IN THE APPEAL TRIBUNAL FOR THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

IN THE MATTER BETWEEN

CASE NO: SAIDS/2017/19/A07

THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT **Appellant**

And

MR NTANDO KEBE **Respondent**

APPEAL DECISION

Before the Appeal Panel of:

Ms. Marissa Damons (Chairperson)

Dr. Nematswerani (Appeal Board Member)

Ms. Mami Diale (Appeal Board Member)

Advocate Clive Pillay (Appeal Board Member)

(hereinafter referred to as "the Appeal Panel")

Appearing for the Appellant:

Attorney: Ms Wafeekah Begg

Of: The South African Institute for Drug-Free Sport.

Appearing for the Respondent:

Attorney: Mr Kellerman

Of: Kellerman Hendrikse Attorneys Incorporated.

A. INTRODUCTION.

1. This is an appeal resulting from the decision of an Independent Hearing Doping Panel (hereinafter referred to as the "Tribunal Panel") appointed in terms of Article 8 of the SAIDS Anti-Doping Rules 2016, which decision was handed down on 13 October 2017.

2. The Respondent pleaded guilty to the charge levied against him, in terms of committing an anti-doping rule violation in terms of Article 2.1 of the 2016 Anti-doping Rules of the South African Institute for Drug-Free Sport (SAIDS).

3. The decision of the Tribunal Panel was as follows:

   3.1. Mr Kebe (the Respondent) was found on a balance of probabilities to have established that he did not act with the necessary intent as defined in terms of Regulation 21.2.1 of the World Rugby Anti-Doping Regulations;

   3.2. The Respondent was not deemed to have met the requirements of "No Significant Fault or Negligence" as envisaged in Regulation 21.10.5.1.1.

   3.3. The Respondent was declared ineligible for a period of 2 (two) years commencing from the date he was notified of the adverse analytical finding, being the 7th July 2016.

4. SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended).

5. SAIDS formally accepted the World Anti-Doping Code (WADC) adopted and implemented by the World Anti-Doping Agency (WADA) (revised in 2015), in terms of which its own Anti-Doping Rules and Responsibilities have been adopted.

6. In terms of a Delegation of Powers Agreement entered into between the Executive Council of the South African Rugby Union (SARU) and SAIDS (July 2012), SARU has ceded and assigned all rights and delegated all its powers and obligations vested in it by virtue of Regulation 21 to SAIDS, with the responsibility to perform all such functions and duties to comply with the requirements of SARU in terms of the said Regulations. It is by virtue of this delegation that the Appeal Panel has been constituted to preside over the said appeal.

B. THE GROUNDS FOR APPEAL

1. The appeal is brought by the Appellant on the following bases:

   1.1. That the Tribunal Panel failed to meaningfully assess Mr Kebe's conduct and his competitive level as a rugby player in relation to the relevant rule dealing with intention, and in so doing arrived at an outcome that was not reasoned directly to his intentional conduct;

   1.2. When determining whether Mr Kebe acted with intent, there was a failure to consider whether Mr Kebe knew there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk;

1.3. That the hearing panel, with respect, incorrectly determined the standard of proof placed on Mr Kebe;

1.4. That the hearing panel failed to consider the evidence tendered by SAIDS such as medical journals, the analysis report from the South African Anti-Doping Laboratory which clearly indicated no traces of Stanozolol from all the supplements that were sent for testing and the confirmation from Dr. Bayever, Deputy Chair of the Drug Authority that Stanozolol is banned in South Africa and is not sold in South Africa;

1.5. That it was not SAIDS testimony that Ripped EFX was purchased outside of South Africa;

1.6. That the hearing panel went beyond its responsibilities in determining:-

1.6.1. What the source of the prohibited substance was;

1.6.2. How the prohibited substance entered Mr Kebe's system; and

1.6.3. That there was no intent or recklessness on the part of the player; and

1.6.4. That Mr Kebe did not know that the Ripped EFX contained a prohibited substance.

1.7. That the decision of the hearing panel did not accord with previously decided cases;

1.8. That the decision of the hearing panel did not satisfactorily deal with the points *in limine* first, such as the criteria to establish fault.

C. THE ISSUES FOR DETERMINATION BY THE APPEAL PANEL

1. The issues that fall to be determined by the Appeal Panel at the Appeal hearing of 13 February 2018 at the SAIDS Office include the following :

1.1. Whether or not it can be established, based on the rules and relevant case law, that Mr Kebe did in fact have the necessary intent as defined in the Rules;

1.2. The correct standard of proof required of the Athlete; and

1.3. The appropriate sanction in the circumstances.

2. *In limine* matters (if any)

3. Costs of the matter.

D. THE FACTS

1. Mr. Ntando Kebe is a 29 year old provincial rugby player for the EP Kings Rugby Union. He was tested during an out-of-competition test on 1st March 2016.

2. Mr. Kebe provided a urine sample (3928495) that was submitted for analysis to the Anti- Doping Control Laboratory in Qatar, a WADA accredited Laboratory.

3. On 23rd June 2016, the Laboratory reported the presence of Stanozolol and its metabolites 3'-hydroxystanozolol, 16b-hydroxystanozolol and 4b-hydroxystanozolol[1] in the sample.

4. The substance is a Prohibited Substance categorised under **Class S.1, Anabolic Agents** on the WADA Prohibited List International Standard 2016 (the WADA Prohibited List is incorporated in the World Rugby Anti-Doping Regulations and for ease we will refer simply to "the Prohibited List"), which resulted in the adverse analytical finding against the Respondent.

5. The Respondent pleaded guilty to breaching Regulation 21.2.1 (see below) (Article 2.1 of the 2016 SAIDS Anti-Doping Rules) and committing an Anti-Doping Rule Violation (ADRV). He further did not dispute the accuracy of the collection of the sample as well as the validity of the testing procedure conducted by the laboratory.

6. The Respondent, Mr Kebe, is an educated individual having studied at the University of Fort Hare towards the degree of Librarian Information Sciences.

7. He played provincial rugby for Border Bulldogs from 2007-2012. Moved over to Boland Cavaliers in 2013 and in 2014 was contracted to Griquas. Thereafter went on loan to Southern Kings to play Super Rugby. He played 12 games in Super Rugby and also played for the South African 'A' rugby team.

8. The Respondent only listed the supplements Creatine, Bok Pulse and Ganic-F on the duly signed Doping Control Form (DCF). He did not list the Ripped EFX on the DCF, which the Tribunal Panel found to be the probable source of the Stanozolol.

