

**THE LEGITIMACY OF THE SYSTEM OF STRICT LIABILITY AND THE TREATMENT
OF INADVERTENT DOPING AMONGST ATHLETES FROM A LEGAL AND HUMAN
RIGHTS PERSPECTIVE**

by

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CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 INTRODUCTION

Doping¹ in sports is currently a highly debated and controversial issue impacting severely on the spirit of sport and the principle of fair play.² It is one of the most debated and controversial issues within the sporting industry itself and has also caused difficulties in law and amongst academics. Within the field of law, criminalization of inadvertent dopers has brought the matters of private law head-on with public laws. It has become a huge concern whether or not anti-doping disputes should be left in the domain of private law, which is that disputes are solved by the contractual parties or that the rules of public law should apply.³ From time immemorial, the strict liability rules have reigned in the doping laws meaning that any sporting person found with prohibited substances in their bodies would be found liable with or without fault.⁴

¹ Doping is defined in terms of Article 1 of the World Anti-Doping Code (WADC) as the occurrence of at least one of the eleven anti-doping violations as provided for in Article 2 of WADC. The eleven anti-doping violations can be summarised as follows: (i) The presence of a prohibited substance or its metabolites or markers in an athlete's sample. (Article 2.1); (ii) Use or attempted use by an athlete of a prohibited substance or a prohibited method. (Article 2.2); (iii) Evading, refusing, or failing to submit to sample collection. (Article 2.3); (iv) Whereabouts failures are considered as any combination of three missed tests and/or filing failures within a 12-month period by an athlete in a registered testing pool (Article 2.4); (v) The 2021 Code makes it clear that engaging in fraudulent conduct (e.g. submitting falsified documents to an anti-doping organisation or asking a witness to lie in their witness statement) is an act of Tampering. From 1 January 2021, if an individual commits an act of Tampering relating to another ADRV, they can receive an additional consecutive ban. (Article 2.5); (vi) Possession of a prohibited substance or prohibited method. (Article 2.6); (vii) Trafficking or attempted trafficking in any prohibited substance or prohibited method. (Article 2.7); (viii) Administration or attempted administration to any athlete of any prohibited substance or prohibited method. (Article 2.8). (ix) Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity or attempted complicity involving an ADRV or any attempted ADRV. (Article 2.9). (x) Associating in a professional or sport-related capacity with a person such as a coach, doctor, physio or trainer who is serving a ban or who has been found guilty of a criminal or disciplinary offence equivalent to a doping violation. (Article 10). (xi) Acts that threaten or seek to intimidate another to discourage them from sharing information about doping or retaliating against another for doing so.

² *Stevens GP "The winner takes it all! Reflections on the world anti-doping code and the possible criminalisation of doping in sport" 2013 De Jure 592.*

³ *Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 De Jure 917.*

⁴ *World Anti-Doping Code (WADC) Article 2.1 through Article 2.11 (Hereinafter referred to as WADC); David McArdle, 'Strict Liability' and Legal Rights: Nutritional Supplements, 'Intent' and 'Risk' in the Parallel World of WADA para 2; Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code"*

In South Africa, doping is regulated by the South African Institute for Drug-Free Sport (SAIDS).⁵ Established in terms of the South African Institute for Drug-free Sport Act,⁶ the SAIDS “fulfils an independent testing, education and research function relating to drugs and doping in sport”.⁷ Doping is defined, in relation to the practice of sport, as the administration of substances belonging to prohibited classes of pharmacological agents or the application of any method intended to enhance performance artificially.⁸

Internationally, the World Anti-Doping Agency (WADA)⁹ was established in 1999 with the aim of harmonising anti-doping regulations worldwide.¹⁰ In principle, WADA relies on the ‘principle of legality’, the legal ideal that demands that all law should be clear, ascertainable, and non-retrospective, since it would be unfair to impose sanctions for acts that were not illegal at the time of their commission (*nullum crimen sine lege*, no crime without law).¹¹ In 2004, WADA adopted the World Anti-Doping Code (WADC) with the aim of embracing a strict liability standard for doping offences in sport (regardless of an athlete’s intent, fault, or negligence), disqualifying any associated sporting results and imposing a two year suspension to protect “clean” athletes and “ensure the integrity of results.”¹²

According to Article 2.1 and 2.2 of the World Anti-Doping Code (WADC),¹³ governing bodies do not have to prove intent or negligence on the part of the athlete to establish guilt. WADC provides that it is incumbent on the athlete to ensure that no prohibited substance finds its way into their bodies. It is without doubt that Article 2.1 and 2.2¹⁴

2013 *De Jure* 918; Stevens 2013 *De Jure* 592; Le Roux 2004 *SAJR SJPER* 68; Mottram and Chester *Drugs in Sport* 83; Hartley *Sport, Physical Recreation and the Law* 227.

⁵ South African Institute for Drug-Free Sport (Hereinafter referred to as “SAIDS”).

⁶ Act 14 of 1997.

⁷ Stevens “The winner takes it all! Reflections on the world anti-doping code and the possible criminalisation of doping in sport” 2013 *De Jure* 598.

⁸ Section 1 of the South African Institute for Drug-free Sport Act.

⁹ World Anti-Doping Agency (Hereinafter referred to as “WADA”).

¹⁰ *Fincoeur B, Henning A & Ohl F* “Fifty shades of grey? On the concept of grey zones in elite cycling” 2020 *Performance Enhancement & Health* 2.

¹¹ *Fincoeur, Henning & Ohl* (2020) above.

¹² Czarnota “The World Anti-Doping Code, the Athlete’s Duty of “Utmost Caution,” and the Elimination of Cheating.” 2012 *Marquette Sports Law Review* 45.

¹³ WADA adopted its first core document, the World Anti-Doping Code (WADC) in 2004 (Hereinafter referred to as “WADC”).

¹⁴ Article 2.1 and 2.2 WADC.

raises a myriad of concerns regarding human rights, civil liberties, and the international rules of due process and *audi alteram partem* rules.¹⁵ It is this controversy between public law rules found in the doctrine of strict liability *vis-à-vis* private law human rights matters and due processes that premises this study. It shall be endeavoured to show whether and to what extent does the strict liability doctrine in doping laws limit human rights of sporting persons and whether a balance is possible, particularly where inadvertent doping is concerned.

1.2 A BRIEF OVERVIEW OF DOPING IN SPORTS

1.2.1 Introduction

The use of performance-enhancing substances in sports is not merely a recent phenomenon.¹⁶ For the longest time individuals have tried to artificially enhance their physical performances using legal and illegal substances.¹⁷ Doping in sports may take many forms including, blood doping specifically meant to enhance the amount of hemoglobin in the athlete's bloodstream.

1.2.2 Blood Doping

According to the International Olympic Committee, blood doping is the administration of blood or related red blood products to an athlete other than for legitimate medical reasons.¹⁸ The amount of oxygen in a human body is determined by the amount of red blood cells. The artificial increasing of red blood cells in turn increases the athlete's oxygen and gives them extra strength and power. It has been observed that blood doping is particularly and highly effective in sports such as long-distance running and cross-country, cycling and skiing. In terms of testing for blood doping, there are both advantages as well as disadvantages with the sampling procedure. One of the advantages of the

¹⁵ *Mariano Puerta v ITF CAS 2006/A/1025*, award of 2006-07-12.

¹⁶ *Sharma & Mernon* (2014). A comparative study of the application of strict liability principles in sports: critiquing anti-doping policies; examining 'illicit crowd chanting' and match fixing. *Nirma University Law Journal* 81.

¹⁷ *Mazzeo* (2018). Development of Doping in sports: overview and analysis. *Journal of Physical Education and Sport*, 1669.

¹⁸ *Skowno* 1995 South African Journal of Sports Medicine 4.

procedure is that it is fast, reliable, and indisputable.¹⁹ However, the disadvantages are that of legal and ethical issues and the fact that extreme caution must be had in the testing process and the testing must be done by specialized personnel. It has however, been argued that blood sampling is quicker and less invasive than urine testing since more people will be comfortable giving blood than urine samples.²⁰

1.2.3 Inadvertent doping

Where an athlete tests positive for a prohibited substance, and it was not their deliberate *animus* to consume the substance, such unfortunate circumstances are described as inadvertent doping and blame factually is assumed on the athlete.²¹ An antidoping rule violation is committed without regard to an athlete's fault. This rule has been referred to in various CAS²² decisions as "strict liability".²³ An Athlete's fault is taken into consideration in determining the consequences of this anti-doping rule violation under Article 10.²⁴ This principle has consistently been upheld by CAS. The Code makes it explicitly clear that strict liability applies uniformly whether or not it is a case of intentional or unintentional doping.²⁵ Inadvertent doping may occur in a myriad of ways including but, not limited to: lack of proper advice; passive inhalation; intimate contact with people who have consumed prohibited substances; supplement food products and malicious acts of third parties.²⁶ Inadvertent doping through food supplements and ordinary food stuff is so vast and complicated considering the wide use of prohibited substances such as anabolic agents used for growth in livestock.

In the medical fraternity, some of the listed prohibited substances by WADA are the same medicines that are used treat diseases such as asthma and diabetes. It therefore becomes incumbent on medical teams and pharmacists to be conversant with the

¹⁹ Skowno 1995 *South African Journal of Sports Medicine* 5.

²⁰ Derman and Schweltnus 2000 *Journal of Modern Pharmacy* 55.

²¹ Article 2.1.1 World Anti-doping code (WADA 2021).

²² Court of Arbitration for Sports.

²³ Comment to Article 2.1.1 WADC 2021 page 19.

²⁴ *Ibid.*

²⁵ Article 2.1.1 WADC 2021.

²⁶ Mottram and Chester *Doping in Sport* 83.

relevant WADA rules on doping.²⁷ In terms of the WADA Rules on sanction, there are two options for athletes who test positive for a prohibited substance. On the one hand, the particular result of the doping may be repudiated, and, on the other, the athlete may be suspended for a specific period. In cases of inadvertent doping though, the athlete may be given an opportunity to prove the lack of intention of fault thereof.²⁸ Evidence to rebut intention to dope may include proving that adequate research was done and recorded or that the use of a particular supplement was declared prior. If the athlete establishes that he or she bears no fault or negligence for the violation, the athlete's individual results in the other competitions shall not be disqualified, unless the athlete's results in competitions other than the competition in which the anti-doping rule violation occurred were likely to have been affected by the athlete's antidoping rule violation.²⁹

1.2.4 The use of steroids

It has been noted that by the year 1935, there had already commenced a discovery of steroids, *albeit* for genuine medical purposes.³⁰ After this discovery, steroids were used for non-medical boosting of the body and testosterone. Thereafter, it was used for strength and expedited recovery for athletes. It has been suggested that German athletes and soldiers may have taken steroids during the 1936 Berlin Olympics and during World War II, respectively.³¹ By the 1950 and 1980 the taking of steroids had become fashionable in the United States throughout athletics and football and even coaches were encouraged to use them for increased strength and speed. To curb the spiralling abuse of the substance, the US passed the Anabolic Steroids Control Act of 1990, which was however less effective at the time.³²

²⁷ Mottram and Chester *Doping in Sport* 5.

²⁸ Mottram and Chester *Doping in Sport* 92.

²⁹ Article 10.1.1 of the WADA Code.

³⁰ Wolf "Conflicting Anti-Doping Laws in Professional Sports: Collective Bargaining Agreements v. State Law" *Seattle University Law Review* para 1608.

³¹ Wolf "Conflicting Anti-Doping Laws in Professional Sports: Collective Bargaining Agreements v. State Law" *Seattle University Law Review* para 1608.

³² Anabolic Steroids Control Act of 1990.

