



Arbitration CAS 2008/A/1558 World Anti-Doping Agency (WADA) v. South African National Equestrian Federation (SANEF) & Jasyn Gertenbach and CAS 2008/A/1578 Fédération Equestre Internationale (FEI) v. SANEF, award of 4 March 2009

Panel: Mr Ercus Stewart (Ireland), President; Mr Olivier Carrard (Switzerland); Mr Jeffrey Mishkin (USA)

Equestrian (vaulting)

Doping (refusal to submit to sample collection)

Right of international federations to appeal against decisions of national federations involving anti-doping rule infractions

Refusal without compelling justification to submit to a sample collection after notification

Young age of an athlete as exceptional circumstance for the reduction of the ineligibility period

- 1. According to the CAS case law, it is essential that international federations have a right of appeal against the decisions of national federations in cases involving anti-doping rule infractions in order to create a 'level playing field' and ensure equity in international competition.**
- 2. An athlete refuses or fails without compelling justification to submit to a sample collection after notification even if there were departures from the rules, where it can be proved that such departures did not cause the factual basis for the athlete's refusal to submit to sample collection. This is particularly so if the applicable rules do not place an obligation on the Doping Control Officer to advise the athlete of the precise consequences of his refusal to comply, or to advise him of what specific sanction he is likely to incur.**
- 3. The young age of an athlete should not be regarded as an exceptional circumstance. CAS case law provides that young athletes cannot escape responsibility for the actions of parents who are in control of their athletic careers. This is particularly the case where the athlete's father testified clearly that his son was free at all times to decide and provide a sample if he so wished.**

The World Anti-Doping Agency (WADA), the Appellant in the case *CAS 2008/A/1578*, is an international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. WADA is a Swiss private law Foundation, with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. It coordinates the development and implementation of the World Anti-Doping Code (WADC), the document harmonizing anti-doping policies in all sports and all countries.

The South African National Equestrian Federation (SANEF), the first-named Respondent in the cases *CAS 2008/A/1558* and *CAS 2008/A/1578*, is recognised by the South African Government as the national governing body of equestrian sports in South Africa. SANEF is affiliated to the Fédération Equestre Internationale (FEI) and holds the status of a National Federation under its statutes.

Mr Jasyn Gertenbach (Mr Gertenbach), the second-named Respondent in the case *CAS 2008/A/1558*, is a South African horse rider, who has represented South Africa in the Vaulting event in international competitions. Mr Gertenbach was born on 16 November 1989 and was seventeen-years-old at the time of the events at issue. He is a member of the Gauteng Horse Society (GHS), the governing body of competitive equestrian sport in its region for the disciplines of Dressage, Driving, Equitation, Eventing, Showing, Showjumping and Vaulting.

FEI is a non-governmental association of national equestrian federations recognized by the IOC as the international federation governing horse sport, as defined in its Statutes. FEI has its registered office in Lausanne, Switzerland.

Mr Gertenbach was selected as a member of the South African equestrian team to compete at the European Vaulting Championships on 7-12 August 2007 in Kaposvar, Hungary.

On 1 July 2007, representatives of the South African Institute for Drug-Free Sport (“SAIDS”) carried out sample collections on several athletes at an equestrian event in South Africa, including Mr Gertenbach’s fifteen-year-old sister and other members of the South African equestrian team which would compete at the European Vaulting Championships. Mr Gertenbach attended this event, but did not compete and did not undergo a sample collection.

On 5 July 2007, at approximately 8pm, Mr Stephen James Van der Walt, a very experienced SAIDS Doping Control Officer (the “DCO”) presented himself at Mr Gertenbach’s home, in order to carry out an out-of-competition urine sample collection on Mr Gertenbach. The DCO was allowed on to Mr Gertenbach’s property by Mr Gertenbach himself, whereupon the DCO presented himself and entered into a brief conversation with Mr Gertenbach regarding the purpose of the DCO’s visit.

Mr Gertenbach’s father, Mr Jacobus Johannes Gertenbach, subsequently joined the two men and engaged in conversation with the DCO. The DCO explained the purpose of his visit to Mr Gertenbach’s father, and showed him his identification card and his Letter of Authority from SAIDS, which contained, *inter alia*, the following warning, in bold type: “**WARNING: The refusal or failure by an athlete to submit to doping control when requested to do so by a doping control officer/ chaperone may result in a sanction being imposed under its national or international federation rules**”.

At that point Mr Gertenbach’s father indicated that he wished to seek legal advice from his lawyer before allowing Mr Gertenbach to submit to the sample collection. Both Mr Gertenbach and his father entered their house at that point and Mr Gertenbach’s father told the DCO to remain outside, which he did.

Mr Gertenbach's father subsequently rejoined the DCO outside the house and advised the DCO that he had spoken to his lawyer and that Mr Gertenbach would not be submitting to a sample collection on that day, and that the DCO should arrange to return on another day, having given advance notice. During the hearing, Mr Gertenbach's father testified that he called his attorney, Ms Tracy Nixon, on the telephone, and she advised him not to allow Mr Gertenbach to submit to the sample collection.

Mr Gertenbach remained in the house and had no further contact with the DCO. In his written witness statement, Mr Gertenbach's father stated that he instructed his son to go to his room. During the oral hearing, Mr Gertenbach's father testified that it was Mr Gertenbach's decision not to come back out of the house, and that he did not instruct Mr Gertenbach to stay in the house.

The DCO advised Mr Gertenbach's father that a refusal by Mr Gertenbach to submit to a sample collection would lead to a sanction for Mr Gertenbach, although he did not indicate what that sanction would be. The DCO admits that he did not directly advise Mr Gertenbach of the risk of a sanction for refusal to submit to a sample collection, as he was prevented from doing so by Mr Gertenbach's father and was barred from entering the house. The DCO testified that he asked the father to allow Mr Gertenbach to provide a sample, but did not specifically ask him to bring Mr Gertenbach out of the house in order that he could explain the possibility of a sanction to him directly. Mr Gertenbach's father testified that he did not think that he would have allowed the DCO to enter the house if he had tried to do so, as *"at that stage we were not going to take the test"*.

