

**IN THE APPEAL BOARD OF THE SOUTH AFRICAN INSTITUTE FOR DRUG
FREE SPORT**

CASE NO.: **SAIDS/2022/41/A02**

In the matter between:

THOMAS WILLIAM OOSTHUIZEN

APPELLANT

and

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

RESPONDENT

DECISION OF THE APPEAL BOARD

Chairperson:	Ms Thabiso Kutumela
Appeal Board Members:	Adv Mosupi Mashele Ms Penelope Beck
Counsel for the Appellant:	Adv Mannie Witz briefed by Cliff Alexander Attorneys
Prosecutor for SAIDS:	Mr Shane Wafer
Date of Appeal:	22 January 2024
Appeal took place at:	The Centurion Hotel (1001 Lenchen Ave N Centurion Central, Centurion, 0046).

INTRODUCTION

1. An appeal has been brought to this Appeal Committee in terms of Article 13 of the South African Institute for Drug-Free Sport Anti-Doping Rules. This is an appeal against the findings of the three-member Tribunal of the South African Institute for Drug Free Sport.
2. The Appellant is Mr Thomas William Oosthuizen (“**Appellant and/or Athlete**”), an adult male professional boxer.
3. The Respondent is the South African Institute for Drug-Free Sport (“**SAIDS**”) established in terms of the South African Institute for Drug-Free Sport Act no.14 of 1997, as amended, as the independent National Anti-Doping Organisation for South Africa.

JURISDICTION

4. SAIDS was established by Parliament as a statutory body through the South African Institute for Drug-Free Sport Act.14 of 1997 as amended in 2006 as the independent National Anti-Doping Organization for South Africa.
5. SAIDS is a signatory to the World Anti-Doping Agency (“**WADA**”) and is required to adopt policies, procedures and legal action that are in line with WADA and the World Anti-Doping Code.
6. In accordance with Article 20.5.1 of the World Anti-Doping Code (“**WADC**”), SAIDS has the necessary authority and responsibility to be independent in its operational decisions and activities from both sporting entities and governmental bodies.
7. SAIDS has the necessary authority and responsibility for planning, coordinating, implementing, monitoring and advocating improvements in Drug Testing in Sport. It aims to promote the participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance, thereby rendering impermissible doping practices which are

contrary to the principles of fair play and medical ethics, in the interest of the health and well-being of sport persons.

8. All participants in South African sport that are subject to the authority of a WADA signatory are required to act in accordance with SAIDS Anti-Doping Rules (“**ADR**”) currently in force.

9. Articles 5.2.1 and 5.2.2 of the ADR read as follows:

“5.2.1 Subject to the limitations for Event Testing set out in Article 5.3, SAIDS shall have In-Competition and Out- of-Competition Testing authority over all Athletes specified in the Introduction to these Anti-Doping Rules (Section “Scope of these Anti-Doping Rules”).

5.2.2 SAIDS may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place.”

10. Except as otherwise provided in Articles 6.6 – 6.8 of the ADR and WADC Article 7.1, Results Management shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organisation (“**ADO**”) that initiated and directed the Sample collection (or, if no Sample collection is involved, the ADO which first provided notice to an Athlete or other Person of a potential anti-doping rule violation (“**ADRV**”) and then diligently pursues that ADRV). The ADO with responsibility for Results Management in this matter is SAIDS.

11. Each of the Athletes or Persons mentioned in the ‘Introduction to the ADR’ is deemed, as a condition of his or her participation or involvement in sport in South Africa, to have agreed to and be bound by the ADR, and to have submitted to the authority of SAIDS to enforce the ADR, including any Consequences for the breach thereof, and to the jurisdiction of the hearing panels, specified in Article 8 and Article 13, to hear and determine cases brought under the ADR.

12. Decisions made under the ADR by SAIDS may be appealed as set forth in Articles 13.2 through 13.7, or as otherwise provided in the ADR, the WADC or

International Standards. All decisions shall remain in effect while under appeal, unless the appellate body orders otherwise.