In 2012, WADA banned the use of steroids due to the serious health repercussions, including affected liver, endocrine, and reproductive function, tumours of the liver and kidneys, heart conditions, and psychiatric symptoms. Besides the negative effect they have on one's health, WADA was founded on the principle that integrity of sport is fundamental to the spirit of sport, and that integrity is threatened by doping.³³

The WADA drafted a Prohibited List which may include any substance and methods that satisfy any two of three criteria which are substances which has the potential to enhance or enhances sport performance, substances which represent an actual or potential health risk to the athlete and substances that violate the spirit of sport.³⁴ Steroids are listed on the WADA S1 Prohibited List, and they are non-specified substances. They are always prohibited regardless of whether they are used in or out of competition.³⁵ All substances or methods on the Prohibited List are prohibited. The sub-classification into "Specified" or "Non-Specified" are important only in the sanctioning process.³⁶ The purpose of the sub-classifications of "Specified" or "Non-Specified" on the Prohibited List is to recognize that it is possible for a substance to enter an athlete's body inadvertently, and therefore allow a tribunal more flexibility when making a sanctioning decision.³⁷ There are over sixty steroids listed as anabolic steroids and anabolic agents under the S1 classification.³⁸

1.3 THE STRICT LIABILITY DOCTRINE IN SPORTS

1.3.1 The general application of the rule

As highlighted above, the strict liability rules in sports have been around from time immemorial. It has been submitted that these strict liability rules are perhaps the cornerstone of anti-doping rules.³⁹ The premise of the rule is that an athlete who tests positive for a prohibited substance in their bodies is automatically found guilty with or

³³ WADC 2021 13.

³⁴ <https://www.wada-ama.org/en/prohibited-list>.

³⁵ WADC International Standard Prohibited List 2021, 3.

³⁶ <https://www.wada-ama.org/en/prohibited-list>.

³⁷ <https://www.wada-ama.org/en/prohibited-list>.

³⁸ WADC International Standard Prohibited List 2021, 5-6.

³⁹ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 918.

without fault. A guilty verdict means that athletes are suspended and forfeits all their privileges and accolades relevant to the sporting activity.⁴⁰

In *Williams v. Nat'l Football League*,⁴¹ there was an interesting challenge to the strict liability sanction in terms of the Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA).⁴² The players who opposed the Act had all of them tested positive for bumetanide, a banned substance. The Act provided that athletes who had tested positive were entitled to a re-test as well as a mandatory drug treatment prior to the employer taking drastic actions.⁴³ The case against the players *in casu* failed as the court opined that the CBA's anti-doping rules sought nothing but, to pre-empt the state's mandatory laws. In cycling doping came to the fore back in 1886, where a cyclist died because of taking a cocktail of cocaine, caffeine and strychnine during a race in Paris. It was, however, the death of a Danish national during the Olympic games of 1960 that the International Cyclic Federation (UCI) began to consider stringent regulation and prohibition of doping in cycling.⁴⁴

Article 2.1 and 2.2 WADA further provides that the burden of proof is on the sports' governing body to prove a prima facie case and evidence of doping by the athlete.⁴⁵ According to WADA there are differences between specified and non-specified substances. For a specified substance, the athlete who tested positive is given an opportunity to prove on a balance of probabilities that the substance was not intended to be used as an enhancement.⁴⁶ Should the athlete succeed in dispersing the burden; the suspension may be reduced or expunged depending also on their degree of fault.

⁴⁰ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 917.

⁴¹ *Williams v. Nat'l Football League*, 582 F.3d 863, 870 (8th Cir. 2009).

⁴² Drug and Alcohol Testing in the Workplace Act (DATWA).

⁴³ *Williams v. Nat'l Football League*, 582 F.3d 863, 870 (8th Cir. 2009) at 874.

⁴⁴ Jakob Morkoberg 2008 Vol. 9 No. 4 *International Sport Med Journal*, 156.

⁴⁵ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 919.

⁴⁶ Article 3.1 WADC 2021.

First time violation of Article 2.1, Article 2.2, Article 2.3, carries a ban of up to four years and it applies to athletes only.⁴⁷ Article 2.5 also carries a ban of up to 4 years and it applies to athletes, athlete support personnel and other persons.⁴⁸ Again, Article 2.6 carries a ban of up to four years and it applies to athletes and athlete support personnel. Article 2.4 and Article 2.10 carries a ban of up to 2 years, the latter applies to athletes, athlete support personnel and other Persons and the former applies to the athlete only.⁴⁹ Violating Article 2.7 and Article 2.8 carries a ban of up to 4 years to lifetime.⁵⁰ The difference is that in Article 2.7 the ban applies to athletes, athlete support personnel and other persons and in Article 2.8 the ban only applies to athletes and athlete support personnel.⁵¹ Lastly, Violating Article 2.9 and 2.11 carries a ban of up to 2 years to a lifetime and the bans are applicable to athletes, athlete support personnel and other persons.⁵²

There are other aggravating circumstances that can increase some bans up to a further two years in certain circumstances e.g. the use of multiple prohibited substances.⁵³ It is also important to note that there is increased flexibility on bans for those considered as recreational athletes and protected persons and shorter bans may be applied where it is determined that the use of the substance took place out of competition and was unrelated to sports performance.⁵⁴ There is recognition that taking these substances might be part of a wider substance misuse or addiction problem and a further reduction in the length of ban may be available if an approved treatment programme is completed.

The application of the strict liability doctrine, particularly in inadvertent doping has been criticized on numerous occasions. Primarily, the doctrine does not follow the rule of innocent until proven guilty. In South African law, the right to be presumed innocent until

⁴⁷ Article 10.3 WADC 2021.

⁴⁸ Article 10.3 WADC 2021.

⁴⁹ Article 10.3 WADC 2021.

⁵⁰ Article 10.3 WADC 2021.

⁵¹ Article 10.3 WADC 2021.

⁵² Article 10.3 WADC 2021.

⁵³ Article 10.4 WADC 2021.

⁵⁴ Article 10.6.3.1 WADC 2021.

convicted by a public court is one of the fundamental rights that may only be limited in terms of the general limitation clause.⁵⁵ Other criticisms are that the doctrine infringes on an individual's right to livelihood; does not take into account individual circumstances; the rationale for the doctrine is not persuasive and convincing; the mandatory penalties are too draconian; the doctrine does not comply with the proportionality rules and human rights and; the rule sacrifice the few innocent athletes in order to find liability of a majority.⁵⁶

1.3.2 The strict liability rule and the right to fairness

It is without doubt that the strict liability rule may lead to unfairness insofar as it does not require proof of fault on the part of athletes; particularly in cases of inadvertent doping.⁵⁷ On the face of it this rule negates the common law trite principle of *audi alteram partem* and the human right of due process. In *Mariano Puerta v ITF CAS*⁵⁸ the Court of Arbitration for Sport recognized the unfairness of the strict liability's one-size-fit-all rule. It has been submitted that there are possible and genuine mistakes such as a genuine prescription by the doctor or the medical team, the malicious acts of third parties or a genuine ignorance about a prohibited substance.⁵⁹

According to the research conducted by Qvarfordt *et al*,⁶⁰ there is a lack of information and lack of knowledge about anti-doping procedures, the prohibited list, and other regulations among the athletes. This lack of knowledge potentially impacts on athletes' ability to comply with the anti-doping regulations and be compliant.⁶¹

⁵⁵ Section 35(3)(h) Constitution of the Republic of South Africa, 1996.

⁵⁶ Hartley *Sport, Physical Recreation, and the Law* 229.

⁵⁷ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 921; *Bernhard v ITU* (unreported, 9 August 1999, Court of Arbitration for Sport, CAS 1998/222).

⁵⁸ 2006/A/1025, award of 2006-07-12.

⁵⁹ In *USA Shooting & Quigley v UIT CAS 94/129*, award of 1995-05-23 it was however held that doing away with the strict liability rules would cripple the WADA's fight against doping since the sports' governing bodies would then be required to prove intent on the part of athletes. This would be impossible and expensive and would lead to a floodgate of litigation.

⁶⁰ Qvarfordt *et al* "Limitations and duties: elite athletes' perceptions of compliance with anti-doping rules" 2021 *Sport in Society* 557.

⁶¹ *Ibid.*

1.4 THE COMPATIBILITY OF STRICT LIABILITY AND CONTRACT LAW

1.4.1 The application of law of contract

It has been submitted that amid all the controversies surrounding issues of strict liability and sports, it is often downplayed that it is the rules and laws of contract that regulate the relationship between athletes and their organizations. However, on the other hand, it is a truism that most sporting agencies are now signatories of the WADC⁶² in the combating of anti-doping laws. Therefore, since the individual and national contracts are concerned, athletes found themselves bound by the WADA rules indirectly by virtue of their organizations' obligations to WADA.

1.4.2 Failure to perform in terms of the contract

It has been illustrated that whether it is the rules of the sporting organization or the rules of WADA that are applicable, the athlete is nonetheless bound by the anti-doping laws directly or indirectly. It has therefore been submitted that where the athlete tests positive for a prohibited substance, he or she has committed a breach of contract in the form of positive malperformance.⁶³ *In casu* malperformance relates to a duty of the athlete to refrain from using a prohibited substance. Breach of contract requires that there was a duty to perform, and that there was a breach of the duty through non-performance, without any proof of fault.⁶⁴ This rule of contract basically corresponds with the strict liability rule of the anti-doping laws of WADA. The rules of contract, however, provide some remedies for the party in breach. Such a party may, through evidence, prove that the breach was not their own fault or that the performance was impossible; such proof may reduce the extent of the sanction. It has, however, been submitted that since the common law rules of contract apply, parties are free to deviate from the common rules and contract in terms

⁶³ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 924 quoting Hutchison & Pretorius (eds) *Law of contract in South Africa* (2012) 294.

⁶⁴ Zimmerman & Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 312; Van der Merwe *et al Contract: General principles* (2012) 301; *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA) 2012; *Administrator Natal v Edouard* 1990 3 SA 581 (A) 597E-F; *Gengan v Pathur* 1977 1 SA 826 (D) 830G.

of their own liking.⁶⁵ As such, it has been suggested that the one-size-fit all rule of strict liability should be rejected and cases must be investigated individually.⁶⁶

In the South African law of contract particularly where there has been a breach of contract by the debtor (*mora debitoris*), there has been a profound dispute as to whether the strict liability rule is applicable or not. In the landmark case of *Scoin Trading (Pty) Ltd v Bernstein*,⁶⁷ it was unequivocally held on appeal that fault is not a prerequisite for the purposes of *mora debitoris*, meaning that the debtor may not escape liability despite the breach being a fault not of their own. Despite this South African decision, there has nonetheless not been an agreement as to whether the strict liability doctrine is applicable in cases of *mora debitoris*. In *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co*⁶⁸ and *Victoria Falls and Transvaal Power Company Co Ltd v Consolidated Langlaagte Mines Ltd*⁶⁹ the court held that fault is required in cases of *mora debitoris*. Despite this evidence that the strict liability rule does not apply in cases of *mora debitoris*, it has nonetheless been argued that that approach in South African law is erred as there is no trace of fault in *mora* cases in Roman law and other South African cases.⁷⁰

1.5 A HUMAN RIGHTS PERSPECTIVE AND STRICT LIABILITY

1.5.1 Fundamental rights at play

The issue of strict liability in sports has attracted a myriad of opposition particularly before the Court of Arbitration for Sport (CAS). Numerous cases that have come before this court

⁶⁵ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 926.

⁶⁶ *Mariano Puerta v ITF* CAS 2006/A/1025, award of 2006-07-12; Loannidis 2012 24 *Denning. L.J* 175 that the *contra proferentem* rules in the law of contract must be applied against the contract drafter where the terms of the contract are not clearly expressed.

⁶⁷ 2011 2 Sa 118 (SCA)

⁶⁸ 1970 1 SA 584 (T).

⁶⁹ 1915 AD 1.