The DCO requested that Mr Gertenbach's father confirm Mr Gertenbach's refusal to submit to the sample collection in writing. Mr Gertenbach's father wrote the following note on the DCO's 'Doping Control Memo' form: *"Could you please return at a decent time and notify me in advance – in the presence of a parent"*.

At this point, Mr Gertenbach's father advised the DCO that he was trespassing on private property and directed him to leave. During the hearing, the DCO testified that Mr Gertenbach's father threatened to shoot him, although the DCO never saw a gun, and put DCO in fear of his life. Mr Gertenbach's father denies threatening to shoot the DCO.

Following the submission of the DCO's report of Mr Gertenbach's failure to submit to a sample collection, a SANEF Judicial Committee, constituted of C. Von Ludwig, T.G. Payne and C.J. McAslin, convened an oral hearing to consider this matter and heard evidence from Nicole de Villiers, the DCO, Mr Gertenbach, Tracy Nixon, and Mr Gertenbach's parents, Jacobus Johannes and Barbara Gertenbach.

On 7 April 2008 the SANEF Judicial Committee issued a decision (the "SANEFJC Decision"), imposing the following sanction on Mr Gertenbach:

"Jasyn Gertenbach is suspended from all equestrian events under the auspices of the FEI, SANEF and/or GHS for a period of 4 months calculated from the date of this finding".

On 23 May 2008, by submission of a Statement of Appeal, WADA filed an appeal with the CAS against the SANEFJC Decision. WADA named SANEF and Mr Gertenbach as respondents to the appeal.

In accordance with Rule R52 of the Code of Sports-related Arbitration (the “Code”), the CAS initiated an appeals arbitration procedure under the reference *CAS 2008/A/1558 WADA v. SANEF & Gertenbach*.

On 5 June 2008 WADA filed an Appeal Brief.

On 13 June 2008, by submission of a Statement of Appeal, FEI filed an appeal with the CAS against the SANEFJC Decision. FEI named SANEF as the sole respondent to the appeal.

In accordance with Rule R52 of the Code, the CAS initiated an appeals arbitration procedure under the reference *CAS 2008/A/1558*.

On 24 June 2008 FEI filed an Appeal Brief.

On 24 June 2008 SANEF informed the CAS that it would “*not be submitting an answer to the appeal brief of the two Applicants in the [cases CAS 2008/A/1558 & CAS 2008/A/1578] and will accordingly accept the decision of the Court*”.

On 14 July 2008 Mr Gertenbach filed an Answer to both appeals.

By correspondence of 23 and 24 June 2008, the parties agreed that the CAS procedures *CAS 2008/A/1558* & *CAS 2008/A/1578* would be consolidated and decided by the same arbitration panel.

On 5 September 2008 the Panel, having consulted the parties, decided to convene an oral hearing on 10 November 2008 at the Court of Arbitration for Sport offices in Lausanne, Switzerland.

On 7 November 2008 the Panel issued an Order of Procedure to the parties for signature, which was duly signed by all parties. On the Order of Procedure signed by Mr Gertenbach, he made the following note: “*The Second Respondent disputes the jurisdiction of CAS to hear the present Appeal. The grounds for the denial of jurisdiction are set out in the Second Respondent’s Answering brief and in the Heads of Argument*”.

WADA submits that the FEI Anti-Doping Rules for Human Athletes (the “FEI AD Rules”) are applicable to this dispute. The FEI AD Rules state, in the section entitled ‘Scope’, that they “*shall apply to the FEI, each National Federation of the FEI, and each participant in the activities of the FEI or any or its National Federations by virtue of the Participant’s membership, accreditation, or participation in the FEI, the National Federation’s activities or Events*”. The FEI AD Rules are therefore applicable to the present case. The SANEF Regulations or the rules of the GHS may also be applicable, in as much as such Rules do not conflict with the FEI AD Rules, but that there are no specific SANEF anti-doping rules.

WADA submitted the following prayer for relief in its Appeal Brief:

“WADA hereby respectfully requests the CAS to rule that:

1. *The Appeal of WADA is admissible.*
2. *The Decision of the SANEF Judicial Committee rendered on April 7, 2008 in the matter of Mr Jasyn Gertenbach is set aside.*
3. *Mr Jasyn Gertenbach is sanctioned with a two-year period of ineligibility starting on the date on which the CAS Award will enter into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Jasyn Gertenbach) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *All competitive results obtained by Mr Jasyn Gertenbach from July 5, 2007 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes;*
5. *WADA is granted an award for costs”.*

FEI contends that at the time of the occurrence of the events in 2007, it is common ground that Mr Gertenbach was also a registered FEI competitor. FEI registered riders must abide and comply with FEI Rules and Regulations and the WADC.

FEI submitted the following prayer for relief in its Appeal Brief:

“The Fédération Equestre Internationale respectfully requests the CAS Panel to make an Award to:

- *Annul the decision of SANEF of 7 April 2008 in the matter of Mr Jasyn Gertenbach;*
- *Impose a sanction upon Mr Jasyn Gertenbach in accordance with the statutes, regulations and rules of the FEI, in particular the FEI Anti-Doping Rules for Human Athletes in conjunction with the World Anti-Doping Code;*
- *Order SANEF to pay all costs of these appeal arbitration proceedings, including a participation towards the legal costs incurred by the FEI;*
- *Dismiss any other relief sought by SANEF or Mr Jasyn Gertenbach should he be joined as a party to these proceedings;*
- *Order such other relief as might be necessary”.*

SANEF informed the CAS on 24 June 2008 that it would *“not be submitting an answer to the appeal brief of the two Applicants in the [cases CAS 2008/1558 & CAS 2008/A/1578] and will accordingly accept the decision of the Court”.*

No written submissions were filed by SANEF and SANEF did not attend the oral hearing, either in person or by video or tele-conference.

