SA INSTITUTE FOR DRUG FREE SPORT (SAIDS)

ANTI DOPING DISCIPLINARY HEARING

ATHLETE:	**MR LUVO MANYONGA**
SPORTS FEDERATION:	**ATHLETICS SOUTH AFRICA ("ASA")**
DATE:	**TUESDAY 22 MAY 2012**
PLACE OF HEARING:	**SAIDS OFFICES, CLAREMONT, CAPE TOWN, SOUTH AFRICA**
DISCIPLINARY PANEL ("PANEL"):	**MR ANDREW BREETZKE (CHAIRMAN)**
	DR GEORGE VAN DUGTEREN (MEDICAL REPRESENTATIVE)
	MR HASNODIEN ISMAIL (SPORTS ADMINISTRATOR)
PROSECUTOR:	**ADV NIC KOCK**
ATHLETE REPRESENTATIVE:	**MR BENJAMIN MARIO SMITH**
SCRIBE:	**MS RAYANAH REZANT**
OBSERVERS:	**MR FAHMY GALANT (SAIDS), PROF DEBBIE HAMMAN**
ANTI-DOPING RULE VIOLATION:	**ANTI-DOPING RULE VIOLATION IN TERMS OF ARTICLE 2.1 OF THE SAIDS ANTI-DOPING RULES.**

APPLICABLE LAW

SAIDS is an independent body established under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 (as amended). SAIDS has formally accepted the World Anti-Doping Code ("WADC") adopted and implemented by the World Anti-Doping Agency in 2003. In so doing, SAIDS introduced anti-doping rules and regulations to govern all sports under the jurisdiction of South African Sports Confederation and Olympic Committee, as well as any national sports federation.

The SAIDS Anti-Doping Rules ("the Rules") were adopted and implemented in 2009. These proceedings are therefore governed by the Rules. This SAIDS Anti-Doping Disciplinary Panel has been appointed in accordance with Article 8 of the Rules, to adjudicate whether the Athlete has violated the said Rules, and if so the consequences of such a violation.

PROCEDURAL MATTERS

The Athlete was in attendance, and was assisted by Mr Benjamin Mario Smith ("BMS"). Ms Dawn Saunders ("DS") was present as a witness for the Athlete.

The rights of the Athlete were explained to him, and he acknowledged that he understood his rights, understood the process and was ready to proceed. The process to be followed was explained in detail to the Athlete. He was also advised that should he not understand any issue raised in the proceedings, he was to ask the Chair for clarity.

SUMMARY OF EVIDENCE AND ARGUMENT

The Prosecutor presented a bundle of documents marked "A" to "E" as documentary and corroborative evidence to the oral evidence presented.

The charge against the Athlete was set out in written correspondence addressed to the Athlete on the 3 May 2012. The charge against the Athlete read as follows:

> *You have been charged with an anti-doping violation in terms of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport (SAIDS).*

On 20 March 2012, you provided a urine sample (A2633714) during an in-competition test. Upon analysis the South African Doping Control Laboratory at the University of Free State reported the presence of a prohibited substance in your urine sample. The substance identified was Methamphetamine (d-). Methamphetamine is categorised under Class S6 "Stimulants" in specific (a) Non-Specified Stimulants, on the World Anti-Doping Code 2012 Prohibited List International Standard.

The Athlete advised that he understood the charge. Evidence was led by the prosecutor that the Athlete had not requested that his B-Sample be tested (email correspondence of 16 April 2012). The Athlete admitted that he was Guilty of the charge as set out, and acknowledged that he understood the implications of such an admission. He had used the social drug TIK, a highly addictive Methamphetamine drug, and this had resulted in the positive test.

The Athlete presented evidence as to sanction, the salient points being:

- The Athlete is a professional athlete (long jump), who has represented South Africa.

- He accepted that he has breached the Anti Doping regulations.

- He earns an income from athletics, and must provide for his child and extended family.

- He had used TIK on several occasions, after he had observed a friend using TIK to recover from a drunken spell. The Athlete did not want to go to his mother's house whilst under the influence and therefore used TIK to ensure he was sober. After this he became a user.

- He did not use TIK to enhance his athletics performance.

