



Arbitration CAS ad hoc Division (OG London) 12/001 Alexander Peternell v. South African Sports Confederation and Olympic Committee (SASCOC) & South African Equestrian Federation (SAEF), award of 25 July 2012

Panel: Mr Michele Bernasconi (Switzerland), President; Mr Efraim Barak (Israel); Mr Ricardo de Buen Rodríguez (Mexico)

Equestrian (eventing)

Selection of athletes

Rights and duties of a National Olympic Committee and of a national federation regarding selection of athletes

Replacement of a recommendation by a CAS decision

- 1. It is the right of each National Olympic Committee (NOC) to select athletes, team officials and other team members for the participation in the Olympic Games. As for any right, also this right shall be exercised in good faith and in accordance with the applicable rules and, in particular, with the principles of the Olympic Charter. In such cases, when the selection decisions are taken properly, there is generally no room for a legal review. However, a NOC is generally not in a position to know all the athletes of all disciplines of its country. Accordingly, where a national federation exists, a NOC will feel itself comfortable in being able to rely on the assistance and on the selection work performed, by way of “recommendation”, by the national sports federations.**
- 2. The purpose of receiving a recommendation by the relevant national federation, i.e. the relevant technical knowledge, can be fully replaced by the knowledge obtained by the NOC within the framework of a CAS procedure to which the NOC was a party and which solved the issue of selection with a final and binding decision. An NOC cannot hide behind the non-receipt of a recommendation from the national federation in these circumstances.**

The Applicant, Mr Alexander Peternell, is a South African Event Rider.

The first Respondent is the South African Sports Confederation and Olympic Committee (SASCOC). The mission of SASCOC, under various National South African Laws, is to promote and develop high performance sport, as well as to act as the controlling body for the preparation and delivery of Team South Africa at all multi-sport international games, including the Olympic Games. Furthermore, pursuant to the Olympic Charter, Chapter 4, Rule 27.7.2, SASCOC has “*the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*”.

The second Respondent is the South African Equestrian Federation (SAEF). It is the domestic federation recognised by the Fédération Equestre Internationale (FEI), in South Africa. The SAEF has a number of local associations which are affiliated to it and which represent the various different equestrian disciplines, including the South African Equestrian Association (SAEA) which is responsible for the administration of Eventing in South Africa.

The Interested Parties are the International Olympic Committee (IOC) and the Fédération Equestre Internationale.

The International Olympic Committee (IOC) is an international not-for-profit organisation, in the form of an association with the status of a legal entity, recognized by the Swiss Federal Council. The seat of the IOC is in Lausanne, Switzerland. The object of the IOC is to fulfil the mission, role and responsibilities as assigned to it by the Olympic Charter. In between these missions one of the paramount roles of the IOC is “to ensure the regular celebration of the Olympic Games” (Art. 2(3) Olympic Charter).

The Fédération Equestre Internationale is the worldwide governing body of equestrian sport and is recognised as such by the IOC.

The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

The selection of South African Athletes for the Olympic Games is governed by Art. 6.3.3 of the Memorandum of Association of SASCOC, which stipulates the following:

“SASCOC shall have the power to ... select, on recommendation from the relevant National Sport Federations (if any), and present multi-sport teams for International and representative competitions at all levels, in terms of National and sports Federation Statutes and Regulations”.

On 11 July 2012, the Applicant filed an appeal with CAS against two decisions issued by the Respondents on 25 June 2012 and 2 July 2012, to select another South African rider, Mr. Paul Hart (“Mr. Hart”), to participate and compete on behalf of the South African team in the Equestrian Eventing discipline in the XXX Olympiad in London. The case was enrolled with the number CAS 2010/A/2845.

In his appeal in CAS 2010/A/2845 the Applicant requested the decisions referred to above be annulled, and that CAS shall issue a new decision declaring that the Applicant does meet the SAEF and SASCOC eligibility criteria for selection for the South African Eventing individual place in the XXX Olympiad. Furthermore, the Applicant requested that in accordance with the selection criteria published by the SAEF and SASCOC, he shall be selected by SASCOC to compete on behalf of the South African team as an individual in the Eventing discipline at XXX Olympiad, replacing Mr. Hart.

On 21 July 2012 CAS rendered the award in the CAS 2010/A/2845 proceedings and communicated the operative part of the award. The award with reasons was communicated on 23 July 2012 (the “CAS 2010/A/2845 Award”).