⁷⁰ Cornelius 2012 PER / PELJ (15)5 619; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Fluxman v Brittain* 1941 AD 273; *Microuticos v Swart* 1949 3 SA 715 (A); *Linton v Corser* 1952 3 SA 685 (A); *Union Government v Jackson* 1956 2 SA 398 (A); *Standard Finance Corporation of South Africa Ltd v Langeberg Ko-operasie Bpk* 1967 4 SA 686 (A); *Nel v Cloete* 1972 2 SA 150 (A); *Van der Merwe v Reynolds* 1972 3 SA 740 (A); *Ver Elst v Sabena Belgian World Airlines* 1983 3 SA 637 (A).

have argued that this common law rules unjustly limits the rights to privacy, work, and the right to be free from all forms of discrimination.⁷¹ The German case, *Krabbe v IAAF*,⁷² is one of the most precise cases on the constitutional challenge to the decisions of sporting organizations and human rights. It was held *in casu* that the four-year ban on athletes was an unconstitutional infringement of human rights. It has been held that CAS's rules on anti-doping policies should be fair, reasonable, justifiable, and proportionate. Lifetime bans on athletes have been dismissed as being severely unfair in all respects.⁷³ The arguments however, submitted by numerous sporting organizations on the issue of human rights is that the anti-doping Codes are necessary, appropriate, and not contrary to the presumption of innocence in Article 6(2) of the ECHR.⁷⁴

According to the WADA Code, the purpose of the anti-doping laws is to preserve the spirit of the sport through the celebration of the human spirit, ethics, fair-play, and honesty.⁷⁵ It has been argued that the purpose of the Code is too wide and too stringent, at least insofar as South African Constitutional dispensation and rights are concerned. As such, the suggestion is that before South African courts accepts this wide definition of purpose, the courts must ask whether the purpose of the limitation are compatible with human rights such as privacy, occupation,⁷⁶ movement and the right to be presumed innocent until found guilty.⁷⁷ Furthermore, it has been submitted that the legal, ethical and fundamental rights issues in doping laws are complicated by conflicting national laws, federal laws, international laws (European Charter on Human Rights) and the international sports governing laws. Primarily, the legal and ethical issues have something to do with consent by athletes and their representatives if any.⁷⁸ Without such consent, the entire procedure is invasive and may be regarded as battery, assault or any other civil

⁷¹ David *World Anti-Doping Code* 15.

⁷² Decision of the OLG Munich, 28 March 1996.

⁷³ David *World Anti-Doping Code* 35.

⁷⁴ Article 6(2) of the European Convention on Human Rights provides for the presumption of innocence before anyone is proven guilty.

⁷⁵ Le Roux 2004 *SAJR SJPER* 74.

⁷⁶ In *JR 1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) read with *Cronje v United Cricket Board of South Africa*, 2001 (4) SA 1361 (TPD) it was reiterated that section 22 of the Constitution of the Republic of South Africa, 1996 protects the rights to choose a trade, occupation, or profession.

⁷⁷ Le Roux 2004 *SAJR SJPER* 74.

⁷⁸ Skowno 1995 *South African Journal of Sports Medicine* 5.

and or criminal liability. Consent, moreover, must be specific and informed consent by and on behalf of athletes and the purpose of the blood testing must be clearly made mention of. The foregoing simply means that as per specific consent, the blood samples may only be used for testing for prohibited substances and may not be used for other purposes such as research without the athlete's specific consent.⁷⁹

1.5.2 Proportionality rules and fundamental rights

One of the most internationally advanced arguments regarding the issue of fundamental rights and strict liability is that of proportionality. It is a situation where there are fixed or prescribed sanctions for athletes with or without fault on their part. It has been argued that although the doctrine of proportionality was founded in the civil law jurisdictions, it now finds itself in human rights and administrative law.⁸⁰ It has been submitted that the proportionality tests before the CAS courts should be set as follows:

- a) "the restriction on human rights must be appropriate and fit to achieve the aim it pursues.
- b) the restriction must be necessary in the sense that no lesser intrusion would achieve the desired aim; and that
- c) the restriction must be proportionate in that it does not affect the interest of the individual in a disproportionate manner, and it must be necessary in the sense of fulfilling a pressing social need."⁸¹

The issue of what a proper sanction for an athlete is has always presented problems, particularly where there is a conflict between national laws and the Code. Such a conflict came before the court in *British Olympic Association (BOA) v WADA: Harmonisation v Self-regulation*.⁸² *In casu*, the appellant was BOA, an Olympic association and a company

⁷⁹ Skowno 1995 *South African Journal of Sports Medicine* 5.

⁸⁰ David *World Anti-Doping Code* 225.

⁸¹ Cottier, Thomas & Echandi, Roberto & Leal-Arcas, Rafael & Liechti, Rachel & Payosova, Tetyana & Sieber-Gasser, Charlotte, *The Principle of Proportionality in International Law* page (2012) 1-29.

⁸² CAS 2011/A/2658 *British Olympic Association (BOA) v. World Anti-Doping Agency (WADA)*.

incorporated in terms of English law. The respondent in the case is WADA. The appeal concerns a decision made by the latter concerning a BOA's bylaw prohibiting any British national with a previous doping charge from being selected to represent BOA in any international sporting competition.⁸³

WADA contends that the bylaw is an unnecessary double sanction that is already provisioned by the Code. Before the Court of Arbitration for Sport (CAS), BOA sought the annulment of WADA'S decision; that their bylaw was merely a selection law and not a sanction and that BOA's bylaw complied with the Code.⁸⁴ The entire arguments by both parties revolved around the interpretation of both the bylaw and the Code. The panel was adamant and unequivocal in that both the bylaw and the Code had a legitimate purpose which is to prohibit doping and preserve the integrity of sporting. However, the panel opined that by virtue of being a signatory of the Code, BOA had agreed to comply with the rules of the Code, including the rules pertaining to sanctions. The court also reiterated the objective of WADA to harmonize doping laws across all systems and its objective to avoid the duplication of sanction. The court therefore held that BOA's bylaw was an unacceptable sanction which is already provisioned by WADA.⁸⁵

So far, the proportionality rules have been applied to reduce the prescribed penalties sanctioned against athletes, particularly in the cases of inadvertent doping. However, whether this doctrine will succeed in the protection of fundamental human rights in sports law is yet to be seen.⁸⁶ In the Marin Cilic case, a 24-year-old tennis player inadvertently ingested nikethamide through the tablet. He had no intention of enhancing his performance. Nikethamide is a short-acting stimulant, which used to be prescribed for an overdose of sedatives. The International Tennis Federation accepted Cilic's contention that he ingested the substance inadvertently in glucose tablets and was not trying to cheat. The Athlete's submissions, in essence, were that the athlete's breach was of a purely technical nature. Nikethamide is prohibited only in competition because its effects

⁸³ *US Olympic Committee v International Olympic Committee* CAS 2011/O/2422.

⁸⁴ Loannidis 2012 24 *Denning*, L.J 171.

⁸⁵ Loannidis 2012 24 *Denning*, L.J 173.

⁸⁶ David *World Anti-Doping Code* 225.

are transient.⁸⁷ The Athlete inadvertently ingested nikethamide out of competition, when it was perfectly legal for him to do so. His inadvertent “use” was therefore not a violation of any rule. There was no nikethamide in the Athlete’s system by the time he played his match on 1 May 2013.⁸⁸ All that remained in his system were traces of the metabolite Nethylnicotinamide, which is not a prohibited substance.⁸⁹

Another case would be that of Therese Johaug, during the period 4-15 September 2016, the Norwegian skier Therese Johaug used a cream (Trofodermin) purchased for her by a team doctor in Italy to treat acute sunburn on her lips.⁹⁰ The active ingredients listed on the packaging included Clostebol acetate (0.5%), an anabolic agent listed on the World Anti-Doping Agency (WADA) Prohibited List and banned at all times, in and out of competition.⁹¹ Ms Johaug underwent an out-of-competition doping control test on 16 September 2016 which revealed the presence of a metabolite of Clostebol.⁹² Further to an investigation, the Adjudication Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sport issued a decision on 10 February 2017 in which Ms Johaug was sanctioned with a period of ineligibility of 13 months beginning on 18 October 2016, the date on which she was provisionally suspended. Having reviewed the matter in full, the Panel noted that Ms Johaug failed to conduct a basic check of the packaging, which not only listed a prohibited substance as an ingredient but also included clear doping cautionary warning. Such omissions resulted in an anti-doping rule violation inconsistent with her otherwise clean anti-doping record. Nevertheless, in order to ensure equality in applying anti-doping rules, the Panel highlighted that it was obliged to apply a proportionate sanction, consistent with the level of fault. For this reason, the Panel noted that, in such a situation of non-significant fault, the 2015 World Anti-doping Code provides for a suspension range of between 12 – 24 months and determined in the present case

⁸⁷ Arbitration CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic, award of 11 April 2014 (operative part of 25 October 2013), 10.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Arbitrations CAS 2017/A/5015 International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) & CAS 2017/A/5110 Therese Johaug v. NIF, award of 21 August 2017, 1-38.

⁹¹ *Ibid.*

⁹² *Ibid.*

that a period of ineligibility of 18 months, commencing on 18 October 2016, was appropriate.⁹³

1.6 HYPOTHESES

The general application of the strict liability doctrine, particularly in inadvertent doping is an unjust limitation of the athlete's human rights and particularly the right to privacy, the right to work and the right to be free from all forms of discrimination.⁹⁴ The application of this rule is evasive and fails to consider that testing positive for a prohibited substance may not always be their own fault. Athletes who test positive have the right to prove their cases without the burden of the strict liability rule on their shoulders. They have the right to a fair and equitable due process prior to any stringent or onerous sanction being imposed on them.

1.7 IMPORTANCE / BENEFITS OF THE STUDY

This qualitative study of the strict liability doctrine endeavours to illustrate that the application of the common rule is not always the proper and effective method of curbing doping in sports. The paper seeks to determine and illustrate that, particularly for inadvertent doping it is not always the fault of the athlete when they test positive for prohibited substances. As mentioned above, the fault may be attributable to the mistakes or oversight of the medical teams, genuine doctor prescriptions, genuine ignorance and even the malicious acts of third parties.⁹⁵ Therefore to uniformly apply the strict liability rules does not always lead to justice. It is the premise of the paper to contribute to the existing field of sports law by research and recommending less intrusive means of anti-doping measures; recommendations that would be compatible with international as well as South Africa's Constitutional dispensation.⁹⁶

⁹³ *Ibid.*

⁹⁴ David *World Anti-Doping Code* 15; sections 9, 14 and 22 of the Constitution of the Republic of South Africa 1996 protects the rights against any form of discrimination, the right to privacy and the right of everyone to choose their profession, respectively.

⁹⁵ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 921.

⁹⁶ Section 8(3)(a) of the Constitution of the Republic of South Africa 1996 provides that to give effect to a right in the Bill, a court must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right.

1.8 METHODOLOGY

In this paper, the methodology of research applied is purely qualitative in nature. This methodology of research is profoundly premised on the qualitative rather than the quantitative questions of the law. The research methodology fundamentally focuses on explaining and the describing of legal phenomena. The research method comprises of data collections such as case law, literature reviews, statutes, policy documents as well as journal articles. The research methodology endeavours to examine the assumptions, hypotheses and meta-narratives that underlie research methods”.⁹⁷ This definition describes a qualitative and scientific process through which the researcher determines and provides relevant and coherent narratives and explanations and legal phenomena. The primary focus of this research is qualitative and focuses on statute, case law, custom, international law as well as other sources of the law in South Africa and the globe.⁹⁸ Qualitative research is premised on written material of law found in traditional libraries and well as the modern digital sources. Unlike quantitative research, this research is not concerned with numbers of statistics but written sources in South African law.

1.8.2 CHAPTER DIVISION

This research consists of five chapters.

Chapter one - This chapter is the introduction outlining the background to the study, the research methodology, the study hypothesis as well as the chapter division.

Chapter two – This chapter discusses the principle of strict liability and its application in sports.

Chapter three – This chapter explores the doping regulation under WADA.

Chapter four – This chapter discusses the regulation of doping in South Africa.