13. In cases where Article 13.2.1 of the ADR is not applicable, the decision may be appealed to the SAIDS Appeals Board. The appeal process shall be carried out in accordance with International Standard for Results Management 2023 ISRM, as well as the SAIDS Operational Standard for Appeal Hearings (“**OSAH**”) for anti-doping cases under the jurisdiction of SAIDS.
14. Given the above statements is clear that the SAIDS Appeal Board has the jurisdiction to hear this matter.

FACTUAL BACKGROUND

15. On 16 October 2022, SAIDS conducted a test mission at a Boxing South Africa (BSA) sanctioned event: - “*5th Element Promotions’ Battle of the Warriors 7 – Thomas Oosthuizen vs. Limbani Lano*” (the Event) held in Hammanskraal, South Africa.
16. The Appellant was requested to submit urine sample during the In-Competition test, in accordance with the 2001 SAIDS ADR and the WADC International Standards.
17. In the course of the routine Doping Control Procedure (“**DCP**”) the Appellant provided 2 (two) samples (178762V) and (178518V). Both samples were outside of the suitable specific gravity (too dilute) for a valid sample as set out in the WADC International Standard for Testing and Investigations.
18. The Appellant was requested by the Doping Control Officer (DCO/Sample Collection Personnel to remain at the Doping Control Station (DCS) and provide an additional third valid sample. The Appellant failed to produce the additional third sample required.
19. The two invalid Samples were sent to the South African Doping Control Laboratory (“**SADoCoL**”), a WADA accredited laboratory in Bloemfontein,

South Africa, where they were analysed in accordance with the International Standard for Laboratories.

20. On 9th November 2022, the SAdoCoL reported that no Prohibited Substance(s), Prohibited Method(s), or their Metabolite(s) or Marker(s) on the test menu were detected in either sample (178762V) or (178518V) according to the 2022 WADC Prohibited List, however, the SAdoCoL found that the Samples were invalid, and that the Testing Authority should consider collecting a new sample from the athlete for testing.
21. On 10th November 2022, after conducting an internal investigation of the matter, including a review of the relevant WADC International Standards, and the Doping Control Form, the Doping Control Officers Report Form and the Supplementary Report Form provided by Ms. Jannita Lucille Gouws, wife of the Appellant and Promoter of the Event on 16 October 2022, SAIDS notified the Appellant by way of Notice of Allegation, of a potential ADRV for a violation of Article 2.3 of the SAIDS ADR.
22. On 10 February 2023, the Appellant was charged with a violation of Article 2.3 of the SAIDS ADR for "Evading, Refusing and/or Failing to submit to a Sample Collection" without compelling justification.
23. The Appellant disputed the ADRV.
24. On 27 March 2023 and pursuant to Article 8 of the ADR, the SAIDS Registrar appointed an Independent Doping Hearing Tribunal ("**the IDHP**") to hold a hearing on 01 June 2023.
25. The hearing of first instance took place on 01 June 2023 before the Tribunal. On 28 June 2023 the IDHP rendered a guilty verdict against the Appellant for a violation of Article 2.3 of the SAIDS ADR, imposing a 4 (four) year period of Ineligibility on the Appellant, including disqualification of all results in terms of Article 10.1 and 10.10 of the SAIDS ADR.

POINTS IN LIMINE

26. At the outset, SAIDS objected to the Appellant's filing of its Heads of Argument ("**HOA**") for the following reasons:
- a. In terms of Article 14.2 of the SAIDS Operational Standard of Appeal Hearings (OSAH), the Appellant is required to file their HOA 20 (twenty) days before the date of the appeal hearing. The Appellant filed their HOA 3 (three) days before the hearing and the HOA have been drafted in response (with various direct replies) to SAIDS written submissions. SAIDS is of the view that this is highly irregular and not in the spirit of the rules or OSAH.
 - b. SAIDS is of the view that the Appellant has submitted new evidence in its HOA and that this is not allowed in terms of Article 14.3 of the OSAH. Article 14.3 of the OSAH provides that, if the Appellant intends to submit new evidence, it must first be dealt with as directed in the OSAH, which read together with Article 16.1 requires a separate consideration by the Appeal Board as to its admissibility.
27. The Appellant stated the following:
- a. The notice of set down that they received did not state the due date for filing of the HOA; and
 - b. The Appellant only received their bundle of documents late and submitted their HOA one and half days after having received the bundle of documents.
28. The Panel decided to condone the Appellant's late of filing of its HOA as the ultimate goal of the OSAH is to achieve expeditious resolution of matters. Indeed rules are there and must be observed, that said, formalism should not trump need for expeditious resolution.

