REASONED DECISION

of

THE SOUTH AFRICAN INSTITUTE OF DRUG FREE SPORT "SAIDS"

ANTI-DOPING DISCIPLINARY

HEARING COMMITTEE

comprising of

John Bush lawyer member and chairperson
Deon-Jacques Pieterse doctor member
Colin Abrahams administrator member

In the matter between

SAIDS

and

SANDILE NGUNUZA

concerning the charge relating to the presence of Methylhexaneamine found to be in his system after the Comrades Marathon on 31 May 2015.

The reasoned decision relating to the outcome of the hearing concerning the charge which

THE SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT

"SAIDS"

brought against

SANDILE NGUNUZA

"Mr Ngunuza"

under the SAIDS Anti-Doping Rules 2015 - "the Rules"-

after Mr Ngunuza had been notified of the adverse analytical finding which had resulted from the testing of his urine sample provided after completion of the Comrades Marathon on 31 May 2015.

A. THE INITIAL DECISION

1. On the 13 October 2015 the hearing panel reached a unanimous decision in the light of the evidence led, the Rules and precedent - in particular that relating to the international harmonisation of decisions and the applicable sanction for anti-doping violations – concerning its determination of the appropriate sanction to be applied, following Mr Ngunuza's having admitted to the following charge brought against him, arising from his participation in the 2015 Comrades Marathon in which he finished among the gold medallists in 9th Position.

> ***"The charge***
>
> ***You are formally charged with an anti-doping rule violation in terms of Article 2.1 of the 2015 Anti-Doping Rules of the South African Institute for Drug Free Sport (SAIDS).***
>
> ***On 31 May 2015 you provided a urine sample (2959357) during an in-competition test. Upon analysis, the South African Doping Control Laboratory* reported the presence of prohibited substances in your urine sample. The substances identified in your sample were Oxilofrene and Methylhexanemine. Oxilofrene and Methylhexaneamine are categorised under Class S6 Stimulants on the World Anti-Doping Code 2015 Prohibited List International Standard"***
>
> (*own insertion = SADoCoL)

2. The *ex tempore* decision delivered by the Chairperson provided that Mr Ngunuza be sanctioned with a 2 (two) year period of ineligibility commencing on the 2nd July 2015 (being the date of notification of the adverse analytical finding to Mr Ngunuza) and ending on 1 July 2017, allowing a credit for time served under provisional suspension.

Although not specifically stated it was implicit that Mr Ngunuza would suffer the sanction of all the other Consequences of the Anti-Doping Rule Violation, as provided in the Article 10, read with the Definitions.

3. As a result of the charge having been amended during the hearing to exclude Oxilofrine the decision related solely to the presence of the Methylhexaneamine in Mr Ngunuza's system.

4. The charge was amended because of the result of further testing of the sample conducted by SADoCoL at the request of SAIDS - in accordance with the guidelines contained in the WADA letter dated 7 May 2015 issued to all accredited laboratories - which SADoCoL had inadvertently not considered and followed at the time of testing in spite of having developed its own methods.

The letter provided as follows

> *"2. Detection of oxilofrine*
>
> *Hydroxy-pseudoephedrine ('pseudo-oxilofrine') is a minor metabolite of pseudoephedrine, which under certain conditions may co-elute with oxilofrine and show an identical fragmentation pattern in LC-MS analyses. This may lead to the incorrect reporting of an Adverse Analytical Finding for oxilofrine, a non-threshold substance. Therefore, it is requested that Laboratories implement procedures that allow the proper chromatographic separation and identification of these two compounds, for example by performing GC-MS analysis of the per-trimethylsilyl (TMS) derivatives, prior to reporting an oxilofrine case. Oxilofrine and hydroxy-pseudoephedrine can also be separated by UHPLC."*

5. SADoCoL reported on 29 September 2015 that the substance was "indeed not oxilofrine but probably the putative metabolite of pseudoephedrine...termed *pseudo-oxilofrine*". As the threshold concentration limits of 150 mg per millilitre, as prescribed in the 2015 Prohibited List, had not been exceeded this did not require that SADoCoL issue a report.

6. The panel's decision followed Mr Ngunuza's

   6.1 admission at the outset of the hearing that he was guilty under the initial charge, which included both the Oxilofrine and Methylhexaneamine and later just the Methylhexaneamine under the amended charge;

   6.2 failure to discharge the onus which rested on him to establish on a balance of probability how the Methylhexaneamine had entered his system;

   6.3 decision at the outset of the hearing not to contest any of the elements of the sample collection process, or testing methods and/or procedures adopted by SAIDS and/or SADoCoL;

   6.4 conceding not to contest the validity of any of the SADoCoL testing procedures, or methods relating to laboratory result relating to the finding for Methylhexaneamine in his urine sample 2959357. This, despite concerns expressed as a result of the mistake which SADoCoL had made in not introducing

a timely procedure, in accordance with the WADA request dated 7 May 2015, for laboratories to test for pseudo-oxilofrine, a minor metabolite of Pseudoephedrine, as opposed to the original detection of Oxilofrine in the A and B sample analyses.

B. THE REASONED DECISION

B1. Introduction

7. Under the Rules (Article 8.3) the Chairperson is required to issue a written dated and signed decision (either unanimously or by majority) at the time of the hearing, or on timely basis thereafter, that includes the full reasons for the decision and for any period of ineligibility imposed, including (if applicable) a justification for why the greatest potential Consequences were not imposed.

8. The following sets out the full reasons for the decision and the sanction imposed, having regard to the strict liability provisions of the Rules and Mr Ngunuza's uncontroverted evidence concerning his innocent and apparent inadvertent 'use' of the Methylhexaneamine found to be in his system.

9. Whilst not within its brief and not affecting the final decision taken by the panel, the panel also sought at the instigation of the chairperson, to consider in depth, address and issue *obiter* comment upon certain aspects of the case having regard to Section 39 of South African Constitution and the Bill of Rights provisions under Chapter 3 –relating to equality – dealing specifically with the right to be treated equally without discrimination; the right to work freely and the right to access to information in the exercise and protection of such rights, with specific reference to –

   9.1 the presence and likely impact of Methylhexaneamine as a Specified Substance on the Prohibited List in enhancing an endurance athlete's performance;

   9.2 the sanctions imposed not only in South Africa but across the sporting world relating to anti-doping violations involving the presence of Methylhexaneamine;

   9.3 whether the attention by national anti-doping authorities on Methylhexneamine especially concerning endurance athletes was fairly justified;

   9.4 if not, whether there was a basis for athletes found to have inadvertently had Methylhexanemine in the system ought - fairly speaking - differentially treated - much in the same way caffein had been dealt with and then even cannabinoids by way of a lesser penalty, especially where it was impossible to determine the origin or source. This having regard to the impact and effect of far more significant Prohibited Substances and Methods;

   9.5 the evidence led by and credibility of Mr Ngunuza with particular emphasis on his own inadvertent use and apparent honest inability to determine the source /origin of the Methylhexneamine within the range of his declared supplement usage and other sources as outlined in his evidence and that led on his behalf in mitigation of sanction;

9.6 the impact this had on the eventual sanction imposed upon Mr Ngunuza, which - having regard to the sanctions where Methylhexaneamine had been involved- appeared to be manifestly unfair;

9.7 whether in the totality of the circumstances facing Mr Ngunuza "the anti-doping system" - as prescribed within the Rules to deal with anti-doping violations towards ensuring fair and safe participation in sport - may have indeed failed him and could thus also fail athletes in a similar position in the future.

See in this regard – for what it may be worth in respectfully addressing the concerns raised by the panel concerning the constitutional imperatives, apparent anomalies and unintended consequences - the Panel Comment set out in Annexure A.

B2. Contextual and jurisdictional summary

10. Mr Ngunuza participated in the 90th Comrades Marathon on 31 May 2015 and finished amongst the gold medallists in 9th position. The race is organised annually by the Comrades Marathon Association, "CMA" and takes place between Durban and Pietermaritzburg a distance of approximately 89 kilometres.

11. Although it was not part of the evidence led it is common cause that

11.1 Comrades is an accredited international endurance event of significant status and following. For most South African long distance runners it is their "holy grail." In the words of Khalid Galant the CEO of SAIDS, the Comrades Marathon along with the Two Oceans Marathon, "are iconic ultra-marathons which have achieved global acclaim. The result has been that these events have become hugely competitive with substantial prize money for top finishers and course record breakers".

11.2 in order to have been accepted as an entrant and thus have participated in Comrades South African Comrades entrants - such as Mr Ngunuza – had to have run a qualifying marathon and be current licensed members of a club affiliated to Athletics South Africa, "ASA", through their respective provincial athletics associations;

11.3 by entering the Comrades Marathon and starting the race Mr Ngunuza was bound to conform to, adhere and abide by the rules and regulations as set out by the CMA.

12. At the time of his participation in Comrades Mr Ngunuza was a member of the Nedbank Club based in Port Elizabeth in the Eastern Province, an affiliate of ASA.

13. He was thus subject to the rules governing participation in events under the jurisdiction of ASA, itself under the jurisdiction of

13.1 the International Association of Athletic Federations ("IAAF") a signatory to the World Anti-Doping Code "the Code" as amended - as the South African national associate of the IAAF;

13.2 the South African Sports Confederation and Olympic Committee, "SASCOC", a signatory to the World Anti-Doping Code "the Code" as amended - as a member of SASCOC.

14. ASA, as the national federation governing the sport of athletics in South Africa, has adopted and implemented SAIDS anti-doping policies and rules which conform to the Code and the Rules, by virtue of its status as a national federation under the IAAF, as a signatory to the WADA code and through SASCOC.

15. Under its constitution adopted on the 20 November 2013 SASCOC committed, as one of its ancillary objects,

> "to adopt and implement the WADA's anti-doping code thereby ensuring that SASCOC's anti-doping policies and rules and regulations , membership and/or funding requirements, and results management procedures conform with the Code and respect all the rules and responsibilities for NOC's that are listed within the Code."
>
> (Clause 2.4.7)

and furthermore committed that

> "SASCOC and all its Members agree to comply and be bound by and to procure that their members comply with the Code presently in force and adopted by the government of South Africa and the IOC declaration adopted in Copenhagen in March 2002 (as amended) or any subsequent declaration or declarations adopted by WADA from time to time."

16. Although it is common cause and accepted without any qualification whatsoever, that the Rules apply to this matter, it is pertinent to note that the panel's jurisdiction to hear this matter arises through SAIDS, as follows.

16.1 The South African Institute for Drug-Free Sport, "SAIDS" is a corporate body established under section 2 of the South African Institute for Drug-Free Sport, Act 14 of 1997, as amended, "the Act".

16.2 The main objective which SAIDS has is to promote and support the elimination of doping practices in sport which are contrary to the principles of fair play and medical ethics in the interests of the health and well being of sportspersons.

16.3 On 25 November 2005 SAIDS, formally accepted the World Anti-Doping Code, "the Code", which the World Anti- Doping Agency, "WADA", had adopted on 5 March 2003.

16.4 By doing this SAIDS, as the National Anti-Doping Organisation for South Africa, introduced anti-doping rules and principles governing participation in sport under the jurisdiction of SASCOC, the South African Sports Confederation and Olympic Committee, or any national sports federation.

16.5 The Anti-Doping Rules 2015, as published by SAIDS, ("the Rules"), which are applicable to the present proceedings, incorporate the mandatory provisions of the Code as well as the remaining provisions adapted by SAIDS in conformance

with the Code. Such Rules amended and replace those published and of force dated 2009.

16.6 Article 8.1.1 of the Rules provides for the Registrar to appoint an independent doping hearing panel to hear and adjudicate cases.

B3. The panel, prosecution, defence representation and witnesses.

17. The anti-doping hearing panel appointed to adjudicate whether Mr Ngunuza had violated the Rules and, if so, what the consequences should be, consisted of Mr John Bush (Chairperson), Dr Deon–Jacques Pieterse and Colin Abrahams.

18. Mr Nic Kock was the prosecutor on behalf of SAIDS.

19. Mr Nguzuza was represented throughout the proceedings by his attorney Mr Danie Gouws of Danie Gouws Attorneys Inc.

20. Apart from the testimony of Mr Ngunuza, the other witnesses called upon to testify were

20.1 Dr Konrad von Hagen - Mr Ngunuza's doctor;

20.2 Dr Marthinus Johannes van der Merwe – the Director of SADoCoL , in order to explain the reasons for SADoCoL's failure to have implemented the further tests requested for the unambiguous presence of oxilofrine as requested by WADA,

by the defence and prosecution respectively.

B.4 THE PANEL'S FINDING CONCERNING THE ANTI-DOPING RULE VIOLATION CHARGE

The panel having accepted Mr Ngunuza's plea that he was guilty (albeit with some degree of fault) of having committed the anti-doping violation, relating to the presence of Methylhexaneamine "MHA" in his system – in accordance with the amended charge - found Mr Ngunuza guilty of the anti-doping rule violation laid down in Article 2.1 of the Rules.

B5. MITIGATION OF SANCTION

Evidence was led and documents introduced and accepted into evidence at the hearing which took place over two evenings – (after which the panel had access to a transcript of the recorded proceedings) - concerning sanction and the possible mitigation of sanction having regard to the panel's determination of the following issues, flowing specifically from the application of Articles 10.2, 10.4 and 10.5, as read with the relevant definitions in the Rules.

The relevant applicable Articles have been set out below for ease of reference.

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *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.

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

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the *Prohibited List*, the presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the *Prohibited List* or *International Standards* may establish special criteria for the evaluation of *Prohibited Substances* that can also be produced endogenously.

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four (4) years where:

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

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and SAIDS can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two (2) years.

10.2.3 As used in Articles 10.2 and 10.3, the term

"intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be refutably presumed to be not "intentional" if the substance is a *Specified Substance and* the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a

substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

10.3 .....

10.4 Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two (2) years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two (2) years *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.2 Application of *No Significant Fault or Negligence* beyond the Application of Article 10.5.1

If an *Athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person*'s degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one (1)-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight (8) years.

No Fault or Negligence:

The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

No Significant Fault or Negligence:

The *Athlete* or other *Person'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. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]

Fault:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete* or other *Person's* degree of *Fault* include, for example, the *Athlete's* or other *Person's* experience, whether the *Athlete* or other *Person* is a *Minor*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk.

In assessing the *Athlete's* or other *Person's* degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete's* or other *Person's* departure from the expected standard of behaviour. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault are the same under all Articles where Fault is to be considered. However, under Article 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

21. Issues for determination

Having regard to the Rules and principles established by precedent the following issues had to be determined before and by the Panel.

21.1 *First hurdle*

21.1.1 How had the MHA entered Mr Ngunuza's system ?

21.1.2 At the very minimum the likely source or origin and manner of ingestion for the MHA found to be present needed to be explained to the panel.

21.2 *Second hurdle*

Once Mr Ngunuza had passed the first hurdle the questions to be asked and steps to follow, required for the determination of a possible reduction or elimination of any period of ineligibility, were -

21.2.1 Was the ingestion of MHA intentional or not?

21.2.2 If intentional then the period of ineligibility that had to be applied was 4 years?

21.2.3 If the ingestion was unintentional - often termed *inadvertent use* - had Mr Ngunuza been at fault or negligent in any way?

21.2.4 If Mr Ngunuza had no fault or negligence attributable to him at all then the period of ineligibility could have been eliminated in totality.

21.2.5 If he was negligent - had such fault or negligence, taking into account the totality of the circumstances , been significant in relationship to the anti-doping rule violation ?

21.2.6 If the fault or negligence was significant the period of ineligibility of 2 years would not have been reduced.

21.2.7 If the fault or negligence it was not significant then

21.2.7.1 if a Specified Substance or Contaminated Product was involved - the period could be reduced to a reprimand and no period of ineligibility, or a maximum period of ineligibility of 2 years, depending on Ngunuza's degree of fault or negligence;

21.2.7.2 in instances where no specified substance or contaminated product was involved the period of ineligibility could be reduced to not less than half the period of ineligibility.

