

SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE: MS CHARMAINE BARNARD

SPORTS FEDERATION: ATHLETICS SOUTH AFRICA (“ASA”)

DATE: 18 SEPTEMBER 2012; 21 NOVEMBER 2012

PLACE OF HEARING: GARDEN COURT ROSEBANK; GARDEN COURT SANDTON

DISCIPLINARY PANEL (“PANEL”): MR ANDREW BREETZKE (CHAIRMAN)
DR SELLO MOTAUNG (MEDICAL REPRESENTATIVE)
MS BEVERLEY PETERS (SPORTS ADMINISTRATOR)

PROSECUTOR: ADV NIC KOCK

ATHLETE REPRESENTATIVE: MS AMANDA MARE

ANTI-DOPING RULE VIOLATION: ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.5 OF THE SAIDS ANTI-DOPING RULES.

APPLICABLE LAW

SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended). SAIDS has formally accepted the World Anti-Doping Code (“WADC”) adopted and implemented by the World Anti-Doping Agency in 2003. In so doing, SAIDS introduced anti-doping rules and regulations to govern all sports under the jurisdiction of South African Sports Confederation and Olympic Committee, as well as any national sports federation.

The SAIDS Anti-Doping Rules (“the Rules”) were adopted and implemented in 2009. These proceedings are therefore governed by the Rules. This SAIDS Anti-Doping Disciplinary Panel has been appointed in accordance with Article 8 of the Rules, to adjudicate whether the Athlete has violated the said Rules, and if so the consequences of such a violation.

PROCEDURAL MATTERS

The Athlete was in attendance, and was represented by Ms Amanda Mare.

The matter was initially convened on the 18 September 2012 (Rosebank), and later reconvened on the 21 November 2012 (Sandton).

The rights of the Athlete were explained to her, and she acknowledged that she understood her rights, understood the process and was ready to proceed. The process to be followed was explained in detail to the Athlete.

SUMMARY OF EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents as documentary and corroborative evidence to the oral evidence presented.

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 20 August 2012. The charge against the Athlete read as follows:

You have been charged with an anti-doping violation in terms of Article 2.5 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS).

On 19 May 2012, you tampered or attempted to tamper with the doping control process after you were notified of your selection for an in-competition doping control test by a South Africa Institute for Drug-Free Sport Doping Control Officer after your event at the South African Masters Athletics Championship.

The Athlete pleaded Not Guilty to the charge, and presented a hand written statement to the Panel.

The Athlete gave evidence that she was participating at the South African Masters Athletics Championships on the 19 May 2012. The Athlete had a foot injury and was considering whether or not to participate in the 100m event. Given her injury she withdrew from the event, and sat near the start massaging her injured foot. At this point her name was called by the SAIDS officials. Her name was called twice. She eventually went to the testing station after pointing out that her name had been spelt incorrectly on the form. She was with another competitor, Adri Schoeman (“AS”). She was not able to urinate at first and returned to the waiting area. AS then proceeded first, and the Athlete followed. The Doping Control Officer (“DCO”), Thandi Moeketsi, (“TM”) informed the Athlete that she could not pass the sample if no one was present. The Athlete gave evidence that she was then sitting on the toilet rubbing ointment on her sore foot. She was fully clothed.

The evidence of the Athlete was that whilst sitting on the toilet rubbing the ointment on her foot, the second DCO Mbale Hadebe (“MH”) entered the testing area. The Athlete testified that MH was arrogant and rude. On advising MH that she was putting ointment on her sore foot, MH insisted on seeing the original ointment. They then left the cubicle, and MH insisted that she contact someone to bring the original medication – the Athlete gave evidence that she did not have her phone with her. The Athlete took the ointment and then mixed it with what she had in a coke bottle – and then she gave it to MH. MH was however not satisfied and continued to be rude. The Athlete was in pain and angry.

The Athlete was thirsty, and she felt as if she was dehydrated. She was eventually given water, and was then asked whether she needed medical assistance for her foot. The

paramedics arrived and the Athlete informed them that she would rather consult her own doctor. Thereafter the Athlete went into the testing cubicle – she could not pass urine immediately and had to wait for a while.