Mr Gertenbach contends *inter alia* that the CAS has no jurisdiction in this case since the SANEFJC Decision is a nullity and the CAS cannot act as a first instance tribunal, as well as that the FEI rules providing for appeals to the CAS are aimed only at decisions made by FEI, not by other bodies such as SANEF. Therefore, the requirement that the decision must be issued under FEI rules was not met, which implies that there is no right of appeal.

Mr Gertenbach submitted the following prayer for relief in his Answer:

“The Second Respondent respectfully requests the above Honourable Court to make an Award in the following terms:

1. *Declare the Decision of the SANEF Judicial Committee dated the 7 April 2008 in the matter of Jaysn Gertenbach a nullity;*
2. *Dismiss any relief sought by WADA or FEI;*
3. *Order SANEF to pay all costs of these appeal proceedings, including a costs on an attorney-own-client scale incurred by the Second Respondent;*
4. *Order further or alternative relief as may be necessary”.*

LAW

CAS Jurisdiction

1. WADA and FEI both contend that the CAS has jurisdiction to hear this appeal, and no objection has been filed by SANEF regarding CAS jurisdiction. However, Mr Gertenbach contests the jurisdiction of the CAS to hear this appeal.
2. As the CAS is an international arbitral tribunal having its seat in Switzerland within the meaning of Article 176 of the Swiss Private International Law Act (PILA), the provisions of Chapter 12 of the PILA are applicable to the present arbitral proceedings.
4. Article 186 of the PILA provides as follows:
 1. *The arbitral tribunal shall rule on its own jurisdiction.*
 2. *The objection of lack of jurisdiction must be raised prior to any defence on the merits.*
 3. *In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision.*
5. According to Swiss legal scholars, this provision “*is the embodiment of the widely recognized principle in international arbitration of ‘Kompetenz-Kompetenz’.* This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement” [ABDULLA Z., *The Arbitration Agreement*, in:

KAUFMANN-KOHLER /STUCKI (eds.), *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague 2004, p. 29]. “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (...). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement*” [MÜLLER Ch., *International Arbitration – A Guide to the Complete Swiss Case Law*, Zurich et al. 2004, pp. 115-116]. “*It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence*” [WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), *International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute*, Basel et al. 2000].

6. It is therefore evident that, in accordance with Swiss private international law, the Panel itself has the power to decide whether it has jurisdiction in the present case.
7. In accordance with CAS procedure, when a request for arbitration or a statement of appeal is filed with the CAS, a preliminary examination of the file is undertaken by the CAS Court Office, in order to identify cases where there is manifestly no arbitration agreement referring to the CAS. Pursuant to Articles R39 and R52 of the Code, if there is manifestly no arbitration agreement referring to the CAS, the parties are informed as such in writing by the CAS Court Office and, in the absence of an alternative agreement between the parties, the arbitration procedure is discontinued. In the present case, having examined the Statements of Appeal filed by WADA and FEI, the CAS Court Office did not conclude that there manifestly existed no arbitration agreement providing for this appeal to be considered by the CAS. An objection to the jurisdiction of the CAS having been filed by Mr Gertenbach, it was therefore for the Panel to examine whether the CAS has jurisdiction to rule on the substantive issues on appeal.
8. Article R47 of the Code provides as follows:
“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.
9. In order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body whose decision is being appealed must provide for an appeal to the CAS, or the parties must have concluded a specific arbitration agreement to that effect.
10. The GHS Constitution contains the following provisions:
*“Preamble: The prime responsibility of the [GHS] is to ensure that the constitutions, regulations, rules and policies of FEI and SANEF are observed at all recognised shows in the SOCIETY PROVINCES.
These rules are supplementary to and in no way conflict with the FEI rules or the SANEF rules and, in cases of dispute, the relevant FEI or SANEF rules will apply.*

Article 3.8 The objects of the [GHS] are ... to ensure that the FEI CONSTITUTION and the SANEF CONSTITUTION are observed where applicable in all activities of the [GHS] or conducted under the auspices of the [GHS];

Article 25.1 To the extent that this Constitution (including its regulations) is in conflict with the FEI Constitution or the SANEF Constitution, such other Constitutions have precedence to the extent that they are applicable.

Article 25.2 All members are bound by the FEI Constitution and the SANEF Constitution by virtue of their membership of the society and undertake under this Constitution not to contravene such other constitutions”.

11. The SANEF Constitution contains the following provisions:

“Article 1.2 The prime responsibility of [SANEF] is to ensure that the statutes, regulations, rules and policies of the FEI are observed at all times ...

Article 1.3 These rules are supplementary to and in no way conflict with FEI rules and, in cases of dispute, the relevant FEI rules will apply.

Article 4.6 The objects of [SANEF] are [...] to uphold the Constitution of the FEI”.

12. The SANEF General Regulations contain the following provisions:

“Article 00.2.1 The Regional Bodies shall ensure that the FEI Rules and/or the SANEF Rules are observed in their jurisdiction areas.

Article 00.2.2 The Regional Bodies shall ensure that contravention by their members of the FEI Rules and/or the SANEF Rules are also contraventions by those members of the constitutions, rules and regulations of the Regional Bodies.

Article 00.2.4 To the extent that these constitutions [of all Regional Bodies] (including the rules and regulations) are in conflict with the FEI Rules or the SANEF Rules, the FEI Rules and the SANEF Rules take precedence to the extent that they are applicable”.

13. The FEI Statutes contain the following provisions:

“Article 35.2 Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration”.