9. It was established at the hearing that Mr Kebe received the Ripped EFX from a fellow rugby player, Mr Monde Hadebe, in January 2016 in Port Elizabeth, who also gave evidence at the Tribunal hearing.

10. It was further established that the Ripped EFX was received in a container that was already open[2].

11. It was established that Mr Monde Hadebe also tested positive for Stanozolol as well as Oxandrolone (both substances are on the Prohibited List) and later retired from rugby in 2016.

12. It was established that Mr Kebe did not do any research regarding the supplements he was taking and neither did he research the ingredients of the opened bottle of Ripped EFX given to him by Mr Monde Hadebe in 2016.

E. THE REGULATORY FRAMEWORK – THE LAW

[1] See indexed bundle page 4
[2] See indexed bundle page 77

Regulation 21.2.1 provides as follows: -

Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

1. *21.2.1.1 - It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players 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 Players part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence).*

2. *21.2.1.2 - Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: Presence of a Prohibited Substance or its Metabolites or Markers in the Player's A sample where the Athlete waives analysis of the B sample and the B Sample is not analysed; or where the Player's B sample is analysed and the analysis of the Athlete's B sample confirms that the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or where the Player's B sample is split into two (2) bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance of its Metabolites or Markers found in the first bottle.*

3. *22.2.1.3 - Excepting those substances for which a quantitate threshold is specifically identified in the Prohibited List, the presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample shall constitute an anti-doping rule violation.*

4. *21.2.2.2 - The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used or Attempted to be Used for an anti-doping rule violation to be committed.*

Sanction

5. *The period of ineligibility to be imposed for a violation of Regulation 21.2.21 (Presence of Prohibited Substance or its Metabolites and Markers) which does not involve a Specified Substance is four years for a first violation.*

6. *The period of ineligibility can be reduced in certain circumstances. In the context of this case they include:*

    6.1. *The Player, if establishing the anti-doping rule violation was not intentional (refer to Regulation 21.10.2.1.1) the period of ineligibility shall be reduced to two years.*

    6.2. *The Player establishing exceptional circumstances as set out in Regulation 21.10.4 (No fault or negligence, in which case, the otherwise applicable sanction shall be eliminated), or 21.10.5 (No significant fault or negligence, in which case the period of ineligibility shall be at a minimum of a reprimand and no period of ineligibility and at a maximum of two years of ineligibility depending on the Player's degree of fault).*

6.3. *In the current circumstances and based on the evidence led before the independent Tribunal Panel neither Regulation 21.10.4 nor 21.10.5 is applicable in the circumstances*.

7. *21.10.2.3 – As used in Regulations 21.10.2 and 21.10.3, the term "**intentional**" is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he/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.*

F. SUBMISSIONS MADE BY THE APPELLANT

1. The Respondent confirmed he started using supplements since 2011/2012 when he started out as a professional rugby player. He confirmed in his evidence that he turned professional in 2010.

2. Stanozolol is prohibited by the World Anti-Doping Agency (WADA) and included on the Prohibited List under Anabolic Agents as a substance that is prohibited at all times (both in and out of competition). Under the 2015 World Anti-Doping Code (WADC), Olympic and Paralympic athletes who test positive for Stanozolol could potentially face a four-year ban from sport for an intentional violation.

3. On 07 July 2016, Mr. Kebe, was issued with a notice[3] advising him *inter alia* that: the analytical report received from the Laboratory confirmed the presence of the prohibited substance and constituted an adverse analytical finding (AAF) and *prima facie* breach of Regulation 21.2.1;

4. The Doping Control Form completed and signed by Mr. Kebe only listed Creatine, Bok Pulse and Ganic-F.[4]

5. On 28th November 2016 the Central Analytical Facilities Laboratory (CAF) at Stellenbosch University received from Mr. Kellerman the following to be analyzed for the presence of Stanozolol: Ganic-F from Supplements SA and Creatine Supreme from Supplements SA. On 3rd January 2017 the CAF analysis report concluded that in both the supplements, the measured concentration of Stanozolol was below the detection limit of the method, i.e less than 0.3 mg/kg dry supplement. Stanozolol is quantifiable, however not a threshold substance on the Prohibited List. Its presence is an AAF. Basically what this report meant was that there was no conclusive proof of contamination of Stanozolol. On 2nd March 2017, Mr. Kellerman sent a newly purchased bottle of Ripped EFX of Muscle Science to CAF to be analysed for the presence of Stanozolol. This too came back as a negative report.

6. Mr. Kebe did not dispute the Adverse Analytical Finding. That being the case, and in accordance with Regulation 22.1.2, sufficient proof of an Anti-Doping Rule Violation (ADRV) had therefore been established. Consequently, Mr. Kebe was guilty of an ADRV.

[3] See indexed bundle of documents – pages 3 to 8.
[4] See indexed bundle page 1

7. Both Parties were therefore tasked with arguing what the appropriate sanction would be for Mr. Kebe to serve.

8. In terms of Article 21.10.2.1 of the World Rugby Rules, presence of a prohibited substance will be considered an intentional ADRV if:

    i. It involved a **non-specified substance** and the Athlete cannot establish that the ADRV was not intentional; or

    ii. It involved a specified substance and SAIDS could establish that the ADRV was intentional.

9. In terms of the definition of intent in Article 21.10.2.3 of the Rules, it is important for the Appeal panel to understand how the Athlete would need to go about establishing that the ADRV was not intentional for 'presence' – as stated above at paragraph G7

10. The Respondent's attorney conceded they were unable to prove contamination of any of his client's supplements. However, he continued to argue around the probability of Ripped EFX being contaminated based on the notion that it was provided to his client, by a former team mate, who also happened to test positive not only for Stanozolol but also Oxandralone[5].

11. The Tribunal Panel's written decision delved into the source of the Stanozolol when it was already clear that the source could not be established; which was confirmed by the Athlete himself. Not even the Athlete's witness, Monde Hadebe, could say what the source of his prohibited substances, Stanozolol and Oxandrolone were. Even if, Ripped EFX was the source and was contaminated, the Tribunal Panel could not do a scientific analysis to say how many contaminated pills would have led to a positive adverse analytical finding for Stanozolol in the Athlete's system.

12. The Panel further considered Dr. Wellman's evidence and claims SAIDS did not refute this evidence. This was not entirely true. On 3rd January 2017 the CAF analysis report concluded that in both the supplements, the measured concentration of Stanozolol was below the detection limit of the method indicating that there is no conclusive proof of contamination of Stanozolol.