21.2.8 Only when the degree of fault or negligence had been established through using objective criteria could an appropriate reduction in the period of ineligibility be determined. This could be reached in accordance with the fair principles of proportionality having regard to the totality of the circumstances, which included the evaluation of both objective and subjective criteria.

22. <u>Burden of proof / evidentiary onus</u>

Article 3 of the Rules prescribes the evidentiary burdens of proof which rested upon SAIDS and the Defence as follows.

22.1 SAIDS - proving that an anti-doping rule violation has occurred to the comfortable satisfaction of the panel. The standard of proof demanded of SAIDS in all cases is more than on a balance of probability and less that proof beyond a reasonable doubt.

22.2 The Defence – rebutting presumptions and establishing facts on a balance of probability.

23. The Evidence

AD PARAGRAPH 21.1

How had the MHA entered Mr Ngunuza's system ?

23.1 Defence testimony

The relevant testimony which was provided by Mr Ngunuza and in support of Mr Ngunuza has been considered in its entirety and summarised as follows.

23.1.1 At the initial hearing the Prosecutor advised that - during preliminary discussions with Mr Gouws, Mr Ngunuza's / Defence attorney - he had offered to have some of the possible sources of the MHA found to be in Mr Ngunuza's system sent away for testing by SADoCoL under the SAIDS "I Play Fair" banner.

23.1.2 It was agreed that the following supplements, which Dr von Hagen had identified from Exhibit M1-M2 - being the list of supplements, rubs etc., prepared by Mr Ngunuza, which Mr Ngunuza had testified as having been used by him during the period leading up to, immediately before or during Comrades, as had been accepted by the Prosecutor as being in their original containers, were sent to SADoCoL.

- Get Going Cream – Sportique
- Cyto Gel HP, USN
- Super Charge, Mc Nab's.

23.1.3 The SADoCoL certificates of analysis identified that such supplements did not have MHA or Oxilofrine, as analysed by CG-MS and LC-MS/MS, for the container tested, or declared (as an ingredient) on the label.

23.1.4 Mr Ngunuza testified in reading from Exhibit M1-M2, which had been accepted into evidence at the initial hearing, that on the morning of the race he ate buns from Pick n Pay and drank Megaload; 30 minutes before the race he took Cytogel and drank McNabs Supercharge tablets.

23.1.5 In reading further from the list Mr Ngunuza went on to state that during the race he took 5 USN Cytogel HP gels, as well as 32GI along the route

and Energade from the (water) stations. The 32 GI was corrected to 4 times as there was a misunderstanding, it seems, by, between the athlete and the people who had assisted him in drafting the document as Mr Ngunuza took his own mixed drinks at four of the six stations which had Nedbank support.

23.1.6. Dr von Hagen explained why he had selected the three products for analysis from the list which Mr Ngunuza sent him for consideration once he had been notified of the anti-doping violation. His reasons were that

23.1.6.1 he was worried about the fact that the McNab's SuperCharge tablets had "some Siberian Ginseng and things like that which are obviously a stimulant and as we all know with these kind of things they say it's safe and it's not on the banned list but we don't always know. So that's a little bit of a red flag for me."

23.1.6.2 although the USN Cytogel HP looked fairly innocent he was a little bit concerned because he noted that Mr Ngunuza had "taken quite a few of them".

23.1.6.3 one of the last of ingredients listed on the label for the Sportique Active Body and Skin Care rub, which Mr Ngunuza used every night was geranium. This was because the full time job which he had "involved him moving tiles and things around so got quite a lot of backache".

23.1.7 Mr Ngunuza would testify that along the route he had used (took in) supplements provided by other water stations/drinking stations. Although called water stations, it was not always water which he drank there but other fluids.

23.1.8 It would be his evidence that because Mr Ngunuza had not used anything else (other than what was listed in M1-M2) it was reasonably possible the Methylhexanamine originated from the foreign supplements that he had (ingested) along the way. Dr van der Merwe had accepted this may have been a possibility had "he (Ngunuza) taken something that had introduced that substance into his system".

23.1.9 Although no evidence had been lead at the previous hearing in mitigation of sanction, apart from reference to "Energade at stations"in Exhibit M1-M2, the notion that Mr Ngunuza would seek to rely on whatever ie "anything" he had taken at the water station as having possibly contained the MHA had not been raised.

23.1.10 Dr van der Merwe testified under further cross-examination that as far as he knew the Energade which Mr Ngunuza had taken from the water stations would not have contained MHA" but he could not state that it had not as such (as had been ingested by Mr Ngunuza) had not been tested".

23.1.11 Mr Ngunuza had just put in Energade there, meaning that whatever he got from the other water stations, it seems like, it was not in sealed Energade bottles that they were drinking, he doesn't really know what he drank, but it was, obviously, supplied by the water stations (page 38 line15 of transcript)

23.1.12 Mr Ngunuza had drunk some of this from cups from water point four;

23.1.13 After he had taken the 4 x 32 GI drinks, which he had previously mixed, from the stations manned and by Nedbank (team supporters) he took Engergade, Powerade and "anything" from the water stations which he received in cups and/or sachets;

23.1.14 Ngunuza could not say where the MHA had come from. He testified that it could have been from the liquids he had received from the water stations, as he was drinking everything - was hungry and exhausted;

23.1.15 He stated that he had drunk

23.1.15.1 a lot of stuff, a lot of energy drinks from the water stations after 60,70kms;

23.1.15.2 not only from the stations (provided by Comrades) but also (from people on the route) "at the stations and then at, people that were on the route" (line 13 page 63 of transcript);

23.1.15.3 anything which he got on the route from 60 kms, in order to avoid being dehydrated - that which he received from people who were at the Comrades stations and spectators (transcript page 64)

23.1.16 Although he had struggled he recovered as he was getting closer to the top ten;

23.1.17 He did not think it dangerous to take from people at the side of the road who were there for "the love of the sport", as it was normal for athletes to take liquids / everything from spectators (line 9 page 67 of transcript onwards), especially when they were tired. This was true for athletes (like him) who had not had a sponsor and money and thus did not have the means to get their own people to supply them their drinks (in terms of the Comrades rules along the entire route);

23.1.18 Mr Ngunuza also took water, ate oranges and potatoes to ensure that he did not "hit the wall" as he did after 70kms in the 2011 Comrades;

23.1.19 He had admitted to everything. It had been an emotional time in his heart, because it was actually painful. He had not intended it and had not known any of the other stuff. He had not known that he should not have taken any drinks from the people that were on the route and that this could have actually harmed him and his family, the way it had.

23.2 Cross-examination by the Prosecution

The following testimony of relevance was provided by Mr Ngunuza whilst responding to the Prosecutor's questions under cross- examination.

23.2.1 Mr Ngunuza competed in the 50km World Champs in Galway Ireland in 2010 in Nedbank colours.

23.2.2 He represented Eastern Province from cross-country through to marathon many times.

23.2.3 He had not received any doping education, including information concerning supplements, from Eastern Province whilst representing such province.

23.2.4 The first time he had received any information regarding prohibited substances was from Nick Bester of Nedbank when he visited Pretoria in 2009 to sign a contract with Nedbank.

At that time he had (attended) a lecture and been provided with a doping book, as well as a list of what was banned and what was not.

23.2.5 Mr Ngunuza had received no doping education when with LibertyNike - only the R 600 pm retainer, shoes and clothes.

23.2.6 He did not have access to a Doctor through Nedbank.

23.2.7 Dr von Hagen helped him with his health problems.

23.2.8 The Nedbank Club in PE is the only one which "keeps one going".

23.2.9 He received a retainer from the Nedbank Club whilst on contract. This stopped when the contract was not renewed in 2014 ie before Comrades.

23.2.10 He still ran for the Nedbank Club - in their colours - although not on contract and funded everything out of his own pocket from what he had earned at work.

23.2.11 Once he had looked at the booklet from Nick Bester - when he needed something - he would seek further information as to what was a banned substance or not from the pharmacist called Ann at the pharmacy in Govan Mbeki Street in "downtown" PE . Westway Pharmacy and Schuin-Villa Pharmacy were the pharmacies he used for this purpose.

23.2.12 He normally chatted to his brother/cousin George Nsthibiza for recommendations for supplements, as was the case for Ciplaton which he had been using for some time.

23.2.13 He made sure whether those supplements are good for use or not from the booklet which he had received in 2009 as "green or red" and by

asking at Schuin-Villa pharmacy whether there are banned substances in them.

23.2.14 Mama Irene (of the Nedbank Club –PE) gave him advice concerning his use of Coryx for flu and his sinus problem. She had also checked whether it was banned substance when they were at the Schuin-Villa pharmacy.

23.2.15 Noted by the panel –Dr Deon Pieterse....although Corex contained pseudo-ephedrine it would not have been reflected on the 2009 Prohibited list which Nick Bester had provided to him, whether as a banned substance or as having a threshold.

23.2.16 Mr Ngunuza had taken great care as to where he bought his supplements from.

23.2.17 He had taken the medication listed on the doping control form, namely the Mc Nabs Supercgarge for cramps; the Ciplaton as a multi-vitamin; the USN HP as gel for energy on the route; Neurobin was administered by the phamacist at Schuin-Villa as a vitamin injection (B12) because he was "skinny", "looking like a zombie" and had "lost a lot of weight".

23.2.18 Mr Ngunuza had run a personal best (PB) for the (Comrades) up run of 5hrs 57mins. His previous PB was 6hrs 01mins in 2013 finishing in position 14.

22.2.19 He had not run for 4-5 months since Comrades. This included a one month rest the period after he had been notified of his provisional suspension on 2 July.

22.2.20 As there were only 6 (six) tables provided by Nedbank for their athletes to drink their pre-mixed and marked drinks from (ie the 32 GI), they had been advised and the expectation was that they would have also been required to use the water stations provided by Comrades to rehydrate.

22.2.21 As he had been tired he had just grabbed drinks from spectators.

22.2.22 (In doing so) Mr Ngunuza had not taken the same care as he had in purchasing whatever he required from the two pharmacies (Schuin-Villa and Westway).

22.2.23 Although he had taken drinks, potatoes, oranges and food from the water stations he also took drinks from spectators because in 2011 he had "hit the wall" *(in not having had enough to eat) and in 2013 he had not had enough to drink and did not want this to happen again.

*Described by Mr Ngunuza as "everything is finished ....you have to eat some bread and .....drink a lot.....walk..... only your heart thinks about the finish."

22.2.24 The drinks which Mr Ngunuza had received from spectators were open drinks. He did not know what kind they were.

22.2.25 He conceded that it was a risk to have taken drinks from spectators. (transcript line 4 page 109).

22.2.25 He had been tested once before in Galway Ireland –which had resulted in a clean result.

22.2.26 Although he had participated in five Comrades marathons between 2011-2015 he had not finished in two of them.

23.3 Questioning by the panel

Mr Ngunuza responded to questions posed by the panel as follows

23.3.1 He had not been warned by Nedbank not to take anything from spectators;

23.3.2 Nedbank knew he would have drunk from the 6 water stations, at which Nedbank had provided support, as well as from the water stations provided by Comrades;

23.3.3 He had not competed in running (since his suspension);

23.3.4 Although the use of stimulants was not dealt with in the documentation for entering Comrades Mr Ngunuza knew about the fact that he could not use stimulants;

23.3.5 Although he was "going blank" at around 60kms he was now aware (after having tested positive) of

23.3.5.1 most of the risks;
23.3.5.2 the danger in taking drinks from anyone along the route that these could have been a stimulant;
23.3.5.3 cheating if he used a stimulant.

AD PARAGRAPH 21.2

Was the ingestion of MHA intentional and if not, was it attributable to any fault or negligence on the part of Mr Ngunuza ?

23.4 Defence testimony

Ngunuza testified that he

23.4.1 was 33 years old and married to Lindeka (33) for eight years. They have two daughters aged 10 and 6 years;

23.4.2 had been running for 23 years having started at age 10;

23.4.3 obtained his matric at Qhayiya High School in Peddie (Eastern Cape);

23.4.4 qualified as a security guard after 3 week course, worked in fishing company for two years;

23.4.5 turned professional in 2003 whilst running for Liberty Nike, under a monthly retainer of R 600 (six hundred rands);

23.4.6 added to this income to support his wife and children (after 2005) through race "winnings" which depended upon where he finished;

23.4.7 started full-time employment with Bathroom Bizarre in August 2014 and earned R 5100 (five thousand one hundred rands) per month which he used to support his family, his wife not having had employment;

23.4.8 worked as a sales assistant involving much physical work in carrying tiles, cement etc., throughout a 9 (nine) hour day;

23.4.9 had not been running for about 5 months because he had been suspended;

23.4.10 was not contracted to any club (at the time of the hearing);

23.4.11 viewed running as "my life.... is... like, is everything, my life. He stated further that "If I don't run, if I can't run, it's like I'll get, I'll be sick, like I've got a serious problem that I normally have. If that, if I don't run I ... (indistinct) or struggle. It's everything, like, my life has been changed after this six, after this five months".

23.4.12 never knew who his father was whilst his mother lived in Motherwell, Port Elizabeth;

23.4.13 grew up with and was looked after by his grandmother in Peddie which was quite a primitive place;

23.4.14 had represented Eastern Province for about 20 years in running events from 4kms and 12kms in cross-country and on the road in all distances from 10kms to marathons.

23.5 Testimony – Dr Konrad von Hagen

The relevant evidence is provided as follows.

23.5.1. Dr von Hagen, who was a Medical Doctor with a master's degree in Sports Medicine. He worked with the EP Kings rugby team. He testified about Mr Ngunuza that he

23.5.1.1 knew him very well over period of 6 years commencing at the time he had seen him for a stress fracture in his leg;

23.5.1.2 Mr Ngunuza always on time for his appointments, no matter how many taxis or lifts he needed to take;

23.5.1.3 had helped Mr Ngunuza because of his honesty and the respect he had for him;

23.5.1.4 had treated Mr Ngunuza when he was sick and because of his running he would only prescribe medication which was not on the banned list;

23.5.1.5 explained when cortisone injections were allowed and not allowed to Mr Nguzuza;

23.5.1.6 he and Mr Ngunuza had never had any discussion about supplementation.

23.5.2 He had always told his rugby and soccer players - in educating them about that MHA – that it could be found in any supplements and one had to be careful about where one bought them as there was a lot of cross-contamination.

23.5.3 He had looked at the list of things (supplements) that Mr Ngunuza normally took and couldn't find anything. He honestly believed that when Mr Ngunuza came to him, in order to try and find out where the MHA had come from and how to prevent this happening again, Mr Ngunuza really did not know where the MHA had come from.

23.5.4 It was possible that the MHA could have come from the supplements provided by some of the spectators or the types of drinks or liquids provided, if you wanted to call them that.

Prosecutor's cross-examination

23.5.5 In attempting to answer a question from the Prosecutor as to whether it may have been possible for Mr Ngunuza to have taken something the day before the race which could have given rise to the adverse analytical finding Dr von Hagen stated that he did not know how long the MHA stayed in one's system.

Panel questioning

23.5.6 Following input from Dr Pieterse as to the half life of MHA as being around 8.5 hours Dr von Hagen said it may have been possible that something taken the day before could still have been in Mr Ngunuza's system on race day.

23.5.7 After having stated that MHA was stimulant - in a speculative comment - Dr von Hagen went on to add that - in a race like Comrades one ought to say that it might have had an impact on one's ability to recover because it was on the banned list for a reason – in his view however MHA ought

not to have any impact on performance in race such as Comrades, as it would with sprinting or punching.

24. Final submissions concerning sanction

24.1 Prosecutor

The Prosecutor, Mr Kock, offered Mr Ngunuza SAIDS's standard support through ICAS for the introduction to and payment of the costs of initial counselling sessions, if he required this to deal with the emotional strain he had been under.

Mr Kock then made the following submissions.

24.1.1 Mr Ngunuza had testified that he did not know the origin and source of the adverse analytical finding or the Methylhexaneamine.

(Testimony provided by Mr Ngunuza's and supported by Dr von Hagen.)