14. The FEI AD Rules contain the following provisions:

“Preface Anti-Doping Rules, like Competition rules, are sport rules governing the conditions under which sport is played. Athletes accept these rules as a condition of participation.

Scope [The FEI AD Rules] shall apply to the FEI, each National Federation of the FEI, and each Participant in the activities of the FEI or any of its National Federations by virtue of the Participant’s membership, accreditation or participation in the FEI, its National Federations or their activities or events.

[...]

The National Federation agrees to ensure that all national-level Testing on the National Federation's Athletes complies with [the FEI AD Rules]. In some cases, the National Federation itself will be conducting the Doping Control described in these Anti-Doping Rules. In other countries, many of the Doping Control responsibilities of the National Federation have been delegated or assigned by statute to a National Anti-Doping Organization. In those countries, references in these Anti-Doping Rules to the National Federation shall apply, as applicable, to the National Federation's National Anti-Doping Organization.

[The FEI AD Rules] shall apply to all Doping Controls over which the FEI and its National Federations have jurisdiction”.

15. On 1 July 2007 Mr Gertenbach signed an Athletes Agreement to participate in the European Vaulting Championships. Such Agreement contained the following provisions:

“3.1 In accordance with the requirements of SANEF, [Mr Gertenbach] agrees to comply with SANEF's Constitution (including, but not limited to, the regulations, byelaws and code of conduct promulgated thereunder).

11.1 [Mr Gertenbach] acknowledges that the current International Olympic Committee's list of doping classes and methods will be used at the Games.

16.2 [Mr Gertenbach] agrees to undergo such medical testing as may be reasonably required by SANEF, including, but not limited to giving blood and/or urine samples for analysis (including, but not limited to testing for doping or for HIV)”.

16. It is clear from the various provisions set out above that as Mr Gertenbach is a member of the GHS, he is bound by the Constitution, Statutes, Regulations and Rules of SANEF and FEI. This is not a matter of dispute between the parties and was expressly accepted by Mr Gertenbach in his written and oral submissions. As it is expressly provided in the SANEF Constitution that FEI rules will take precedence in cases of dispute between FEI rules and SANEF rules, it is evident to the Panel that Mr Gertenbach is subject to the provisions of the FEI AD Rules.

17. The question which must therefore be addressed by the Panel is whether the fact that Mr Gertenbach is bound by the provisions of the FEI AD Rules effects a direct right of appeal to the CAS for WADA and FEI in the present case.

18. Article 13.2 of the FEI AD Rules provides as follows:

“13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions

A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the FEI or its National Federation lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or otherwise in violation of

Article 7.4 may be appealed exclusively as provided in this Article 13.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.

13.2.1 In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court.

13.2.2 In cases involving Athletes that do not have a right to appeal under Article 13.2.1, each National Federation shall have in place an appeal procedure that respects the following principles: a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the person’s expense; and a timely, written, reasoned decision. The FEI’s rights of appeal with respect to these cases are set forth in Article 13.2.3 below.

13.2.3 In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FEI and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (e) WADA. In cases under Article 13.2.2, the parties having the right to appeal to the national-level reviewing body shall be as provided in the National Federation’s rules but, at a minimum, shall include: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FEI; and (d) WADA. For cases under Article 13.2.2, WADA and the FEI shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body”.

19. All parties accept that Mr Gertenbach is not an International Level Athlete for the purposes of Article 13.2.1 of the FEI AD Rules. Therefore, of the provisions of the FEI AD Rules which provide for a right of appeal to the CAS, the applicable provisions in the present case are Articles 13.2.2 and 13.2.3.
20. Article 13.2.2 provides that “National Federation shall have in place an appeal procedure”. In addition, Article 13.2.3 provides that “For cases under Article 13.2.2, WADA and the FEI shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body”. Ordinarily, this would provide for a right of appeal from the SANEFJC Decision to a SANEF appeals body, with an additional right of appeal to the CAS existing for WADA and FEI against the final decision of SANEF *i.e.* that of its appeals body.
21. In the present case, however, the Constitution and General Regulations of SANEF do not provide for any right of appeal from the SANEFJC Decision, either to an SANEF appeals body or to the CAS. The SANEFJC Decision, being a final decision with no further legal remedies available within the SANEF structure, is therefore equivalent in effect to the *national-level reviewing body* referred to in Article 13.2.3 of the FEI AD Rules. This is confirmed by SANEF’s refusal or failure to act upon SAIDS request to SANEF of 23 April 2008 to review the

SANEFJC Decision. It is also supported by FEI's uncontested statement that "*the SANEF explained to the FEI that its Constitution did not provide for any review process*", in response to FEI's request that the SANEFJC Decision be reviewed and overturned.

22. As the GHS and SANEF regulations provide that in event of their non-conformity with the FEI rules, the FEI rules will apply, the Panel finds that notwithstanding the absence of a right to appeal from decisions of the SANEF Judicial Committee in the SANEF rules, the right of appeal to CAS expressly provided for in the FEI AD Rules must be upheld. It is the Panel's decision that as the FEI AD Rules provide for a right of appeal to the CAS from the final decision of SANEF, and as the final decision of SANEF in the present case was the SANEFJC Decision, there exists a right of appeal from the SANEFJC Decision for WADA and the FEI to the CAS, and the CAS has jurisdiction to hear the present appeals.
23. The inclusion of Article 13.2.3 in the FEI AD Rules was clearly intended to allow FEI and WADA to perform a supervisory role in domestic anti-doping cases. This supervisory role is facilitated by the Panel's ruling in paragraph 5.20 above. This approach is supported by previous CAS case law, which holds that in order to create a 'level playing field' and ensure equity in international competition, it is essential that international federations have a right of appeal against the decisions of national federations in cases involving anti-doping rule infractions (*CAS 2006/A/1119; para. 42* and *CAS 2006/A/1159, para. 41*).
24. A further question, which does not arise for consideration by the Panel in the present case but should be considered carefully by SANEF and FEI in order to ensure equitable treatment of athletes, is whether there exists a right of appeal from decisions of the SANEF Judicial Committee for parties other than WADA and FEI. As mentioned above, this issue does not require consideration by the Panel in the present case, as Mr Gertenbach is not prejudiced by this ambiguity, having had the opportunity to fully argue his case before the CAS, and to file his counterclaim requesting that the SANEFJC Decision be declared a nullity. However, the question arises as to whether, and in what forum, Mr Gertenbach would have had the opportunity to make such submissions had WADA or FEI not filed an appeal.
25. Having confirmed its jurisdiction to hear the present appeals, the Panel considered the nature and scope of these appeals. Article R57 of the Code provides that "*The Panel shall have full power to review the facts and the law*". Therefore, in accordance with Article R57 of the Code and established CAS jurisprudence, the Panel considered the present case as a *de novo* appeal.