13. Dr. Wellman did not examine the Athlete. Secondly, he did not look at the concentration levels of Stanozolol in the Athlete's urine sample. Thirdly, the laboratory used by the Respondent does not use WADA Compliance standards and methods when running test analyses on supplements. It was for this reason that SAIDS sent the supplement to the Anti-Doping Laboratory in Bloemfontein for analysis, using WADA accredited methods; and no traces of Stanozolol were found in the supplements submitted, which goes to the probable source of the Stanozolol.

[5] Transcript of 28th August 2017: pg 53 lines 19-23

14. The 'probable' source of the Stanozolol was speculative and the Athlete's representative was not able to provide actual evidence as opposed to mere speculation[6]. It has been established through case law that raising an 'unverified hypothesis' is not the same as clearly establishing the facts[7].

15. An Athlete cannot discharge their burden of proof merely by showing that he/she made reasonable efforts to establish the source but without success…*mere assertion as to what the source is, without supporting evidence, will be insufficient*[8]. In addition, it is insufficient for an athlete to merely protest his innocence and suggest that the substance must have entered their body inadvertently from some supplement, medicine or other product. Athletes must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete took contained the substance in question[9].

16. The Tribunal Panel failed to tackle in depth the criteria of intention. In fact, they contradict themselves in that the Panel indicated that it was satisfied that the Athlete did not know the Ripped EFX contained the prohibited substance, yet the Respondent's attorney conceded that they were not successful in proving contamination.

17. The Athlete must prove that he did not engage in conduct that he knew constituted an ADRV or prove he did not engage in conduct for which he knew that there was a significant risk that it might constitute or result in an ADRV and manifestly disregarded that risk. If one examines the Athlete's conduct, it clearly implies that he could have known there was a risk in taking the "supplements" however manifestly disregarded that risk in that:

    i. He confirmed he was a professional rugby player for 7 (seven) years, since 2010;
    ii. He is educated and he specialises in research, yet by his own admission he does not research or read his own player contracts or labels of the seven or more supplements he was ingesting at the time.
    iii. He made it clear, that he did not read the contracts he signed and that it was all about the money;
    iv. He attempted to convince the Tribunal Panel that he had no education in anti-doping and was clueless regarding the dangers of supplements. It was pointed out to him that there are warnings on supplement containers indicating the risk of taking the supplement; and
    v. Evidence was sent to the Tribunal Panel confirming that anti-doping education was provided by the team doctor at the beginning of every season to the rugby players of the union Mr Kebe belonged to. He was therefore not honest in his testimony;
    vi. He did not consult with doctors, manager or coaches on the use of all these different types of supplements he takes. Yet he knew of other rugby players who have tested positive for taking supplements such as Chiliboy Ralapelle and Bjorn Basson who had been sanctioned for doping.

[6] WADA v Damar Robinson CAS 2014/A/3820
[7] Meca-Medina v FINA CAS 99/A/234 and CAS 99/A/235
[8] WADA v Daiders, CAS 2014/A/3615.
[9] Naumova v. CISM and WADA, CAS 2017/A/4944

18. By doing nothing and acting ignorant (or displaying behaviours of ignorance) cannot be a valid reason to accept that the Respondent showed no intention to enhance his performance or cheat. If this was a minor, rugby player, it could probably be accepted. However, the Respondent had access to all sorts of resources at his disposal at anytime of the day and yet expects everyone to believe he knew nothing and could not have reasonably been expected to know anything. He is a professional rugby player, who by virtue thereof is to be held to a higher standard.

19. He was also called up to play in the South African 'A' squad and by virtue thereof had been educated regarding the taking of supplements and/or banned substances.

20. The conduct that needed to be looked at, was his conduct as a professional rugby player. In fact in SAIDS v Barend Steyn[10], this athlete also went through a process of elimination of getting six of his supplements tested for contamination for anabolic agents at the CAF Laboratory in Stellenbosch. Mr. Steyn's A sample test results from the Laboratory showed the presence of 19-norandrosterone (14,8ng/ml) and its metabolite 19-noreticholanolone. While it was not Stanozolol, however both prohibited substances are classified as S1 Anabolic Agents. The Tribunal Panel in this case found that Mr. Steyn did not produce any evidence to demonstrate that he was diligent and cautious in researching the substances he ingested. The Tribunal was of the view that due to his experience and the fact that he is not a minor that he ought to demonstrate a greater exercise of care and should have investigated the ingredients and possible risk of using supplements, as well as display the duty to disclose all substances ingested prior to testing. The Tribunal was of the view that Mr Steyn had failed to demonstrate how the prohibited substance was ingested and as a result thereof was not able to discharge the onus of illustrating that the violation lacked intention as contemplated by the Regulations and that the ingestion of the prohibited substance was indeed unrelated to sport performance. Accordingly the period of ineligibility of the 26 year old rugby player was four (4) years.

21. The Tribunal Panel in the current case went into great depth in the *Arijan Ademi* case, and should the Tribunal Panel's decision be left to stand it would be entrenching in the jurisprudence - that if an athlete does not know the source of the prohibited substance, and did not know how it entered their system or cannot prove same, then that would be condoned as sufficient, as long as the athlete tested all the supplements being taken for contamination – which then satisfied the burden of intent.

G. SUBMISSIONS MADE BY THE RESPONDENT

[10] SAIDS/2017/10

1. The Athlete, Mr Kebe is a 29 year old rugby player contracted to the EP Kings Rugby Union. He was 28 years old at the time his urine sample was taken on 01 March 2016, which sample resulted in an adverse analytical finding, discovering that Stanozolol and its metabolites were present in his sample.

2. Mr Kebe pleaded guilty to breaching Regulation 21.2.1 and committing an ADRV. He further admitted that the sample was collected correctly as well as the validity of the testing procedure conducted by the WADA accredited Laboratory.

3. The only issue which remained for determination by the Tribunal Panel was that of an appropriate period of ineligibility. In this regard the Athlete conceded that he was negligent in ingesting the prohibited substance. What was in contention, was whether the Athlete acted with intent and if not whether he was significantly at fault or negligent.

4. The Tribunal Panel found that the Athlete was significantly at fault and that he had proved on a balance of probabilities that he had not ingested the Stanozolol intentionally by proving the probable source. A two year period of ineligibility was imposed with effect from 07 July 2016.