24.1.2 In the circumstances the Prosecutor accepted that without evidence of such source - SAIDS as the prosecuting authority – had not been able to prove that Mr Ngunuza had committed the anti-doping rule violation intentionally.

24.1.3 This meant that a period of 4 years of ineligibility under Article 10.2.1.2 was not applicable.

24.1.4 It was impossible for Mr Ngunuza to access any reduction in the mandatory 2 (two) year period of ineligibility.

24.1.5 This was because he had failed to prove the origin of the MHA which resulted in the adverse analytical finding.

24.1.6 Mr Ngunuza's own evidence was that he did not know what the source or origin of the MHA was.

24.1.7 The sanction (in this regard) should be 2 (two) years.

24.1.8 The Prosecutor then addressed the speculation regarding Mr Ngunuza having testified that a possible source of MHA) had been the liquids provided by the spectators from 60 kms.

25.1.9 He stated a 2 (two) year period of ineligibility was justified (even if such speculation was accepted) having regard to the great degree of fault on the part of Mr Ngunuza) who had

24.1.9.1 run professionally since 2003 and competed at a high level;

24.1.9.2 run the Comrades marathon since 2011;

24.1.9.3 run internationally;

24.1.9.4 attended a workshop run by Nick Bester at which he received a booklet covering what was banned or not banned;

24.1.9.5 taken great care as to what he should and should not consume under advice or support provided his doctor and/or pharmacists;

24.1.9.6 been aware – although not intimately – of the Mamabola case;

24.1.9.7 despite such awareness and experience had trusted spectators blindly "as they were there for the sport" – "which did not gel for me".

24.2 Defence submissions

24.2.1 It seemed that Ngunuza had not attended any classes (on doping) – all he had received were shoes;

24.2.2 It seemed that Nike and Nedbank did not care about their athletes. All they gave them was clothes and shoes;

24.2.3 He had received a book, which he followed, but was not asked whether he had read the book;

24.2.4 Mr Ngunuza went to the pharmacist for advice;

24.2.5 One would not expect to get banned substances from spectators assisting runners during Comrades;

24.2.6 Taking the evidence of (Mr Ngunuza) and his honesty into account, the only logical conclusion the Defence attorney Mr Gouws could have come to was that the origin of this supplement (stimulant) was most probably from the spectators;

24.2.7 There was no other evidence before the forum;

24.2.8 The only logical conclusion was that he (Mr Ngunuza) got it from a spectator or from one of the water-stops, if that was what one wanted it to be called;

24.2.9 It (the MHA) could have been from a contaminated drink at a legal water stop;

24.2.10 It (the MHA) seemed like a very common supplement or substance, anyway;

24.2.11 A deviation from the 2 (two) years was asked for having regard, inter alia, to the submission "it seems like the origin is quite in front of us. We must take it or reject it" and Mr Ngunuza's negligence, which was admitted, as not having been gross (ie significant) due to the fact that one would not have expected a spectator to hand out banned substances to a runner;

24.2.12 Furthermore Mr Ngunuza had passed the 60kms mark and was probably not *'compos mentis*;

24.2.13 He had come from a previously disadvantaged background and had not received the assistance on banned substances that he should have received;

24.2.14 The only support Mr Nugunua had received were clothes and shoes;

24.2.15 Although he received a book and saw a chemist and it seemed that he had seen his doctor, Mr Ngunuza had to do all that he had to himself, without the support of his Province or sponsors.

25. ***Panel's findings***

25.1 The panel's findings were made after full consideration and weighing up of the evidence produced through

25.1.1 the testimony provided as evidence-in-chief and under cross-examination by

25.1.1.1 Mr Ngunuza and Dr von Hagen in mitigation of sanction;

25.1.1.2 Dr van der Merwe

25.1.2 the following exhibits and documents, which had been accepted into evidence by the Prosecutor and Defence, considered as relevant thereto.

25.1.2.1 Doping Control Form - Exhibit B;

25.1.2.2 SADoCoL analytical test report: A-Sample Analysis dated 22 June – Exhibit C;

25.1.2.3 SADoCoL analytical test report: B-Sample Analysis dated 16 July- Exhibit I;

25,1.2.4 List of supplements, rubs etc used headed Sandile Ngunuza – marked M1 and M2, although referred to in the transcript as M3-M4;

25.1.2.5 Revised SADoCoL analytical test report: A-Sample Analysis dated 29 September;

25.1.2.6 SADoCoL report on the detection of "pseudo-oxilofrine" in sample 2959357 and appendices dated 29 September;

25.1.2.7 SADoCoL Certificate of analysis: Analysis of Supplements dated 4 September – Get Going Cream;

25.1.2.8 SADoCoL Certificate of analysis: Analysis of Supplements dated 4 September – Cyto Gel HP - USN;

25.1.2.9 SADoCoL Certificate of analysis: Analysis of Supplements dated 4 September – Super Charge Mc Nabs.

25.2 ***Findings concerning evidence led as to how the Methylhexaneamine(MHA) had entered Mr Ngunuza system.***

The panel found that Mr Ngunuza had failed to establish on a balance of probability how the MHA - a Prohibited and Specified Substance - had entered his system.

25.3 *The panel's reasons for this were that* - .

25.3.1 Nr Ngunuza had admitted that he did not know how the Methyl-hexaneamine ("MHA"), which had caused the adverse analytical finding and had resulted in him being found guilty of the anti-doping violation for which he had been charged, had entered his system;

25.3.2 The inadvertent presence of the MHA, as had been averred by Mr Ngunuza, had not been established from the tested samples of USN Cytogel – HP, Mc Nabs Super Charge and Sportique Get Going cream, in their original containers, as analysed by the SADoCoL laboratory for the presence of Oxilofrine or MHA, in terms of the offer of assistance as had made by the Prosecutor on behalf of SAIDS towards determining their likely source..

25.3.3 As the analysis of such products, which had been identified by von Hagen as "suspect" at the initial hearing, from the list prepared by Mr Ngunuza, (read with the medication and nutritional supplements listed on the Doping Control Form) had "drawn a blank", the Defence had therefore looked to other possible sources.

25.3.4 The averments made by Mr Ngunuza and final submissions made by Mr Gouws as his Defence Attorney with regard to the origin of the MHA which had entered Mr Ngunuza's system having therefore possibly having emanated from the liquids which Mr Ngunuza had taken and ingested from

25.3.4.1 the water points set up along the Comrades route for the rehydration of runners, whether such liquids were Energade, water or not actually known by Mr Ngunuza, or contained in sachets, open cups or bottles;

25.3.4.2 spectators along the route from after 60 to 70 kms,

were in the panel's opinion not only speculative in nature but also confusing.

25.3.5 Mr Gouws as Mr Ngunuza's Defence Attorney sought to rely on the liquids provided by the spectators as the more probable of the possible origins of the source of the MHA. As the Defence was clearly unable to produce the hard evidence of who and what was provided at the water points he sought to have relied on speculative suggestions even going so far as to submit that "it seems like the origin is quite in front of us. We must take it or reject it" (Transcript line 6-7 page 132)

25.3.6 As the Defence attorney Mr Gouws could not escape from the fact that on Mr Ngunuza's own evidence before the panel, the other possible origin of the MHA was contaminated liquids provided by the official Comrades water stations he sought to "hang Ngunuza's hat on" and convince the panel that the spectator possibility was the more probable.

25.3.7 The panel found that Mr Ngunuza failed to prove either of such possibilities on a balance of probability as the probable source of the MHA even if one were to have applied the test laid down in *Gasquet* case, referred to below, of a probability of just 51% (fifty one per cent).

25.3.8 The basis for the panel's conclusion rests upon the submissions made by the Defence Attorney on behalf of Mr Ngunuza, as summarised above and repeated for convenience as follows

> *"24.2.6 Taking the evidence of (Mr Ngunuza) and his honesty into account, the only logical conclusion..... was that the origin of this supplement (stimulant) was most probably from the spectators;*
>
> *24.2.7 There was no other evidence before the forum;*
>
> *24.2.8 The only logical conclusion was that he (Mr Ngunuza) got it from a spectator or from one of the water-stops, if that was what one wanted it to be called;*
>
> *24.2.9 It (the MHA) could have been from a contaminated drink at a legal water stop;*
>
> *24.2.10 It (the MHA) seems like a very common supplement (anyway) or substance;....."*

25.3.9 The panel found further that

25.3.9.1 although Mr Ngunuza had concluded that the possible sources of the MHA were either the 'water stops' which were provided

by spectators, or the Comrades organisers, the spectator option was not the most probable origin;

25.3.9.2 it was not correct to conclude that "there was no other evidence before the forum";

25.3.9.3 there was indeed undisputed evidence before the panel which related to Mr Ngunuza having ingested "supplements, rubs etc" in the period immediately before Comrades, including the day before and the morning of race, as well as during the race itself, which still left doubt in the minds of the panel members as to what indeed was the probable source of the MHA;

25.3.9.4 as most of these had not been tested it was not correct to ignore or even discount any of these as possible sources of the MHA along with the liquids and foods, including such potatoes and oranges as may have been provided to Mr Ngunuza at the spectator or official Comrades "water stops" as he drank or ate anything provided to him;.

25.3.9.5 even if the panel were to have limited the possible source to just the 'water stops' - as alleged by Mr Ngunuza - he had failed to place sufficient evidence before the panel to convince the panel that, on the balance of probability, the spectator liquid option was that upon which the panel should find in his favour as the probable source of the MHA.

The reasons for this rested initially on the panel's finding that such averments were purely of a speculative nature, without the necessary substantive and supportive additional factual evidence, wavering as to source between Mr Ngunuza's own testimony and the remaining evidence in which he stated that he

23.3.9.4.1 had not known what kind of drinks he had received in the open drinks provided by spectators; (transcript page 38 line 190)

23.3.5.4.2 drank anything he received on the route from both the Comrades people and the spectators; (transcript line 11 page 64)

23.3.5.4.3 took water, ate potatoes, everything on the route and oranges; (transcript line 10 page 68)

23.3.5.4.4 would not have expected to have received banned substances from a spectator.

25.3.6 Finally given the panel's findings and case precedent in harmonising decisions across the anti-doping arena,

23.3.6.1 in the absence of such factual evidence, as would been compelling enough for the panel to have decided that the

source of the MHA was in all probability only the spectator option, there were - unfortunately for the outcome of this hearing for Mr Ngunuza, upon whom the burden of proof had rested in the circumstances of alleged inadvertent use - a number of possible sources which remained open and untested;

23.3.6.2 as Mr Ngunuza had failed to satisfy the evidentiary burden on the balance of probability, it was not up to the panel to determine which of the possibilities Mr Ngunuza had testified was the most probable, especially when the panel had found these to be too remote;

23.3.6.4 mention needs to be made of the following cases upon which the panel's findings were based. Such cases involved decisions taken by hearing panels in similar circumstances, which had, inter alia, involved two and even more possible options as to the origin of the Prohibited Substance which had given rise to the anti-doping rule violation.

CAS 2010/A/2230 IWBF v UKAD & Gibbs at paragraph 12.4 and 13.1

"There are a number of possibilities as to how the mephedrone came to be present in Mr Gibbs's body. That he took it deliberately (a possibility that Ms Holmes accepted); that he was given it by Ms Paul his girlfriend and partner; that food or drink taken during whatever period before the test would have resulted in the amount shown in his sample was contaminated; that by accident someone who possessed mephedrone and in whose company Mr Gibbs was either at home or during his Tuesday break with team mates or, in the pub's on Friday, allowed the mephedrone to enter Mr Gibbs's food or drink; or that on one or more of those occasions, someone spiked his drink. Mr Gibbs can produce no actual evidence as to which of those possibilities was a probability."

"In summary, the Sole Arbitrator concludes that the Appeal is dismissed but emphasises that this does not mean that he – or any of the adjudicative bodies – have attached stigma of 'doper' to Mr Gibbs. It means only that Mr Gibbs has not been able to supply evidence to pass through the gateway of Article 10.4, so as to reduce or eliminate the sanctions consequential upon the indisputable presence of mephedrone found in his body by an in-competition test. It was not, the Sole Arbitrator repeats, for UKAD to provide intent to dope."

SAIDS v Olivier July 2014

"14.5 Because of the Defence failure to have adequately substantiated the submissions made by the Defence, the Panel was thus unable to come to any conclusion as to whether the Nano Vapour or the vitamin C tablets was the probable cause of the Drostanolone found in Olivier's system."

Applying the decision in

where the Panel found that based upon the evidence before it the both the contaminated meat theory and supplement theory were possible and ruled at 485-488, as follows

485. As has been shown above, the Panel has to assess the likelihood of different scenarios that – when looked at individually – are somewhat remote for different reasons.

486. However since it is uncontested that the Athlete did test positive for clenbuterol and having it in mind that both the meat contamination theory and the blood transfusion theory are equally unlikely, **the Panel is called upon to determine whether it considers it more likely, in the light of the evidence adduced**, (own highlighting) that the clenbuterol entered the Athlete's system through ingesting a contaminated food supplement. Furthermore, for the reasons already indicated, if the Panel is unable to assess which of the two alternatives of ingestion is more likely, the Athlete will bear the burden of proof according to the applicable rules.

487 Considering the Athlete took supplements in considerable amounts, that it is incontestable that supplements may be contaminated, that athletes have frequently tested positive in the past because of contaminated food supplements, that in the past an athlete has also tested positive for a food supplement contaminated with clenbuterol and that the Panel considers it unlikely that the piece of meat ingested by him was contaminated with clenbuterol, it finds that, in the light of all the evidence on record, the Athlete's positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat. This does not mean that the Panel is convinced beyond a reasonable doubt that this scenario of the ingestion of a contaminated food supplement actually happened. This is not required by the UCI ADR or by the WADC, which refer only to the balance of probabilities as the applicable standard of the burden of proof. In weighing the evidence on the balance of probabilities and coming to a decision of such basis, the Panel has to take into consideration and weigh all the evidence admitted on record, irrespective of which part advanced which scenario(s) and what party adduced which parts of the evidence.

488. That said, the Panel finds it important to clarify that, by considering an weighing the evidence in the aforegoing manner and deciding on such basis, the Panel in no manner shifted the burden of proof away from the Athlete as explained above (see supra 243-265). The burden of proof only allocates the risk if a fact or scenario cannot be

established on a balance of probabilities. However, this was not the case here."

***CCES v Lelievre*, Sport Dispute Resolution Centre of Canada** decision dated 7 February 2005, para 51.

'Bearing in mind that the Athlete has the burden of establishing on a balance of probabilities that he bears no fault or negligence, or no significant fault or negligence for the anti-doping violation, there must be evidence of contamination of the marijuana used by the Athlete if I am to be persuaded that exceptional circumstances that would result in elimination or reduction of the normal penalty exist. ***While recognizing that obtaining such evidence might be difficult if not impossible, mere speculation as to what may have happened will not satisfy the standard of proof required'***.

***ITF v Burdekin*, Anti-Doping Tribunal** decision 4 April 2005

"The player [ ] bears the burden of proving how the prohibited substance entered his system...he has signally failed to discharge that burden on the balance of probabilities. He cannot discharge it by merely denying wrongdoing and advancing an innocent explanation. He must go on to show that the innocent explanation is more likely than not to be the correct explanation, ***and to do so he must show what the factual circumstances were in which the substance entered his system, not merely the route by which it entered his system***."

In ***Karatantcheva v ITF*, CAS 2006/A/1032**, award dated 3 July 2005, para 117.

"Obviously this precondition to establishing no fault or no significant fault must be applied quite strictly, ***since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence***".

In ***ITF v Beck*, Anti-Doping Tribunal** decision dated 13 February 2006, (where the athlete alleged his drink must have been spiked by a colleague who was jealous of his girlfriend).