Chapter five – This chapter concludes the study and provides recommendations.

⁹⁷ Kroeze 2013 (16)3 *PER/PELJ* 37.

⁹⁸ Section 39(1)(b)-(c) provides that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international and foreign law.

CHAPTER 2

THE PRINCIPLE OF STRICT LIABILITY AND ITS APPLICATION IN SPORTS

2.1 Introduction

The strict liability principle is a principle of no-fault liability. It has been applied in doping disciplinary rules for decades.⁹⁹ Generally, the principle of strict liability imposes liability on defendants who are neither negligent nor guilty of intentional wrongdoing.¹⁰⁰ The general elements of strict liability involves casting a legal obligation upon a person.¹⁰¹ The principle is specifically applied where an athlete's blood or urine sample has returned a positive test result for the presence of substances that are prohibited in sport.¹⁰² In the realm of Anti-Doping rules in Sports Law, the principle of strict liability has been enshrined in the Article 2.1.1 of the World Anti-Doping Code 2021 which states that:

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

The Code has been adopted by some 191 countries and is the pervasive law governing doping in sports across most countries and sports. In this Code, certain presumptions are made in relation to culpability of the athlete in anti-doping law which may lead to injustice.¹⁰³ However it has been suggested that in the attempt to put an end to doping

⁹⁹ Du Pisani, Annelize. (2013). A contractual perspective on the strict liability principle in the World Anti-Doping Code. *De Jure Law Journal*, 46(4), page 917.

¹⁰⁰ Sharma & Mazumdar. (2011). A Critical Appraisal of the Concept Strict Liability in WADA Code. *Journal of Sports & Legislation*

¹⁰¹ Sharma & Mernon (2014). A comparative study of the application of strict liability principles in sports: critiquing anti-doping policies; examining ‘illicit crowd chanting’ and match fixing. *Nirma University Law Journal* 81.

¹⁰² Du Pisani, Annelize. (2013). A contractual perspective on the strict liability principle in the World Anti-Doping Code. *De Jure Law Journal*, 46(4), 917.

¹⁰³ Sharma, Sooraj and Mazumdar, Shujoy, A Critical Appraisal of the Concept Strict Liability in WADA Code (August 14, 2011) *Journal of Sports & Legislation*, Vol.1, No. 1, 2011 page 2.

sport the severe rule of strict liability has been applied as it is the lesser of the two evils and that the fight against doping in sport justifies such a harsh approach.¹⁰⁴

2.2 The history and background of strict liability in sports

The strict liability rule in doping law has been called the cornerstone of anti-doping programmes.¹⁰⁵ The principle emanates from the law of delict and was evolved in the famous case of *Ryland's v. Fletcher* where it was held that *no mens rea* was required in order to prove liability.¹⁰⁶ It is a well-known legal rule and is contained in several statutes around the world, especially in statutory offences.¹⁰⁷ The strict liability doctrine seeks to impose a responsibility, deemed a 'personal duty', on an athlete to be responsible for what he or she ingests, and not to ingest any prohibited substances.¹⁰⁸ The justification for strict liability in regard to statutory offences seems to also be applicable to the WADC.¹⁰⁹

2.3 Strict liability defined

The strict liability principle entails that the athlete is responsible for any prohibited substance which is found in their sample and regardless of whether the athlete intentionally, carelessly, or recklessly consumed that substance.¹¹⁰ The mere presence of a prohibited substance may enhance performances and it may endanger the athletes' body. It further goes against the spirit of the game and consequently it will be sufficient to

¹⁰⁴ Sharma, Sooraj and Mazumdar, Shujoy, A Critical Appraisal of the Concept Strict Liability in WADA Code (August 14, 2011). *Journal of Sports & Legislation*, Vol.1, No. 1, 2011 page 2.

¹⁰⁵ Amos "Inadvertent Doping and the WADA Code" (2007) *Bond Law Review* 2.

¹⁰⁶ *Ryland's v. Fletcher* (1868) L.R. 3 H.L. 330.

¹⁰⁷ Niel du Toit, "Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?" *The International Sports Law Journal* (Issue 3-4) page 163.

¹⁰⁸ Smith "A critical analysis of the divided court of arbitration for sport jurisprudence on the World Anti-Doping Code Article 10.4" (2013) *Australian and New Zealand Sports Law Journal* 108.

¹⁰⁹ Niel du Toit, "Strict Liability and Sports Doping - What Constitutes a Doping Violations and What Is the Effect Thereof on the Team?" *The International Sports Law Journal* (Issue 3-4) page 163.

¹¹⁰ David McArdle, 'Strict Liability' and Legal Rights: Nutritional Supplements, 'Intent' and 'Risk' in the Parallel World of WADA para 2.

hold the athlete liable without the need to possess guilty intent.¹¹¹ The principle of strict liability imposes liability on defendants who are neither negligent nor guilty of intentional wrongdoing. Strict liability is an absolute rule that does not consider inadvertent doping since absence of intent or negligence is by itself no defence to it.

2.4 The application of strict liability principle under the International Olympic Committee Anti-Doping rules and the World Anti-Doping Code.

The International Olympic Committee¹¹² has a zero-tolerance policy to cheating and the committee holds accountable anyone responsible for using or providing doping products. The Committee focuses on prevention through detection and deterrence, supported by athlete and entourage education. Around 1960, the IOC dedicated itself to fight against doping and in 1999, it supported the establishment of the WADA. At the Olympic Summit held in October 2015, the IOC proposed an anti-doping testing and sanctioning system independent from sports organisations. Since March 2016, it has delegated the decisions on alleged anti-doping rule violations during the Games to an independent body, namely a new Anti-Doping Division of the Court of Arbitration for Sport (CAS). The CAS Anti-Doping Division has replaced the IOC Disciplinary Commission to hear and decide on doping cases at the Olympic Games.

2.5 The Principle of Strict Liability and Inadvertent doping

Doping is defined as the occurrence of one or more of the antidoping rule violations set forth in Article 2.1 through Article 2.11 of the Code.¹¹³ The WADA Code does not define inadvertent doping per se. The definition of inadvertent doping is assumed under the jurisdiction of Article 2.1 which states that it is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any prohibited

¹¹¹ *K Nivedhitha* "Strict Liability, Inadvertent Doping, and the WADA Code- A case of Disproportionate" (2019) 1 JSLPG 2.

¹¹² International Olympic Committee (hereinafter referred to as IOC).

¹¹³ Article 1 WADC 2021.

substance, or its metabolites or markers found to be present in their samples.¹¹⁴ Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1. This basically means that an athlete is liable for doping or having prohibited substance without fault and lacking the intention to dope.¹¹⁵ The strict liability principle means the athlete is responsible for any prohibited substance which is found in their sample and regardless of whether the athlete intentionally, carelessly, or recklessly consumed that substance.

Inadvertent doping can be justified when an athlete is *unaware* as to how a prohibited substance entered their body while they exercised utmost caution.¹¹⁶ This has been given effect in the case of *Adams v Canadian Centre of Ethics in Sports*,¹¹⁷ when Adams, a wheelchair athlete, in his sleep was kissed by a woman who had cocaine on her lips.¹¹⁸ The prohibited substance entered his body through an assault.¹¹⁹ Adams was aware of how the substance entered his body.¹²⁰ Thus when we use the strict application of a justified inadvertent doping case, Adam should not have qualified for the exception.¹²¹

The WADC does 'cater' for inadvertent dopers in the form of 'exceptions' to doping, although its provisions are faulty, harsh in their application and disproportionate.¹²² The 'no fault or negligent' exception for one is repugnant in the sense that according to its definitional elements an athlete has to be unaware of how a banned substance entered their body but must also explain to the governing body how the banned substance entered

¹¹⁴ Article 2.1.1 WADC 2021.

¹¹⁵ Article 2.1 through to 2.11 WADC 2021.

¹¹⁶ K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 8.

¹¹⁷ *Adams v/CCES CAS 2007/A/1312*.

¹¹⁸ K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 8.

¹¹⁹ K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 8.

¹²⁰ K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 8.

¹²¹ K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 8.

¹²² K Nivedhitha, 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 11.

their body. Although recourse is provided under Article 10.5, Article 10.6 and Article 10.7, with a chance to curb any ineligibility sanction imposed on them, Article 2.1 will always be used as a defence by the governing body to say, 'you should have done more'.¹²³

2.6 The implications of the principle of strict liability application in South Africa

The sanction for an anti-doping rule violation within sport is not a criminal punishment in the sense of criminal law. It is a disciplinary sanction within sport, normally under private law. The principles of criminal law, especially the principle of "*in dubio pro reo*" and "*nulla poena sine culpa*," are not applicable.¹²⁴ In law, the term "strict liability" is usually understood as liability without intent or negligence. It implies no intentional element that is that there is no tie between the sanction and intent. In doping, "strict liability" means that the sanction is an inevitable consequence if an anti-doping rule violation has been established, irrespective of culpability.¹²⁵ Due to the harsh ramification of the principle of strict liability, especially on inadvertent dopers, Article 10 of the WADA code was introduced. Article 10.5, Article 10.6 and Article 10.7 provides inadvertent dopers with a chance to curb any ineligibility sanction imposed on them. This is known as the principle of proportionality; it brings the WADA code in line with international human rights and the principle of *audi alteram partem*.¹²⁶

According to the *Gasser v Stinson*¹²⁷ case, the principle of strict liability is reasonable in placing a burden of proof on the athlete upon a doping violation to rebut a *prima facie* case by proving 'no fault' on their behalf.¹²⁸ This sentiment has also been shared by the *Wilander v Tobin* case.¹²⁹ The courts have given effect to the 'no fault exception', as

¹²³ JK Foschi, 'A Constant Battle: The Evolving Challenges in The International Fight Against Doping in Sport' (2006) 16 *Duke Journal of Comparative & International Law Spring* page 478.

¹²⁴ Klaus Vieweg, The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position, 15 *Marq. Sports L. Rev.* 37 (2004), 41-42.

¹²⁵ Klaus Vieweg, The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position, 15 *Marq. Sports L. Rev.* 37 (2004), 41-42.

¹²⁶ K Nivedhitha 'Strict Liability, Inadvertent Doping, And the WADA Code – A Case of Disproportionate' (2019) 1 *JSLPG* 3.

¹²⁷ *Gasser v Stinson* (1988), QBD, Unreported.

¹²⁸ P Mccutcheon, 'Sports Discipline, Natural Justice and Strict Liability' (1999) 37 *Anglo-American Law Review* 45.

¹²⁹ *Wilander v Tobin* 1996 CA.

evident in the Jessica Foschi case, where the court held that had the athlete had no knowledge of how the substance entered her body, and that she and her entourage lacked fault and the mandatory sanction must be set aside.¹³⁰

The principle of strict liability protects the athletes' fundamental right to participate in a free anti-doping sport that promotes fairness, good health and any form of doping would violate such rights.¹³¹ It is praise-worthy not to fix one case of accidental unfairness than to cause an intentional unfairness to a body of many athletes.¹³² Having to prove intent will hamper the efficacy of doping sporting bodies and the main and broader principle to protect the integrity of the sport.¹³³ A deviation away and a focus on individual equality will have the effect of allowing those who cheat to slip away because of the difficulty of proving intent or a guilty mind.¹³⁴

There is also a contractual dimension between athletes and the governing bodies that makes doping a breach of contract as athletes are deemed to be bound by the rules as a condition for their participation. This principle has been confirmed by WADA.¹³⁵ Athletes are deemed to be bound by the rules as a condition for their participation.¹³⁶ This facet brings about the common law principle of *pacta sunt servanta*. The fact that athletes freely and voluntarily enter into agreements gives effect to their Constitutional right of freedom to contract and this is one of the reasons why our courts have, repeatedly, upheld the principle. Therefore, since the athletes agree to carrying the personal duty to ascertain that no prohibited substance enters their body, they must uphold their contractual

¹³⁰ P Mccutcheon 'Sports Discipline, Natural Justice and Strict Liability' (1999) 37 *Anglo-American Law Review* 45. Page 69.