5. Regulation 21.20 requires that the Rules "*be interpreted as an independent and autonomous text and not with reference to existing law or statues."* Further: *"where provisions in an anti-doping policy seek to implement the standards of the Code …..tribunals should interpret the provisions in a manner which upholds the purpose of the Code as set out in the Articles…"*

6. CAS and other anti-doping jurisdictions appear to strive for a consistent approach to the interpretation and application of the Code in a manner that accords with its purpose.

7. It is conceded that the interpretation of Regulation 21.10.2.1. read with 21.10.2.3 does not allow for much room to manoeuvre, in that the term "intentional" is defined.

8. There is consensus amongst legal jurisdictions internationally that intention relates to an offender's state of mind at the time of committing the alleged offence. Regulation 21.10.2.3 corresponds with this view of intent as a subjective state of mind as it states that "….*the term requires that the Player or other Person engaged in conduct which he/she knew constituted an anti-doping rule violation*…"

9. The definition of intent in terms of Regulation 21.10.2.1 goes further to say that if the Player knew that the conduct in which he engaged in constituted a significant risk of resulting in an anti-doping rule violation and he manifestly disregarded that risk, he will also have the intent required for the sanction provided for in Regulation 21.10.2.1.

10. In the case of *Arijan Ademi v UEFA*[11]*,* a soccer player tested positive for Stanozolol. He suspected that the source of the Stanozolol was a contaminated dietary supplement, Megamin. The panel found that the factors supporting the proposition that establishment of the source of the prohibited substance in a player's sample is not mandated in order to prove an absence of intent[12]. The UEFA ADR, based on WADC, represents a new version of the anti-doping Code which language

[11] CAS 2016/A/4676
[12] Supra at para 70

should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. The relevant provisions of the EUFA ADR do not refer to any need to establish source. The panel finally found that the player had established that he did not engage in conduct which might constitute or result in an anti-doping rules violation .

11. The Athlete *in casu* contended that he did not take the prohibited substance intentionally, and that he must have ingested it from a supplement that he had taken at some time prior to the sampling of his urine. At the time Mr Kebe was notified of the AAF, he no longer had the benefit of testing the supplements that he was taking at that time, except for the Ganic F as there was some left.

12. The Athlete had the containers of the supplements he had been using tested and acquired a new container of the Ripped EFX as there was none left. The test results were negative. This was confirmed by the tests conducted on all the supplements by the SAIDS laboratory.

13. Monde Hadebe testified, indicating that he also took the Ripped EFX prior to being tested and he also tested positive for Stanozolol.

14. Mr Kebe testified that he started taking the Ripped EFX in January 2016 when he obtained it from Mr Hadebe (which was supported by Mr Hadebe's evidence – at pages 63 of the Transcript). The container was already open. He took two capsules daily, excluding weekends. He was not certain whether he finished the container before or after the first game on 01 March 2016. Had the container been only half full, as testified, there would have been approximately 45 capsules left and he would have taken them over approximately 22 weekdays, ie five weeks, which means he would have been taking them until the middle of February 2016 , about two weeks before the urine sampling on 01 March 2016. Dr Wellman testified that it would still have been detectable in his sample and Dr Wellman's evidence stood uncontested.

15. The Tribunal Panel considered the likelihood of the Ripped EFX being the source of the Stanozolol in the totality of the evidence before it and found that it is more likely than not that, if Mr Kebe and Mr Hadebe's evidence is accepted at face value – that the Ripped EFX was the source of the Stanozolol and that the Athlete's submissions and evidence go beyond speculation and were not merely firm denials but a credible explanation as to how the prohibited substance may have entered his system.

16. SAIDS did not present any evidence to contradict the evidence presented by the Athlete and could not disprove any of the evidence relating to the alleged source of the Stanozolol. Further the evidence presented by SAIDS in the form of the articles submitted along with its Heads of Argument were never put to Dr Wellman or the Athlete under cross-examination.

17. The totality of the evidence presented by the Athlete, accepted by the Panel *a quo*, provides a concrete basis on which the panel held that the Ripped EFX was, on a balance of probabilities, the source of the Stanozolol.

18. The extent of the risk that Mr Kebe was aware of prior to ingesting the Ripped EFX, was dealt with extensively in evidence and in the Panel *a quo's* judgement. There is no other basis for the Panel *a quo* to have come to a different decision than it did in paragraph 119 of its ruling.

19. There was never any doubt that the Panel *a quo* used the evidentiary standard of a balance of probabilities – there was never any dispute about this between the Athlete and SAIDS in formulating the issues in dispute and the Panel *a quo* correctly applied the standard when weighing up the evidence.

20. The supplements that were tested by the CAF laboratory which were also tested by the SA Anti-Doping Laboratory, confirmed the absence of Stanozolol in those substances and supported – through a process of elimination – the Athlete's contention that the Stanozolol must have been in the Ripped EFX container that was unavailable for testing as it had already been finished.

21. Regarding the sentiments by SAIDS regarding the *in limine* matters being dealt with first; the only points that needed to be determined by the Panel *a quo* were stated in the opening statements on behalf of the Athlete and of SAIDS. These were firstly whether the Athlete could show, on a balance of probabilities, that the Stanozolol was not taken intentionally and secondly, whether the Athlete could show that he did not ingest the prohibited substance through any significant fault on his part. These issues were properly dealt with by the Panel in its decision.

22. Each case is to be dealt with on its own merits. The findings of the Panel *a quo* are not in any way destructive of or irreconcilable with the principles enunciated in the CAS jurisprudence.

23. The decision in the *Ademi* case was a decision of three arbitrators of CAS, whereas in the decision of *WADA v Gharbi*[13] was a decision of a sole arbitrator handed down after the *Ademi* decision, wherein it was stated that: "*To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his/her body inadvertently from some supplement, medicine or other product which he/she was taking. Rather the athlete must adduce actual evidence to demonstrate that a particular product ingested by him/her contained the substance in question."*[14]

24. Dr Wellman identified the Ripped EFX and the Ganic F that the Athlete was taking as the possible sources of the Stanozolol for the reasons expressed in his evidence. He further testified that the purported effects of the Ripped EFX are congruent with the effects of Stanozolol.

25. The evidence of the Athlete goes beyond speculation and presents a factual basis for the identifying of the source of the Prohibited Substance.

26. It was conceded that the Athlete cannot explain why Mr Hadebe tested positive for an additional substance, Oxandrolone, and that the Athlete did not take any precautionary measures when taking the Ripped EFX, but cannot be said to have acted recklessly as he could not have perceived a significant risk with the knowledge available to him at the time.