'[The purpose of the requirement is] to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. ***The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the***

player is responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases. (para 18)... *The opportunity was there, the motive is asserted but any evidence is lacking. ... On all the evidence the tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body. The explanations put forward are no more than theoretical possibilities'*); *"On all the evidence the Tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body.* ***The explanations put forward are no more than theoretical possibilities.*** *Regrettably this is not a case where exceptional circumstances are proved but a conventional case in which the player asserts his moral innocence but is unable to prove how the prohibited substance entered his body"* (para 23) *"on that basis the tribunal is not able to make any finding as to the players lack of fault.* ***In the absence of proof as to how the substance entered the players body it is unrealistic and impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the Commission of a doping offence"*** (para 24).

WADA vs Ms Lebogang Phaluala and SAIDS Case AT 01/2013 *dated 10 January 2013* at paragraph 27 page 5, per Alex Abercrombie.

"The Appeal Board agrees with the submission by WADA that if an athlete merely had to submit that he placed great trust in a coach or administrator in order to obtain a reduced sanction a reduction under Rule 10.4 or 10.5.2 could be engineered to apply in almost every situation"

Arbitration CAS 2009/A/1926 International Tennis Federation (ITF) v. Richard Gasquet & CAS 2009/A/1930 World Anti-Doping Agency (WADA) v. ITF & Richard Gasquet, award of 17 December 2009

..... it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.

Contamination with cocaine through kissing is, from a medical point of view, a possibility in the present case:

"We are agreed that there is no need to postulate any mechanism by which cocaine may have entered Mr Gasquet's body other than an intimate kiss with "Pamela" immediately after she had used cocaine".

In view of all of the above, the Panel concludes that it is more likely than not that the Player's contamination with cocaine resulted from kissing Pamela. The Panel is satisfied that there is at least a 51% chance of it having occurred. Any other source is either less likely than the kissing to have resulted in the contamination, or is even entirely impossible. With regard to a possible contamination from physical contact with persons other than Pamela at "Set", the Panel emphasises that it is not established with which persons the Player had any physical contact, e.g. by shaking hands, if any, and if these persons were cocaine users. In any case, the closest physical contact the Player had with anyone during the night from 27 to 28 March 2009 was with Pamela, who was, at least at that time, a regular cocaine user.

The Panel therefore concludes that the Player has met the required standard of proof, such as stipulated in Art. K.6.2 of the Programme and Art. 3.1 of the WADA Code, with regard to the way of ingestion. Therefore, in a next step, the Panel has to consider whether the player acted with no fault or negligence, or with no significant fault or negligence."

UKAD v Brett Mc Dermott SR 00001/120041

4.10 UKAD submitted that prior to any consideration by the Tribunal of degrees of fault and/or negligence, it may be convenient for the Tribunal to first assess whether the Respondent had established how the substances entered his system on the basis that if he could not establish this "threshold showing", he would be unable to rely upon either Article 10.5.1 or Article 10.5.2 for the purposes of elimination or reduction of the sanction period and questions of degrees of
negligence would not arise. Mr Herbert maintained that the Respondent had provided no corroborative evidence as to how the Prohibited Substances entered his system. In his witness statement he had claimed to have used the tablets supplied by a friend who had undergone pectoral surgery. The Respondent had not offered any documentary evidence about the tablets such as the name of the products, photos of the products, how he used them, when he used them or a statement from the friend to corroborate this story. In his initial letter to UKAD the Respondent had referred to using "one over the counter medication which I took solely to heal quicker". UKAD observed that the substance 19-Norandrosterone is most commonly detected as a metabolite (bi-product) of the use of the steroid Nandrolone. Neither Drostanolone nor Nandrolone are available over the counter in the United Kingdom. Nandrolone is available as a prescription-only medication and is primarily used in injectable form. UKAD indicated that it was not aware of Drostanolone being available at all as a medication in the United Kingdom.

4.11 UKAD submitted that the Respondent was unable to establish on the balance of probabilities how these Prohibited

Substances entered his body with the consequence that the "threshold showing" was not made out and the Respondent's case foundered on that basis. UKAD submitted in the alternative that if the Respondent had established how the substances entered his system, in assessing the degree of the Respondent's "fault", the starting point was the principle that an athlete must make sure that a prohibited substance does not enter his system at all and this basic requirement encompasses various specific requirements including that an athlete should make himself aware of what substances are prohibited, that he takes care not to ingest any food or supplements that contain a Prohibited Substances and that he avoids any medical treatment that contains a Prohibited Substances without first obtaining a TUE for that treatment. Essentially the Respondent had failed to demonstrate that he had taken any of these steps.

6.2 The burden of establishing No Fault or Negligence or No Significant Fault or Negligence lies upon the Respondent. The Tribunal found that the Respondent had failed to establish the "threshold showing", in other words that he had failed to establish how the substances in question entered his system. The Tribunal therefore concluded that the Respondent was unable to rely upon either of Articles 10.5.1 or 10.5.2 for a reduction of sanction period and questions of degrees of negligence did not arise on the facts of this case.

6.3 Had the Tribunal concluded that the Respondent had successfully established the "threshold showing", the Tribunal would have concluded that the Respondent had patently failed to discharge the burden upon him under Articles 10.5.1 and/or 10.5.2.

6.4 On the Respondent's own case, he had failed to provide corroborative evidence as to how the Prohibited Substances entered his system, he had unquestioningly taken tablets from a friend, he had not offered any documentary evidence about the identity or origin of the tablets, and there was no evidence in support from his friend. The Respondent's case was self-contradictory. On the one hand he said that he had used an "over the counter medication". On the other hand he stated that he thought that the tablets had been purchased in the gym. He had taken no steps to satisfy himself as to what substances are prohibited. He had taken no care so as to avoid taking or ingesting a Prohibited Substance. He thought that the tablets might affect his sports performance. He knew that what he had done was "wrong from a sports point of view". He took no medical advice about the tablets. He conceded that it was wrong for him to have taken the tablets in the first place and secondly not to have taken any advice about them. In reality, it was not even clear whether the tablets were the source of the adverse analytical finding.

6.5 Accordingly, the period of Ineligibility imposed on the Respondent is two years.

Applying the decisions in the Court of Arbitration for Sport ("CAS") in

CAS 2010/A/2277 Barbera; CAS 2006/A/1133 Stauber; CAS 2006/A/1130 Stanic; CAS 2005/A/830 Squizzato; and

the Decision of an Independent Anti-Doping Tribunal in the matter of International Tennis Federation and Mark Nielsen.

Arbitration CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA), award of 27 May 2003

43. Taking into account the Appellant's own statements and those of the experts Professor Dimitrios Har. Mourtzinis and Dr. Saugy, the Panel is unable to draw a final conclusion regarding the origin of the prohibited substances found in the Appellant's body fluids, but does not exclude the possibility that the injection administered by his coach was the cause. Having said that, however, the Panel takes the position that the Appellant clearly acted with negligence in not specifically having queried both his physician and his coach regarding the identity of the substances which were administered to him. As Dr. Saugy stated in his testimony, athletes have been placed on notice that the ingesting of food and vitamin supplements carries risk. The Appellant should not have ignored this risk, not only at the time he purchased the illegal substances in an Athens pharmacy just before leaving for Tunis, but especially when such substances are injected by the coach and not his physician on the eve of a competitive event

44. If an athlete who competes under the influence of a prohibited substance in his body is permitted to exculpate and reinstate himself in competition by merely pleading that he has been made the unwitting victim of his or her physician's (or coaches) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat. It is the trust and reliance of clean athletes in clean sports, not the trust and reliance of athletes in their physicians and coaches which merits the highest priority in the weighing of the issues in the case at hand. If such a defence were permitted in the rules of sport competition, it is clear that the majority of doped athletes will seek refuge in the spurious argument that he or she had no control over the condition of his or her body. At the starting line, a doped athlete remains a doped athlete, regardless of whether he or she has been victimized by his physician or coach.

Findings concerning fault or negligence / significant fault or negligence

25.4 Mr Gouws, Mr Ngunuza's Defence attorney submitted - in support of a possible reduction in sanction under Article 10.5 - that Ngunuza had been at fault, but that such fault was not significant. The Prosecutor argued that it had been significant and that the applicable period of ineligibility was thus 2 years.

25.5. As Mr Ngunuza had failed to prove how the Methylhexaneamine had entered his system.

The panel thus found – in the light of decided case precedent as outlined above – that it was not necessary for the panel to make any finding concerning whether Mr Ngunuza's fault or negligence had been significant for the purpose of possibly reducing any period ineligibility.

25.6 The panel nevertheless felt it necessary to consider and make findings and comment on this aspect as well.

It did so with regard to the 2015 Rules having included the requirement for the athlete to establish how the Prohibited Substance had entered his system under the definition of *No significant fault or negligence*, whereas under the previous 2009 Rules this "first hurdle" requirement was included under Rules 10.5.1 and 10.5.2.

25.8 The panel, having considered the totality of the circumstances and having viewed the criteria for *no fault or negligence*, as follows

"the Athlete establishing that he or she did not know or could reasonably have known even with the exercise of utmost caution that he or she had used the Prohibited Substance"

came to the following finding, based upon previous case precedent involving the use or ingestion of Methylhexaneamine and the reasons, as set out below,

that even though it had been accepted that Mr Ngunuza's apparent inadvertent ingestion of MHA had not been intentional, such fault or negligence, as had been admitted on his part, may well have justified a reduction in the period of ineligibility. This was because, in the panel's view, Mr Ngunuza may well have been able to prove no significant fault or negligence on his part HAD he been able to prove HOW the MHA had actually entered his system.

25.9 The reasons for this arise from the panel's objective and subjective evaluation of Mr Ngunuza's own reliable and uncontroverted testimony and despite his having advised that

25.9.1 he had attended a lecture and received a book and material relating to doping, as to what was prohibited and what was not, from Nick Bester when he had signed up for the Nedbank as a professional athlete in 2009;

25.9.2 he had relied upon his brother/cousin George who coached him (was not a doctor) for recommendations with regard to the use of supplements;

25.9.3 he had relied upon the 2009 booklet and the list of what was prohibited or not, instead of ensuring that he had access the most recent and up to date list in assessing whether a product contained prohibited substances or not;

25.9.4 he was aware of that the use of stimulants would amount to cheating;

25.9.5 despite having access to Dr von Hagen for possible free advice regarding his use or intended use of supplements, Mr Ngunuza simply continued to

25.9.5.1 have referred to the out of date booklet as to what was "green" or "red";

25.9.5.2 have held discussions with either of the two pharmacies as to whether a product, contained a prohibited substance or not and either acceptable or not;

25.9.5.3 in the case of Coryx also included Mama Irene in the discussion for her advice.

25.9.6 he had been tested before. This had been at the time he had participated in the international 50 kms World Champs in Galway Ireland;

25.9.7 he had acknowledged that despite all the care he had normally taken in choosing supplements he had taken a risk in receiving drinks from spectators on the Comrades route;

25.9.8 Mr Ngunuza had participated in the Comrades since 2011 and was aware of the Ludwig Mamabolo case;

25.10 The panel found that it would not have been comfortably satisfied that the Prosecutor's submission , that the evidence set in 25.9 had established significant fault or negligence on the part of Mr Ngunuza.

25.11 The panel's reason for this stems from the fact that Mr Ngunuza could simply have averred that one of the products – contaminated or otherwise - which he had ingested prior to Comrades was the source of MHA.

25.12 That Mr Ngunuza did not do so, but chose rather to have produced the suspect products for analysis, under the honest belief that SAIDS would thereby have assisted him in having the probable source determined, says much for Mr Ngunuza's honest belief that he

25.12.1 really did not know how the MHA had entered his system;

25.12.2 wanted to know what the source of the MHA was against his list or otherwise in order to avoid an occurrence in the future,

thereby purposefully avoided having 'engineered' a solution which may well have resulted in reduction of the sanction which the Panel was obliged to impose under the Rules .

25.13 It does not necessarily mean that because Mr Ngunuza had possibly failed to exercise the due care and take those steps which an athlete in his position as a potential gold medallist might reasonably have taken - objectively speaking - to guard against the risk and thus possibility of his ingesting a prohibited substance by

25.13.1 being "on guard" and not taking whatever liquids he could from spectators;

25.13.2 failing to inquire what it was that he had received and drank from spectators;

25.13.3 relying on the fact that as everyone, who did not have the means for support along the entire Comrades route, took drinks from spectators - as is truly the case for those who have run Comrades unsupported - such spectators "love of the sport" was a sound basis for Mr Ngunuza having concluded that such spectators would not have given him any illegal substance, contaminated or not, to drink;

25.13.4 essentially throwing "caution to the wind" in taking whatever liquids he could from spectators from 60 -70 kms into the race as he was tired;

25.13.5 not simply relying on the over 40 official Comrades water stations for his rehydration needs to be met;

that his fault or negligence had been significant, as case precedent has shown "it is well nigh impossible to determine fault or negligence without having established how a prohibited substance had entered an athlete's system."

Applying

USADA v ASFAW American Arbitration Association - AAA Case No. 01-14-0001-4332 at pages 16-17

Analysis of Fault

5.30 Pursuant to Article 10.4 of the Code, if an athlete who has tested positive for a Specified Substance carries both her burden of establishing the source of her positive test and an absence of intent to enhance performance or mask the use of a prohibited substance then the athlete's "degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*."

5.31 In analyzing the degree of fault under Article 10.4, the Panel is guided by the multi-part analysis set forth by the Court of Arbitration for Sport Panel in ***Cilic v. ITF*, CAS 2013/A/3327, 3335.**

5.32 The *Cilic* Panel recognized the following degrees of fault:

1. "Significant degree of or considerable fault," for which the sanction range would be 16-24 months ineligibility and a "standard" sanction would be 20 months;

2. "Normal degree of fault," for which the sanction range would be 8-16 months ineligibility and a "standard" sanction would be 12 months;

3. "Light degree of fault," for which the sanction range would be 0-8 months ineligibility and a "standard" sanction would be 4 months.

5.33 According to the decision in *Cilic,* both the objective and subjective level of fault may be considered in assessing into which of the three relevant categories of fault a particular case falls. However, "the objective element should be foremost" in making this assessment.

Generally, the subjective element should only "be used to move a particular athlete up or down within that category," i.e., within the three categories set forth above. "[I]n exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however." The Panel is not convinced that any subjective element pertaining to Respondent's circumstances is so exceptional that it would justify deviation from the *Cilic* objective fault categories.

5.35 In this case Respondent admitted that she took an Ephedrine pill on the morning of her competition, therefore, there is no dispute that the substance was taken in-competition, meaning that the full standard of care described in *Cilic* should apply. Accordingly, pursuant to *Cilic* the standard to which the Respondent was accountable was to:

(i) read the label of the product used (or otherwise ascertain the ingredients),
(ii) cross-check all the ingredients on the label with the list of prohibited substances,
(iii) make an internet search of the product,
(iv) ensure the product is reliably sourced and
(v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

25.14 It is the panel's view that it appears that Mr Ngunuza's honest belief in the circumstances surrounding inadvertent use

25.14.1. not knowing how the MHA had entered his system;

25.14.2 then having had to rely on either the unproven Comrades or spectator water points as being possible options for the source of MHA following his not being able to prove that the "suspects" offered for analysis contained such MHA,

may well have worked unfairly against him.

25.15 The panel accordingly recommends within the ambit of the Position Paper, prepared by the Chairperson, attached hereto as Annexure A, that consideration

be given to whether or not any unfair prejudice which Mr Ngunuza may have suffered – through his inability to prove the origin of the MHA in circumstances involving inadvertent use - may or may not have been attributable to systemic failures acting against him and others in his position and remedied if necessary.

FINAL DECISION & SANCTION

For the reasons set out above the panel makes the following decision in accordance with the mandatory provisions of the Rules.

1. Mr Sandile Ngunuza

    1.1 having admitted the charge under Article 2.1 of the Rules and been found guilty of such anti-doping rule violation;

    1.2 having established that the anti-doping rule violation was not intentional in accordance with Articles 10.2.1 and 10.2.3 of the Rules;

    1.3 not having established on a balance of probability to the satisfaction of the Panel, how the Methylhexaneamine had entered his system, in accordance with the provisions of Articles 10.2.2 and 10.5 of the Rules, as read with the definitions for no significant fault or negligence,

    is required to serve a 2 (two) year period of ineligibility as the sanction under the consequences relating to such anti-doping rule violation.