The operative part of the CAS 2010/A/2845 Award states as follows:

1. *The appeal filed by Alexander Peternell is upheld.*
2. *The SAEF decision of 25 June 2012 and the SASCOC decision of 2 July 2012 are set aside.*
3. *Alexander Peternell meets the SAEF and SASCOC eligibility criteria for selection for the South African Eventing Team and the 2012 Olympic Games.*
4. *In accordance with the selection criteria published by the SAEF and SASCOC, Alexander Peternell shall be eligible for selection by SASCOC to compete on behalf of the South African team in the eventing discipline at the 2012 Olympic Games, in lieu of Paul Hart.*
5. *The costs of this procedure to be calculated and communicated to the parties by the CAS Court Office shall be borne 50% by SASCOC and 50% by SAEF.*
6. *SASCOC and SAEF shall each pay to Alexander Peternell the amount of CHF 5,000 (five thousand Swiss Francs) as a contribution towards his legal fees and other expenses.*
7. *All further and other claims for relief are dismissed”.*

On 22 July 2012, following the communication of the CAS 2010/A/2845 Award, SAEF sent a letter to SASCOC in respect of the CAS 2010/A/2845 Award in which it informed the SASCOC that having reviewed the decision of CAS and the selection process SAEF had come to the following conclusion:

“In spite of the CAS ruling, the SAEF cannot endorse the selection of Alex Peternell to SASCOC based on the fact that he has not ever met the criteria as outlined in the SASCOC general selection policy ...

... Having considered the above information and the advice of the eventing technical committee, we recommend that SASCOC selects Mr. Hart over Mr. Peternell though he is the highest ranked rider, as Mr. Hart is better prepared, his horse is better and the results expected will be better in the Olympic Games than Mr. Peternell”

(the “SAEF Decision”).

Further to the SAEF Decision, by letter dated 23 July 2012, the SASCOC sent a letter to the FEI referring to the CAS 2010/A/2845 Award notifying SASCOC’s decision (the “SASCOC Decision”) that *“South Africa will not be presenting a candidate for the Eventing Competition at the London 2012 Olympics, due to the fact that the National Federation has not been able to nominate a candidate for selection”*. In its letter to FEI, SASCOC further stated that: *“... the National Federation (SAEF) have [sic] now advised SASCOC in writing that they are unable to recommend the substitution of Mr. Peternell over Mr. Hart despite CAS’s ruling, and therefore we are unable to comply with article 6.3.3 of our Memorandum of Association which stipulates selection on recommendation from the National Federation, of an athlete to compete at the Olympic Games”*.

The SAEF Decision and the SASCOC Decision are the subject matter of the present proceedings and will hereinafter be referred to as the “Appealed Decisions”.

LAW

Procedure before CAS

1. On 24 July 2012, at 8:00 am, the Applicant filed an application with CAS directed against the Appealed Decisions; further, he requested provisional urgent measures to be ordered by the Panel.
2. In his application, the Applicant requested the following reliefs:
“That the decisions of the Respondents set out above are annulled and replaced by decisions that the Applicant is:
 - (a) immediately nominated by SAEF; and*
 - (b) immediately selected by SASCOC to represent South Africa in the eventing discipline at the London 2012 Games.**That SASCOC do forthwith make all the arrangements necessary to enable the Applicant to represent South Africa in the eventing discipline at the London 2012 Games.*
Given the respondents conduct to date, we further request that this application be considered as soon as possible tomorrow morning, and that a hearing be fixed irrespective of the Respondents ‘convenience in light of (a) the Respondent’s deliberate delays set out above; (b) the urgency of this matter; and (c) the proceedings in CAS 2010/A/2845 in which the Respondents set out their case fully”.
3. On 24 July 2012, the President of the CAS ad hoc Division for the Games of the XXX Olympiad in London, nominated a Panel composed of Mr. Michele Bernasconi (Switzerland), as President, Mr. Efraim Barak (Israel) and Mr. Ricardo de Buen Rodríguez (Mexico), as Arbitrators, to deal with the application.
4. Later the same day, the CAS notified the Summons to Appear and the Procedural Directions to the parties, informed the parties that a hearing was going to be held the same day, on 24 July 2012, at 5:00 pm, at the London Offices of the CAS ad hoc Division, and invited the IOC and the FEI to participate as Interested Parties.
5. In the same document the CAS granted the Respondents and the Interested Parties a deadline until 2:30 pm to answer and to comment on the application and the requests of the Applicant.
6. The Panel also asked the FEI to advise the Panel on the cut-off date for stabling the horses expected to participate in the relevant Olympic Eventing competition.
7. Finally, the Respondents were also requested to provide the Panel with several documents.
8. On 24 July 2012, at 2:30 pm, FEI sent an e-mail to the CAS with the information requested by the Panel, and informed the Panel that the deadline that may be applicable to this case, in

particular to the Applicant to take his horse to the stables, will expire at 10:00 am on Friday, 27 July 2012.