¹³¹ JK Foschi, 'A Constant Battle: The Evolving Challenges in The International Fight Against Doping in Sport' (2006) 16 *Duke Journal of Comparative & International Law Spring* 462.

¹³² JK Foschi, 'A Constant Battle: The Evolving Challenges in The International Fight Against Doping in Sport' (2006) 16 *Duke Journal of Comparative & International Law Spring*, page 475.

¹³³ TW Cox 'International War Against Doping: Limiting the collateral damage from strict liability' (2014) 47 *Vanderbilt Journal of Transnational Law* Jan 308.

¹³⁴ Cox (n 14 above) 309.

¹³⁵ A D Pisani 'A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping' (2013) 46 *De Jure* 918.

¹³⁶ GP Stevens 'Winner takes all! Reflection on the world anti-doping code and possible criminalisation of doping in sport' (2013) 46 *De Jure* 594.

obligation and in turn also carry the burden of proving that they lacked the intent to dope where inadvertent doping occurs.

Although the strict liability principle limits the right to be presumed innocent until proven guilty, right to fair labour practice and trade with the automatically ineligibility provision, its limitation is justified in accordance with section 36 of the Constitution¹³⁷ in the bid to achieve a greater social need.¹³⁸

2.7 Criticism against the Strict Liability Principle

Although the principle of strict liability, where the burden lies on the athlete to ensure that his/her body is not intoxicated with banned substances, is seen by the international sport body as an effective measure to clean up sports, like most legal systems, anti-doping laws are not perfect. There are grave consequences that arise from the principle of strict liability. Doping allegations will affect the livelihood and reputation of athletes, therefore it is essential for the authorities to encourage a fair, trustworthy and transparent system.

The principle of strict liability poses potential unfairness to athletes. The fact that the athlete lacks the intent to dope should not be ignored for the sake of compliance, since the consequences of the principle of strict liability are quite harsh when applied to inadvertent doping cases. Whilst the Code introduced Article 10 as a provision to curtail such shortcomings, by giving the athletes a chance to redeem themselves from any ineligibility sanction that may be imposed on them, if they have 'no fault or negligence' and/or 'no significant fault or negligence', however, just mere allegations of doping have dire consequences to the livelihood of athletes.

An example would be the Jessica Foschi case,¹³⁹ which arose after Foschi was wrongfully suspended from swimming competitively for two years as the result of her failing a drug

¹³⁷ The Constitution of the Republic of South Africa, 1996.

¹³⁸ RL Roux 'The World Anti-Doping Code: A South African Perspective' (2004) 26 *South African Journal for Research in Sport* 73.

¹³⁹ *Foschi by Foschi v. United States Swimming, Inc.*, 916 F. Supp. 232 (E.D.N.Y. 1996).

test. She had no knowledge of the way the banned substance entered her body. The AAA panel decided to rescind all sanctions against her, concluding that they had violated fundamental fairness and that they were arbitrary and capricious.¹⁴⁰ In so doing, the panel rejected the strict liability rule.¹⁴¹ It ruled that to discount her innocence would be unjust.¹⁴² This was also similar to the case of Chris Froome in 2017,¹⁴³ who had won the Tour de France. A urine sample he provided showed a concentration of the asthma drug salbutamol that was twice the permitted level. He suffered from asthma since childhood, and he claimed that he only ever used his puffer to manage symptoms within the permissible limits. The World Anti-Doping Agency accepted that Froome's sample results did not constitute an adverse analytical finding and that the union had thus decided to close the proceedings against Mr. Froome. He became one of the few cyclists to win the title more than once and his success was something to be celebrated.¹⁴⁴ However, his victory was overshadowed by stories in the press implying his win was not a clean win, but one assisted by doping. Although WADA and UCI¹⁴⁵ accepted that there was no breach and recommending the case to be dropped, there is still the perception, for some, that his successes are unnatural.¹⁴⁶

Nevertheless, whilst the notion of intent is crucial, it is a complex issue, and it may not always be easy to resolve because whether the athlete had the intention or lacked the intention to use prohibited substance, his or her performance may be enhanced by the substances and thereby placing him in an unfair advantage. Therefore, it is only fair that the burden of proof be placed on the athlete to rebut presumption that doping may have been done intentionally. As mentioned above, in the *Gasser v Stinson* case, it was held that the principle of strict liability is reasonable in placing a burden of proof on the athlete

¹⁴⁰ James A. R. Nafziger. "Dispute Resolution in the Arena of International Sports Competition." *The American Journal of Comparative Law* 50 (2002) page 163.

¹⁴¹ Nafziger, (n81 above) page 163.

¹⁴² Nafziger, (n81 above) page 163.

¹⁴³ *Chris Froome vs UCI* 2017.

¹⁴⁴ Sumner, C. The spirit of sport: the case for criminalisation of doping in the UK. *Int Sports Law J* 16, 217–227 (2017) page 1.

¹⁴⁵ International Cycling Union

¹⁴⁶ Claire Sumner, "The spirit of sport: the case for criminalisation of doping in the UK" 1.

upon a doping violation to rebut a prima facie case by proving ‘no fault’ on their behalf.¹⁴⁷ This sentiment was also shared in the *Wilander v Tobin* case.¹⁴⁸

2.8 Conclusion

As established above, the principle of strict liability is the cornerstone of anti-doping policies in sports. However, it is criticised for the fact that the application thereof could lead to unfairness in cases of inadvertent doping or where the athlete had no intention to enhance his or her performance.¹⁴⁹ The approach does not take into consideration the circumstances that might result in a positive test but might not have been caused due to the athlete’s fault. Examples of such circumstances include acting on the medical advice of the team doctor, a prescription error by a medical adviser, a dispensing error by a pharmacist, an honest and reasonable belief that the substance was not prohibited, or even the malicious act of a third party who might have “spiked” the drink of the athlete.¹⁵⁰

The Court of Arbitration for Sport has itself recognised that the application of the strict liability principle does not always appear to be fair. Notwithstanding, the criticism against it, the strict liability approach has been consistently upheld in arbitral awards delivered by the CAS. The use of the strict liability principle has been justified on two grounds. First, the principle is said to operate to the benefit of all “clean” athletes and secondly, it has been argued that the application of the strict liability principle is counterbalanced by the fact that an athlete has the opportunity to avoid or reduce the applicable sanction.¹⁵¹ An athlete can do so if they can demonstrate that, pursuant to article 10 of the Code, the substance in question was not taken with the intention to enhance performance or was ingested negligently or through no fault or no significant fault of that athlete.¹⁵² Therefore,

¹⁴⁷ *Gasser v Stinson (and Another)* 1988, Unreported, 15 June.

¹⁴⁸ *Wilander and Another v Tobin and Another* CA 8-Apr-1996.

¹⁴⁹ *A D Pisani*, ‘A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping’ (2013) 46 *De Jure* page 921.

¹⁵⁰ *A D Pisani*, ‘A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping’ (2013) 46 *De Jure* page 923.

¹⁵¹ *A D Pisani*, ‘A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping’ (2013) 46 *De Jure* page 923.

¹⁵² *A D Pisani*, ‘A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping’ (2013) 46 *De Jure* page 923.

it has been said that the revised approach to the strict liability principle in the Code achieves a satisfactory balance between the attempt by the WADA to effectively regulate the fight against doping by harmonising the surrounding regulatory and sanctioning framework, and the athletes' legitimate expectation of both a fair process and proportionality in the outcome.¹⁵³ Apart from that fact that the strict liability principle appears to be the fairest way to handle the anti-doping offences described in article 2.1 and 2.2 of the Code, it will be argued below that the application of the strict liability principle is also in line with general contractual principles relating to breach of contract.¹⁵⁴

The general application of the strict liability doctrine, particularly in inadvertent doping is an unjust limitation of the athlete's human rights and particularly the right to privacy, the right to work and the right to be free from all forms of discrimination. The application of this rule is evasive and fails to consider that testing positive for a prohibited substance may not always be their own fault. Athletes who test positive have the right to prove their cases without the burden of the strict liability rule on their shoulders. They have the right to a fair and equitable due process prior to any rigorous or tedious sanction being imposed on them.

¹⁵³ *A D Pisani, 'A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping' (2013) 46 De Jure* page 923.

¹⁵⁴ *A D Pisani, 'A Contractual Perspective on the Strict Liability Principle in the World Anti-Doping' (2013) 46 De Jure* page 923.

CHAPTER 3

THE DOPING REGULATION UNDER WADA

3.1 Introduction

In elite sport, doping has been a global controversial problem since competitive sports first began. There is even evidence of drug use by ancient Greek and Roman athletes.¹⁵⁵ The first modern regulation of doping was instated in 1928.¹⁵⁶ As stated in Chapter 1 above, in 2004, WADA adopted the World Anti-Doping Code (WADC) with the aim of embracing a strict liability standard for doping offences in sport (regardless of an athlete's intent, fault, or negligence), disqualifying any associated sporting results and imposing a two year suspension to protect "clean" athletes and "ensure the integrity of results."¹⁵⁷ The mere presence of a prohibited substance may enhance performances and it may endanger the athletes' body and it goes against the spirit of the game and consequently it will be sufficient to hold the athlete liable without the need to possess guilty intent.¹⁵⁸

3.2 World Anti-Doping Code (WADC)

The Code is the core document that provides the framework for harmonized anti-doping policies, rules and regulations within sport organisations and among public authorities.¹⁵⁹ It works in conjunction with eight International Standards aimed at bringing harmonization among anti-doping organisations in various areas which are code compliance by signatories, education, prohibited list, therapeutic use exemptions (TUEs), testing and investigations, laboratories, results management and protection of privacy and personal information.¹⁶⁰ The International Standard for Results Management (ISRM) is the core of the athletes' rights after they test positive. The ISRM was first adopted and approved by the WADA Executive Committee at the World Conference on Doping in Sport in 2019 and came into effect January 2021. It was approved by the WADA Executive Committee

¹⁵⁵ *Jeff Cisyk*, "What's the economic impact of doping in sport?" World Economic Forum, 16 July 2015, para 1.

¹⁵⁶ *Jeff Cisyk* (n3 above) para 1.

¹⁵⁷ *Czarnota*, "The World Anti-Doping Code, the Athlete's Duty of "Utmost Caution," and the Elimination of Cheating." 2012 *Marquette Sports Law Review* 45.

¹⁵⁸ *K Nivedhitha*, "Strict Liability, Inadvertent Doping, and the WADA Code- A case of Disproportionate" (2019) 12.

¹⁵⁹ WADC 2021 11.

¹⁶⁰ <https://www.wada-ama.org/en/what-we-do/international-standards>

on 20 May 2021 and has been effective since this date. The purpose of the ISRM is to set out the core responsibilities of Anti-Doping Organizations (ADOs) with respect to results management.¹⁶¹ In addition to describing certain general principles of results management, the ISRM also sets out the core obligations applicable to the various phases of results management from the initial review and notification of potential anti-doping rule violations (ADRVs), through provisional suspensions, the assertion of ADRV and proposal of consequences, the hearing process until the issuance, and notification of the decision and appeal.¹⁶²

The WADA uses the Code to play its role in detecting, deterring, and preventing the use of prohibited substances and methods that are contrary to the principles of fair play and the health and well-being of athletes in the international sporting environment.

3.3 The purpose of anti-doping regulations

The purpose of anti-doping regulations is to protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness, and equality for Athletes worldwide, and to ensure harmonized, coordinated, and effective anti-doping programs at the international and national level regarding detection, deterrence and prevention of doping.¹⁶³ The Code preserves what is inherently valuable about sport. This inherent value is often referred to as the 'spirit of sport', it is the essence of Olympism, it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind.

The Code lists a series of values characterising the spirit of sport; namely "ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage, community and solidarity".¹⁶⁴ The Code also strives to protect

¹⁶¹ <https://www.wada-ama.org/en/results-management>.