27. When considering "fault or negligence" or "no significant fault or negligence", Regulation 21 allows the panel to have regard to the peculiar circumstances of an athlete – in terms of examining the athlete's experience, whether he/she is a minor and the level of care and investigation the athlete should have taken or done in order to determine the risk.

[13] CAS 2017/A/4962
[14] At paras 50 and 52

H. REPLY BY THE APPELLANT

1. In regard to the DCF , specifically page 3 whatever is on the DCF is *prima facie* evidence. Paragraph 46 (on page 3 of the bundle) sets out a declaration and the Athlete then puts his signature to it and attests that everything that he puts on the form is correct. Only the three substances stated is what he attested to.

2. A year and a half later the Appeal Panel is asked to believe his oral testimony, whereas there was nothing stated to that effect in his written submissions until the day he testified indicating that the doping control officer informed him to only indicate what he had taken in the previous few days. He therefore listens to what the doping control officer said over what is clearly stated in paragraph 46.

3. Further, doping control officers are well trained and are accredited individuals who know very well what they are supposed to saying to athletes.

4. In light of the *prima facie* evidence, the onus lies on the Athlete to provide the panel with concrete evidence to substantiate that that was what the doping control officer in fact told Mr Kebe.

5. The aforegoing distinguishes the *Ademi* case from the current set of circumstances, in that in the *Ademi* case, the athlete disclosed that he had taken Megamin on the DCF and by a process of elimination determined the probable source. Furthermore Ademi was provided or prescribed the Megamin by a doctor, with his reliance being on a professional.

6. In contrast Mr Kebe didn't do anything to eliminate risk, as Mr Kebe's reliance is on a fellow team mate.

7. SAIDS is of the view that Mr Kebe knew there was a risk in taking all these supplements as is indicated in the transcript[15].

8. Mr Kellerman makes much of the Mr Kebe's circumstances - If one does examine his circumstances, while Mr Kebe came from a disadvantaged background he managed to become a professional rugby player, who was well educated and well paid.

9. Identifying him as a previously disadvantaged individual should not carry any weight in terms of determining the sanction, it would only be a consideration in determining 'significant fault' which has already been established.

[15] Page 87 of the bundle line 20-22

10. The issue for determination is the intention of Mr Kebe, direct or indirect, in taking a Prohibited Substance.

11. Mr Kellerman is asking the Appeal panel to deviate from the rules based on Mr Kebe's previously disadvantaged status.

12. The question that needs to be asked is "but for what was contained in the Ripped EFX container, would Mr Kebe have achieved the same results?" A further question is, "why should the perceived risk not be applicable to a professional rugby player, when by his own admission, knew about the saga around Chiliboy Ralepelle, where he too tested positive for 'just a steroid.'

13. The decisions in Teboho Rampai and Jandre Marais which had recently been handed down where younger athletes who admitted to taking prohibited substances had been guilty of ADRVs and obtained sanctions of four years each.[16]

I. DECISION

1. Preface:

1.1. An important component of the decision reached by the Appeal Panel, is the evidence and conduct of the Athlete based on his testimony before the Tribunal Panel on 28 August 2017, considered in the light of the circumstances taken in totality, the facts and the relevant case law provided by both Parties.

1.2. The decision on Appeal is made with the utmost respect for the members of the Tribunal Panel, however it is the responsibility of the Appeal Panel to ensure fair play as well as with regard to Regulation 21.10, Comment 42 of the World Rugby Anti-Doping Rules, in terms of which *'anti-doping principles are enforced in a global and harmonised manner'*. While the harmonisation of sanctions has been one of the most discussed and debated areas of anti-doping, it seeks to apply the same "strict liability" rules and criteria to each set of unique facts and circumstances of each case. This lack of harmonisation of sanctions has also frequently been the source of jurisdictional conflicts between international federations and national anti-doping organisations – which is something the Appeal Panel took into consideration.

1.3. The main issue before the Appeal Panel is whether the Athlete acted with the necessary intention in accepting and taking the Prohibited Substance which was found to be present in his urine sample.

1.4. Non - contamination was conceded by the Athlete's representative.

[16] The decision of Teboho Rampai was handed to the panel at the Appeal hearing

2. Regarding Intent:

2.1. In terms of the stated Regulations (21.2.1), there is a "Strict Liability"[17]on Athletes to ensure that no Prohibited Substance enters his / her body. Athletes are therefore held strictly responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples unless they are able to discharge an onus of proof to indicate an absence of such intent, which only affects the period of ineligibility, which would otherwise be a period of four years.

2.2. Regulation 21.10.2 provides that the period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be four years, where:

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

21.10.2.2 *If Regulation 21.10.2.1 does not apply, the period of ineligibility shall be two years.*

2.3. In terms of the standard of proof for non-specified substances:

2.3.1. The onus is on SAIDS to prove the presence of the Prohibited Substance in order to prove the anti-doping rule violation (the ADRV).

2.3.2. Consequently then the onus shifts to the Athlete, Mr Kebe, to establish the absence of intent as contemplated in the Regulations in order to reduce the applicable sanction, the standard of proof being on a balance of probability.

2.4. In attempting to dispute intent

2.4.1. The Athlete must prove that he did not engage in conduct that he knew constituted an ADRV; or prove he did not engage in conduct for which he knew that there was a significant risk that it might constitute or result in an ADRV and manifestly disregarded that risk[18]; and

2.4.2. Furthermore, in order to establish the absence of intent, it is necessary for the Athlete to establish how the Prohibited Substance came to be in his system ("Proof of Source");

2.5. The question which arises in this case is: 'has the Athlete, on a balance of probabilities, established the source of the Stanozolol present in his sample?' – meaning that his explanation for how the prohibited substance entered his body must be the most probable explanation before the Panel. His explanation must be based on concrete facts and not amount to mere

[17] Sufficient proof of an anti-doping violation under Regulation 21.2.1 is established by the 'presence' of the Prohibited Substance or its Metabolites or Markers and where the Player's B sample is analysed and the analysis of the Player's B sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample. (

[18] Regulation 21.10.2.3 defines the term "*intentional*" as used in Regulation 21.10.2.1.1 which states: "….the term '*intentiona'* is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk….."

speculation[19]. More must be established by way of proof given the nature of an athletes' basic personal duty to ensure that no prohibited substance enters their body.[20]

2.6. The Tribunal Panel found that the Athlete was significantly at fault[21] and that he had proved on a balance of probabilities that he had not ingested the Stanozolol intentionally by proving the probable source as being the pills contained in the Ripped EFX container handed to him by Mr Hadebe. This was so, given that the other supplements he had been taking at the time his sample was taken tested negative for Stanozolol and the container of the Ripped EFX, believed to have been the source of the Stanozolol, was no longer available for testing. A two year period of ineligibility was imposed with effect from 07 July 2016. It is exactly this finding that is being appealed against.