The Athlete stated that she was shown no sympathy, and that MH had acted in an arrogant manner. She had been an athlete for 38 years, and had served her country – she had no problem with being tested.

Under cross examination the Athlete stated that TM told her she could enter the toilet by herself; the toilet was closed and she sat and took her shoe off. The Athlete confirmed further that she had been tested previously, and that the process was similar to what she experienced on this occasion. It was not explained to her to wait in the reception area, to be accompanied to the cubicle. She confirmed that MH walked into her cubicle when she was rubbing her ankle with ointment. MH wanted the ointment, and the Athlete confirmed that MH had asked for the original – the Athlete advised her it was Voltaren.

The Athlete testified that at this stage the urine cup was open and standing just outside the door. It was not in her hand

On exiting the cubicle she was offered medical assistance, but she advised that she preferred to use her own doctor. She confirmed she was given a new cup and proceeded to the cubicle to urinate. The Athlete gave evidence that MH had the sample cup in her hands – the Athlete also gave evidence that MH divided the urine (A and B sample). MH took the coke bottle with the mixed ointment.

In conclusion of cross examination the Athlete again stated that she had been running for 38 years, and was a coach to close friends. She had tested positive in 1992, she had been tested three times.

MH was called as a witness for SAIDS. She gave evidence that she was part of a contingent of DCOs – 2 female, one trainee and one male chaperone. She has been a DCO for 5 years and had received training on an annual basis throughout the country. She had undertaken

over 1000 tests in South Africa and approximately 75 in Singapore (Youth Olympics). She had never had a complaint levelled against her work.

The Athlete in questions was a target test for that day, and they were not able to locate her at the finish of the 100m event. An announcement was made, and she was located and went to the testing area. MH thereafter left the testing area and later returned to hear her colleague, TM, screaming for assistance. She knew something was wrong as she had left two Athletes (AS and the Athlete) in the area yet there was no one in the waiting room. She stated that it was not possible that TM had both athletes with her. On arriving at the cubicles she saw TM standing with AS, and the door to the other cubicle was open. Charmaine was alone in the cubicle and MH went in and asked her what she was doing. MH gave evidence that the Athlete was sitting on the toilet with her shorts and tights down at her ankles, one hand holding the urine sample cup and the other holding a small brownish bottle – the toilet was open. On being confronted the Athlete put the urine cup down and said she was rubbing her foot with the ointment. MH asked her for the medication, and she replied that it was prescribed – the prescription was in her bag. The Athlete refused to hand over the bottle despite 4 requests to do so. On leaving the cubicle she went to her bag and removed a 500ml coke bottle and mixed the contents of the ointment bottle with what was contained in the coke bottle. MH told her not to do this, upon which the Athlete became aggressive.

The Athlete again refused a request to hand over the two bottles. MH asked for the prescription, the Athlete responded that the coke bottle substance was the prescription.

MH confirmed that she had offered the Athlete medical assistance, as she constantly complained of the pain she was suffering.

On returning to the doping control room MH went to the cubicle with the Athlete and advised her to squat so as to ensure that MH was able to see her pass urine. The Athlete refused and said she cannot squat as her foot was sore and she could not balance. MH asked the Athlete 5 times to open her legs so that she could observe the urine leaving her body and entering the vessel. MH was concerned that the Athlete was moving the vessel towards the rear of the toilet where water was dripping, and warned her against doing this. The sample was collected.

Evidence of MH was that normal procedure was followed as far as the sample collection process was concerned: she instructed the Athlete to select a sample box, to check the seal, separate samples. This was done by the Athlete as per accepted procedure. She denied that she handled the collected sample.

On conclusion of the collection process, there was a small amount of urine remaining in the vessel. The Athlete asked for this sample, MH insisted that it be destroyed.

MH again asked the Athlete what the substance was in the coke bottle, and she replied that it was something that she mixed herself. MH was able to take possession of the coke bottle when the Athlete was handed the doping control forms. She then took the bottle, sealed it, and on instruction from SAIDS sent it to the laboratory.