- He had disappeared from his coach's home before the competition on the 20 March 2012 and was not aware that he was going to compete. He had used TIK the previous day and was "caught off guard".

- He is aware his actions are wrong and with the assistance of his coach consulted a sports psychologist, Dawn Saunders. He was then referred to rehabilitation (Harmony), and is currently still in rehabilitation.

- The Athlete stated that he was willing to be trained by Harmony staff and by SAIDS to assist and educate other athletes in a drug education program.

- The Athlete pleaded that the tribunal take into consideration that this is his first offence, and that he has "nothing more than Athletics".

Under cross examination, the Athlete stated that he had been using TIK three times a week for a period of three months. He did drink alcohol, but other than the TIK had not used any other unlawful substances. He had investigated TIK on the internet, and determined that it stayed in one's system for a period of 9 days. Given that he had not expected to participate in the meeting on the 20 March 2012, he had not anticipated being tested. The Athlete later contradicted his evidence in stating that he had started using TIK in July 2011. Since being in rehabilitation, the Athlete had not used TIK – a period of 21 days.

Further evidence presented under cross examination of the Athlete focused on his personal circumstances. He was 21 years of age, and had grown up in Mbekweni (Paarl). He had finished grade 10 at school and attempted to study at Boland College, but this was not successful. He has no idea of what he will do in future after his athletics career.

As a professional athlete, he trains at Stellenbosch Athletics Club. He has not had any formal education on doping issues, but has been tested 5 times. He is aware that TIK is illegal, and therefore managed his usage relative to his participation in events. He bought the TIK from a dealer in Kyamandi.

The Athlete had jumped 8.26m in June last year, and had jumped 8.07m in 2012. It was his ambition to qualify for the Olympic Games.

Further evidence was led by the coach of the Athlete BMS. The salient points being:

- He has been coaching the Athlete since 2009.

- The Athlete has the potential to become one of the world's greatest long jumpers.

- The Athlete has come from a poor and broken family. His mother earns R120 per week as a domestic cleaner.

- The Athlete has displayed a lack of "vital life skills", which can be attributed to his upbringing. His father has rarely worked and his brother and sister have been in jail.

- The success of the Athlete has given his family a false sense of being wealthy, and the Athlete has wasted his prize money on friends and alcohol. It is these friends who introduced him to TIK.

- BMS gave evidence as to the nature of the drug, how addictive it is, and the fact that it distorts the user's perception of reality and impairs judgement.

- BMS was adamant that the use of the drug was not to enhance performance.

Further evidence was led as to the impact of the positive test on the Athlete, and specific mitigating factors:

- The Athlete did use TIK, but has admitted to the fact that he has an addiction problem. BMS immediately arranged assistance for the Athlete.

- If the Athlete were to be banned, he would lose his income, would have no purpose in life and would possibly resort to TIK again.

- The Athlete needs one more qualifying jump to be able to go to the London Olympics.

- Specific factors in mitigation are: the Athletes contrition; a first offence; no intention to enhance performance; his willingness to assist in drug education; the negative publicity which is already caused personal hardship; his co-operation in this process.

- BMS pleaded for a lenient sanction, as the circumstances of this case are unique.

Under cross examination it became apparent that there had been various behavioural issues with the Athlete during the previous year. The Athlete had borrowed money to pay for TIK, and this had led to him being indebted to the dealers. The Athlete resided, along with other athletes, at the premises of BMS and had clearly abused this relationship by taking possessions from BMS. BMS had also helped the Athlete's parents financially in an attempt to ensure that the Athlete had peace of mind. The Athlete has received very little support from ASA.

DS gave evidence that she had consulted with the Athlete after BMS had advised that he had been struggling with him. It was immediately evident that he had a drug problem and that he was not able to handle his success. She had him referred to rehabilitation immediately.

In closing the Prosecutor stated that the case was tragic in that none of the institutions that are supposed to be nurturing this Athlete have done so; the South Africa Sports Confederation and Olympic Committee ("SASCOC"), ASA and Stellenbosch Athletics Club have failed in this regard. He argued that neither Articles 10.5.1 nor 10.5.2 applied in this case as the Athlete had fault and was aware that his actions were wrong. On this basis Prosecutor asked that the sanction be for a period of 2 years.