2.7. In terms of assessing the Athlete's conduct in disputing intent, which the Tribunal Panel held he had successfully disputed, it is encumbent on the Appeal Panel to establish whether he in fact proved that he did not engage in conduct that he knew constituted an ADRV or prove that he did not engage in conduct for which he knew that there was a significant risk that it might constitute or result in an ADRV and manifestly disregarded that risk.

2.8. The Appeal Panel in analysing the conduct of the Athlete confirms the following:

i. Mr Kebe had been a professional rugby player for approximately seven years prior to the discovery of the ADRV and was an experienced Athlete;

ii. He was an educated individual, specialising in research techniques, yet did no research on the supplements he was taking;

iii. He had access to material and professional people which he could have used to enrich himself with regards to anti-doping information;

iv. He was aware of the Chiliboy Ralapelle and Bjorn Basson cases and why they had tested positive for banned substances;

v. He would certainly have had anti-doping talks from his team doctor at the Southern Kings – which was confirmed at page 132 of the bundle lines 5-10, which evidence the Appeal Panel finds is credible;

vi. At no stage did he seek medical advice with regards to the use of supplements he was taking;

vii. He accepted an open container of an alleged supplement from a fellow rugby player who was also found to have committed an ADRV after his sample tested positive for two Prohibited Substances namely Stanozolol and Oxandrolone. Mr Kebe did so without consulting the team doctor who, by his own admission, he had access to;

viii. He further did not disclose the Ripped EFX on his DCF. The Appeal Panel finds it improbable that the doping control officer informed him to only indicate what he had taken on the day,

[19] WADA v Damar Robinson CAS 2014/A/3820 and WADA v Daiders CAS 2014/A/3615
[20] IWBF v Gibbs, CAS 2010/A/2230
[21] In terms of the definition as contained on page 192 of the bundle

and that he forgot about it[22]. This is so in light of the training that doping control officers undergo and what is stated on the DCF in terms of the athlete being required to list what he/she had taken in the last seven days, which Mr Kebe is taken to have read and acknowledged by virtue of him appending his signature thereto.

2.9. In light of the aforegoing and based on the Athlete's own version he was an educated person, he did have access to material and professional people who could have assisted him in determining the safety of the supplements he was taking or considering taking, and did no research on the supplements he was taking or considering taking.[23] He further accepted an open container of an alleged supplement given to him by a fellow rugby player.

2.10 Mr Kebe's testimony shows inconsistencies under cross examination when asked about whether he knew that Mr Hadebe had tested positive for the same prohibited substance and whether he had confronted Mr Hadebe about his adverse analytical finding, Mr Kebe first answers no and thereafter admits to calling Mr Hadebe on finding out that he too tested positive for Stanozolol[24].

2.11 Moreover when probing a bit further by Dr Jaffer of the Tribunal Panel, further inconsistencies were found in the Athlete's version in terms of receiving education as a professional athlete regarding the taking of medication[25]. Dr Jaffer further probes the Athlete regarding that he played at a very high level and whether he received any advice regarding his diet[26] which the Athlete finally admits to after much to and fro[27].

2.12 With regard to whether or not the Athlete perceived or should have perceived the risk of taking the pills in the Ripped EFX container which had been opened at the time he accepted same from a fellow rugby player, it was confirmed that (at page 87 of the bundle) the Athlete was asked under cross-examination whether there was at any stage concern from him that those supplements could pose a danger to him, and the Athlete answered in the affirmative by saying "*yes he did perceive danger although not 100%*" but he did perceive that those supplements could pose a danger to him. Therefore indicating that he did perceive the risk or should have perceived the risk of taking the pills in the opened Ripped EFX container in conjunction with the cocktail of other supplements he was taking at the time, and chose to disregard that risk by not even enquiring from the medical professionals that were available for him to consult. Further, on the Athlete's own admission he had accepted opened supplements previously from other players while playing at the South African A level[28] without informing the team medical team. Mr Kebe was therefore not active in ensuring that the supplements or other products ingested by him did not contain prohibited substances and thus did not exercise the 'utmost caution' in ensuring same.

2.13 The jurisprudence highlighted by the Appellant in its Heads of Argument highlights the standard of care required of athlete's, especially those playing at a professional level to be active in ensuring

[22] See page 73 line 11-16 and page 74 of the bundle lines 17-20
[23] Page 102 of the bundle
[24] See page 100 line 25 and page 101 of the indexed bundle
[25] See page 103 of the bundle lines 3-6 and lines 15-25
[26] Page 108 of the bundle at lines 22-25 and page 109
[27] Page 109 of the bundle
[28] Page 100 of the bundle lines 18-22

that the medication, supplements or other products ingested by them do not contain prohibited substances,[29] which the Appeal Panel accepts.

2.14 In fact closer to home, in the matter of *SAIDS v Raydall Walters*[30], where on Mr Walters own admission, he was significantly at fault by taking a supplement from one of his team mates. It was found that Mr Walters had not exercised the 'utmost caution' in first checking that the supplement did not contain any prohibited substance and was found to have clearly violated the Rules of strict liability and had engaged in conduct which he knew could constitute an anti-doping rule violation, or alternatively knew that there was a significant risk that his conduct might result in an anti-doping rule violation and manifestly disregarded that risk.