9. Later the same day, the Respondents sent a written joint response to the CAS and submitted several documents.
10. In their response, the Respondents stated the following:
“[...]”
3. The decision and the reasons therefor appear from the above letter.
4. The urgent communications which passed between the parties must be seen in the context of the above events. SASCOC and SAEF did not unduly delay the process but treated it with the necessary urgency.
5. It is and has always been SASCOC’s policy to select persons for participation at international level based, only upon the recommendation of the national federation failing which a situation exists SASCOC may select athletes contrary to the national federation policies and without the necessary objectivity.
6.- The respondents are not able to attend the proposed hearing later today nor to participate therein.
“[...]”
11. The hearing started at 5:00 pm on 24 July 2012. The Applicant participated via tele-conference and was represented in person by Mr. Andrew Hunter, QC and via tele-conference by Ms. Sarah Boon.
12. As announced in their response, the Respondents did not attend the hearing, neither in person nor via tele-conference.
13. The IOC was represented by Mr. Christian Thill. The FEI was represented by its General Counsel Ms. Lisa F. Lazarus.
14. At the hearing the Panel heard opening and closing submissions from the representative of the Applicant and heard the position of the IOC and FEI through their representatives.
15. At the conclusion of the hearing, the Applicant and the Interested Parties expressed that they were satisfied with the way the hearing was held and that their right to be heard had been respected.

Legal framework

16. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the fact that the seat of CAS is Lausanne (cf. Art. 7 of the CAS ad hoc Rules) and that neither of the parties is domiciled nor is habitually resident in Switzerland.

17. The jurisdiction of the CAS is undisputed. One may add that the Applicant first referred to a specific agreement between the parties as the basis for CAS jurisdiction. At the hearing it was later confirmed by the Applicant as well as by the Interested Parties that the jurisdiction of the CAS ad hoc Division was based on Art. 1 of the CAS ad hoc Rules, as well as on Rule 61 of the Olympic Charter. Finally, also the Articles of Associations of SASCOC refer to the jurisdiction of CAS (cf. Art. 25.2 and 25.3 of the Articles of Association).
18. Under Art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute *“pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”*.
19. According to Art. 16 of the CAS ad hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*.

Merits

A. *The issues at stake*

19. Summarised in a nutshell, the issue at stake in the present matter is whether the Applicant has or has not a right to be selected and participate as a competitor for South Africa for the Equestrian Eventing competition at the XXX Olympic Games starting a few days after the commencement of the present procedure, i.e. on Saturday, 28 July 2012.
20. The Applicant considers the Appealed Decisions to be wrong, basically (i) because he fulfilled all relevant selection criteria and (ii) because the refusal by the SASCOC to select him is without valid legal grounds.
21. The SASCOC mainly defends its refusal to select the Applicant by arguing that the SAEF did not recommend the Applicant to the SASCOC and that therefore SASCOC cannot do so, based on Art. 6.3.3 of its Memorandum of Association.
22. The SAEF basically argues that it cannot recommend the Applicant because another South African rider, namely Mr. Hart, is better prepared.

B. *Is SASCOC right in refusing to select the Applicant, because of the lack of a clear recommendation by SAEF?*

23. As mentioned above, SASCOC bases its claim to be unable to select the Applicant on Art. 6.3.3 of SASCOC's Memorandum of Association. Such provision reads as follows:
24. SASCOC shall have the power to: *“[...] select, on recommendation from the relevant National Sports federations (if any), and present multi-sport teams for international and representative competitions at all levels, in terms of National and International Sports Federation Statutes, Rules and Regulations [...]”*.