Admissibility of the Appeals

26. Article 13.5 of the FEI AD Rules provides as follows:

“13.5 Time for Filing Appeals

The time to file an appeal to CAS shall be thirty (30) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to the decision subject to appeal:

- a) Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;*
- b) If such a request is made within the ten day period, then the party making such request shall have thirty (30) days from receipt of the file to file an appeal to CAS”.*

27. On 7 April 2008 the SANEF Judicial Committee issued the SANEFJC Decision, imposing a sanction on Mr Gertenbach.
28. By e-mail dated 23 April 2008, SAIDS sent the SANEFJC Decision to WADA.
29. On 23 May 2008, by submission of a Statement of Appeal, WADA filed an appeal with the CAS against the SANEFJC Decision.
30. The Statement of Appeal filed by WADA on 23 May 2008 was therefore filed within the time limit prescribed under the FEI AD Rules.
31. The SANEFJC Decision was transmitted by WADA to FEI on 7 May 2008.
32. On 8 May 2008 FEI requested from SANEF a copy of the file on which SANEF relied for its Decision.
33. On 15 May 2008 the complete file was notified to FEI by SANEF.
34. On 13 June 2008, by submission of a Statement of Appeal, FEI filed an appeal with the CAS against the SANEFJC Decision.
35. The Statement of Appeal filed by FEI on 13 June 2008 was therefore filed within the time limit prescribed under the FEI AD Rules.
36. WADA and FEI both complied with the provisions of Article R48 of the Code, including payment of the minimum CAS filing fee of CHF 500 in accordance with Article R65.2 of the Code.
37. As described in paragraph 5.19 above, the legal remedies available to the appellants were exhausted before the filing of the present appeals, in accordance with Article R47 of the Code.
38. In light of the above, the Panel concludes that the appeals filed by WADA and FEI are both admissible.

Applicable law

39. Regarding applicable law, FEI contends that a clear choice of law clause is comprised within the FEI Statutes and agreed between the parties and, therefore, the Panel shall apply the FEI Regulations and AD Rules and, subsidiarily, Swiss law.
40. WADA made no express submissions to the Panel regarding the applicability of a particular national law.
41. SANEF made no submissions regarding applicable law.
42. Mr Gertenbach's position regarding applicable law is that the FEI AD Rules are applicable, as they take precedence over SANEF and GHS rules. Mr Gertenbach made no submissions regarding the applicability of a particular national law.
43. Article R28 of the Code provides that the seat of the CAS and of each Arbitration Panel is in Lausanne, Switzerland. Swiss procedural law therefore applies to this arbitration.
44. The question of what law is applicable to the merits of the present dispute shall be decided by the Panel in accordance with the provisions of Chapter 12 of the PILA and Article R58 of the Code.
45. Article 187(1) of the PILA provides as follows:
"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".
46. Article 187(1) of the PILA constitutes in itself the entire private international law or conflict of laws system applicable to arbitral tribunals having their seat in Switzerland and its provisions confirm that the type of conflict of laws rules contained in the Swiss private international law are not applicable to the determination of the applicable substantive law in international arbitrations (KAUFMANN-KOHLER/STUCKI, *International Arbitration in Switzerland*, Zurich 2004, pg. 116).
47. The parties' agreement regarding the choice of law is not required to take a particular form and can be concluded either expressly or tacitly. Such a tacit agreement can result from, for example, a common attitude adopted by the parties during the arbitration procedure, where both parties refer to the same law in their submissions to the Panel (LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, pg. 390). However, circumstances such as the place of arbitration, the place of residence or the nationality of the parties, or the choice of a procedural law, do not imply a choice of substantive law. Nor can a choice of law be derived from a so-called hypothetical intent of the parties, i.e. the intent that

the parties would presumably have had – but in the event did not have – if they had thought about the question of applicable law (BUCHER/TSCHANZ, *International Arbitration in Switzerland*, Basle 1989, pg. 99).