29. For the sake of expediency the Appellant (in consultation with the Respondent) agreed to abandon the following grounds of Appeal:
- a. The Appellant was not aware his legal representative was unauthorised to appear in terms of Section 33(1) of the Legal Practice Act;
 - b. The Chairperson of the IDHP failed to consider a conflict of interest and did not recuse himself; and
 - c. The IDHP did not allow cross examination of witnesses.
30. The Appellant stated that they seek to challenge the ruling of the IDHP on the following substantive grounds:
- a. The Appellant did not ever refuse to provide a third sample;
 - b. There were no prohibited substances detected in the Appellant's urine samples; and
 - c. The Appellant was not ever warned of the consequences of his refusal in terms of the ADR, by the DCOs.

THE APPELLANT'S SUBMISSIONS

31. The Appellant submits that he gave his full cooperation in respect of the supply of the two urine samples. The Appellant relied on the evidence of Mr Phiri who testified that *"The athlete was willing to give us the third sample."*¹ Mr Phiri further stated that the Athlete *"was okay, he was friendly, he was willing to give us, even the third, he was cooperating."*²
32. When the Appellant gave evidence at the IDHP and he stated that he did not have any problem with providing a third sample but that the doping control

¹ Line 19-20 at page 24 of the bundle of documents

² Lines 23-24 at page 30 of the bundle of documents.

officers would have to wait and said *“if you guys are willing to hang around, I will give you the third sample.”*³

33. The Appellant further submits that no proper explanation was given by Mr Phiri to the Appellant regarding the consequences that the Appellant would face if he failed to provide a third sample (i.e. a four-year ban). The only explanation that Mr Phiri gave for the third sample of urine was that the other samples were not within the range required.
34. The Appellant states that it is common cause that the first two samples had come back negative, and there were no prohibited substances. The evidence of Mr Du Preez, the laboratory director was that *“there is no prohibitive substance”*⁴.
35. The Appellant submits that it is clear from the evidence, as well as that of the doping control officers that the Appellant gave his full cooperation to them, and he further explained his pre-fight training regime, and further the physical position in giving a sample without having eaten or having something to drink.
36. The Appellant requested this Panel to reduce the sanction imposed as there was no prohibited substance found in the Appellant’s first and second sample.

SUMMARY OF RESPONDENTS’ CASE

37. The Respondent submits that the Appellant has offered no documentation whatsoever to support any defence to the charge, no less any persuasive evidence to suggest there was a compelling justification for not submitting and/or completing the Sample Collection Session on the day of the Event.
38. The Respondent submits that on the documentary evidence alone presented in the first instance hearing bundle, by way of witness statements of the DCO’s and the admissions made in correspondence, that the Appellant having been

³ Line 15 – 16 at page 103 of the bundle of documents.

⁴ Line 3 at page 77 of the bundle of documents.

requested to submit a third (valid) Sample and refusing, is sufficient to prove a violation of Article 2.3 of the SAIDS ADR.

39. The Respondent provided the following background:
- a. At 18h08 and 19h19 respectively, the Appellant provided 2 (two) urine Samples (178762V) and (178518V);
 - b. Following the collection of the first urine Sample, the lead DCO informed the Appellant that Sample 1 (178762V) had been measured to be outside of the Suitable Specific Gravity for Analysis, as set out in the WADC ISTI;
 - c. Accordingly, the Appellant was requested to provide a second Sample (178518V);
 - d. The second Sample collected at 19h19, Sample 2 (178518V) was also measured to be outside the Suitable Specific Gravity for Analysis;
 - e. In accordance with the WADC ISTI, the SCP shall continue to collect additional Samples until the requirement for Suitable Specific Gravity for Analysis is met. The Appellant was requested to remain at the Doping Control Station (“DCS”) to provide an additional third Sample; given the invalidity of the previous 2 (two) samples;
 - f. The Appellant elected not to submit a third Sample and intentionally left the DCS at approximately 19h23;
 - g. The Appellant was warned by both the SCP and Lead DCO that failing to submit a third (valid) Sample could be considered an ADRV;
 - h. At approximately 20h40, the Lead DCO (Thulani Phiri) called Mr Fahmy Galant (General Manager of SAIDS) to advise him of the situation (the Appellant not wanting to submit a third Sample);
 - i. The Appellant thereafter did not return to the DCS (he remained at the hotel) refusing to submit to the third Sample which was required of him. The SCP