Under cross examination MH stated that she did advise the Athlete that what she was doing was wrong, and that it would be recorded in a report.

The second witness of the prosecution was TM, the lead DCO. She gave evidence that she had welcomed the Athlete and advised her that she had been selected for a test. The Athlete then stated that she was ready to pass urine and they proceeded to the toilet cubicle. The Athlete then stated that she could not pass urine and they returned to the waiting area. TM then proceeded to accompany another athlete (AS), the Athlete then said she was ready as well – TM told her she could not come to the cubicle as she could not enter alone. The Athlete continued to follow – TM made it clear to her that this was not acceptable. MH then entered and TM immediately asked her for assistance – MH took over at this point.

TM gave evidence that she clearly instructed the Athlete not to enter the cubicle by herself and must remain in the waiting area, but she failed to comply.

TM also confirmed that she did not inform the Athlete of her rights as per standard procedure, as the Athlete was experienced and knew the process.

Under cross examination it was put to TM that she could have waited for another DCO to arrive. She responded that this was not possible, as the other DCO was male, and it was possible for the Athlete to remain in the waiting area. TM admitted that she was panicking given that the Athlete was alone in the cubicle. She had overheard the conversations between HM and the Athlete, but was not a party to these conversations.

It was confirmed that the Athletes' sample did not indicate the presence of any prohibited substances. It was not possible to test the coke bottle substance given the mixed nature thereof.

No other evidence was presented.

In closing the prosecution argued that the charge under Article 2.5 was focused on tampering with any part of the doping control process, and that the Article prohibits any act that subverts the doping control process. There were numerous violations of protocol that the Athlete was required to observe – she was instructed not to enter the cubicle, but proceeded to disobey this instruction; she had a brown bottle in her hand in breach of protocol; she refused to hand over the bottle; she could not produce the prescription that she said she had; she failed to listen to the DCO after being instructed 4 times to comply. These actions constituted a breach of the said Article.

The Athlete in closing stated that she did co-operate with the process, and did not try and avoid any part of the process. When she was called for the test, she complied and was at all times aware that she may be tested. The sample was eventually taken without any problem. It was placed on record that the Athlete was not present when the coke bottle sample was sealed and she was not informed that it would be tested. It was submitted that the administration of the test was not properly undertaken. The lead DCO had failed to inform the Athlete of her rights, and given her experience this was unacceptable.

It was submitted that this was a clash of personalities, and there was no intent on the part of the Athlete to obstruct the testing process. It would be unfair to suspend the Athlete in

such circumstances – especially as it was the DCO’s who should have managed the process in a more professional manner.

The prosecution asked for a sanction of 8 years to life given that his was the second offence of the Athlete. It was submitted that there were no grounds for a reduction in sanction as envisaged in 10.5.

DISCUSSION ON THE CHARGE and EVIDENCE

Article 2.5 states that it is a doping violation if the athlete tampers or attempts to tamper with any part of the doping control process. The commentary on the Article refers to conduct that “subverts” the doping control process. It is important to understand the key elements of the charge before one can review the evidence relative to the charge:

The first key element is the concept of “tampering”. To “tamper” is defined as:

- interfere with (something) in order to cause damage or make unauthorized alterations (Oxforddictionaries.com)
- to interfere so as to weaken or change for the worse (Marriam-webster.com)
- to touch or make changes to something which you should not, usually without enough knowledge of how it works or when you are trying to damage it (Cambridge Dictionaries)

The second key element that is contained in the commentary, is the concept “subvert”. This is defined as:

- undermine the power and authority of (an established system or institution) (Oxforddictionaries.com)
- to try to destroy or damage something (Cambridge Dictionaries)

It is therefore evident that the nature of this charge relates to actions on the part of an athlete that are designed to interfere and undermine the doping control process so as to weaken, destroy or damage the outcome of the process.