48. In order for a choice of law to exist in the sense envisaged by 187(1) para. 1 of the PILA, there must be awareness and willingness by the parties to adopt such a choice of law (LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, pg. 390). Once the arbitral tribunal has established the actual intent of the parties, it must enforce their agreement, without examining the merits of the parties' choice or second-guessing whether this choice is legitimate or appropriate. In particular, the arbitral tribunal may not refuse to apply the chosen law because it is incomplete, surprising or unfair in the circumstances of the contractual relationship (KAUFMANN-KOHLER & STUCKI, *International Arbitration in Switzerland*, Zurich 2004, Schulthess, pg. 119).
49. The parties may indirectly choose the applicable substantive law by reference, for example, to a set of arbitration rules. Therefore, if the parties have not specifically agreed upon the applicable substantive law but have made reference to arbitration rules setting forth a method for determining such law, the arbitral tribunal will apply these rules as the law chosen by the parties. An express choice of law clause will, however, prevail over a reference to arbitration rules (KAUFMANN-KOHLER/STUCKI, *International Arbitration in Switzerland*, Zurich 2004, pg. 120-121).
50. The wording of Article 187(1) of the PILA, which states that the parties may choose the 'rules of law' to be applied, does not limit the parties' choice to the designation of a particular national law. It is generally agreed by academics and commentators that the parties may choose to subject the contract to a system of rules which is not the municipal law of a State and that such choice is consistent with Article 187 of the PILA (DUTOIT B., *Droit international privé suisse*, Bâle 2005, pg. 657; LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, pg. 392 ff.; KARRER P., in HONSELL/VOGT/SCHNYDER (publ.) *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, Basle 1996, Art. 187, N. 69 et seq.). The relevant statutes, rules or regulations of a sporting governing body may therefore be designated by the parties as the applicable rules of law for the purposes of Article 187(1) of the PILA (RIGOZZI A., *L'arbitrage international en matière de sport*, Basle 2005, pg. 599-600).
51. The Panel having found that the CAS has jurisdiction to hear the present appeals, in the absence of any express agreement of the parties in the alternative, the parties can be deemed to have tacitly accepted the application to these proceedings of the CAS procedural rules, contained in the Code.
52. In consideration of the para. 49 above, it follows that acceptance by the parties of the provisions of the Code implies a choice by the parties of the substantive law that is identified by application of the relevant provisions of the Code (RIGOZZI A., *L'arbitrage international en matière de*

sport, Basle 2005, sect. 3 Chap. 2 (I)), specifically Article R58 for the purposes of appeals arbitration proceedings. As the parties can be said to have chosen the substantive law that is identified by application of Article R58 of the Code, there is no need for the Panel to decide what is the “*law with which the action is most closely connected*”, as described in Article 187(1) of the PILA.

53. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

54. The Panel must therefore decide whether the parties in this case have made a choice regarding “*the applicable regulations and the rules of law*” described in Article R58 of the Code and, if so, what regulations and rules of law the parties have chosen.

55. In the present case the parties have not advised the Panel of any explicit agreement between them regarding the applicable law. However, as detailed in paragraph 16 above, the Panel finds that the FEI Statutes, Rules and Regulations, in particular the FEI AD Rules, are applicable in these proceedings.

56. The Panel considered what national law, if any, should be applied in addition to the FEI AD Rules.

57. Articles 35.2 and 35.3 of the FEI Statutes provide as follows:

“35.2 Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration.

35.3 The parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS are governed by Swiss Law”.

58. It is therefore apparent that the parties can be said to have, at least implicitly, agreed to the applicability of Swiss Law to these proceedings.

59. As an express choice of law clause will prevail over an implied choice, had the parties explicitly agreed to the application of an alternative national law, notwithstanding the reference in the FEI Statutes to the applicability of Swiss Law, this express choice of law would have been enforced by the Panel, to the extent that the chosen law was compatible with the applicable FEI Statutes, Rules and Regulations. However, no such express agreement was entered into by the parties.

60. The Panel therefore concludes that the FEI Statutes, Regulations and Rules, including the FEI AD Rules, are applicable in the present case and Swiss law applies complementarily.

Merits

61. Having confirmed its jurisdiction and the admissibility of the appeal, the Panel addressed the substantive aspects of the appeal.

62. The Panel first of all considered whether Mr Gertenbach had committed a breach of the FEI AD Rules.

63. Article 2.3 of the FEI AD Rules provides as follows:

“The following constitute anti-doping rule violations:

2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in these Anti-Doping Rules or otherwise evading Sample collection”.

64. The Panel therefore had to consider whether Mr Gertenbach refused, or failed without compelling justification, to submit to a sample collection after notification as authorised in the FEI AD Rules or otherwise evaded sample collection. When considering this point, the Panel was cognisant of the fact that Mr Gertenbach was still a minor at the time of the incident, and in that context concluded that the behaviour of Mr Gertenbach's father, as his legal guardian, was pertinent. However, the Panel decided nevertheless that it was the behaviour of Mr Gertenbach himself that was most relevant when considering whether he had breached Article 2.3 of the FEI AD Rules.

65. As a preliminary issue, the Panel examined the authority of the DCO to conduct an out-of-competition test on Mr Gertenbach. In particular, the Panel considered the provisions of Article 5.1 of the FEI AD Rules, which provide as follows:

“All athletes affiliated with the National Federation shall also be subject to Out-of-Competition testing at any time or place, with or without advance notice, by the FEI, WADA, the Athlete's National Federation, the National Anti-Doping Organisation of any country where the Athlete is present, the IOC during the Olympic Games and the IPC during the Paralympic Games”.

66. The Panel therefore considers that Mr Gertenbach was legitimately subject to out-of-competition testing by SAIDS, as the National Anti-Doping Organisation of South Africa, and the DCO did have authority to conduct a sample collection on Mr Gertenbach 'at any time or place'. The evidence before the Panel indicated that the DCO advised Mr Gertenbach of his authority to do so.

67. On the basis of the evidence submitted by the parties, the Panel considered that having been notified of his obligation to provide a urine sample, Mr Gertenbach refused to do so. As

Mr Gertenbach did not attend the oral hearing, the Panel did not have the benefit of direct testimony regarding his will, or lack thereof, to submit himself to a sample collection. However, Mr Gertenbach's father stated during his testimony that Mr Gertenbach was free to come back outside the house to where the DCO was located at any time, but chose not to. Having considered the circumstances of the sample collection, as described in section 2 above, it appears that Mr Gertenbach's behaviour constituted a breach of Article 2.3 of the FEI AD Rules.

68. Mr Gertenbach argues that he did not breach Article 2.3 of the FEI AD Rules and his arguments in this regard are summarised above. Mr Gertenbach principally argues that in the present case there were several departures from the IST, and it is his contention that he cannot be said to have refused to submit to the sample collection, as he could only have refused to submit to sample collection if he had received notification as contemplated by the IST. He states that he was not aware of what he was refusing and that had he been made aware of the consequences of refusing to submit to sample collection, he would not have refused.