25. Before analyzing the chain of events of the present case, the Panel wishes to highlight that it is indeed the right of each National Olympic Committee to select athletes, team officials and other team members for the participation in the Olympic Games (cf. Olympic Charter, Chapter 4, Rule 27.7.2). As for any right, also this right shall be exercised in good faith and in accordance with the applicable rules and, in particular, with the principles of the Olympic Charter. In such cases, when the selection decisions are taken properly, there is generally no room for a legal review. It is now to be analyzed whether in the present case, the applicable rules and principles have been complied with.
26. While the nature and meaning of the SAEF Decision will be analyzed later, it is undeniable that the letter dated 22 July 2012 sent by SAEF to SASCOC does not contain a recommendation to SASCOC to select the Applicant. In fact, SAEF wrote that it recommended SASCOC to select “*Mr Hart over Mr Peternell*” or to “*consider withdrawing the entry of South Africa from the Eventing competition*”. Therefore, it is true that SASCOC never received a recommendation by SAEF to select the Applicant to the XXX Olympic Games, neither before nor after the CAS 2010/A/2845 Award.
27. The Panel, however, is not satisfied that the mere fact that no recommendation was submitted to SASCOC automatically triggers the impossibility for SASCOC to select any athlete on the basis Art. 6.3.3 of the Memorandum of Association. Rather, it is necessary to look at the rationale of such provision to see when and why it was decided to grant the power to SASCOC to make selection decisions only “on recommendation” by the national federations.
28. The rationale of the provision is, in the Panel’s view, clear: generally, a National Olympic Committee is not in a position to know all the athletes of all disciplines of its country. Accordingly, where a national federation exists, a National Olympic Committee will feel itself comfortable in being able to rely on the assistance and on the selection work performed by the national sports federations. Therefore, it is possible to conceive a case where a national Olympic Committee is not able to select an athlete because of lack of a recommendation by the relevant sports federations and because of lack of any knowledge by that national Olympic Committee of the discipline and the athletes involved.
29. This was not the case for the SASCOC when it took its decision on 23 July 2012 not to select the Applicant, because, being a party to the CAS 2010/A/2845 case, the SASCOC very well knew:
 - (1) that the Applicant meets all relevant eligibility criteria for selection for the South African Equestrian Eventing team at the XXX Olympic Games in London;
 - (2) that the selection of the Applicant would regrettably mean “*that the Appellant would replace the Interested Party [i.e. Mr. Hart]*” (CAS 2010/A/2845 Award at para. 8.1);
 - (3) that CAS had declared the Applicant eligible to participate in the XXX Olympic Games in lieu of Mr. Hart.

30. Accordingly, upon receipt of the letter of SAEF of 22 July 2012, SASCOC did not have any reason to consider itself “unable to comply with article 6.3.3” of its Memorandum of Association, as wrongly alleged in SASCOC’s letter to FEI of 23 July 2012.
31. In fact, on one side SASCOC could and should have acknowledged that the attitude of SAEF was without any merit, since all technical selection issues had been dealt in the CAS 2010/A/2845 procedure and no other relevant technical issues had been raised in between (in relation to this, the new argument advanced by SAEF in its response of 24 July 2012, i.e. that “Asih”, the horse of the Applicant, was not entitled to participate in the Olympic Eventing competition is without merit, since the horse complied and complies with the nationality registration requirements, as confirmed by FEI at the hearing of 24 July 2012).
32. On the other side, SASCOC could not and should have not aim at hiding behind the non-receipt of a recommendation, because SASCOC itself had been a party to the CAS 2010/A/2845 procedure and therefore very well knew that the Applicant was to be selected. The purpose of receiving a recommendation by the relevant national federation, i.e. the relevant technical knowledge, was, therefore, fully replaced by the knowledge obtained by SASCOC within the framework of the CAS 2010/A/2845 procedure.
33. Upon receipt of SAEF’s letter of 22 July 2012, SASCOC should have reacted by selecting the Applicant and reminding the national federation, SAEF, that both SAEF and SASCOC are members of the Olympic family and therefore supposed to select athletes in conformity with the applicable selection criteria. With respect to this the Panel notes that based on the Olympic Charter, it is the duty of National Olympic Committees to “ensure that the entries proposed by the national federations comply in all respects with the provisions of the Olympic Charter” (cf. Bye-law 2.1 to Rules 27 and 28). The course of action proposed by SAEF in its letter of 22 July 2012 was, without doubt, against the obligation to recognise the jurisdiction of CAS (cf. Rule 61 of the Olympic Charter and Art. 25.2 and in particular Art. 25.3 of the Articles of Association of SASCOC: “It is recorded that the decision of the arbitrator or of CAS shall be final and binding on all parties, in all manners whatsoever”), against the applicable selection criteria (cf. CAS 2010/A/2845 Award) and against the principles of Olympism expressed in the Olympic Charter. To propose, as a kind of retaliatory measure, “to withdraw the Entry of South Africa”, as SAEF did (cf. SAEF’s letter of 22 July 2012, page 3), and to follow such a proposal, as SASCOC did (cf. SASCOC’s letter of 23 July 2012: “... South Africa will not be presenting a candidate for the Eventing Competition at the London 2012 Olympics ...”) is hardly within the Olympic spirit or the promotion of ethics and good governance in sport.
34. Eventually, from a sporting point of view, it may be worth noting that in its letter of 22 July 2012, SAEF wrote to SASCOC that SASCOC may consider to approach the FEI and the IOC “to allow both athletes [Mr Hart and Mr Peternell] to compete [...]” In their Response to CAS, the Respondents did not, however, raise this issue. The Panel addressed the matter at the hearing, but both IOC and FEI confirmed not to be aware of any such requests by SASCOC or SAEF. FEI in particular confirmed that the only official submission received had been the SASCOC’s letter of 23 July 2012. Accordingly, and with reference to the prayers for relief of the parties, it is not for this Panel to further comment on this point.