2. Although Article 10.10 provides that such period of ineligibility "shall start on the date of the final hearing decision" it allows for an exception under Article 10.10.3.

    2.1 This enables a panel to grant credit for any period of ineligibility served under provisional suspension, which has been respected, against any period ultimately imposed.

    2.2 Thus although the period could have ended on 12 October 2017 the panel decided that because the period of provisional suspension had been respected by Ngunuza, it should -

        2.2.1 be deemed to have commenced on the date of notification of the adverse analytical finding and Mr Ngunuza's provisional suspension, being the 2 July 2015;

        2.2.2 end at midnight on 1 July 2017,

    on the understanding that the time Mr Ngunuza served under provisional suspension from 2 July 2015 be credited to such 2 (two) year period of ineligibility.

3. During such period of ineligibility Mr Ngunuza shall – in accordance with the provisions of Article 10.11 of the Rules - not participate in any capacity in any singular race, match,

or singular sport contest or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by Athletics South Africa (ASA) or any national federation affiliated to SASSCOC , or a club or other member organization of a *Signatory's* member organisation, or in singular race, match, or singular sport contest organised by any professional league or any international or national level *Event* organisation or any elite or national-level sporting activity funded by a governmental agency.

4. As further consequences of such anti-doping rule violation

4.1 Mr Ngunuza's result - as having finished among the gold medallists in 9th position in the Comrades Marathon - is invalidated along with forfeiture of the gold medal, any points and prize money;

4.2 SAIDS may make disclosure in accordance with the provisions of Articles 10.12 and 14.3, read with Article 13.7.2 which provides

NOTE: No party or parties may make any revelations, decisions taken, projected outcomes, opinions, comments, etc., known to the media, in whatever form, until the appeal process is exhausted.

5. Mr Ngunuza may return to train with a team or to use the facilities of a club or other member organisation of SAIDS's member organisation during the shorter of: (1) the last two (2) months of his period of *Ineligibility,* or (2) the last one (1)quarter of the period of *Ineligibility* imposed.

6. Mr Ngunuza , including any other party referred to in Article 13.2.3, has the right to appeal this decision in accordance with the provisions of Article 13, specifically Articles 13.2 - 13.7 of the Rules.

The time provided for the filing of any appeal, shall be twenty-one (21) days from the date of written receipt of the decision by the appealing party, as provided under Article 13.7.2, which also provides

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John Bush Chairperson	Deon-Jacques Pieterse Member	Colin Abrahams Member

26 February 2016

rehabilitation programs) authorised or organised by Athletics South Africa (ASA) or any national federation affiliated to SASSCOC, or a club or other member organization of a *Signatory's* member organisation, or in singular race, match, or singular sport contest organised by any professional league or any international or national level *Event* organisation or any elite or national-level sporting activity funded by a governmental agency.

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Chairperson	Member	Member

26 February 2016

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John Bush
Chairperson

Deon-Jacques Pieterse
Member

Colin Abrahams
Member

26 February 2016

ANNEXURE A

In the matter between

SAIDS v MR SANDILE NGUNUZA ("Mr Ngunuza")

PANEL *OBITER DICTUM* COMMENT REGARDING CONCERNS DEALING WITH THE POSSIBLE CONSTITUTIONAL IMPERATIVES, ANOMALIES AND UNINTENDED CONSEQUENCES OF THE APPLICATION OF THE RULES

Introduction

1. This commentary relates to matters of concern identified by the chairperson of the panel in his and the panel's consideration of the totality of the evidence and argument before the panel, as well as the chairperson's subsequent and contemporaneous investigation and consideration of matters related or incidental thereto, within the context of his write-up of the reasoned decision.

2. It is predicated on the content of paragraph B.9 on page 3 of the reasoned decision, which is repeated for convenience, as follows.

> "9. Whilst not within its brief and not affecting the final decision taken by the panel, the panel also sought at the instigation of the chairperson, to consider in depth, address and issue *obiter* comment upon certain aspects of the case having regard to Section 39 of South African Constitution and the Bill of Rights provisions under Chapter 3 – relating to equality – dealing specifically with the right to be treated equally without discrimination; the right to work freely and the right to access to information in the exercise and protection of such rights, with specific reference to –
>
> 9.1 the presence and likely impact of Methylhexaneamine as a Specified Substance on the Prohibited List in enhancing an endurance athlete's performance;
>
> 9.2 the sanctions imposed not only in South Africa across the sporting world relating to anti-doping violations involving the presence of Methylhexaneamine;
>
> 9.3 whether the attention by national anti-doping authorities on Methylhexneamine in endurance athletes was fairly justified;
>
> 9.4 if not, whether there was a basis for athletes found to have inadvertently had Methylhexanemine in the system ought - fairly speaking, to be differentially treated - much in the same way as caffeine had been dealt with and even cannabinoids had by way of a lesser penalty, especially where it was impossible to determine the origin or source. This having regard to the impact and effect of far more significant Prohibited Substances and Methods;
>
> 9.5 the evidence led by and credibility of Mr Ngunuza with particular emphasis on his own inadvertent use and apparent honest inability to determine of the source /origin of the Methylheneamine within the range of declared supplemental usage and other sources as outlined in the evidence led by him and on his behalf in mitigation of sanction;
>
> 9.6 the impact this had on the eventual sanction imposed upon Mr Ngunuza, which having regard to the sanctions where Methylhexaneamine had been involved appeared to be manifestly unfair;
>
> 9.7 whether in the totality of the circumstances facing Mr Ngunuza "the anti-doping system" - as prescribed within the Rules to deal with anti-doping violations towards

ensuring fair and safe participation in sport - may have indeed failed him and could thus also fail athletes in a similar position in the future.

See in this regard – for what it may be worth in respectfully addressing the concerns raised by the panel concerning the constitutional imperatives, apparent anomalies and unintended consequences - the Panel Comment set out in Annexure A."

3. It is not intended that it deal exhaustively with all the matters raised. It is respectfully tendered as a brief position paper or discussion document to serve as a "platform" or "springboard" for possible further consideration by and conversations between other individuals and entities, in particular clubs, provincial associations, national federations, anti-doping organisations and their advisers.

4. It is anticipated that such 'conversations' will

   4.1 thoroughly consider the concerns raised as possible constitutional imperatives, anomalies and unintended consequences - arising from the interpretation and application of the Rules specifically in Mr Ngunuza's case and thus possibly affecting other athletes in similar circumstances

   4.2 address such concerns towards seeking viable solutions – even possible amendments to the Rules - to the extent that these may be both desirable and/or necessary,

   in the interests of justice, the principles of equality as enshrined in the South African Constitution and specifically fairness in "levelling the playing fields" in the contest between anti-doping organisations and specifically *endurance athletes found to have Methylhexaneamine in their systems through inadvertent or innocent use, where the source or origin can honestly not be explained*, in line with the principles of "I PLAY FAIR".

5. The following position statement simply seeks to clarify the matters of concern, having regard to the context, outcome and apparent underlying intent and drivers as appeared evident in Mr Ngunuza's case, in the hope that this might provide impetus for the "kick-start" of any possible process to deal with such anomalies, unfairness and any unconstitutional matters as may then be determined to exist and requiring possible attention.

   Position statement

   Accepting that

   6.1 it was not in dispute that Mr Ngunuza was an honest witness and that his testimony could thus be relied upon;

   6.2 the Panel had determined Mr Ngunuza receive the mandatory 2 (two) year period of ineligibility, as one of the consequences of his having admitted to and been found guilty of the anti-doping violation for which he had been charged, because he had not been able to prove how the Specified Substance, Methylhexaneamine ("MHA") had entered his system;

   6.3 Mr Ngunuzahad admitted that he did not know how the MHA had entered his system;

6.4 *the three "suspect" product samples of possible sources of MHA, which Mr Ngunuza's defence and treating doctor and sports physician had selected, being the USN Cytogel-HP, Mc Nabs Super Charge and Sportique Get Going Cream and provided in their original containers, had been analysed by SADoCoL and had resulted MHA not having been identified in any such samples;*

6.5 *the panel had not accepted that Mr Ngunuza had established that the only probable source or origin of the MHA was liquids provided to Mr Ngunuza after 60km water points/stops along the route by spectators ('the only logical conclusion'- as had been submitted by his defence attorney) and/or the official Comrades water stations;*

6.6 *The panel found that these remained possible and thus unproven sources, along with all the other possible sources which Mr Ngunuza had used or ingested, (or may have failed to disclose) in the days before and on the day of Comrades, according to the list which he had drawn up with assistance for supplements, rubs etc.;*

6.7 *it may have been far simpler – given the apparently unfair outcome of the case – for Mr Ngunuza to simply have "hung his cap" on and alleged that any one of the supplements which he had used had been the probable source of MHA;*

6.8 *such as "dishonest approach" might well have served Mr Ngunuza's interests best given the 2 (two) year period of ineligibility and other consequences he subsequently suffered as a result of the panel having to give him the mandatory 2 two) year period of ineligibility;*

6.9 *it could possibly have resulted in a range of possible sanctions, starting with the minimum of a reprimand with no period of ineligibility, up to a maximum of 2 (two) years; this, notwithstanding possible evidential difficulties facing Mr Ngunuza and his defence team, in having to convince the panel on a balance of probability that*

6.9.1 *any such supplement had been the probable source;*

6.9.2 *there had been no significant fault or negligence, in accordance with the principles laid down in Article 10.5.1 having regard to the degree of any fault established both objectively and subjectively speaking in the totality of the circumstances.*

6.10 *that because he genuinely did not know how the MHA had entered his system, he sought to find out what the source really was in order to avoid future problems;*

6.11 *the outcome is an anomaly - given the outcome of the many MHA related cases in South Africa and around the sporting world.*

The main reason for this is that

6.11.1 *the apparent innocent and inadvertent use or ingestion of MHA in Mr Ngunuza's case resulted in him having to face the mandatory 2 (two) year*

period of ineligibility prescribed under 10.2.2 for him genuinely not having established how the MHA entered his system,

6.11.2 those Athletes, who have established - how MHA entered their system and no significant fault - have faced and received significantly lesser periods of ineligibility, based upon Article 10.5.1.1 of the Rules specifically providing for this and as previously determined under articles 10.4 and 10.5 under the 2009 SAIDS rules.

It is submitted that the following tables of cases illustrate this.

South African cases - involving Methylhexanemine	
SAIDS v Cornel Welgemoed	*3 months*
SAIDS v Dante Muller	*6 months*
SAIDS v Darron Ornatius	*6 months*
SAIDS v Earl Snyman	*6 months*
SAIDS v Ian Furman	*7 months*
SAIDS v Jaco van Niekerk	*3 months*
SAIDS v Johan Pieterse	*4 months*
SAIDS v Johan Pieterse	*24 months*
SAIDS v Lebogang Phalula	*3 months*

USADA Cases involving the use of Methylhexaneamine & other stimulants			
www.usada.org/testing/results/sanctions			
Athletes Names	***Sport***	***Sanction***	***Date***
Qunitaveon Poole	*T&F*	*6 months*	*21/1/2015*
Braulio Estima	*Brazilian Ju-Jitsu*	*2 years*	*25/11/2014*
Logan Loader	*Cycling*	*8 months*	*16/7/2014*
Hirut Beyene	*T&F*	*4 months*	*21/2/2014*
Tyson Gay	*T&F*	*1 year*	*5/2/2014*
Jason Rogers	*Cycling*	*9 months*	*27/11/2013*
Camdin Crouse	*Para T& F*	*2 years -amphetamine*	*23/9/2013*
Dominique Bradley	*Wrestling*	*8 months*	
Cameron Ostrovski	*T&F*	*1 year*	
Julio Cruz	*Cycling*	*6 months*	
Shelby Stacy	*Cycling*	*6 months*	
Kristopher Dyer	*Weightlifting*	*6 months*	*9/8/2013*
Brian Wilhelm	*Weightlifting*	*9 months*	*8/8/2013*
Cesar Lopez	*Cycling*	*3 months THC def/edu*	*31/8/2012*
Steven Andus	*Wrestling*	*6 months THC& Amph*	*31/8/2012*
Michael Rogers	*T&F*	*9 months*	*3/1/2012*
Jesse Bates	*Taekwondo*	*10 months*	*11/11/2011*
Nathaniel Tadd	*Taekwondo*	*2years*	*11/11/2011*
Frederic Kieser	*T&F*	*8 months*	*27/10/2011*
Michael Miller	*Cycling*	*8 months*	*27/10/2011*
Joshua Webster	*Cycling*	*2 years*	

Fernando Reis	*Weightlifting*	*6 months*	
Jonathan Nguyen	*Taekwondo*	*6 months*	

Other International Cases involving Methylhexanemine and other stimulants	
Evi Sachenbacher Stehle	*a sanction of 2 years reduced to 6 months on appeal*
Asafa Powell	*involving Oxilofrine a sanction of 18 months reduced to 6 months on appeal*
Tim Hoffman	*involving Ephedrine a sanction of 2 years*
Quintarean Poole	*6 months*
Marcus Stroman	*baseball - 50 game suspension*
Logan Loader	*8 months*
Lauren Mulwitz	*Involving THC 3 months*

6.12 the outcome appears to also be unfair.

It is submitted that the reasons advanced for this are that

6.12.1 although the "war against doping" requires the strictest and most stringent rules to be applied and enforced, justice and within this broad concept certainly fairness, requires that a true balance be drawn between

6.12.1.1 an anti-doping system, founded under the South African Institute for Drug free Sport Ac. No 14 of 2997, as amended and predicated, inter alia, upon

6.12.1.1.1 the principles of strict liability, as provided under Article 2 of the Rules;

> **2.1.1** It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *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.
>
> **2.1.2** Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analysed;

6.12.1.1.2 *the provisions of Article 4.3 which declare WADA's determination of the Prohibited List,*

> *"final and shall not be subject to challenge by an Athlete or other Person based upon an argument that the substance or method was not a masking agent, or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport."*

and

6.12.1.2 *the rights and interests of innocent and honest athletes, such as Mr Ngunuza, caught in the "cross-fire" of the struggle by anti-doping organisations to rid sport of the cheats,*

regarding the current and any future prohibited use of MHA and thus its position on the Prohibited List as a Specified Substance, under a review process, which will clearly

6.12.1.3 *establish an empirical basis for its continued presence on the Prohibited List, specifically as far as endurance athletes are concerned;*

6.12.1.4 *distinguish - in fairness to endurance athletes, for whom there is currently no apparent empirical clinically proven performance enhancement benefit to be derived through the use of MHA - those circumstances in which such use of MHA may be danger and thus a health risk to any such athletes who use MHA and then ensure that it then rather possibly be included under the Prohibited List as a Specified Substance in terms of an appropriate clinically proven threshold;*

6.12.1.4 *determine – having regard to whether or not MHA was a masking agent, or had the potential to enhance performance, or represents a health risk or violates the spirit of sport – whether MHA*

6.12.1.4.1 *ought to remain as a Prohibited Substance / Specified Substance on the Prohibited List for endurance athletes at all;*

6.12.1.4.2 *might thus be removed from the Prohibited List as an exception for such endurance athletes specifically or generally;*

6.12.2 *whereas MHA may well offer an advantage or enhance the performance of sprint athletes, or boxers and other fighters, whose "fast twitch" muscles are engaged in such sports and indeed in other sporting disciplines, it has certainly not been proven to enhance the performance, or any offer any other advantage to endurance athletes, especially those participating in ultra-distance such as Mr Ngunuza in the Comrades.*

6.12.3 the real difficulty that Mr Ngunuza had as an impecunious and previously disadvantaged athlete within the context of South African sport, where the playing fields have not yet been fully levelled – notwithstanding the access and support he had through his attorney Mr Danie Gouws - in establishing how the MHA had entered his system against the further complexity of his having to had prove no significant fault or liability for a possible reduction in any period of ineligibility.

