violation of Article 2.1 of the Rules.
- 27 The Athlete's period of ineligibility is 4 years commencing from her date of suspension of 26 November 2019 and ending at midnight on 25 November 2023 during which period the Athlete is prohibited from participation in any sport in accordance with the Rules and in particular Article 10.12.1.
- 28 The Athlete has a right of appeal subject to the provisions of Article 13 of the Rules.

Dated: 24 March 2021

C Cothill

Adv C Cothill (Chairperson)

Dr Christa Janse van Rensburg

Mr Leon Fleiser