35. From a legal point of view, the fact that SAEF, on 22 July 2012, did not recommend the selection of the Applicant to SASCOC, is, in any event, for the purposes of determining the validity of the SASCOC Decision is to a large extent irrelevant: at that point of time SASCOC did not have a reasonable need to receive a recommendation, and should have disregarded the letter of SAEF. It can be therefore left open whether the letter of SAEF of 22 July 2012, which was never sent to the Applicant, is, in strict legal terms, a “decision” and, if so, whether such decision would be null and void: the Panel considers therefore appropriate to annul the effects of both the Appealed Decisions, i.e. the one of SAEF of 22 July 2012, as well as that of SASCOC of 23 July 2012.

C. *Conclusions*

36. Against the above background, the Panel is satisfied that the decision of SASCOC not to select the Applicant because SASCOC did not receive an explicit recommendation by SAEF is wrong, and shall be annulled. The fact that the Applicant complies with all relevant selection criteria has been already ruled by CAS in the CAS 2010/A/2845 procedure, and it is not up to this Panel to second-guess the CAS 2010/A/2845 Award, in particular lacking any new objective reasons to do so.
37. Therefore, the Panel finds that the Applicant shall be declared selected to represent South Africa in the Equestrian Eventing discipline at the XXX Olympic Games in London.
38. In line with the principles of the Olympic Charter, the recognition of CAS by the IOC, the FEI, the SASCOC and the SAEF, the latter two shall be ordered to place the Applicant in the Olympic Team of South Africa, avoiding any act that could prejudice the participation of the Applicant at the Equestrian Eventing competition of the XXX Olympic Games in London, and make all arrangements necessary to enable the Applicant to represent South Africa in such Eventing competition.
39. In relation to the request to stay and the preliminary relief requested by the Applicant, taking into account that the FEI informed the Panel that the deadline for the Applicant to bring the horse into the stables will expire on 27 July 2012, at 10:00 am, that the operative part of the award rendered in this case deciding to uphold the application was notified to the parties few hours after the hearing, and within approximately twelve hours from the time the application was received by the CAS, and also that the representative of the Applicant agreed on the non-application of the interim reliefs that the Applicant was asking for, should the award be notified in a short time, the Panel considers that there is no need to take a specific decision regarding those interim reliefs.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. The decision of the South African Equestrian Federation of 22 July 2012 and the decision of the South African Sports Confederation and Olympic Committee of 23 July 2012 are annulled.
2. Mr. Alexander Peternell is declared selected to represent South Africa in the Eventing discipline at the XXX Olympic Games in London.
3. The South African Sports Confederation and Olympic Committee and the South African Equestrian Federation are ordered to place Mr. Alexander Peternell in the Olympic Team of South Africa.
4. The South African Sports Confederation and Olympic Committee and the South African Equestrian Federation are ordered to take all arrangements necessary to enable Mr. Alexander Peternell to represent South Africa in the Eventing discipline at the XXX Olympic Games in London.
5. All other requests are rejected.