69. Article 5.3 of the FEI AD Rules provides as follows:

"5.3 Testing Standards

Testing conducted by the FEI and its National Federations shall be in substantial conformity with the International Standard for Testing in force at the time of Testing".

70. Article 3.2.2 of the FEI AD Rules provides as follows:

"3.2.2 Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the FEI or its National Federation shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

71. The Panel must therefore examine whether there were departures from the IST, and if so, whether such departures caused the factual basis for breach of Article 2.3 of the FEI AD Rules by Mr Gertenbach.

72. Having considered the arguments advanced by Mr Gertenbach regarding alleged departures by the DCO from the IST and his arguments as to why the Panel should consider that his behaviour did not constitute a breach of Article 2.3 of the FEI AD Rules, the Panel largely agree with, and adopt, the substantive findings of the SANEF Judicial Committee in this regard. Paragraphs 15-18 of the SANEF Decision, addressing the arguments advanced on behalf of Mr Gertenbach by his attorney, Mr Harris, on this point, provide as follows:

"On the face of it Mr Harris' submission is an attractive one. However, notwithstanding that it was persuasively argued, it does not bear up to scrutiny. The fundamental flaw in the submissions is that whilst non-compliance with Article 4.6.1 and/or Article 5.4.1 of the International Standards could conceivably constitute grounds for

impugning the validity of a test result, it cannot be relevant where no test result exists because the sample collection was refused. This much is apparent from Article 3.2.2 of the Anti-Doping Rules which provides, inter alia:

If the Athlete establishes that departures from the International Standard occurred during Testing then the FEI or its National Federation shall have the burden to establish that such departures did not cause ... the factual basis for the anti-doping rule violation.

Thus, departures from the International Standards are only material where they caused the factual basis for the anti-doping rule violation. In the case of Article 2.3 of the Anti-Doping Rules the factual basis for the violation is the refusal to submit to a sample collection. On the facts of this matter it cannot be said that Jasyn refused to submit to a sample collection because Article 4.6.1 and Article 5.4.1 of the International Standards had not been complied with. By their own admission none of the defence witnesses knew the provisions of the Anti-Doping Rules let alone those of the International Standards. The reasons for a sample not being collected from Jasyn are set out above and it is clear that none of the reasons have a direct bearing on Article 4.6.1 or 5.4.1 of the International Standards. Whilst the defence witnesses did attempt to broaden the grounds for not allowing Mr van der Walt to collect a sample from Jasyn, the complaints and objections which they apparently had are placed into context when one considers their consistent testimony that if they only knew that Jasyn could face a suspension of two years they would have allowed Mr Van der Walt to carry out the test. That is a stance which is wholly inconsistent with a reliance on the non-compliance with Article 4.6.1 and/or 5.4.1 of the International Standards.

There is another consideration which counts against Mr Harris' submissions insofar as it concerns Article 4.6.1 of the International Standard, and that is that Article 3.2 of the Anti-Doping Rules speaks only of a refusal "after notification". It does not expressly incorporate the requirements for the selection of athletes as prescribed in Article 4.6.1, which would appear to be more apposite for a contravention of Article 2.4 of the Anti-Doping Rules.

Insofar as "notification" is concerned the facts are against Mr Harris' submissions. Notification of athletes is dealt with in Article 5.4 of the International Standards and much was made of the fact Mr van der Walt did not inform Jasyn of what he was entitled to know such as, in particular, the nature of the sample collection. Although Mr van der Walt testified that he told Jasyn that it would be a urine sample under supervision, Jasyn's father was equally adamant that no such information was conveyed to Jasyn. Again, in our view not much turns on the dispute because Jasyn testified in chief that he knew a urine sample would be required because that was the nature of the sample collection on 1 July 2007 when his sister and four other athletes were tested. Furthermore, Mr van der Walt testified that he was not given the opportunity to inform Jasyn of all the requirements for notification contained in Article 5.4.1 of the International Standards because upon his arrival Jasyn's father almost immediately asked to consult his attorney and then upon his return refused to allow a sample to be taken from Jasyn. In our view it would be somewhat of an anomaly to allow an athlete to contest his/her refusal to submit to a sample collection on the basis that Article 5.4.1 of the International Standards was not complied with in circumstances where that athlete's refusal was the cause of the non-compliance".

73. Regarding the question of whether Mr Gertenbach could be found to have refused to submit to a sample collection, the SANEF Judicial Committee stated in its Decision that it was:

"mindful of the fact that the decision not to submit Jasyn to a sample collection was taken by his father on the advice of Ms Nixon. We also take cognisance of the fact that Jasyn testified that he wanted to submit himself to

a sample collection but did not do so on the instruction of his father. In our view the reasons for Jasyn not submitting to a sample collection can only be relevant to the question of the sanction. As a matter of principle, athletes and especially athletes which compete at an international level need to respect the Anti-Doping Rules and the policies that underpin those rules. They cannot pass on their responsibility to abide by the Anti-Doping Rules on to anybody, even if the athlete is a minor”.