2.15 A further test in order to establish the absence of intent, it is necessary for the Athlete to establish how the prohibited substance came to be in his system (ie Proof of the source)

3. Proof of Source

3.1. Even though the Regulation does not specifically mention establishing the origin of the prohibited substance as a requirement, there is case law from the Court of Arbitration in Sport (CAS) that is clear that origin should be established to prove the absence of fault or intent. See *WADA v Gharbi*[31]and *WADA v Alvarez*[32]. In terms of the Tribunal Panel examination of the proof of source which is re-iterated herein, the case of *Alabbar v FEI*[33]was cited and which stated that:

> *"Proof of precisely how and when the substance got into the athlete's system is a strict requirement of establishing fault (or the lack thereof). Further that this is an important and necessary precondition, otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up which would undermine the strict liability underlying the WADC.*

3.2. In terms of the definition of "No Fault or Negligence" as defined[34], it states that " *The Athlete or other Person establishing that he/she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution that he/she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his/her system.*

3.3. The definition of No Significant Fault or Negligence also states: *"The Athlete or other person establishing that his or her Fault or negligence, when viewed in the totality of the circumstances, and taking into account the criteria for no fault or negligence, was not significant in relation to the*

[29] *P v ITF* CAS 2008/A/1488 (para 2) ; Czarnota, P. (2012): The World Anti-Doping Code, the Athlete's duty of 'utmost caution'and the elimination of cheating. Marquette Sports Law Review. Article 9 Vol 23 (1) ; *WADA v CISM & Federico Turrini* CAS 2008/A/1565 para 66 & 67.
[30] SAIDS/2016/56
[31] CAS 2017/A/4962
[32] CAS 2016/A/4377.
[33] CAS 2013/A/3124 at para 93 of the Tribunal decision
[34] Page 115 of the SAIDS Anti-Doping Rules 2016

anti-doping rule violation, except in the case of a minor…the Athlete must also establish how the Prohibited Substance entered his or her system." Which is to be established on a balance of probabilities.

3.4. Factors to be taken into consideration in assessing an athlete or other Person's degree of fault include, the athlete or other Person's experience, whether the athlete is a minor, or other special considerations, the degree of risk that should have been perceived by the athlete and the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk.

3.5. The Tribunal Panel concluded and the Appeal Panel concurs, that despite his background, Mr Kebe is an experienced athlete and should have acted with a higher degree of care. He should have been aware of what constituted prohibited substances and should have known better than to accept an unsealed substance from a third party. As such he should have acted with a higher degree of care when it came to taking the alleged supplements.

3.6. The Tribunal Panel further concluded that Mr Kebe was significantly at fault and that his actions were casual and not consistent with the obligations imposed on all athletes. He was found to not have exercised the "utmost caution"; yet despite this find to the contrary - that on a balance of probabilities, he had not ingested the Prohibited Substance intentionally. This finding in the view of the Appeal Panel is contradictory in its terms.

3.7. The Tribunal Panel further finds that by a process of elimination, the probable source of the Prohibited Substance was the Ripped EFX handed to the Athlete by Mr Hadebe. In terms hereof, the Appeal Panel agrees with the Appellant's contention that it was not for the Tribunal Panel to deduce this on behalf of the Athlete, but it was up to the Athlete to have proved this as the most probable source in the face of other possible contentions, which the Appeal Panel finds he did not do.

3.8. In the case of *WADA v Gharbi* [35]it is specifically indicated that: *To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his/her body inadvertently from some supplement, medicine or other product which he/she was taking at the time. Rather an athlete must adduce actual evidence to demonstrate that a particular product ingested by him/her contained the substance in question as a preliminary step in seeking to prove that it was unintentional or without fault*.

3.9. Athletes must therefore produce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.[36]

3.10. From an examination of the evidence before the Tribunal Panel, the Appeal Panel is of the view that on a balance of probabilities the source of the Prohibited Substance was in fact not the Ripped EFX, for the following reasons:

[35] At paragraphs 51 and 52
[36] *Naumova v CISM and WADA*, CAS 2017/A/4944

3.10.1 It is clear that while Mr Kebe took the same pills contained in the open Ripped EFX container given to him by Mr Hadebe, he tested positive for Stanozolol while Mr Hadebe had tested positive for Stanozolol and Oxandrolone. There must therefore have been something more.

3.10.2 Moreover, Mr Kebe testified that he started taking the Ripped EFX in January 2016 after obtaining same from Mr Hadebe at a training camp in Port Elizabeth. According to him the container was about half full and had taken two capsules a day, excluding weekends, according to Mr Kebe he finished taking the supplement at the beginning of February 2016, which if given the benefit of the doubt would have been at least three weeks prior to being tested. Further, according to Dr Wellman's evidence about two weeks before the urine sampling on 01 March 2016, if Ripped EFX was the source it would have no longer been detectable in the Athlete's system.

3.10.3 In addition, for the purposes of testing, Mr Kebe purchased a further bottle of Ripped EFX over the internet and had it tested at the CAF laboratory in Stellenbosch, the results of which came back as negative for Stanozolol. Therefore the probability of it being the source is even further diminished.

3.11. In light of the aforegoing the Appeal Panel is not convinced that the Athlete proved on a balance of probabilities the most probable source of the prohibited substance in his system was the Ripped EFX.

3.12. In particular the Athlete relied on amongst others, the case of *Arijan Ademi v UEFA*[37]*,* where a professional soccer player tested positive for Stanozolol. He suspected that the source of the Stanozolol was a contaminated dietary supplement known as Megamin. The athlete contended therefore that he had not ingested the prohibited substance intentionally, and further that there was no significant fault or negligence on his part. The athlete was granted a reduction in the period of ineligibility from two years to something between a reprimand and two years. The panel in the *Ademi* matter found that proof of source while important in order to establish lack of intent, was not the only consideration. The panel in *Ademi* found that the athlete could not establish the source of the substance but nonetheless found that the athlete had established that he did not engage in conduct which might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. In this case the pills given to the athlete were provided by an external doctor, Dr Vajda, and endorsed as being safe to take by the club doctor. The evidence of Dr Vajda and of the club doctor confirmed that the player had no intent to use a prohibited substance and that the athlete used the pills provided by Dr Vajda for back pain relief, believing them to be safe to use. This was sufficient to establish on the balance of probabilities that the athlete had no intention to cheat.[38]It was further indicated that the athlete had clearly indicated having taken the Megamin on his DCF.

3.13. In the Appeal Panel's view the *Ademi* case is distinguishable from the case *in casu,* in light of the very different circumstances in the manner that Mr Kebe obtained the Ripped EFX, which

[37] CAS 2016/A/4676
[38] Ibid Para 76 of the decision

according to him was the probable source of the Stanozolol, the fact that Mr Kebe, as a professional rugby player, having some anti-doping training and knowledge (as set out herein), firstly accepted an open container handed to him by a fellow rugby player, did not enquire as to the ingredients of what was given to him or pass it through his team doctors or do any research of his own, and failed to list the Ripped EFX on his DCF. All of which leads the Appeal Panel to further conclude that in the circumstances, Mr Kebe, by virtue of his experience, knowledge, education and level at which he played rugby should have perceived the risk of committing an ADRV and yet chose to manifestly disregard same, which goes directly to his intent. Accordingly, the Appeal Panel finds that the Athlete, Mr Kebe in fact did have the requisite intention in the circumstances.