6.13 the outcome may well not "pass muster" under the Chapter 3 Human Rights provisions of the South Africa Constitution, considering the background, context and surrounding circumstances.

6.13.1 This, because it appears that the outcome of the doping control process leading to Mr Ngunuza having to sit-out and serve a 2(two) year period of ineligibility and not such lesser period, as tabled in 6.11 above, may well have resulted in Mr Ngunuza having been unfairly discriminated against.

6.13.2 In addition to the reasons outlined above, consideration ought to be given to the possibility that "the anti-doping system", defined to include ASA, EP Athletics, all Clubs - LibertyNike and Nedbank - Port Elizabeth, as well as the Comrades Marathon Association and even WADA and/or SAIDS, even with all the assistance SAIDS had provided during the proceedings and the offer for counselling thereafter - may possibly have failed the athlete, Mr Ngunuza, in any way.

6.13.3 Accepting that "there is no freedom without responsibility" and "all athletes are responsible and accountable for whatever enters their system" it was certainly evident that Mr Ngunuza had

6.13.3.1 received elementary anti-doping education and apparently significant instructive materials from Nick Bester at the time he joined Nedbank in2009;

6.13.3.2 received no other education or information, apart from advice from a sports practitioner regarding the use of steroids for the treatment of an injury for which he did not have to pay;

6.13.3.3 his own method in determining whether medication a supplement which he intended to use was prohibited or not relying not on internet searches, or the advice of expert s (such as the sports practitioner who helped him when he was ill) but on referral to possibly outdated material and certainly to an outdated 2009 list to determine what was prohibited or not; following his brother's /cousin's recommendation(s) as his coach; the advice obtained at two pharmacies and at least on one occasion involving his choice of the flu medication Coryx from a club supporter;

6.13.3.4 little or no real knowledge and /or understanding of supplements and their use or even why they should be ingested at all;

6.13.3.5 not called upon the person, who had helped him draw up his list of supplements, rubs etc., to testify. The panel was clearly entitled to consider and possibly draw a negative inference about this .It did not do so as there had been no reason to do so for not only had the Prosecutor had not enjoined it to do so, but he had certainly accepted the evidence of Mr Ngunuza, a single witness whose evidence on his own behalf was thus subject to the cautionary rules in the weighing up of the reliability thereof, as truthful and reliable.

6.13.4 It is respectfully submitted that it ought to be accepted that it is imperative that within the emerging South Africa society that all athletes, including Mr Ngunuza himself, be held fully responsible and accountable for what may have happened, or might happen, to them, as they participated, or still may participate, in their chosen sport(s) at whatever level, subject to the rules governing such sport(s) and the SAIDS Rules, notwithstanding their own limiting personal circumstances and /or disadvantaged backgrounds, such as those outlined in Mr Ngunuza's own testimony under evidence-in-chief, cross-examination and rejoinder, as well as his attorney's submission.

6.13.5 It is nevertheless further respectfully submitted that it ought to be significantly instructive and of value – for regard to be had to Mr Ngunuza's own testimony (particularly as to what happened to him and was in the press reports about him) as seemingly the first Port Elizabeth athlete to have received a gold medal at Comrades - in order to determine through objective reflection - in the totality of the circumstances and despite his having run for over 20 years and as a professional since 2003 - whether any of those entities and individuals within "the system" referred to above may have failed Mr Ngunuza, either singularly or collectively, and thus ought to be "held to account" for what happened to him within the context of the provisions of the RSA Constitution.

6.13.6 Those provisions of the Constitution which are considered relevant for such purposes are set out below. The Chairperson Mr Michael Murphy referred *to some of these in paragraphs 75 through to 95 at pages 32 to 42 in the decision of* **SAIDS vs Ludwick Mamabolo** in which the following statement at paragraph 76 has bearing.

> *"In the sporting context the decision of* ***Coetzee v Comitis*** *has removed any doubts there may hove been regarding the application of constitutional principles particularly where one is dealing with sportspersons seeking to pursue an occupation or career."*

Rights

7(1) *This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all peoples in our country and affirms the democratic values of human dignity, equality and freedom.*

(2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*

(3) *The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 of elsewhere in the Bill.*

Application

8(2) *A provision of the Bill of Rights binds a natural or juristic person if and to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by that right.*

Equality

9. (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3) *The state may not unfairly discriminate against directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

(4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

(5) *Discrimination on one or more grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair.*

Human Dignity

10. *Everyone has inherent dignity and the right to have their dignity respected and protected.*

Privacy

14. *everyone has the right to privacy, which includes the right not to have*

(a) *their person or home searched;*

(b) *their property searched;*

(c) *their possessions seized;*

(d) *the privacy of their communications infringed.*

Access to information

32 (1) *Everyone has the right of access to*

(a) *any information held by the state; and*

(b) *any information that is held by another person and that it required for the protection any rights.*

(2) *National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

Just administrative action

33 (1) *Everyone has the right to administrative action which is lawful, reasonable and fair.*

(2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

(3) *National legislation must be enacted to give effect to these rights and must –*

(a) provide for the review of administrative action by a court or, where appropriate , an independent and impartial tribunal;

(b) impose a duty upon the state to give effect to the rights in sub-section (1) and (2); and

(c) promote efficient administration.

Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of the law decided in affair public hearing before a court or where appropriate another independent tribunal or forum.

Limitation of rights

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open society based upon human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose;

(e) less restrictive means to achieve the purpose.

36.(2) Except as provided in sub-section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Interpretation of Bill of Rights.

39.1 When interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based upon human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

39.2 When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum, must promote the spirit, purport and intent of the Bill of Rights.

6.13.7 It is also submitted that consideration be given to the possible unintended consequences of the strict liability provisions of Article 2.1 of the Rules. It is common cause that these have been deemed to 'pass constitutional muster' and reasonably fair in the fight against doping in sport under the opinion provided by

Gabrielle Kaufman-Kohler & Antonio Rigozzi,
***Legal Opinion on the Conformity of Article 10.6 of the2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes*, Nov. 13, 2007, at 910**
http://www.wadaama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_

because of the tempering provisions of Articles 10.2, 10.4 and 10.5, as read with the definitions.

6.13.8 *It may not be surprising however to discover - in the light of the totality of Mr Ngunuza's testimony, and irrespective of his position as a previously disadvantage citizen - that any application of the Bill of Rights provisions relating in particular to his right to equal protection, access to information and not to be unfairly discriminated against may result in it being established that such rights have had been infringed upon.*

6.13.8 *Possible reasons for this might be that*

6.13.8.1 *Mr Ngunuza's averred innocent and inadvertent use, without his being able to establish the origin of the MHA and thus how the MHA probably entered his system, resulting in the mandatory 2 year period of ineligibility being applied in his case, was clearly unfair in the light of*

6.13.8.1 *the sanctions applied in the MHA related cases quoted above;*

6.13.8.2 *a possible unintended consequence, which may well not have been adequately considered and/or not been properly addressed in the Rules*

in order to ensure fairness, as well as equality of treatment and the avoidance of discrimination under the South African Constitution.

6.13.8.2 *The inclusion of the peremptory requirement that for a violation under Article 2.1 of the Rules the Athlete (other than a minor) must establish how the prohibited substance entered his or her system within the definition of no fault or negligence or no significant fault or negligence, without ensuring that someone in Mr Ngunuza's situation would not be prejudiced, either through such requirement being relegated to being a specific element of the no fault or negligence inquiry itself, or less restrictively discriminatory requirements being introduced to achieve the anti-doping objectives within the Rules.*

6.14 *Mr Ngunuza did not elect to attack the doping control processes relating to sample collection (as was the successful thrust in the* ***Momabolo*** *case) and testing.*

6.14.1 *Having regard to the Rules the only other avenue which his Defence Attorney Mr Gouws may well then have considered as an option for possible relief was to challenge the inclusion of MHA as a Specified Substance (Stimulant) on the Prohibited List.*

6.14.2 *Article 4.3 of the Rules provides however that any such a challenge is not permissible. It provides -.*

4.3 *WADA*'s Determination of the *Prohibited List*

WADA's determination of the *Prohibited Substances* and *Prohibited Methods* that will be included on the *Prohibited List*, the classification of substances into categories on the *Prohibited List*, and the classification of a substance as prohibited at all times or *In-Competition* only, is final and shall not be subject to challenge by an *Athlete* or other *Person* based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

6.14.3 *Consideration ought to be given to whether or not in the circumstances surrounding Mr Ngunuza's case such "lock-out" may well have been an infringement of his constitutional right under Section 34 of the Constitution for a fair public hearing, regard also being had to the properties and effect of MHA on endurance athletes in circumstances of innocent or inadvertent use.*

6.14.4 *Notwithstanding the necessity for restrictive rules in the "war against doping" Mr Ngunuza's right to challenge the inclusion of MHA on the Prohibited List, as not meeting the criteria for inclusion, as prescribed under the provisions of Article 4.3 of the World Anti-Doping Code, may well have been severely restricted.*

6.14.5 The legality of such limitation could thus well be open to rigorous challenge under the Constitution, having particular regard to the paucity of medical or other scientific evidence, pharmacological effect or experience that

6.14.5.1 *MHA* ..."alone or in combination with other substances or methods has the potential to enhance or enhances sport performance" in endurance athletes;

6.14.5.2 the use of the substance (*MHA)* or method represents an actual or potential health risk to an athlete (having particular regard to inadvertent or innocent use);

6.14.5.3 WADA's determination that the use of the substance *(MHA)* or method violates the spirit of sport described in the introduction to the Code.

Articles 4.3.1.1 – 4.3.1.3 of the WADA Code

See in this regard

CAUGHT IN THE NET: ATHLETES' RIGHTS AND THE WORLD ANTIDOPINGAGENCY by MATTHEW HARD
http://weblaw.usc.edu/why/students/orgs/ilj/assets/docs/19-3%20Hard.pdf

where reference at page 4 was made to the opinion of Gabrielle Kaufman-Kohler & Antonio Rigozzi in referring to

Johnson v. Athletic Canada and IAAF in which it was stated,

"there is a growing understanding among legal commentators that sports governing bodies can no longer ignore fundamental right issues, at least if they intend to avoid governmental intervention."

6.15 *It is submitted that - notwithstanding the obvious support and assistance which SAIDS and the Prosecution and indeed his own club and others, had provided to Mr Ngunuza - his rights of access to a fair hearing (a fundamental right under Section 34) may of itself have been limited by his impecunious financial position and the limited resources available to him.*

6.15.1 For this reason, with due regard being had to

6.15.1.1 the interventions open to the panel make in order to ensure a fair hearing in accordance with Article 8 of the Rules

6.15.1.2 the reputational, financial, career and other consequences of an anti-doping rule violation,

it is submitted that further consideration ought to be given to how best to "level the playing fields" between the anti-doping organisation and the athlete caught up in "the war against doping."

6.16 *Further matters for consideration and attention ought to be the extent to which the publication in the press and/or electronic media of Mr Ngunuza having been found*

- *to have the presence of banned stimulants;*
- *guilty before his right of appeal was finalised ,*

may have been not only inaccurate, because of SADoCol's failure to have tested for pseudo-oxilofrine / pseudoephedrine, which ruled out the charge for Oxilofrine, but also an infringement of Mr Ngunuza's right to privacy under Section 14 of the Constitution and a breach of the Rules themselves regarding publication.

6.16.1 The possibly offending articles referred to appeared, inter alia, in

6.16.1.1 Sport 24 on 24 July 2015

http://www.sport24.co.za/OtherSport/Athletics/South-Africa/Comrades-stars-caught-in-doping-storm-20150724.

6.16.1.2 *The Citizen on 27 November 2015*

http://citizen.co.za/885447/banned-ngunuza-comrades-gold/

6.16.1.3 BizNews.com

http://www.biznews.com/tag/sandile-ngunuza/

6.16.1.4 *Daily News 24 July 2015*
http://www.iol.co.za/dailynews/news/top-10-comrades-runner-found-doping-1890049

6.16.1.5 All Athletics
http://allathletics.co.za/2015/07/comrades-gold-medallists-in-doping-controversy/

6.16.2 Excerpts of the articles from Sport24, The Citizen and All Athletics web-sites follow for reference purposes

6.16.2 .1 Sport 24

COMRADES STARS CAUGHT IN DOPING STORM

Cape Town - Two 2015 Comrades Marathon top-10 finishers face the possibility of losing their gold medals for doping offences.

Port Elizabeth's Sandile Ngunuza will appear before an Independent Anti-Doping Tribunal hearing after tests at the event revealed presence of banned stimulants in his system. Ngunuza finished ninth in this year's Comrades.

.....

Ngunuza, 32, was found to have traces of oxilofrine and methylhexanamine in a urine sample taken at the Comrades. He requested that his "B sample" be tested and the result was confirmed. He will now face a hearing.

Stimulants are generally used by athletes on the day of competition to improve performance, while anabolic steroids are normally used to build muscle.

SAIDS has revealed that it tested several Comrades Marathon athletes before and on the day of the event. The top 10 men and women finishers were all tested on the day.

6.16.2.2 The Citizen

Ultra-distance runner Sandile Ngunuza has been stripped of his Comrades Marathon gold medal after being slapped with a two-year doping ban.

The 32-year-old athlete, who finished ninth in the 87km 'up' run between Durban and Pietermaritzburg in May, faced a hearing after his 'A' and 'B' samples tested positive for the banned stimulants oxilofrine and methylhexanamine.

"Ngununza has been sanctioned for two years," Khalid Galant, chief executive of the SA Institute for Drug Free Sport (Saids) confirmed on Friday.

Russian Vasily Larkin, who ended 11th, was expected to be bumped to 10th place and receive a gold medal.

6.16.2.3 All Athletics

Sandile Ngunuza tested positive for two banned substances after this year's 87km 'up' run from Durban to Pietermaritzburg (photo credit: www.heraldlive.co.za)

Two Comrades Marathon runners could be stripped of their gold medals for doping offences.

Sandile Ngunuza of Port Elizabeth, who secured his first top-10 finish when he finished ninth at the 87km in KwaZulu-Natal in May, will appear before an independent anti-doping tribunal hearing after his 'A' and 'B' samples tested positive for two banned substances.

"Ngunuza was found to have traces of oxilofrine and methylhexaneamine in a urine sample taken at the Comrades Marathon," the SA Institute for Drug-Free Sport (Saids) revealed in a statement on Friday.

6.17 *Another matter which ought to be addressed is whether Mr Ngunuza's right of access to information (Section 32 of the Constitution) may have been infringed upon.*

6.17.1 It is submitted that in a country such as South Africa it cannot be assumed that everyone has access to the internet.

6.17.2 Thus to what extent have the clubs, the Eastern Province Athletics and ASA, as the provincial and national athletic associations respectively, themselves and indeed, the Comrades Marathon Association "CMA" taken proper steps to educate athletes about doping in sport ?

6.17.3 Questions ought to asked, with the answers and results subject to audit scrutiny, as to just how these entities, which form part of the anti-doping system, may have failed not only Mr Ngunuza, but many other athletes, by not ensuring that they are fully and properly informed. Inter alia, as to

6.17.3.1 what their obligations / "rules of engagement" are when it comes to the use of prohibited substances and generally in dealing with doping in sport;

6.17.3.2 how to ensure that they meet these through proper prior scrutiny and advice;

6.17.3 3 the use of supplements containing prohibited substances as ingredients and the real possibility of contamination;

6.17.3.4 the meticulous keeping of records and even the retention of samples of products used.

6.17.4 The extent to which the CMA, as the custodian of Comrades Marathon has covered doping or anti-doping information sharing in its many pre-race briefings around the country, as well as the Comrades race rules and /or EXPO events needs to be reviewed in order ensure that the net is cast far wider than it has been to assist athletes such as Mr Ngunuza.

ANNEXURE A1

1. Physiological and pharmacokinetic effects of oral 1,3 dimethylamylamine administration in men. Research Article

Brian K Schilling, Kelly Hammond, Richard Bloomer – Department of Health and Sport Sciences University of Memphis, TN, USA
Chaela Presley and Charles Yates – University of Tennessee Health Sciences Centre, Memphis.