had not however, determined that there were exceptional circumstances rendering it impossible to continue with the Sample Collection Session; and

- j. As a result of the Appellant's actions, and after failed attempts to recall the Appellant, the Lead DCO together with the SCP (Hilton Mitileni) closed the Sample Collection Session prematurely at approximately 21h00, due entirely to the Appellant's refusal / failure to submit a third (valid) Sample.

40. The Respondent submits that:

- a. The Appellant admitted to submitting 2 (two) urine Samples;
- b. The Appellant admitted to being advised by the SCP that the first and second Samples fell outside the suitable Specific Gravity for a valid Sample; and
- c. The Appellant admits that he was requested to provide a third Sample.

41. The Respondent submits that it is indisputable that the Appellant was asked to submit a third Sample and refused to provide same, thus confirming he Refused and/or Failed to submit to a Sample Collection.

42. According to the ISTI and ISTI Sample Collection Guidelines, when collecting Urine Samples that fall outside of the range of Suitable Specific Gravity for Sample, the DCO must continue to collect additional Samples until the requirement for Suitable Specific Gravity for Analysis is met, or until the DCO determines that there are exceptional circumstances – which means that it is impossible to continue with the Sample Collection Session. Any exceptional circumstances must be documented accordingly by the DCO.

43. Such exceptional circumstances may include, but are not limited to:

- a. the closure of a venue or location where the testing is taking place and no alternative location can be found nearby to continue sample collection;

- b. evacuation of all persons from a venue or location due to an emergency situation;
 - c. all Sample collection equipment had been used or not deemed suitable by the DCO;
 - d. SCP or the Athlete having to leave the venue to attend a hospital for medical treatment or attend to an emergency situation of an immediate family member; and/or
 - e. Athlete has provided a number of dilute Samples, it is late in the evening and the Athlete is due to compete early the next day.
44. The Respondent submits that it is self-evident from the submission of the DCO's and SAIDS at the time, that the DCO's/SCP's did not determine there were any exceptional circumstances that would prevent the collection of an additional Sample.
45. The Respondent further submits that Refusing to submit to Sample Collection contemplates intentional conduct by the Appellant. Therefore, the actions of the Appellant in refusing to submit a third (valid) Sample to the DCO after having been duly notified and requested to do so, is capable of being classified as international conduct.
46. The Respondent further submits that the Appellant engaged in conduct that he knew constituted an ADRV, or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly and consciously disregarded that risk.
47. With regard to Fault and Negligence, the Respondent submits that the Appellant is a high-level boxer that has been tested many times before. He is well aware of the doping control process and therefore, it is evident that he also knew and suspected and/or could reasonably have known or suspected, even with the exercise of utmost caution, that by failing to submit to the third Sample, he would be in violation of the SAIDS ADR.

48. The Respondent requests the SAIDS Appeal Board to find that:
- a. The Appellant is guilty of an ADRV for a violation of Article 2.3 of the SAIDS ADR;
 - b. The Appellant be subject to a period of Ineligibility of 4 (four) years in accordance with Article 10.3.1 of the ADR;
 - c. The Appellant's results of the 16th October 2022 at the Event, (including any other competition the Athlete participated in since such date) be immediately disqualified, along with the return of any medals or prize money awarded in accordance with Article 10.1 and 10.10 of the ADR.
 - d. Pursuant to Article 10.13, the period of Ineligibility shall start from the date of the decision of the IDHP.