¹⁶² <https://www.wada-ama.org/en/results-management>.

¹⁶³ World Anti-Doping Code (2021) 11.

¹⁶⁴ WADC 2021 14.

the athletes' health.¹⁶⁵ This has been noted in court decisions for instance, the Ontario Court of Justice stated the following in a decision regarding the life ban imposed on Ben Johnson, "It is necessary to protect Mr Johnson for the sake of his own health from the effects of consistently using prohibited substances."¹⁶⁶ It is vital to note that sport is meant to be a life-enhancing activity not one that imperils life. Lastly, the purpose of anti-doping regulations is to level the playing field, which entails giving each contestant an equal chance.

3.3.1 Doping control and definition of doping (Article 1)

The Code defines doping as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.11 of these Anti-Doping Rules. There is no common definition of doping, however, it can be defined as the presence of prohibited substance(s) and related substances in a sportsman's body or evidence of the use thereof.¹⁶⁷

3.3.2 Anti-Doping rule violations (Article 2)

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations.¹⁶⁸ Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.¹⁶⁹ Article 2.1 and 2.2 of the Code provides that it is not necessary for the sports' governing body to show intent, fault, negligence or knowing use on the athlete's part in order to establish an anti-doping rule violation under Article 2.1 or 2.2 of the Code.¹⁷⁰ Both of these Articles provide that it is each athlete's personal duty to ensure that no prohibited substance enters his or

¹⁶⁵ Article 4.3.1.2 WADC (2021) one of the criteria for Including Substances and Methods on the *Prohibited List* is where the "pharmacological effect or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete".

¹⁶⁶ *Johnson v Athletic Canada and IAAF* [1997] O.J. 3201, para.29.

¹⁶⁷ Article 2.1 through Article 2.11 WADC 2021.

¹⁶⁸ Article 2 WADC 2021 Anti-doping rule violations 18.

¹⁶⁹ Article 2 WADC 2021 Anti-doping rule violations 18.

¹⁷⁰ Article 2.1.1. WADC 2021.

her body and athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.¹⁷¹

3.3.3 Burden of proof (Article 3)

When an athlete is accused under any one or more violations mentioned in Article 2, the burden of proof is on the Anti-Doping Organisation to prove the presence of the substance in the athlete's sample or the use or attempted use by the athlete of a prohibited substance or method.¹⁷² This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.¹⁷³ The standard of proof required is that the alleged violation must be established to the "comfortable satisfaction" of the tribunal bearing in mind the "seriousness of the allegation which is made".¹⁷⁴ The operation of the strict liability principle entails that once the sports' governing body has discharged its burden of proof in respect of the offences in Article 2.1 and 2.2, the athlete is automatically found to be guilty of an anti-doping rule violation.¹⁷⁵ The athlete cannot escape a guilty finding on the basis that he or she had acted without intention or negligence.¹⁷⁶

The standard can be satisfied quite easily because a positive result for a prohibited substance satisfies that burden.¹⁷⁷ Under Article 4.1, any WADA-accredited laboratory is presumed to follow the proper procedures for conducting sample collection and analysis as set forth by the International Standards supplement to the Code.¹⁷⁸

The three Articles of the Code discussed above are the basis of the conflicts that arise in the battle against prohibited substances. The principle of strict liability leads to the

¹⁷¹ *Du Pisani, Annelize.* (2013) "A contractual perspective on the strict liability principle in the World Anti-Doping Code" *De Jure*, 46(4), 917.

¹⁷² WADA Code Article 3.1 (2015).

¹⁷³ WADA Code Article 3.1 (2015).

¹⁷⁴ WADA Code Article 3.1 (2015).

¹⁷⁵ *Du Pisani, Annelize.* (2013). A contractual perspective on the strict liability principle in the World Anti-Doping Code. *De Jure Law Journal*, 46(4), 919.

¹⁷⁶ *Du Pisani, Annelize.* (2013). A contractual perspective on the strict liability principle in the World Anti-Doping Code. *De Jure Law Journal*, 46(4), 919.

¹⁷⁷ WADA Code Article 3.2 (2015).

¹⁷⁸ *Sharma, Sooraj and Mazumdar, Shujoy,* A Critical Appraisal of the Concept Strict Liability in WADA Code (August 14, 2011) 5.

punishment of athletes of varying degrees of fault, athletes who could vastly benefit medically from a prohibited substance are persecuted and not granted Therapeutic Use Exemptions, contamination of common supplements taken by athletes leads to doping violations, a lack of understanding of the 2010 Prohibited List¹⁷⁹ due to its complexity, and the ability of athletes to defend themselves are some of the typical issues which have not been adequately addressed.¹⁸⁰

3.5 Conclusion

To protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness, and equality for athletes worldwide, the Code implemented the rule that an athlete who tests positive for a prohibited substance in their bodies is automatically found guilty with or without fault. A guilty verdict means an athlete is suspended and forfeits all their privileges and accolades relevant to the sporting activity.¹⁸¹ Article 2.1 and 2.2 WADA further provides that the burden of proof is on the sports' governing body to prove a prima facie case and evidence of doping by the athlete.¹⁸² According to WADA there are differences between specified and non-specified substances. For a specified substance, the athlete who tested positive is given an opportunity to prove on a balance of probabilities that the substance was not intended to be used as an enhancement.¹⁸³ WADA's attempt to preserve the spirit of sports is remarkable however, it brings about the principle of strict liability which is a controversial principle as discussed in chapter 2 above.

¹⁷⁹ The World Anti-Doping Code (WADC) The 2010 Prohibited List International Standard. Available at https://www.wada-ama.org/sites/default/files/resources/files/WADA_Prohibited_List_2010_EN.pdf.

¹⁸⁰ Shivankar Sharma & Pranav Menon, "A comparative study of the application of strict liability principles in sports: Critiquing anti-doping policies; examining illicit crowd, chanting and match fixing," (Nirma University Law Journal: Volume-4, Issue 1, July 2014) 97.

¹⁸¹ Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 917

¹⁸² Pisani "A contractual perspective on the strict liability principle in the World Anti-Doping Code" 2013 *De Jure* 919.

¹⁸³ Article 10.4 WADC 2021.

CHAPTER FOUR

THE REGULATION OF DOPING IN SOUTH AFRICA

4.1 Introduction

The WADA Code and related International Standards (IS) are the core documents that provides the framework for the South African Institute for Drug Free Sport's (SAIDS)¹⁸⁴, as well as regulations and policies for anti-doping across all sports in South Africa.¹⁸⁵ The South African Government is a signatory to the Code and formally recognised the role of WADA through the Copenhagen Declaration of Anti-Doping in Sport (2003).¹⁸⁶ SAIDS is an independent public entity who receives its jurisdiction and authority from the Drug-Free Sport Act.¹⁸⁷ As such, SAIDS is the national custodian of the World Anti-Doping Code and the implementing agency for South Africa's National Anti-Doping Rules.¹⁸⁸

4.2 The South African Institute for Drug-free Sport Anti-doping Rules 2021

The SAIDS Anti-Doping Rules contains sport rules governing the conditions under which sport is played.¹⁸⁹ The aim of these rules is to enforce anti-doping rules in a global and harmonised way.¹⁹⁰ The Rules contain 24 Articles whose contents are briefly outlined below.

Article 1 provides for the definition of doping. In terms of Article 1, doping is the occurrence of one or more of the anti-doping rule violations.¹⁹¹ Article 2 deals with the anti-doping violations. According to Article 2, its purpose is to specify the circumstances and conduct which constitute anti-doping rule violations.¹⁹² Article 3 deals with the proof of doping and

¹⁸⁴ South African Institute for Drug Free Act No.14 of 1997 (Hereinafter referred to as the "SAIDS Act")

¹⁸⁵ *South African Institute for Drug-Free Sport, Anti-Doping Rules 2019* 3.

¹⁸⁶ *South African Institute for Drug-Free Sport, Anti-Doping Rules 2019* 3.

¹⁸⁷ *South African Institute for Drug-Free Sport Act (Act No 14 of 1997 as amended by Act No.25 of 2006)*.

¹⁸⁸ *South African National Anti-doping rules: 2021 (draft)*.

¹⁸⁹ SAIDS Anti-doping Rules 2021 draft.

¹⁹⁰ *Ibid.*

¹⁹¹ Article 1 of the SAIDS Anti-doping Rules 2021.

¹⁹² Article 2 of the SAIDS Anti-doping Rules 2021.

places a burden of establishing that an anti-doping rule violation occurred on SAIDS.¹⁹³ Article 4 contains the prohibited list,¹⁹⁴ while Article 5 deals with the testing and investigations.¹⁹⁵

Article 6 provides for the methods of analysing samples and the purpose for analysing the data and samples.¹⁹⁶ Article 7 contains the results management which establishes a process designed to resolve anti-doping rule violation matters in a fair, expeditious and efficient manner.¹⁹⁷ Article 8 provides for the right to a fair hearing and a notice of hearing decision.¹⁹⁸ Article 9 provides for the automatic disqualification of individual results.¹⁹⁹ Article 10 deals with the sanctions on individuals,²⁰⁰ while Article 11 makes a provisions for the consequences to teams.²⁰¹ Article 12 contains sanctions by SAIDS against other sporting bodies.²⁰² Article 13 provides for the appeals against the decisions made under the Code or these Anti-Doping Rules.²⁰³

Article 14 deals with confidentiality reporting,²⁰⁴ while Article 15 provides for the implementation of decisions and their binding effect.²⁰⁵ The remaining Articles under the Anti-doping rules deals with issues such as statutory limitations,²⁰⁶ education,²⁰⁷ roles and responsibilities of national federations,²⁰⁸ roles and responsibilities of SAIDS,²⁰⁹ roles and responsibilities of athletes,²¹⁰ roles and responsibilities of athlete support

¹⁹³ Article 3 of the SAIDS Anti-doping Rules 2021.

¹⁹⁴ Article 4 *ibid.*

¹⁹⁵ Article 5 *ibid.*

¹⁹⁶ Article 6 *ibid.*

¹⁹⁷ Article 7 *ibid.*

¹⁹⁸ Article 8 *ibid.*

¹⁹⁹ Article 9 *ibid.*

²⁰⁰ Article 10 *ibid.*

²⁰¹ Article 11 *ibid.*

²⁰² Article 12 *ibid.*

²⁰³ Article 13 *ibid.*

²⁰⁴ Article 14 *ibid.*

²⁰⁵ Article 15 *ibid.*

²⁰⁶ Article 16 *ibid.*

²⁰⁷ Article 17 *ibid.*

²⁰⁸ Article 18 *ibid.*

²⁰⁹ Article 19 *ibid.*

²¹⁰ Article 20 *ibid.*

personnel,²¹¹ roles and responsibilities of other person who are subjected to the anti-doping rules,²¹² interpretation of the anti-doping provisions,²¹³ and the final provisions.²¹⁴

4.3 The South African Institute for Drug-free Sport Act

In South Africa doping is regulated by the South African Institute for Drug-Free Sport Act 14 of 1997. According to the Act, a corporate body was established, which is the South African Institute for Drug-free Sport.²¹⁵ Section 10(1) (a)-(g) of the SAIDS Act states the objectives of the Institute. From these objectives, there is a strong similarity between the WADA Code and the SAIDS Act. The latter states that it seeks to promote 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 a manner consistent with protecting the health and well-being of competitors, and the rights of all persons who take part in sport.²¹⁶ The WADA Code also lists a series of values characterising the spirit of sport; namely "ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage, community and solidarity".²¹⁷ The objectives of WADA and SAIDS are therefore similar.