Schilling *et al at BMC Pharmacology and Toxicology 2013, 14:52*

http://www.biomedcentral.com/2050-6511/14./52

Abstract

Background: 1,3 dimethylamylamine (DMAA) has been a component of dietary supplements and is also used within "party pills" often in conjunctionwith alcohol and other drugs. Ingestion of higher than recommended doses results in untoward effects including cerebral haemorrhage. To our knowledge no studies have been conducted to determine both the pharmacokinetic and physiologic responses of DMAA.

Methods: Eight men reported to the lab in the morning following an overnight fast and received a single 25 mg dose of DMAA. Blood samples were collected before and through 24 hours post DMAA ingestion and analysed for plasma concentration using high performance liquid chromatography-mass spectrometry. Resting heart rate, blood pressure and body temperature was also measured.

Results: One subject was excluded was excluded from the data analysis due to abnormal DMAA levels. Analysis of the remaining seven participants showed DMAA had an oral clearance of 20.02 approx. 5L.hr-1, an oral volume of distribution of 236 approx.38 L and a terminal half life of 8.45 approx.1.9hr. Lag time, the delay in appearance of DMAA in the circulation following extra vascular administration, varied among participants but averaged approximately 8 minutes (0.14 approx 0.13hr), The peak DMAA concentration for all subjects was observed within 3-5 hours following ingestion and was very similar across subjects, with a mean of -70ng.ml-1. Heart rate, blood pressure and body temperature were largely unaffected by DMAA treatment.

Conclusions: These are the first data to characterize the oral pharmacokinetic profile of DMAA. These findings indicate a consistent pattern of increase across subjects with regards to peak DMAA concentration, with peak values approximately 15-30 times lower than those reported in case studies linking DMAA intake with adverse events. Finally, a single 25 mg dose of DMAA does not meaningfully impact resting heart rate, blood pressure or body pressure.

Trial registration: NCT01765933

Keywords:1/3-dimethyllamylamine, Pharacokinetics, Dietary supplements.

2. Scientific Opinion on the Regulatory Status of 1.3-Dimethylamylamine (DMAA)

Bastiaan J Venhuis and Dries de Kaste

European Journal of Food Research & Review – Published 26 November 2012

RIVM-National Institute for Public Health and the Environment, P.O.Box 1, NL-3720 BA, Bilthoven, The Netherlands. * Corresponding author : Bastiaan.Venhuis@reivm.nl

Abstract

DMAA is a pressor amine often found in food supplements for athletes at dosages of 25-65mg. Historically, the compound has been used as a nasal decongestant but its oral application is unstudied leaving the regulatory status of such food supplements as unlicensed medicines undetermined. We therefore reviewed the literature on DMAA and similar amines in order to deduce an effective oral dosage. Based on our findings we conclude that oral preparations with >4mg DMAA per dose limit should be considered as effective as a bronchodilator. Food supplements that exceed that limit are in fact subject to the Medcines Act and require licensing. Dosages higher that 100-200mg are expected to cause serious adverse effects.

3. Inadvertent doping through supplement use by athletes: assessment and management of the risk in Australia.

Baylis A[1], Cameron-Smith D, Burke LM

Abstract

Many athletes report using a wide range of special sports foods and supplements. In the present study of 77 elite Australian swimmers, 99% of those surveyed reported the use of these special preparations, with 94% of swimmers reporting the use of non-food supplements. The most popular dietary supplements were vitamin or mineral supplements (used by 94% of the group), herbal preparations (61%), and creatine (31%). Eighty-seven percent of swimmers reported using a sports drink or other energy-providing sports food. In total, 207 different products were reported in this survey. Sports supplements, particularly supplements presented as pills or other non-food form, are poorly regulated in most countries, with little assurance of quality control. The risk of an inadvertent "positive doping test" through the use of sports supplements or sports foods is a small but real problem facing athletes who compete in events governed by anti-doping rules. The elite swimmers in this survey reported that information about the "doping safety" of supplements was important and should be funded by supplement manufacturers. Although it is challenging to provide such information, we suggest a model to provide an accredited testing program suitable for the Australian situation, with targeted athlete

4. Doping through supplement use: a review of the available empirical data.

Outram S[1], Stewart B.

Abstract

The potential for supplement use to result in doping infringements is likely to be of concern for anyone involved in sports nutrition. The available data indicates that between 40-70% of athletes use supplements, and that between 10-15% of supplements may contain prohibited substances. Such data indicates that there is a considerable risk of accidental or inadvertent doping through using supplements. Accordingly, this paper sets out to provide an overview of the currently available empirical evidence of accidental doping by supplement use. In carrying out this task, the authors refer to press releases and proxy measures associated with nutritional supplement use, as well as statistical data on supplement contamination rates and doping infractions. A number of different indications as to the percentage of doping cases that might be attributed to supplement use are presented, ranging from 6.4% to 8.8%. Such percentages are not comparable; instead they are provided as indications as to how difficult it is to ascertain or estimate the scale of this problem. Although some forms of estimation can be made, it is suggested that it is currently not possible to quantify the scale of the problem. By way of conclusion, it is argued that antidoping regulators may wish to review current data gathering and information provision systems so that the problem of inadvertent doping can be more directly assessed as a factor in sports doping overall.

5. Supplements and inadvertent doping - how big is the risk to athletes.

Judkins C[1], Prock P.

Abstract

Despite ongoing improvements to regulatory and manufacturing guidelines, the potential for contaminated nutritional supplements to cause a failed doping test for an athlete remains a concern. Several surveys of supplements available through the internet and at retail have confirmed that many are contaminated with steroids and stimulants that are prohibited for use in elite sport. Suggested responses to this issue include the complete avoidance of all supplements. However, this approach seems to be unrealistic as many athletes use nutritional supplements for very different reasons. In addition, the number of publications describing trials that demonstrate the benefit of certain nutritional products has also increased over the last decade or so. This ensures that for many sports the use of supplements will remain a common practice. In response to the issue of contamination in nutritional supplements, many reputable manufacturers have their products rigorously tested by sports anti-doping laboratories to help ensure as far as possible that the risks to an athlete remain minimal. In this chapter we review the issue of supplements and contamination, and look at how this might be addressed through effective quality control procedures at the manufacturing facility and through the highly sensitive testing of finished products using appropriately accredited tests.

6. Contaminated nutritional supplements--legal protection for elite athletes who tested positive: a case report from Germany.

Striegel H[1], Vollkommer G, Horstmann T, Niess AM.

Abstract

A significant proportion of nutritional supplements manufactured worldwide contain non-listed contaminations with anabolic-androgenic steroids (AAS), whose ingestion may lead to positive doping test results. This will lead to the suspension of, and sanctions against, since this group of active substances is prohibited by the anti-doping code of the World Anti-Doping Agency as well as by sports associations not connected with this agency. Considerable financial losses are often the consequence for a banned athlete. Based on an amendment to the law governing the manufacture and prescription of drugs (AMG) in Germany in 1997 and an increasingly extensive interpretation of the term "drug" by the Federal Supreme Court, preparations containing anabolic steroids or their precursors are to be classified as drugs and, therefore, are subject to compulsory declaration as stated by the AMG. If this obligation is not adhered to, the result may be a claim for damages by against the manufacturer of a preparation, if took the preparation thinking it was harmless as judged by the Anti-Doping regulations, but was then found to be positive in doping tests. The judges in the first case before the county court in Stuttgart decided in favour of the claim for damages with respect to lost bonuses, loss of earnings and accrued legal costs by a soccer player who tested positive and was therefore suspended. Based on the evidence presented, the court came to the decision that the soccer player's positive test result was due to the ingestion of nutritional supplements containing non-listed AAS. This procedure could set a precedent for other states to demonstrate that athletes who had tested positive due to contaminated nutritional supplements are not without legal protection.

8. Contamination of dietary supplements and positive drug tests in sport.

Maughan RJ

Abstract

The use of dietary supplements is widespread in sport and most athletes competing at the highest level of competition use some form of dietary supplementation. Many of these supplements confer no performance or health benefit, and some may actually be detrimental to both performance and health when taken in high doses for prolonged periods. Some supplements contain excessive doses of potentially toxic ingredients, while others do not contain significant amounts of the ingredients listed on the label. There is also now evidence that some of the apparently legitimate dietary supplements on sale contain ingredients that are not declared on the label but that are prohibited by the doping regulations of the International Olympic Committee and of the World Anti-Doping Agency. Contaminants that have been identified include a variety of anabolic androgenic steroids (including testosterone and nandrolone as well as the pro-hormones of these compounds), ephedrine and caffeine. This contamination may in most cases be the result of poor manufacturing practice, but there is some evidence of deliberate adulteration of products. The principle of strict liability that applies in sport means that innocent ingestion of prohibited substances is not an acceptable excuse, and athletes testing positive are liable to penalties. Although it is undoubtedly the case that some athletes are guilty of deliberate cheating, some positive tests are likely to be the result of inadvertent ingestion of prohibited substances present in otherwise innocuous dietary supplements

9. Nutritional supplements cross-contaminated and faked with doping substances

H Geyer; MK Parr; Koehler K, Mareck U

Abstract

Since 1999 several groups have analyzed nutritional supplements with mass spectrometric methods (GC/MS, LC/MS/MS) for contaminations and adulterations with doping substances. These investigations showed that nutritional supplements contained prohibited stimulants as ephedrines, caffeine, methylenedioxymetamphetamie and sibutramine, which were not declared on the labels. An international study performed in 2001 and 2002 on 634 nutritional supplements that were purchased in 13 different countries showed that about 15% of the nonhormonal nutritional supplements were contaminated with anabolic-androgenic steroids (mainly prohormones). Since 2002, also products intentionally faked with high amounts of 'classic' anabolic steroids such as metandienone, stanozolol, boldenone, dehydrochloromethyl-testosterone, oxandrolone etc. have been detected on the nutritional supplement market. These anabolic steroids were not declared on the labels either. The sources of these anabolic steroids are probably Chinese pharmaceutical companies, which sell bulk material of anabolic steroids. In 2005 vitamin C, multivitamin and magnesium tablets were confiscated, which contained cross-contaminations of stanozolol and metandienone. Since 2002 new 'designer' steroids such as prostanozol, methasterone, androstatrienedione etc. have been offered on the nutritional supplement market. In the near future also cross-contaminations with these steroids are expected. Recently a nutritional supplement for weight loss was found to contain the beta2-agonist clenbuterol. The application of such nutritional supplements is connected with a high risk of inadvertent doping cases and a health risk. For the detection of new 'designer' steroids in nutritional supplements, mass spectrometric strategies (GC/MS, LC/MS/MS) are presented

10. Pharmacology of stimulants prohibited by the World Anti-Doping Agency (WADA)

Docherty JR
http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2439527/

Abstract

This review examines the pharmacology of stimulants prohibited by the World Anti-Doping Agency (WADA). Stimulants that increase alertness/reduce fatigue or activate the cardiovascular system can include drugs like ephedrine available in many over-the-counter medicines. Others such as amphetamines, cocaine and hallucinogenic drugs, available on prescription or illegally, can modify mood. A total of 62 stimulants (61 chemical entities) are listed in the WADA List, prohibited in competition. Athletes may have stimulants in their body for one of three main reasons: inadvertent consumption in a propriety medicine; deliberate consumption for misuse as a recreational drug and deliberate consumption to enhance performance. The majority of stimulants on the list act on the monoaminergic systems: adrenergic (sympathetic, transmitter noradrenaline), dopaminergic (transmitter dopamine) and serotonergic (transmitter serotonin, 5-HT). Sympathomimetic describes agents, which mimic sympathetic responses, and dopaminomimetic and serotoninomimetic can be used to describe actions on the dopamine and serotonin systems. However, many agents act to mimic more than one of these monoamines, so that a collective term of monoaminomimetic may be useful. Monoaminomimietic actions of stimulants can include blockade of re-uptake of neurotransmitter, indirect release of neurotransmitter, direct activation of monoaminergic receptors. Many of the stimulants are amphetamines or amphetamine derivatives, including agents with abuse potential as recreational drugs. A number of agents are metabolized to amphetamine or metamphetamine. In addition to the monoaminomimetic agents, a small number of agents with different modes of action are on the list. A number of commonly used stimulants are not considered as Prohibited Substances.

11. Contamination of supplements: an interview with Professor Ron Maughan by Louise M. Burke

Maughan R

Abstract

This issue of IJSNEM features two articles related to supplement use by athletes. In one (Morrison et al. 2004), people who undertake regular exercise in a gym were found to report the use of a wide variety of supplements. The other paper (Goel et al. 2004) dealt with one of the issues that a sub-group of athletes need to consider before deciding to take supplements - the risk of a positive drug test if the product contains substances banned by the anti-doping codes under which their sport is conducted. This issue received much publicity earlier in the year when top tennis player Greg Rusedski tested positive for the steroid nandrolone as the result of inadvertent intake via a contaminated supplement. In this article, Professor Ron Maughan, Chair of Sports Nutrition at Loughborough University in the United Kingdom, advisor to the British Olympic team, and co-editor of IJSNEM, provides his insight on this important topic.

12. Inadvertent use of drugs in sport

The role of healthcare professionals

– Written by David Mottram, United Kingdom

In accordance with the regulations of the World Anti-Doping Code, the World Anti-Doping Agency (WADA) publishes, annually, the List of Prohibited Substances and Methods[1]. Athletes

are subject to routine anti-doping tests for these prohibited substances and methods, with no prior notice, both within competition and out-of-competition[2].
Many athletes who have recorded an Adverse Analytical Finding (AAF) arising from an anti-doping test have claimed that the presence of the prohibited substance was due to inadvertent use.

Some recent examples of cases in which athletes have claimed such inadvertent use are shown in Table 1.

Athletes may take drugs for a wide variety of reasons. These include the treatment of medical conditions, social or recreational use, nutritional supplementation and for illegal performance enhancement[3]. With the exception of illegal performance enhancing drug use, such reasons for taking drugs could lead to the inadvertent use of substances that are included on the WADA Prohibited List.

The term 'inadvertent' may be defined as 'not resulting from or achieved through deliberate planning'[4]. However, athletes should be aware that WADA's principle of strict liability states that "each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not an athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault"[5].

The onus to prove that use was inadvertent therefore rests with the athlete. The variability in the sanctions that were imposed on those athletes described in Table 1 reflects the degree to which the athletes were or were not able to prove their case for inadvertent use.

In this paper, the factors surrounding the inadvertent use of prohibited substances by athletes are explored. An evaluation is made of the types of prohibited substances that may be taken inadvertently, with particular regard to supplements and recreational drugs. The systems employed by the anti-doping organisations to sanction inadvertent prohibited drug use are reviewed. Finally, some thoughts on the role of Athlete Support Personnel, particularly healthcare professionals, in advising athletes on this issue are presented.

EXAMPLES OF PROHIBITED SUBSTANCES THAT MAY BE TAKEN INADVERTENTLY

Table 2 lists some of the more common prohibited substances that may be taken inadvertently by athletes and the potential routes for their administration.
Supplements provide the primary route for the inadvertent use of prohibited substances. However, other methods of administration should not be discounted and are therefore included in the brief review, below.

Food

The case of Alberto Contador, in 2010, raised the concern of foodstuffs being contaminated with prohibited substances such as the anabolic agent, clenbuterol. This drug has been used in countries such as China and Mexico as a growth promoter for cattle. A large number of similar cases relating to inadvertent use of clenbuterol have subsequently been reported[6,7].

Differentiating between the intentional use of clenbuterol or its consumption through food contamination during anti-doping testing is challenging, however, analytical procedures are being investigated[8].

Additional cases involving foodstuffs contaminated with other growth promoting agents, which have resulted in an AAF during routine anti-doping tests, have been described[9]. Other types of foodstuff that have the potential to produce inadvertent doping include products containing hemp, derived from Cannabis sativa. Brownies, cookies and cakes prepared with hemp could result in excretion of the metabolites of tetrahydrocannabinol within the urine[10]. Similarly, the consumption of poppy seeds in bread or cakes could give rise to morphine excretion within the urine.