4. **Other jurisprudence** considered by the Appeal Panel, which are considered to be *ratio* decisions, which the Appeal panel would fail in its duty if it did not consider, include the following:

4.1. In *SAIDS v Barend Steyn*[39], Mr Steyn, a professional rugby player's 'A' sample test results from the WADA accredited Laboratory, indicated the presence of 19-norandrosterone (14,8ng/ml) and its metabolite 19-noreticholanolone. While it was not Stanozolol, both were prohibited substances classified as S1 Anabolic Agents. The Tribunal Panel in this case found that Mr Steyn did not produce any evidence to demonstrate that he was diligent and cautious in researching the substances he ingested. The Tribunal was of the view that due to his experience and the fact that he was not a minor, he ought to have demonstrated a greater exercise of care and should have investigated the ingredients and possible risk of using supplements, as well as displayed the duty to disclose all substances ingested prior to testing. The Tribunal was of the view that Mr Steyn had failed to demonstrate how the prohibited substance was ingested and as a result thereof was not able to discharge the onus of illustrating that the ADRV lacked intention as contemplated by the regulations. Accordingly the period of ineligibility of the 26 year old rugby player was four (4) years.

4.2. In a further more recent case, released on the day of the Appeal hearing in the current matter, is that of *SAIDS v Teboho Rampai*[40]where a doping test was conducted on the athlete, who was 17 years of age at the time and still a minor, who tested positive for Stanozolol and its Metabolites and Markers. The athlete was consequently suspended from competing in any authorized or organised sport by any amateur or professional league as from 29 August 2017. The athlete admitted that he was supplied with ten injections, of which he took four, which contained a substance of which he was merely informed would enhance his size and performance to be chosen for the SA School's Team; and as a result contravened Article 21.2.1 of the SAIDS Rugby Anti-Doping Rules. The Tribunal Panel found that the athlete had received anti-doping education as part of Craven week rugby festival. He did not consult a doctor or his coaches to check what he was taking was safe, and knew what he was doing was wrong as he destroyed the other six injections, yet disregarded same. The athlete further provided no explanation as to how he tested positive for a prohibited substance which he had taken six months prior to being tested. The athlete therefore

[39] Supra note 10
[40] SAIDS/2017/45

failed to disclose the reasons which led him to test positive and it was concluded that there was a clear intention on the part of the athlete to use a performance enhancing substance which was prohibited. The sanction handed down was a period of four years ineligibility effective from the date of suspension, being 29 August 2017.

4.3. Finally in the *SAIDS v Inus Vermeulen*[41] case, the athlete tested positive for Stanozolol and Methylhexaneamine, both on the Prohibited list and was found guilty of contravening Regulation 21.2.1. and handed a four year sanction in accordance with Regulation 21.10.2.1.1.

5. Sanction

5.1. The departure point for any matter of this nature is the strict liability / personal responsibility placed on each Athlete to ensure that no Prohibited Substance or any of its Metabolites or Markers enters his/her body, and understanding that it is their individual duty to act with the 'utmost caution' to avoid any prohibited substance entering his/her body, which duty requires athletes to leave no reasonable stone unturned in terms of ingesting products without consulting a competent medical professional, or refrain from ingesting products from 'unreliable sources'. Mr Kebe, in the circumstances, did not fulfil this responsibility and neither did he, as a professional athlete, act with the utmost caution to avoid any prohibited substance from entering his body or at least avoid the risk of same, in fact based on the totality of his conduct, he manifestly disregarded the risk, which in the Appeal Panel's view he was fully aware of.

5.2. Mr Kebe's conduct was reckless in terms of failing to make enquiries from the resources mentioned that were at his disposal, to establish the ingredients of what he was taking or considered taking.

5.3. The failure to disclose the alleged supplement he received from Mr Hadebe in the opened Ripped EFX container on his DCF and transferring the blame for such omission to what was allegedly told to him by the doping control officer, from which an adverse inference is drawn by the Appeal Panel. There is therefore no basis for the Appeal Panel to conclude that the Athlete was not significantly at fault or negligent in the circumstances.

5.4. The Appellant has satisfied the onus placed on it in terms of Regulation 21.2.1, in terms of proving the presence of the Prohibited Substance in the Athlete's system thus constituting an ADRV. The substance in question, Stanozolol, is not a Specified Substance in terms of Regulation 21.10.2.1.1.

5.5. The period of ineligibility to be imposed for a violation of Regulation 21.2.1.2 (Presence of Prohibited Substance or its Metabolites and Markers) which does not involve a Specified Substance is four years for a first violation.

5.6. While the period of ineligibility can be reduced in certain circumstances as indicated in paragraphs 6.1 and 6.2 above, in the context of this Appeal hearing and considering the findings of the Tribunal Panel, neither Regulation 21.10.4 nor 21.10.5 is applicable in the circumstances. Any

[41] SAIDS/2017/06

reduction in the sanction would be unlawful not to mention unfair and arbitrary in relation to the other athletes (some of whom have been mentioned herein), who were subject to the same Anti-Doping Code and entitled to expect fair and equal treatment in terms of the same law, especially where the law is clear and unambiguous.

5.7. Given that the Appeal Panel finds that the Athlete, Mr Kebe, in fact did have the requisite intention the sanction of two years imposed by the Tribunal Panel, should be changed to four years in accordance with Regulation 21.10.2.1.1.

5.8. Finally, in accordance with Article 10.10.3.1. of the Anti-Doping Rules, if a provisional suspension is imposed and respected by the Athlete, the Athlete shall receive a credit for such period of provisional suspension against any period of ineligibility which may be imposed. As such Mr Kebe should receive a credit for the period of provisional suspension served as well as a credit for the period of ineligibility already served.

J. ORDER

In the current premise, it is hereby ordered that:

1. The Tribunal Panel failed to address the definition of intention as defined in the Rules and relevant case law and as such based on a balance of probabilities Mr Kebe is found to have acted with the requisite intention ;
2. To avoid the setting of bad precedent within sport in South Africa, the Tribunal Panel's decision be set aside;
3. The period of ineligibility be four (4) years in accordance with the Rules as stated.
4. In addition that Mr Kebe receives a credit for the period of provisional suspension as well as the period of ineligibility already served, with effect from 07 July 2016.
5. Each party to pay its own costs in regard to the Appeal.

DATED AT Durban ON THIS 24th DAY OF March 2018.

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MS. MARISSA DAMONS

CHAIRPERSON

THE APPEALS BOARD