BMS in closing argued that there was no fault or negligence on the part of the Athlete, and that the sanction be reduced.

FINDING ON THE CHARGE

The presence of the substances identified as *Methamphetamine (d-)* was proven. The Panel has therefore determined that the Athlete is Guilty of the offence as set out, and is in

violation of Article 2.1 of the 2009 Anti-Doping Rules of the South African Institute for Drug-Free Sport.

DISCUSSION ON EVIDENCE AND ARGUMENT AS TO SANCTION

Article 2.1.1 of the Rules reads as follows:

> *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 violation under Article 2.1.*

This Article is the foundation of the strict liability principle that is applicable to anti-doping violations. There is a clear and definitive standard of compliance that all athletes are required to adhere to and it is on this basis that they are held accountable. Ignorance of the anti-doping provisions and/or prohibited list cannot be accepted as an excuse. The responsibility that rests on the athlete is therefore clear, and the liability that rests on the Athlete *in casu* has been established.

The Athlete has been found guilty of a doping offence in respect of the substance identified as *Methamphetamine (d-)*, being a Class S6 "Stimulants" in specific (a) *Non-Specified Stimulants,* on the World Anti-Doping Code 2011 Prohibited List International Standard. As such, it is for the Panel to determine whether there are grounds for a reduction in the period of ineligibility in terms of Article 10.5 of the Rules. Article 10.5 reads as follows:

> **10.5 Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances.**
>
> 10.5.1 *No Fault or Negligence*
>
> If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Marker*s or it*s Metabolites* is detected in an *Athlete's*

Sample in violation of *Code* Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* eliminated. In the event that this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of *Ineligibility* for multiple violations under Article 10.7.

10.5.2 *No Significant Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of *Code* Article 2.1 (Presence of *Prohibited Substance*), the *Athlete* shall also establish how the *Prohibited Substance* entered their system in order to have the period of *Ineligibility* reduced.

Article 10.5 sets 2 conditions for the reduction of the ineligibility period to be applied on an athlete following a finding of guilty for the anti-doping violation as set out above:

1. The athlete must establish how the Prohibited Substance entered his system;

2. The athlete must establish that he bears No Fault or Negligence, or No Significant Fault or Negligence.

The Athlete *in casu* has satisfied the first condition. There is no dispute that the Prohibited Substance entered his system through his use of the drug TIK. He has admitted this fact, and is in a rehabilitation facility to deal with his addiction.

The issue to determine relates to the second condition. The commentary to Articles 10.5.1 and 10.5.2 states that they "*are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."* The Rules provide a definition of *No Fault or Negligence* and *No Significant Fault or Negligence:*

> *No Fault or Negligence: The Athlete's establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method.*
>
> *No Significant Fault or Negligence: The Athlete's establishing that their 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.*

From these definitions it is evident that there is a duty of care that rests on the athlete. The onus on an athlete in respect of the application of *No Fault or Negligence* is onerous. It requires that the athlete must have not known or suspected that they had used a prohibited substance, and that the athlete must have exercised utmost caution in his actions. For example, an athlete is required to provide his/her physician with information that he/she is an athlete subject to applicable anti-doping regulations (*ATP v Vlasov 24/4/2005*). There is a heightened duty of diligence and a personal responsibility on the athlete (CAS *2005/A/830 G.Squizzato v/FINA; ITF v Koubek 18/01/2005*). However, in the matter of *CAS 2009/A/1930 WADA v. ITF & Gasquet* the athlete argued that a positive test for cocaine was attributable to physical interaction with someone who had taken cocaine. The Panel accepted this argument and the athlete was found to have acted without fault or negligence.