Medicines

Many of the classes of drugs that appear on the WADA Prohibited List are prescribed for the treatment of medical conditions, such as asthma, type 1 diabetes, certain cardiovascular disorders and sports injuries. Inadvertent use of these drugs, by athletes, should not occur provided the medical practitioner prescribing such drugs is conversant with and complies with the WADA regulations appertaining to Therapeutic Use Exemption (TUE)[11].

In contrast, inadvertent use of prohibited stimulants, such as cathine, ephedrine and pseudoephedrine, through self-medication with over-the-counter (OTC) medicines, provides a much greater cause for concern for athletes. Athletes should therefore always seek expert advice from healthcare professionals before self-medicating for any minor medical condition such as hay fever, the common cold or cough. Another potential route for inadvertent doping is through the use of over-the-counter 'natural' medicines that include animal tissues containing endogenous anabolic androgenic steroids[9].

It is worth noting that over-the-counter medicines do not always contain the same ingredients in each country. This was highlighted by the case of Alain Baxter, the British skier who tested positive for the prohibited drug levmethamphetamine, having used a Vicks sinus inhaler purchased in the USA during the 2002 Salt Lake City Winter Olympic Games. The equivalent Vicks product that he normally purchased in the UK did not contain this ingredient.

Recreational drugs

'Recreational' use of drugs is an increasingly common aspect of social behaviour in many countries. Published research concerning the extent to which athletes use recreational drugs is scarce. However, it is reasonable to assume that a proportion of athletes use drugs recreationally. Indeed, a study on self-admitted behaviour among competitive Hungarian athletes indicated that 31.7% used recreational drugs[12].

The more frequently used recreational drugs, that are included in the WADA Prohibited List and may therefore result in inadvertent doping, are amphetamines, narcotics, cocaine and cannabinoids. These classes of drugs, with the possible exception of cannabinoids, have the potential to significantly enhance sport performance and are liable to be used deliberately as doping agents as well as being used in a recreational context.

With specific regard to cannabis, its use may reduce anxiety and produce a feeling of euphoria. These properties could be beneficial in alleviating the stress induced through competition, either pre- or post-event. However, cannabis smoking impairs cognition and psychomotor and exercise performance[13]. The balance of evidence suggests that cannabinoids, in most sports, are ergolytic rather than ergogenic[14]. Nonetheless, the annual statistics from WADA Accredited Laboratories show that cannabinoids is a class of drugs that is frequently analysed and reported by the laboratories (Table 3).

It is worth noting that cannabinoids are only tested in-competition, therefore, any positive results found in urine samples taken out-of-competition are not reported by laboratories. The extent of cannabis use by athletes could therefore be significantly higher than that indicated by these WADA statistics.

Some of the pharmacokinetic properties of cannabinoids may account for the high frequency of reporting by WADA laboratories. Cannabinoids accumulate in fatty tissue from where they are slowly released over extended periods of time. Complete elimination from the body may take as long as 30 days[15]. A further reason for the extended period of elimination for cannabinoids is that the metabolites are only partially excreted in the urine whereas most (65%) are excreted into the gastrointestinal tract from where they are re-absorbed into the body, a process that continues over a considerable period of time[16]. This delayed elimination is likely to be associated with recreational and therefore inadvertent use of cannabinoids by athletes.

Unsurprisingly, some athletes who have recorded an AAF for cannabinoids, have claimed that it was through the passive inhalation of cannabis smoke from other users. However, WADA regulations now state that urinary levels of tetrahydrocannabinol (Carboxy-THC) must exceed a threshold of 150ng/mL in order to trigger an AAF[17], a situation which is unlikely to occur through passive inhalation.

Supplements

Supplement use by high-performance athletes has been estimated to be between 65 and 95%[18]. In support of this estimate, some recent reports relating to the extent of supplement use by elite athletes are shown in Table 4.

The evidence shows clearly that supplements are used extensively by elite athletes, a practice that is imitated by sportsmen and sportswomen at all levels of performance. In addition to the ongoing debate as to whether it is always beneficial for athletes to use supplements in sport, one must also ask the critical question, are supplements safe to use?

Since 2003, a significant number of nutritional supplements have appeared on the market, with claims that they can produce remarkable increases in muscle growth and improved strength. In some cases, these claims were attributable to ingredients with unapproved names which have been analysed as containing anabolic steroids such as metandienone, stanazolol, oxandrolone and dehydrochloromethyltestosterone[9]. Supplements that contain 'designer steroids' have produced positive doping results with serious consequences for Mr Ngunuzas' concerned[25].

Other supplements, advertised as fat burners or mood enhancers, may contain prohibited stimulants such as ephedrine, sibutramine or methylhexaneamine, undeclared on the product label[26].

It has been reported that a significant percentage (5 to 20%) of supplements contain prohibited substances, which are present either through inadvertent contamination or through deliberate adulteration during the production process[18].

When considering evidence such as that presented above, it was unsurprising to learn that, in the UK, "44% of anti-doping rule violations in 2012 were claimed to be associated with supplement usage" (personal communication with UK Anti-Doping).

It has been recommended that athletes should only use supplements after a careful cost-benefit analysis[27]. This advice makes perfect sense since the cost can include the significant threat of sanctions through inadvertent use of prohibited substances.

ANTI-DOPING REGULATIONS RELATING TO INADVERTENT USE OF PROHIBITED SUBSTANCES

The 2015 WADA Code (Article 2.1.1) states that: "It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. 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."

Where an athlete claims 'no fault or negligence', he or she must establish how the prohibited substance entered his or her system, a difficult undertaking in the case of inadvertent use. On the basis that prevention offers a more rational approach to this problem, athletes would benefit from expert advice and support in order to avoid inadvertent prohibited drug use.

WHAT CAN HEALTHCARE PROFESSIONALS DO TO ADVISE ATHLETES ON AVOIDING INADVERTENT USE OF PROHIBITED SUBSTANCES?

The 2015 World Anti-Doping Code recommends a more proactive role for Athlete Support Personnel, a group which includes healthcare professionals, in the prevention of doping in sport. The inadvertent use of prohibited substances in sport is preventable in most cases. There are a number of ways in which healthcare professionals can advise and support athletes to reduce the incidence of inadvertent use of prohibited substances. These are summarised in Figure 1.

SUMMARY

Athletes who record an AAF, arising from an anti-doping test, frequently claim that the drug had been taken inadvertently.

Inadvertent use of prohibited substances in sport may arise through drug treatment for medical conditions, taking drugs recreationally, using nutritional supplements or consuming contaminated food.

Sanctions for anti-doping rule violations are severe.

Although the potential for inadvertent use of prohibited substances is recognised by anti-doping agencies, the onus to prove inadvertent use rests with the athlete.

There are a number of ways in which healthcare professionals can advise and support athletes in order to reduce the incidence of inadvertent use of prohibited substances in sport.

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David R. Mottram B.Pharm., Ph.D., F.R.Pharm.S.
Emeritus Professor of Pharmacy Practice
Liverpool John Moores University Liverpool, UK Contact: dr.mottram@btinternet.com

13. Supplements and Inadvertent Doping – How Big Is the Risk to Athletes

Judkins C, Prock P

Dr. Catherine Judkins, HFL Sport Science/LGC Group, Newmarket Road, Fordham CB7 5WW (UK), Tel. +44 1638 724400, E-Mail cjudkins@hfl.co.uk

Abstract

Despite ongoing improvements to regulatory and manufacturing guidelines, the potential for contaminated nutritional supplements to cause a failed doping test for an athlete remains a concern. Several surveys of supplements available through the internet and at retail have confirmed that many are contaminated with steroids and stimulants that are prohibited for use in elite sport.

Suggested responses to this issue include the complete avoidance of all supplements.

However, this approach seems to be unrealistic as many athletes use nutritional supplements for very different reasons. In addition, the number of publications describing trials that demonstrate the benefit of certain nutritional products has also increased over the last decade or so. This ensures that for many sports the use of supplements will remain a common practice. In response to the issue of contamination in nutritional supplements, many reputable manufacturers have their products rigorously tested by sports anti-doping laboratories to help ensure as far as possible that the risks to an athlete remain minimal. In this chapter we review the issue of supplements and contamination, and look at how this might be addressed through effective quality control procedures at the manufacturing facility and through the highly sensitive testing of finished products using appropriately accredited tests.

14. Inadvertent doping through nutritional supplements is a reality

PJ van der Merwe, E Grobbelaar

Abstract

Objective. Inadvertent doping through the use of nutritional supplements is a potentially important cause of the increase in positive drug tests involving high-profile Olympic athletes. The aim of this study was to screen over-the-counter nutritional supplements for the presence of steroid or stimulant compounds banned by the International Olympic Committee (IOC) and the World Anti-Doping

Agency (WADA).

Method. Thirty different nutritional supplements from 14 different manufacturers were bought at shops in Bloemfontein, South Africa and analysed for testosterone and nandrolone prohormones, various ephedrines and caffeine.

Results. Eighteen (60%) of the 30 supplements contained no prohibited substances. Of the 12 (40%) positive supplements, 8 (66.7%) contained prohormones and 4 (33.3%) contained stimulants. Six supplements contained prohormones, which were listed on the labels, while 2 contained prohormones not listed on the labels. The stimulants were listed on the labels as Ma Huang, Guarana and Kola extracts and all contained a mixture of ephedrines and caffeine.

Conclusion. The results showed that approximately 7% of supplements tested may be mislabelled or contaminated with banned substances and that inadvertent doping through nutritional supplement use is a reality for athletes. The sporting community should therefore be aware that supplements might contain anabolic androgenic steroids and stimulants that are not declared on the labels.

15. Q's & A's

4. What is the status of methylhexaneamine (MHA)?

Methylhexaneamine (MHA), which sometimes is presented as dimethylamylamine, remains prohibited in competition as a specified stimulant under Section 6.b.

It has been considered a stimulant at least since WADA took over responsibility for the List in 2004. It was reclassified on the 2011 List to become a 'specified substance'.

Methylhexaneamine was sold as a medicine up to the early 1970s and has medicinal properties, but to WADA's knowledge it has not been sold as a medicine since then.

5. What is the link between geranium oil and methylhexaneamine (MHA)?

Recent scientific studies have clearly demonstrated that natural geranium oil does not contain methylhexaneamine (MHA), and the use of geranium oil cannot be considered as being the source of the presence of MHA or related metabolites in a urine sample collected for anti-doping purposes.

Methylhexaneamine (MHA) is a pharmacological substance classified as a stimulant that was commercialized up to the beginning of the seventies. MHA reappeared a few years ago as a constituent of dietary supplements sold freely on some markets or on the Internet.

MHA is prohibited as a stimulant under section S6.b of the 2013 List of Prohibited Substances and Methods.

Athletes should be aware that MHA has been made available under several names, one being geranium oil

https://www.wada-ama.org/en/questions-answers/prohibited-list

7. What is a 'specified substance'?

A specified substance is a substance which allows, under defined conditions, for a greater reduction of a two-year sanction when an athlete tests positive for that particular substance.

The purpose 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.

Specified substances are not necessarily less serious agents for the purpose of doping than other prohibited substances, and nor do they relieve athletes of the strict liability rule that makes them responsible for all substances that enter his or her body.

However, there is a greater likelihood that these substances could be susceptible to a credible non-doping explanation, as outlined in section 10.4 of the World Anti-Doping Code.

This greater likelihood is simply not credible for certain substances – such as steroids and human growth hormone – and this is why these are not classified as specified.

16. Dietary supplements containing prohibited substances: A review (1)

P van der Bijl, BSc Hons (Chem), BSc Hons (Pharmacol), BChD, PhD, DSc

Emeritus Professor and Former Head, Department of Pharmacology, Faculty of Medicine and Health Sciences, Stellenbosch University, Tygerberg, Cape Town,
South Africa; and Invited Foreign Professor, Department of Pharmacology, Pirigov's Russian National Research Medical University, Moscow, Russia

Methylhexaneamine

Methylhexaneamine, a stimulant originally intended to be marketed as a nasal decongestant, has been detected as an ingredient of dietary supplements and was declared a prohibited compound bythe WADA in 2009.

The serious adverse effects of this stimulant have recently been highlighted by a case report on the death of two US soldiers who were taking commercially available dietary supplements that contained methylhexaneamine. Both soldiers collapsed from cardiac arrest during physical exertion and ultimately died.

The issues surrounding this stimulant have been complicated by the fact that methylhexaneamine is found on package labels under a very wide variety of chemical and non-chemical names, e.g. 1,3-dimethylamylamine, 1,3-dimethylpentylamine, 2-amino-4-methylhexane, 2-hexanamine, 4-methyl-2-hexanamine, 4-methyl-2-hexylamine, 4-methylhexan-2-amine, dimethylamylamine, methylhexaneamine, dimethylpentylamine, floradrene, forthan, forthane, fouramin, geranamine, geranium extract, geranium flower extract, geranium oil, geranium stems and leaves, metexaminum, methexaminum, etc.

Only the names methylhexaneamine and dimethylpentylamine appear on the WADA 2011 list of prohibited agents, creating even further confusion among consumers and complicating identification. While geranium root extract or geranium oil are mentioned as natural sources of methylhexaneamine, the presence of this compound in these plant products could not be demonstrated on analysis, strengthening the suspicion that it was added during or after the

manufacturing process.[27]

Conclusion
While food supplements and pharmaceutical agents may enhance strength and performance of athletes, there is insufficient scientific data to support this theory. Although stimulants have been widely used among athletes for performance enhancement, these substances are prohibited by the WADA. In addition, ingestion of stimulants via accidentally or intentionally contaminated dietary supplements may lead to failed doping tests and its consequences. The presence
of stimulants in nutritional supplements may also lead to serious systemic adverse effects; athletes, coaches and sports doctors should be aware of these pitfalls when using or advising on the intake of these products. The risk of accidental ingestion of forbidden substances from dietary supplements can be diminished by using 'safe' products listed on databases such as those available in the Netherlands and Germany.

17. Inadvertent Doping and the CAS: Part 1

Review of CAS Jurisprudence of Article 10.4
Antonio Rigozzi and Brianna Quinn 27.11.2013

18. USADA - Athlete Advisory – Methylhexaneamine And Dietary Supplements - June 2011

www.usada.org/athlete-advisory-methylhexanemine-and-dietary supplements/

19. Methylhexaneamine: What exactly is the drug that Toronto Blue Jays prospect Marcus Stroman tested positive for?

www.thestar.com/sports/baseball/2012/08/29/methylhexanemine_what_exactly
Liam Casey - Staff Reporter on Wed Aug 29 2012

Excerpt from article

> While it's chemically related to amphetamines it's only slightly more powerful than coffee according to Greg Wells, Kinesiology Professor at the University of Toronto who has educated Olympic athletes
> "It's a short acting stimulant but it is not something that we ought to hang this guy up for anything like that" said Wells.
>
> It is a nasal decongestant, but it's considered a stimulant. It is considered a vasoconstrictor, increasing heart rate and sending more blood to areas of the body that need it.

20. Canadian Centre for Ethics in Sport Supplements containing methylhexaneamine or DMAA can lead to a doping violation

www.cces.ca/en/advisories-34

Cori Mc Phail, Manager Communications and Technology
cmcphail@cces.ca

See also

21. **Drug of the Year: Methylhexanamine and the supplement industry** // Why your supplement might be a 'loaded gun' 15 December 2010

http://sportsscientists.com/2010/12/drug-of-the-year-methylhexanamine-and-the-supplement-industry/

Professor Ross Tucker PhD
Professor of Exercise Physiology with the School of Medicine of the University of the Free State

22. **A house of cards? Sprinting crisis as Gay, Powell and more Jamaicans fail controls** // Sprinting tumbles down as Gay, then Powell, then Simpson, Carter named as failing drug controls 14 July 2013

http://sportsscientists.com/2013/07/a-house-of-cards-sprinting-crisis-as-gay-powell-and-more-jamaicans-fail-controls/

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