4.3.1 The South African Institute for Drug-free Sport (SAIDS)

The South African Institute for Drug-Free Sport (SAIDS) is a public entity established by an Act of Parliament, Act No. 14 of 1997. It is responsible for anything related to South African doping rules in sports.²¹⁸ The Institute for Drug-Free Sport receives most of its

²¹¹ Article 21 *ibid.*

²¹² Article 22 *ibid.*

²¹³ Article 23 *ibid.*

²¹⁴ Article 24 *ibid.*

²¹⁵ Section 2 SAIDS Act 14 of 1997.

²¹⁶ Section 10(1)(a) SAIDS Act & WADA Code (2021) 14.

²¹⁷ WADC (2021) 14.

²¹⁸ SAIDS Act Preamble.

funding from Sport and Recreation South Africa. Some of SAIDS's objectives among others as far as doping is concerned are to ensure independent testing, provide education and ensure research on doping and related matters.²¹⁹ It has been said that the South African regulation rules on doping, in many respects are similar to the internationally binding WADA Code.²²⁰ More than 170 countries have assented to, accepted or ratified the WADA Convention but, South Africa did so on November 30, 2006. It has; however, been argued that the Code is subject to the governing laws of its signatories. Therefore, in South African law, the Code is subject to the Constitution and may be struck down if found to be in contrast with the Bill of Rights.²²¹

South Africa is also a signatory to the International Convention against Doping in Sport, adopted by UNESCO on the 19th October 2005 and entered into force on 01 February 2007.²²² The Convention represents the first time that governments around the world have agreed to apply the force of international law to sport and anti-doping. This is also in line with Section 39 of Constitution of South Africa that states that international law must be considered when interpreting the Bill of Rights.

The Convention is guided by the operational framework outlined in the WADA Code and the international standards that ensures a harmonised and global implementation of the WADA Code. South Africa being a signatory to the Convention, its government can give effect to the Convention, either by way of legislation, regulation, policies, or administrative practices.²²³ By being a signatory South Africa is committed to encourage international cooperation to protect athletes and the ethics of sport, limit the availability of prohibited substances and methods by combating trafficking, facilitate doping controls and support national testing programmes, encourage producers and distributors of nutritional supplements to establish 'best practice' in the labelling, marketing, and distribution of

²¹⁹ Stevens 2013 *De Jure* 598, Coopoo and Sanjra 2004 Vol 16. No 3 *South African Journal of Sports Medicine* 14.

²²⁰ Stevens 2013 *De Jure* 598.

²²¹ Bickand and Boswell 2013 *Without Prejudice* 78; section 2 of the Constitution of the Republic of South Africa, 1996 read in line with section 39(2) makes provision for the Supremacy and the interpretation clauses respectively. The Bill of Rights must be purposively interpreted in an open and democratic society based on human dignity, equality, and freedom.

²²² <https://en.unesco.org/themes/sport-and-anti-doping/convention>.

²²³ <https://en.unesco.org/themes/sport-and-anti-doping/convention>.

products which might contain prohibited substances, support the implementation of anti-doping education programmes, and promote anti-doping research.²²⁴ Consequences of South Africa being a non-signatory to the Convention or non-compliant with the rules of the WADC would mean zero participation of South African sporting organisations competing at intentional sporting events including the Olympics.

It has been argued that the results of this research, particularly in South African law where doping laws are still at their infancy is to caution clinicians and physicians about these prohibited substances in the food supplements they recommend to athletes. Particular caution must be had on what athletes consume as enhancement products since South Africa is not an exception to the WADA's anti-doping rules.²²⁵ One of the utmost responsibilities of the South African Institute for Drug free Sport (SAIDS) is advocacy, education and research into the knowledge and awareness of South African athletes about doping laws. As such research was conducted and compared the views of athletes who participated in the 1998 Kuala Lumpur and the 2002 Manchester Commonwealth games.²²⁶ The questionnaire included questions on drug awareness, usage, patterns of use and effects of drug use on athletes and teammates. Whereas ninety-eight per cent of the athletes opined that the use of prohibited substances was indeed cheating, seventeen per cent acknowledged that they only used supplementary produces for strength, healing process and reduced fatigue.²²⁷

Whereas there has been a considerable amount of research on the veracity and legality of doping in South Africa, there has been less focus on the reasons for doping by athletes. This is a huge concern as there has been a dearth of awareness insofar as to why athletes feel the need to take enhancement substances. Among other reasons that have been advanced as rationale for doping on the part of athletes are: the need for success, pressure, the lack of legitimate enhancement methods such as psychology and supplements, community pressure, financial rewards and the subjective beliefs that other

²²⁴ <https://en.unesco.org/themes/sport-and-anti-doping/convention>.

²²⁵ Van der Merwe and Grobbelaar 2005, Vol. 95, No. 7 SAMJ 511.

²²⁶ Coopoo and Sanjra 2004 Vol 16. No 3 *South African Journal of Sports Medicine* 14.

²²⁷ Coopoo and Sanjra 2004 Vol 16. No 3 *South African Journal of Sports Medicine* 15.

athletes are also using substances.²²⁸ It has been argued that both the intrinsic and extrinsic forms of pressure on athletes should be taken into account when furnishing sanctions for doping, at least as far as the economic circumstances in South Africa are concerned.²²⁹

Besides the effect of subjective reasons for doping by South African athletes, it has been contended that physicians should also at times be liable for their conduct. It is trite law that physicians should be informed of the modern trends on doping, and they should be liable where they intentionally or negligently dispense prohibited substances to athletes. The practice of physicians and pharmacists must be premised on independence, honesty and integrity and should be held accountable where there are discrepancies and outward pressure even from athletes and coaches.²³⁰

4.4 Judicial approach to doping in South Africa

According to the SAIDS Annual Report,²³¹ there were 209 tests conducted during the period between April 2020 and March 2021, out of which 21 were found in violation of the anti-doping rules. One of the leading South African cases of doping was that of Ludwick Mamabolo, a comrade's marathon runner who tested positive for Methylhexanamine (MHA), a banned stimulant. However, the athlete was adamant that he had no idea how the substance got into his body; and all tests done to the food intakes he had had the preceding hours tested negative for the prohibited substance.

In the case of SAIDS v Thapelo Phora,²³² An eight-and-a-half-month sanction from all sport on the Athletics South Africa (ASA) athlete, was issued by the SAIDS Independent Doping Hearing Panel on the 19th June 2021 with his period of Ineligibility commencing from 21st May 2020.²³³ Mr. Phora tested positive for the presence of Stanozolol and its Metabolites. Thapelo had an out of competition test conducted on him.²³⁴ He took

²²⁸ Derman and Schweltnus 2000 *Journal of Modern Pharmacy* 52.

²²⁹ Derman and Schweltnus 2000 *Journal of Modern Pharmacy* 53.

²³⁰ Derman and Schweltnus 2000 *Journal of Modern Pharmacy* 53.

²³¹ SAIDS Annual Report 2020/21.

²³² SAIDS/2020/10/A03

²³³ <https://drugfreesport.org.za/athletics-sa-athlete-thapelo-phora-faces-an-8-half-month-sanction/>

²³⁴ SAIDS/2020/10/A03

supplements and went for a jog only for his urine and samples to come back positive for a substance called Stanozolol. He testified that he purchased his supplements at Dischem over the counter and prior to purchasing the supplement, he would conduct a medical check on SAIDS website, and he would thoroughly check the labels of the container of the supplements.²³⁵ He alleged that the supplements were for the purposes of recovery but he often used them prior to training. SAIDS appealed the rendered decision, however, the appeal was dismissed.²³⁶ The matter has since been reviewed by World Anti-Doping Agency (WADA) and no case was filed to Court of Arbitration for Sport (CAS) for consideration of further appeal.²³⁷

There is also the case of Gordon Gilbert and the case of Demarte Pena, two athletes sponsored by Biogen, who both returned an adverse analytical finding for a prohibited, Testoforte, for Stamina, produced by Biogen.

In the case of *WADA v SAIDS & Gordon Gilbert*,²³⁸ Gordon Gilbert, tested positive for Testoforte, during a mountain bike race on 13 May 2016. The matter was brought before the SAIDS independent doping hearing panel, where Gilbert claimed that he took Testoforte on the advice of a friend. Gilbert also claimed that he did not know that Testoforte contained a prohibited substance as this substance was not listed on the bottle, and Biogen had also assured him that their products were safe to use and that they did not contain any prohibited substances listed on the WADA List.²³⁹ However, Gilbert did not declare his use of Testoforte on the doping control form. In this regard, the SAIDS panel imposed on him a six month ban on 30 August 2017. In imposing a 6-month ban, the SAIDS Panel reasoned that from the totality of the evidence presented by Gilbert, the panel was satisfied with Gilbert's assertions that he had done enough extensive research regarding the legality of the drugs listed on the bottle of Testoforte.²⁴⁰ As such, on a balance of probability, his doping was not intentional because the banned substance entered his body as a result of the ingestion the prohibited drug which he could not have

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *CAS 2017/A/5369. (hereinafter referred to as "Gilbert" case).*

²³⁹ *Gilbert case para [33].*

²⁴⁰ *Gilbert case para [52].*

reasonably known was contained in Testoforte.²⁴¹ Thus, the SAIDS Panel found that since Gilbert consumed a contaminated product, he acted with no significant fault or negligence. The applicable range for the period of Ineligibility would be reduced to a range of two (2) years to a reprimand.²⁴²

However, WADA decided to approach the CAS to appeal the six-month ban imposed on Gilbert by the SAIDS panel, and have the ban extended to a four-year sanction instead.

The appeal by WADA was heard on 23 October 2017, pursuant to Article R47 of the Code of Sports-related Arbitration, before the CAS, where the central issue was concerned the determination of the origin of the prohibited substance found in Gilbert's body, and the consequences for the violation.²⁴³ WADA argued that Gilbert failed to demonstrate that the contaminated Testoforte was the source of the prohibited substance in his system, and that unless he can establish that the anti-doping rule violation was not intentional, a period of ineligibility of four years should be imposed;²⁴⁴ In the decision on appeal, that was heard by a Sole Arbitrator, the Sole Arbitrator found in favour of WADA, reasoning that based on extensive laboratory tests that were admitted into evidence by the parties, Gilbert had failed to establish, by balance of probability, that the ingestion of the contaminated product Testoforte was at the origin of the AAF.²⁴⁵ Furthermore, the Sole Arbitrator found that Gilbert had failed to discharge the burden which lies upon him to establish by a balance of probability the non-intentional use of a prohibited substance.²⁴⁶ As a result, the Sole Arbitrator found that the sanction of the ineligibility for 4 years is necessarily to be imposed on the Gilbert, who has failed to prove lack of intent to use a prohibited substance.²⁴⁷

In the case of *WADA v SAIDS & Demarte Pena*.²⁴⁸ The facts of this case are that Pena, who competes in the Ultimate Fighting Championship tested positive on 11 November 2016 for Testoforte after his Extreme Fighting Championship Africa bantamweight title

²⁴¹ *Gilbert case* para [52].

²⁴² *Gilbert case* para [42].

²⁴³ *Gilbert case* para [139].

²⁴⁴ *Gilbert case* para [94].

²⁴⁵ *Gilbert case* para [157].

²⁴⁶ *Gilbert case* para [151].

²⁴⁷ *Gilbert case* para [151].

²⁴⁸ CAS 2017/A/5260 (hereinafter referred to as "*Pena*" case).

against Irshaad Sayed.²⁴⁹ Pena's matter was brought before the SAIDS Panel, where Pena claimed that he did know that the product was contaminated, and that he had listed Testoforte on his doping control form, as well as also seeking the advice of a sports nutritionist prior to consuming the product.²⁵⁰ Similar to the decision by the SAIDS Panel in the *Gilbert* case matter, the SAIDS Panel in the *Pena* case also held in its decision that Pena's anti-doping rule violation was not intentional and established no significant fault or negligence. thereby entitling Pena to a fault-related reduction, because the AAF was caused by a contaminated product and the degree of fault was minimal:²⁵¹ However, unlike Gilbert who received a 6-month ban, Pena only received a reprimand and no period of ineligibility was imposed on him.²⁵² WADA also decided to appeal decision of SAIDS panel and have a four-year ban imposed on Pena.