To succeed with an argument of *No Significant Fault or Negligence*, all circumstances must be assessed in totality and provide evidence that the fault or negligence was not significant in relationship to the anti-doping rule violation. In such a case the period of ineligibility may be reduced to half of the applicable period. The issue as to whether the negligence of an athlete is significant has been debated in many cases, *CAS 2005/A/847 Knauss v. FIS; CAS*

2008/A/1489 CCES & BCS & Despres; CAS 2009/A/1870 WADA v. Hardy & USADA; CAS 2008/A/1565 WADA v. CISM & Turrini; CAS 2006/A/1133 WADA v. Stauber; ITF Doping Tribunal, ITF v. Koubek (2005); IBAF 10-001, IBAF v. Luque. In the Hardy matter, the athlete had returned an adverse analytical finding after using a contaminated nutritional supplement. She had taken various precautions prior to taking the supplement, including consulting the manufacturer, not purchasing from a third party – she exercised care and was found to bear "No Significant Fault or Negligence".

More relevant to the facts of the matter under discussion, are cases that have dealt with specific social drugs and the issue of *No Significant Fault or Negligence*. In this regard the following are of interest:

CAS 2008/A/1515 WADA v. Swiss Olympic Association & Daubney: In this matter the athlete tested positive for cocaine. The athlete argued that his drinks had been spiked, and hence the positive test. The Panel held that even if he were able to prove such sabotage, he would not be able to overcome the test of No Significant Fault or Negligence.

CAS 2007/A/1364 WADA v. FAW & James: the athlete had taken drugs whilst partying. Peer pressure, ignorance and commitment not to commit a future offence were not regarded as sufficient to overcome the burden of proof;

CAS 2008/A/1490 WADA v. USADA & Thompson: following a positive test for cocaine, the athlete was found by the Panel to bear no significant fault or no significant negligence due to the particular circumstances of the athlete. These included relative inexperience, not part of a coaching program, not participated in any doping program, no advice or warnings regarding doping. His sanction was reduced to one year.

In the matter of *CAS 2009/A/2012 Doping Authority Netherlands v Mr Nick Zuijkerbuijk,* the athlete tested positive for cocaine. In argument the athlete stated that the period of 2 years ineligibility is "out of proportion" and should only apply to use if doping where it intended to enhance performance. The Panel stated that doping regulations restrict the application

of proportionality and that the athlete had to prove exceptional circumstances for a reduction to be considered.

On the issue of proportionality, in the matter of *CAS 2005/A/830 Squizzato v/FINA*, the Panel stated as follows[1]: "*The Panel recognizes that a mere uncomfortable feeling alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (…)*". In the legal opinion of Justice Rouiller[2], he reviews the issue of proportionality as follows:

> *"Would it not be possible, in certain exceptional cases, to set the penalty at something less than the absolute one-year limit in order to take the personal situation of the offender into account, just as a criminal judge should do? This way of looking at the matter is seductive. But it fails to take account of a number of factors. The Code's aim is to completely eradicate doping, which is acknowledged as potentially fatal for the future of large sports competitions. Even if deterrence does not justify every means, the punitive system, which also takes on a general preventative role, must be in keeping with what is at stake. If the athletes themselves think, rightly, that this system is appropriate and necessary, that hardly leaves any room for criticizing it from the angle of proportionality..."*

In conclusion, the position on the discussion of Article 10.5 and its application can be summarised as follows: "No fault or Negligence" means that the athlete has fully complied with the duty of care. "No significant fault or Negligence" means that the athlete has not fully complied with his or her duty of care. The Panel has to determine the reasons which prevented the athlete in a particular situation from complying with his duty of care. For this

[1] As quoted in *CAS 2009/A/2012 Doping Authority Netherlands v Mr Nick Zuijkerbuijk*
[2] As discussed in Niggli and Sieveking, *Selected Case Law Rendered Under the World Anti Doping Code* 2006.

purpose, the Panel has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the Panel may then depart from the standard sanction (*CAS 2005/C/976 & 986, FIFA & WADA; CAS 2007/A/1370 & 1376 FIFA &WADA v/Dodo*).

It is therefore incumbent upon this Panel to review and evaluate the specific and individual circumstances of the Athlete *in casu*.

It is evident that the Athlete is at fault. He has intentionally used the social drug TIK. He has purchased the drug from dealers, ensured over an extended period that he has taken the drug during periods out of competition; intentionally not listed the drug on the anti-doping form. As such, Article 10.5.1 is not applicable.