There is a paucity of case law on this topic – however, the cases that have been reported clearly set out the key elements of tampering and subverting:

In the matter of ***Julia Kostrikova (Disciplinary Anti-Doping Committee of NADO “RUSADA” DECISION N 1/1)***, the athlete was found guilty of tampering in that she feigned herself to be another athlete. This was a clear attempt by the athlete to subvert the doping control process.

In ***The Doping Tribunal of the NOC and Sports Confederation of Denmark (10 February 2012) in case nos. 10/2011 and 11/2011; the matter of The Doping Commission of the NOC and Sports Confederation of Denmark v Dodji Hounou and Gerard Hounou***, the athletes admitted tampering in that the one athlete took the doping test in the place of the selected athlete, for fear of the selected athlete testing positive. As with the first case, the subversion is clear.

In ***CAS 2009/AI1873 WADA cl Fédération Portugaise de Cyclisme (IJVP~FPC) et M. João Paulo da Costa Cabrelra***, the found guilty of manipulating a urine sample rather than taking a banned substance. Again, the athlete tampered with the sample thereby subverting the anti-doping control process.

The above analysis of the elements of the charge must be considered when reviewing the evidence presented. There are a number of “episodes” in the facts presented, that can be isolated and analysed. In many of these, there are significant disputes on the facts as presented by the witnesses.

1. When the Athlete was selected for the test, there was difficulty in securing her attendance at the doping station. She did not participate in the 100m race as expected, and it required a public announcement to secure the Athlete at the station. This announcement was made a few times, and the Athlete eventually attended at the

station. These facts do not suggest a subversion of the process by the Athlete, and can be attributed to the general difficulties encountered in securing an athletes' attendance at the doping control station.

2. The Athlete initially went to the cubicle to pass urine for the test, but advised that DCO that she was not able to do so, and returned to the waiting area. This in itself is common, as many athletes are unable to pass urine when initially required to do so. As with 1 above, there is no subversion of the process.
3. When TM then took AS to the cubicle, the Athlete followed. The Athlete gave evidence that TM advised her she could go into the second cubicle, whilst TM gave evidence that she constantly informed the Athlete that she could not follow her to the cubicles, and that her actions in following were a breach of the protocol. There is a clear conflict on the evidence presented. When MH returned to the doping station, she noted immediately that there was a problem as there were no athletes in the waiting room – TM “screamed” for assistance, as the Athlete was unattended in the cubicle. The evidence of MH corroborates the evidence of TM, as it is improbable that TM would have been seeking such urgent assistance had she willingly allowed the Athlete to enter the cubicle unattended. Furthermore, such an act would be a material breach of standard protocol and it is difficult to understand why TM would allow such a breach. Given the above, the evidence of the Athlete is not probable. Such action by the Athlete, in entering the cubicle when instructed not to do so, does subvert the process: it created a situation where the DCO did not have control of the procedure and as such undermined the authority of the DCO and the procedure.
4. On entering the testing station, MH found the Athlete in the cubicle, naked from the waist down, holding the sample collection cup in one hand and a brown bottle in the other. The Athlete testified that she was sitting on the toilet massaging her foot/ankle which was sore – she also testified that she as fully clothed. There is a direct conflict on the evidence presented as to whether the Athlete was clothed or not. What is common cause is that the Athlete had a brown bottle with liquid in it, and that the Athlete had a sample collection cup. It is not possible to make a determination on the evidence that is

directly contradictory; however, given that the Athlete was in the cubicle contrary to a direct instruction, with the sample collection cup is in itself highly irregular. The Athlete was holding both the brown bottle and the sample collection cup in her two separate hands – it was not at that point possible for her to massage her foot as both hands were occupied. If the intention of the Athlete was to massage her foot, why did she have the sample collection cup in her other hand? The only plausible explanation is that this was an attempt to tamper with the process.