74. The Panel concurs with the findings of the SANEF Judicial Committee in this regard. The Panel considers that if the Panel were to take Mr Gertenbach’s submissions regarding the alleged departures from the IST at their high point, and thereby accepted that the alleged departures had occurred, the Panel nevertheless would not consider that these departures caused Mr Gertenbach’s refusal to submit to sample collection, particularly as the IST placed no obligation on the DCO to advise Mr Gertenbach of the precise consequences of his refusal to comply, or to advise him of what specific sanction he was likely to incur.
75. In light of the above, the Panel finds that on 5 July 2007 Jasyn Gertenbach breached Article 2.3 of the FEI AD Rules in that he refused to submit to a sample collection after notification as authorised in the FEI AD Rules.
76. Having found that Mr Gertenbach committed a breach of Article 2.3 of the FEI AD Rules, the Panel considered what sanction should be imposed on Mr Gertenbach.
77. Article 10.4.1 of the FEI AD Rules provides as follows:
*“The period of Ineligibility for other violations of these Anti-Doping Rules shall be:
10.4.1 For violations of Article 2.3 (refusing or failing to submit to Sample collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility periods set forth in Article 10.2 shall apply”.*
78. Article 10.2 of the FEI AD Rules provides as follows:
*“10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods
Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Methods) shall be:
First violation: Two (2) years’ Ineligibility.
Second violation: Lifetime Ineligibility.
However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5”.*
79. The present case being Mr Gertenbach’s first anti-doping rule violation, the Panel concluded that the appropriate sanction for his breach of Article 2.3 of the FEI AD Rules shall be a period of two years’ ineligibility.

80. The Panel then considered whether there were any grounds to reduce the two-year period of ineligibility provided for by Article 10.2 of the FEI AD Rules.
81. Article 10.5 of the FEI AD Rules is entitled ‘Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances’. Article 10.5.2 provides as follows:
“This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced”.
82. The Panel considered whether the present case was one in which Mr Gertenbach bore no significant fault or negligence, and could thereby benefit from a reduction in sanction. Having regard to the provisions of Article 10.5.2 of the FEI AD Rules, the Panel concluded that in any event, Mr Gertenbach’s period of ineligibility could not be reduced to a period of less than one year.
83. The following are the definitions of ‘No Fault or Negligence’ and ‘No Significant Fault or Negligence’ contained in the FEI AD Rules:
“No Fault or Negligence.
The Athlete’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method”.
“No Significant Fault or Negligence.
The Athlete’s establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation”.
84. FEI and WADA both argued that there were no grounds to reduce the sanction on the basis of Article 10.5.2 of the FEI AD Rules. Mr Gertenbach argued that although the erroneous advice of his attorney should not be regarded as an exceptional circumstance, the defective performance of the DCO in executing his duties as required under the IST should be regarded as an exceptional circumstance. He argues that the Panel should therefore find that Mr Gertenbach bore No Significant Fault or Negligence for his breach of Article 10.2 of the FEI AD Rules and that his sanction should be reduced to a period of one year’s ineligibility. Mr

Gertenbach also contended that the Panel should take into consideration the fact that he was a minor at the time of the incident.

85. It must be noted again that Mr Gertenbach did not give any evidence, as he declined to appear before the Panel to give his own evidence. The Panel found that the explanation proffered by Mr Gertenbach's legal representative - that Mr Gertenbach couldn't appear because he was in Mauritius - was unsatisfactory, considering the Panel's willingness to hear Mr Gertenbach by video-conference. The very experienced DCO confirmed that he drew Mr Gertenbach's attention to the possible consequences of refusing to provide a sample, but Mr Gertenbach has provided the Panel with absolutely no explanation for his refusal that could be regarded as possible mitigating circumstances. SANEF itself found there was no reasonable excuse for Mr Gertenbach to fail to give a sample – a conclusion shared by the Panel. The Panel does not agree with Mr Gertenbach's evaluation of the performance of the DCO and it rejects the argument that the allegedly defective performance of the DCO in executing his duties as required under the IST should be regarded as an exceptional circumstance. Nor does the Panel consider that the young age of Mr Gertenbach, who was less than a year from his eighteenth birthday, should be regarded as an exceptional circumstance. CAS case law provides that young athletes cannot escape responsibility for the actions of parents who are in control of their athletic careers. In any case, in the present matter, Mr Gertenbach's father testified clearly that his son was free at all times to come downstairs and provide a sample if he wished to do so. The Panel therefore finds that there are no grounds in the present case to reduce Mr Gertenbach's sanction on the basis of the provisions of Article 10.5.2 of the FEI AD Rules.
86. In light of the above, the Panel confirms its finding that that the SANEF Judicial Committee erred by imposing a four-month period of ineligibility on Mr Gertenbach and confirms that Mr Gertenbach's period of ineligibility shall be increased to two years.
87. Having established the length of Mr Gertenbach's suspension, the Panel considered what the starting date for such suspension should be.
88. Article 10.8 of the FEI AD Rules provides as follows:
- “Commencement of Ineligibility Period*
- The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the FEI or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection”.*
89. In accordance with Article 10.8 of the FEI AD Rules, the Panel finds that as Mr Gertenbach has not competed since 7 April 2008, the date of commencement of the period of suspension imposed on him by the SANEF Judicial Committee, Mr Gertenbach's two-year suspension shall be served from 7 April 2008.

90. Article 10.7 of the FEI AD Rules provides as follows:

“Disqualification of Results in Competitions Subsequent to Sample Collection

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes”.

91. In consideration of Article 10.7 of the FEI AD Rules, the Panel rules that all competitive results obtained by Mr Gertenbach between 5 July 2007 and the commencement date of his period of ineligibility, 7 April 2008, shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

The Court of Arbitration for Sport rules:

1. The Appeal filed by the World Anti-Doping Agency against a decision of the Judicial Committee of the South African National Equestrian Federation dated 7 April 2008 is upheld.
2. The Appeal filed by the Fédération Equestre Internationale against a decision of the Judicial Committee of the South African National Equestrian Federation dated 7 April 2008 is upheld.
3. The period of ineligibility of four months that was imposed on Mr Jaysn Gertenbach by the Judicial Committee of the South African National Equestrian Federation is hereby increased to two years, commencing on 7 April 2008.
4. All competitive results obtained by Mr Jaysn Gertenbach between 5 July 2007 and 7 April 2008 shall be disqualified.
5. (...).
6. (...).
7. All other prayers for relief are dismissed.