On appeal to the Sole Arbitrator of CAS, WADA argued that Pena's anti-doping violation was intentional because Pena failed to demonstrate on the balance of probabilities that contaminated Test Freak and Testoforte were the source of the prohibited substance. and that he had intentionally consumed the prohibited substance.²⁵³ The Sole Arbitrator also found that no persuasive evidence has been offered that the explanation he offers for his AAF is more likely than not to be correct, in that it is simply not more likely that the AAF was caused by the prolonged intake of 9.0 mcg of Androstenedione, than by the intake of a larger dose of Testosterone or one of its precursors.²⁵⁴ Accordingly, the Sole Arbitrator found Pena failed to prove a lack of intent, imposed a 4 year ban on Pena.²⁵⁵ The sanction of the ineligibility for 4 years is necessarily to be imposed on the Athlete, who has failed to prove lack of intent.

These South African cases illustrate the many cases of inadvertent doping that has caused profound controversies in sports and doping. In a study approved by the Ethics Committee for Medical Research at University of Free State, it was investigated the

²⁴⁹ *Pena* case para [6].

²⁵⁰ *Pena* case para [14].

²⁵¹ *Pena* case para [14].

²⁵² *Pena* case para [17].

²⁵³ *Pena* case para [95].

²⁵⁴ *Pena* case para [159].

²⁵⁵ *Pena* case para [162].

relationship between nutritional supplements and doping. Nutritional supplements recommended and used by athletes are basically meant for increased strength, expedited recoveries, reduction of illness risk and performance enhancing.²⁵⁶ These supplements are basically available on the market, including South Africa and athletes consume these products unaware that they contain prohibited substances. In the study from the Medical Research, it was found that all the volunteers who were given these food supplements, their urinary samples all tested positive for norandrosterone, a prohibited substance.²⁵⁷ In some athletes the substance even lasted up to 36 hours from consumption of the food supplement.

4.5 The extent to which South African doping rules comply with WADC

The South African Institute for Drug-Free Sport Act defines doping in relation to the practice of sport, as the administration of substances belonging to prohibited classes of pharmacological agents or the application of any method intended to enhance performance artificially.²⁵⁸ Similar to the WADA Code, which is the cornerstone of regulations for all sportsmen, the SAIDS Act, follows Article 2.1 of the WADA Code which provides that it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body.²⁵⁹ Athletes are responsible for any Prohibited Substance, or its Metabolites or Markers found to be present in their Samples.²⁶⁰ Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athletes part be demonstrated in order to establish an anti-doping rule violation under Regulation 2.1.²⁶¹

As per the SAIDS Anti-Doping Rules 2021, the burden of proof lies with SAIDS. It has the burden of establishing that an anti-doping rule violation occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which

²⁵⁶ Van der Merwe and Grobbelaar 2005, Vol. 95, No. 7 *SAMJ* 510.

²⁵⁷ Van der Merwe and Grobbelaar 2005, Vol. 95, No. 7 *SAMJ* 510.

²⁵⁸ *SAIDS Act* Section 1(ii).

²⁵⁹ Article 2.1.1 *WADC* 2021.

²⁶⁰ Article 2.1.1 *WADC* 2021.

²⁶¹ Article 2.1.1 *WADC* 2021.

is made.²⁶² This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.²⁶³ Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.²⁶⁴ This is as per the WADA Code requirements which states that the Anti-Doping Organisation in South Africa has the burden of establishing that an Anti-Doping Rule Violation has occurred to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation.²⁶⁵ According to the WADA Code, the standard of proof in all cases is greater than a mere balance of probability but is less than proof beyond a reasonable doubt.²⁶⁶ As a consequence of the provisions of article 3.1, the athlete bears the onus of establishing, on a balance of probabilities, that the anti-doping rule violation was not intentional, or that he acted with no significant fault or negligence. SAIDS, is only required to prove the 'presence' of a prohibited substance in the system of an athlete.²⁶⁷

It is each Athlete's personal duty to ensure that no prohibited substance enters his/her body and that no prohibited method is used.²⁶⁸ Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation for use of a prohibited substance or a prohibited method.²⁶⁹ The success or failure of the use or attempted use of a prohibited substance or prohibited method is not material.²⁷⁰ 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.²⁷¹

²⁶² SAIDS Anti-Doping Act Article 3.1.

²⁶³ SAIDS Anti-Doping Act Article 3.1.

²⁶⁴ SAIDS Anti-Doping Act Article 3.1.

²⁶⁵ Article 3.1 WADC 2021.

²⁶⁶ Article 3.1 WADC 2021.

²⁶⁷ Article 2.2.1 WADC 2021.

²⁶⁸ Article 2.2.1 *Ibid.*

²⁶⁹ Article 2.2.1 *Ibid.*

²⁷⁰ Article 2.2.2 *Ibid.*

²⁷¹ Article 2.2.2 *Ibid.*

It has been argued that in South Africa specifically, the rules of the code may be attacked on the rationality, procedure, and legality. More so, these rules may be challenged on the ground of the Constitution itself and public policy.²⁷² *Le Roux* opines that in South African law, it will particularly be difficult if not impossible to enforce the rules of anti-doping because these rules are inconsistent themselves. There has been a plethora of inconsistent application of the Code from across the nations as well as allegations of sporting organizations protecting their own athletes from the onerous enforcement of the international Code.²⁷³ In South African law, it has been argued moreover, that it will be difficult for courts to interpret the requirement of burden of proof. This is so because the Code itself has profoundly failed to clearly define the standard of proof required by both the sporting organizations and athletes. The current wording of the standard of proof premised on ‘seriousness of the allegation’ has created a lot of confusion in the deliberation of doping matters. It been suggested that perhaps in South African law, the courts may either adopt the long-standing and established standards of burden, either the ‘beyond reasonable doubt’ or the preponderance of probabilities test.²⁷⁴

4.5 Conclusion

South Africa’s doping regulatory policies are almost a replica of the WADA. In South Africa the Constitution is the Supreme law of the Republic and no other law can supersede the provisions of the Constitution. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. The system of strict liability and the treatment of inadvertent doping amongst athletes infringes on the rights of Athletes.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

²⁷² *Le Roux* 2004 SAJR SJPER 65; In *Magna Alloys and Research (SA)(Pty) Ltd v Ellis* 1984 (4) SA 874 (A), *Coetzee v Comitis and Others*, 2001 (1) SA 1254 (C) and *Brisley v Drotzky*, 2002 (4) SA 1 (A) it has been made unequivocally clear that a restraint of trade is only valid where it does not infringe public policy. Therefore, whether the ban of athletes on the premise of strict liability rules passes the public policy and the Constitutionality tests in South African law is yet to be seen.

²⁷³ *Le Roux* 2004 SAJR SJPER 66; *Australian Cricket Board v Warne* 2002.

²⁷⁴ *Le Roux* 2004 SAJR SJPER 71.

5.1 SUMMARY

This mini dissertation addressed a study on the legitimacy of the concept of strict liability and the treatment of inadvertent doping amongst athletes from a legal and human rights perspective.

Chapter one was the introductory chapter which laid down the foundation and background to the study as well as introducing research questions and chapter overviews. The chapter gave a synopsis of the historical perspective of drugs, steroids and testing mainly focusing on the regulation of doping in South Africa, the strict liability doctrine, and a human rights perspective on strict liability.

Chapter two focused on the principle of strict liability and its application in sport. It was an intensive discussion on the application of the principle under the International Olympics Committee Anti- Doping Code and its application under the World Anti-Doping Code. This chapter also touched on the legal effects of the application of strict liability and the criticisms thereof.

Chapter three was a discussion of the doping regulation under the World Anti-Doping Code, particularly the purpose of the anti-doping regulations.

In chapter four, focus was placed on the regulation of doping in South Africa. This chapter dealt with the South African Institute for Drug-free Sport Act, the judicial approach to doping in South Africa and the extent to which the South African doping rules comply with the World Anti-Doping Code.

Chapter five is the current chapter which focuses solely on conclusions from the whole study as well as making recommendations.

5.2 CONCLUSION

The general application of the strict liability doctrine, particularly in inadvertent doping is an unjust limitation of the athlete's human rights and particularly the right to privacy, the right to work and the right to be free from all forms of discrimination. The application of this rule is evasive and fails to consider that testing positive for a prohibited substance may not always be their own fault. Athletes who test positive have the right to prove their cases without the burden of the strict liability rule on their shoulders. They have the right to a fair and equitable due process prior to any rigorous or tedious sanction being imposed on them.

The principle of strict liability applies uniformly, whether it is a case of intentional or unintentional doping and that is where the bone of contention is. Despite the several ways in which inadvertent doping may occur, this aspect is not taken into consideration *per se* as the priority is to protect the athletes' fundamental right to participate in doping-free sport. As displayed above, the doctrine does not follow the rule of innocent until proven guilty. It infringes on one of fundamental rights in South African law, the right to be presumed innocent until convicted by a public court. This right may only be limited in terms of the general limitation clause. Due to the strictness of this principle, an athlete's right to livelihood is in turn infringed upon if the athlete is suspended or if penalties are imposed on him/her. Furthermore, it does not consider individual circumstances and the mandatory penalties are too harsh. The doctrine does not comply with the proportionality rules and human rights considering that it sacrifices the few innocent athletes to find liability of a majority.

It is therefore concluded that the treatment of inadvertent doping amongst athletes from a legal and human perspective is an unconstitutional infringement of human rights. The rules on anti-doping policies are currently unfair, unreasonable, unjustifiable, and disproportionate.

5.3 RECOMMENDATIONS

It is submitted that; the South African lawmakers must scrutinize the application of the world-doping laws before they are fully absorbed into the legal system through statute or other. This scrutiny should be done in line with a constitutional mandate, particularly the limitation clause. Section 36 of the Constitution provides that any limitation of a right must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Section 36 (1)(d) of the Constitution makes provision for the limitation to consider the relation between the limitation and its purpose.

It is also only fair that the burden of proof be placed on the athlete to rebut presumption that doping may have been done intentionally. Evidence to rebut intention to dope may include proving that his or her supplements were contaminated therefore doping was inadvertent, or that adequate research was done and recorded or that the use of a particular supplement was declared prior. Success in rebutting a presumption of intention to dope would result in a discharge of sanction or the reduction of sanction.²⁷⁵

It is further submitted that, the current system can be improved to help innocent athletes who have no intention to enhance their performances by not punishing inadvertent athletes that can prove that the substance had no performance enhancing effect.²⁷⁶ Otherwise, governing bodies will not be carrying out any rationale purpose by punishing such athletes, although it will cause administrative difficulties when proving actual performance enhancement. WADA should reconsider the current system regarding negligence and must aim to protect athletes who ingest a substance for a therapeutic purpose.

WADA could initiate an agreement with supplement producing companies and manufacturers to endorse their products to every athlete in line with any prohibited substances by WADA. This will ensure no prohibited substances are produced and should an athlete test positive with a product that has been produced by such companies,

²⁷⁵ Sachenbacher-Stehle tested positive for methylhexaneamine at the Sochi 2014 Winter Olympic Games. She alleged that she took the supplement to cleanse herself. She was disqualified and expelled from the Games with a subsequent two-year ban reduced, on appeal, to six months by the Court of Arbitration for Sport.

²⁷⁶ Section 36 Constitution of the Republic of South Africa, 1996; Coopoo and Sanjra 2004 Vol 16. No 3 *South African Journal of Sports Medicine* 15 where athletes have argued that the genuine use of amphetamines, ephedrine and marijuana is not for enhancements but for medical and health reasons, it remains yet to be seen whether these reasons will fare against the South African rules of doping.

athletes should not be blamed but the companies should. Athletes that have substances in their system because of products that are contaminated in a foreign country and who are unaware of such, should not be given the ordinary punishment, but should be merely disqualified because of the presence of the substance in their body.

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