5. MH asked the Athlete specific questions relating to the brown bottle medication, and demanded that she hand s it over (4 times). The Athlete refused to do so, and ultimately mixed the contents of the brown bottle with the contents of a coke bottle. The Athlete was also unable to provide the prescription that she stated that she had. Given the circumstances that MH found when she entered the testing station, her demand that the brown bottle be handed over was reasonable – failure of her to do so would have been negligent on her part. The actions of the Athlete were suspicious and as such the demand for the bottle had to be made. The failure of the Athlete to hand it over was a clear subversion of the process and the subsequent mixing of the substances was an act of tampering with the doping control process. The DCO had a duty to ensure that the substance was secured and the actions of the Athlete undermined this. Furthermore, the DCO is the highest authority in the doping control station and his/her instructions must be adhered to – the actions of the Athlete undermined this authority in a material manner.
6. When the Athlete did enter the cubicle to pass urine, the DCO was not satisfied that she was able to see the urine pass directly into the collection cup. She had to ask the Athlete 5 times to open her legs, and at one stage was concerned that the Athlete was attempting to collect water from the back of the toilet. The Athlete did not deny that she was asked 5 times to open her legs. The sample was eventually collected. The Athlete is experienced and has undertaken tests before – it is difficult to understand her reluctance in this regard. However, although the final collection of the sample proved difficult, in isolation it cannot be found to have been an act which amounted to attempted tampering or subversion of the doping control process.

The Athlete argued that the issues that arose on the day were attributable to the failings on the part of the 2 DCO's involved. In reviewing the evidence, the only issue on which fault can be attributed to a DCO was the failure of TM to advise the Athlete as to her rights in the process. This was an error. However, this error was not material relative to the incidents that occurred. The Athlete was at all times informed of what was expected, and instructed as to what her actions should be. She elected to ignore/disobey these instructions.

In addition to the above, the argument of the Athlete that she was not present when the second "coke" sample was sealed is not material to the charges in this matter. The test of the "coke" sample was not presented as material evidence in the matter.

FINDING ON THE CHARGE

The Panel therefore finds that the Athlete is Guilty of an anti-doping violation in terms of Article 2.5 of the 2009 Anti-Doping Rules of the SAIDS, in that on 19 May 2012, she tampered or attempted to tamper with the doping control process after she was notified of her selection for an in-competition doping control test by a South Africa Institute for Drug-Free Sport Doping Control Officer after her event at the South African Masters Athletics Championship. The finding of Guilty relates specifically to points 3, 4 and 5 above.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

The Athlete has been found Guilty of an anti-doping violation in terms of Article 2.5 of the 2009 Anti-Doping Rules of the SAIDS.

As such, it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. The relevant portions of Article 10.5 (for an offence under Article 2.5) read as follows:

10.5 Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances.

10.5.1 No Fault or Negligence

If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. ...In the event that this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years.

No direct evidence was presented in respect of the above. The Athlete contended that the issues that arose were as a result of a clash of personalities. It may be that there was such a clash, but this in itself is no excuse for the subverting of the anti-doping process. The DCO's were fulfilling their duty and it was incumbent upon the Athlete to comply.

The prosecution argued that given the previous anti-doping violation, the sanction should be between 8 years to life. However, the anti-doping violation of the Athlete took place in 1992, outside of the Article 17 Statute of Limitations (8 years). The 1992 anti-doping violation is therefore not relevant.

The sanction on the finding of Guilty is as follows:

1. The Athlete is ineligible to participate in any organised sport, club or higher level or as envisaged in Article 10.10 of the Rules, for a period of two years;

2. The period of two years will be effective as of 14 December 2012 (being the date of this finding), to terminate on the 13 December 2014; ;

3. The above anti-doping violation occurred during the South African Masters Athletics Championships on the 19 May 2012. The rule violation is therefore related to an in-competition test. In terms of Article 9 of the Rules an anti-doping violation in individual sports in connection with an in-competition test automatically leads to disqualification of the results obtained in that competition, including forfeiture of medals, points and prizes. In accordance with this Article, the Athlete therefore forfeits her performance in the said South African Masters Athletics Championships.

This done and signed at Cape Town, December 2012



Andrew Breetzke (Chair)

For and on behalf of the Tribunal Panel

Dr Sello Motaung, Ms Beverley Peters