THE REGULATORY FRAMEWORK

49. The Appellant was charged with a violation of Articles 2.3 of the SAIDS ADR for evading, refusing or failing to submit to Sample Collection.

50. Article 2.3 of the ADR reads as follows:

"Evading, Refusing or Failing to Submit to Sample Collection by an Athlete

Evading Sample collection; or refusing or failing to submit to Sample collection without compelling justification after notification by a duly authorized Person."

51. Footnote 10 to Article 2.3 provides that:

"Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading" Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification of Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete".

52. Clause 10.3 of the ADR reads as follows:

“10.3 Ineligibility for Other Anti-Doping Violations

The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 of 10.7 are applicable:

10.3.1 For violations of Article 2.3 or 2.5, the period of Ineligibility shall be four (4) years except: (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person’s degree of Fault; or (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete’s degree of Fault.”

53. Article 10.5 of the ADR provides that, if an Athlete or other Person can establish in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

54. Fault is defined in the SAIDS ADR as:

“Any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete’s or other Person’s degree of Fault include, for example, the Athlete’s or other Person’s experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, 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. In assessing the Athlete’s or other Person’s degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behaviour.”

55. No Fault or Negligence is defined in the SAIDS ADR as:

“The Athlete or other Person’s establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.”

THE COMMITTEE’S FINDINGS

56. The charge of “Evading, Refusing or Failing to Submit to Sample Collection” by an Athlete is a non-analytical charge, meaning that there has been no Adverse Analytical Finding. There is no dispute that the Samples collected by the Athlete did not contain any Prohibited Substance.

57. It is common cause that two samples were provided by the Athlete and both of them fell outside of the range of a Suitable Specific Gravity for Sample and that a third sample was requested from the Athlete.

58. The Athlete failed to submit the third sample therefore the Appellant is guilty of an ADRV for a violation of Article 2.3 of the SAIDS ADR.

59. The question that now needs to be answered is the period of Ineligibility.

60. Article 10.3.1 provides that the for violations of Article 2.3 or 2.5, the period of Ineligibility is 4 (four) years except in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be 2 (two) years.

61. The Panel is of the view that in the commission of the ADRV, the Appellant was not intentional in for the following reasons:

- a. The Appellant provided 2 (two) urine samples at 18h08 and 19h19 respectively;

b. Mr Phiri testified at the IDHP that *“The athlete was willing to give us the third sample.”*⁵ Mr Phiri further stated that the Athlete *“was okay, he was friendly, he was willing to give us, even the third, he was cooperating.”*⁶

c. The Appellant gave evidence at the IDHP that he did not have any problem with providing a third sample but that the doping control officers would have to wait and said *“if you guys are willing to hang around, I will give you the third sample.”*⁷

62. The Panel finds that the Athlete was negligent in the commission of the ADRV and in accordance with Article 2.3 **the period of Ineligibility shall be 2 (two) years.** The Panel believes that the sanction is proportional to the offence committed.

ORDER

63. The Appellant is guilty of an ADRV violation of Article 2.3 of the SAIDS ADR therefore the IDHP’s guilty finding is upheld.

64. The decision of the IDHP in paragraph 7.2 of its ruling is upheld in that *“All the Respondent’s results of 16 October 2022 at the relevant Event, as well as any other Event or competition in which the Respondent has particate since that date, to be immediately expunged/disqualified together with any prize money or medals awarded in terms of Article 10.1 and 10.10 of the ADR.”*

65. The Appeal is upheld in respect of the sanction and cost order issued by the IDHP, therefore:

a. The period of Ineligibility shall be 2 (two) years and shall start from the date of the decision of the IDHP.

⁵ Line 19-20 at page 24 of the bundle of documents

⁶ Lines 23-24 at page 30 of the bundle of documents.

⁷ Line 15 – 16 at page 103 of the bundle of documents.

- b. Each party to pay its own costs with regard to this Appeal and the proceedings at the IDHP

DATED at JOHANNESBURG on this the 13TH day of FEBRUARY 2024.

Kutumela

MS THABISO KUTUMELA (CHAIRPERSON)