Article 10.5.2 deals with the question of *No Significant Fault or Negligence.* In this regard the Athlete presented various arguments that must be considered:

- This is his first doping offence;
- He has shown remorse;
- He had no intention to enhance performance;
- He has an addiction problem, and is currently in a rehabilitation centre;
- He has received no formal education on doping in sport;
- He had immediately admitted he was guilty, and that he had made an error when confronted with notification of an anti-doping violation;
- The substance was only prohibited in-competition.

In addition to these points, the Panel also believes that the following factors are to be considered:

- The Athlete comes from a poor and dysfunctional social background. He has also had limited schooling. As such, he is a product of an impoverished background, and it is naive to expect him to be socially adept and astute merely because he has become a professional athlete. His circumstances would be dire were it not for his coach, who has attempted to mentor him and provide a structured environment for him.

- ASA and SASCOC have failed in their duty to support the Athlete. Although funds have been made available to the Athlete for purposes of participation, this in itself is not sufficient to provide a sound basis for a young athlete to manage a lifestyle that he is not accustomed to. He is young and immature and whilst he has needed professional guidance, these institutions have failed him;

- The Athlete has undoubted talent, and his athletics is his opportunity to escape the poverty that has been part of his life to date.

The prosecution argued that the Athlete had not been able to show that he had no significant fault or negligence, and as such the only appropriate sanction was that of 2 years.

Aggravating factors considered by the Panel are the following:

- Although the Athlete is young, he has participated in 5 anti-doping tests and is therefore aware of the process;

- He managed his TIK addiction to the extent that he researched the substance on the internet to determine how long it would remain detectable;

- He managed his TIK addiction so as to ensure that he was not using when participating in competitive events;

- He was at all times aware that his TIK usage was wrong.

Has the Athlete proved that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Significant Fault or Negligence, was not significant in relationship to the anti-doping rule violation? A review of specific arguments and case law as set out above, provides guidance:

1. It is a well established principle that the age of the Athlete is not a relevant factor in such matters. In *CAS 2009/A/2012 Doping Authority Netherlands v Mr Nick Zuijkerbuijk* the Panel stated as follows "*The circumstances, that the Athlete was only 23 years old, has admitted the anti-doping rule violation and was not aware of the possible consequences, are not relevant as with regard to the degree of his fault. The CAS has already affirmed in a previous CAS award that the age is not a relevant factor when imposing a sanction. ... it is not the age, sex or any other personal characteristics of an individual that determines the application of the anti-doping rules but the participation of an athlete in events governed by the rules. (CAS 2006/A/1032 Sesil Karatancheva v/International Tennis Federation)";*

2. Given that *Methamphetamine* is a prohibited substance and not listed as a specified substance, it is irrelevant as to whether the Athlete had an intention to enhance his sporting performance;

3. Can the personal circumstances of the Athlete be considered as an argument to prove no significant fault on the part of the Athlete. The totality of such circumstances was found to be relevant in the *CAS 2008/A/1490 WADA v. USADA & Thompson*, where the Panel found that age, knowledge of doping offences, not being a national or international athlete, no guidance, did amount to exceptional circumstances that justified a reduction in sanction to one year. This case is however, distinguishable from that under discussion. The Athlete is a professional athlete who has competed at the

highest level, he had been subjected to a number of doping tests, and was aware of the possibility of a positive test, hence his management of his addiction. The facts of *CAS 2009/A/2012 Doping Authority Netherlands v Mr Nick Zuijkerbuijk* have more in common with that of the Athlete in that *Zuijkebuijk* argued that this was his first offence, cocaine was not performance enhancing, the presence of cocaine was not an out-of-competition violation; his taking of cocaine was social; he had no intention to enhance performance; he has admitted his cocaine use and he was not aware that cocaine would still be traced 3 days after use. The Panel found that the athlete had failed to prove that he bears no significant fault or negligence and the sanction was a period of 2 years ineligibility.

However, it is not possible to avoid the personal social circumstances of the Athlete. His lack of basic formal education, dysfunctional social background and family poverty are factors that have contributed to his TIK addiction. The utilisation of social drugs amongst the peers of the Athlete appears to be the norm, rather than the exception. He lacks the social skills to manage his professional life as an athlete. The facts of this matter are an indictment on those formal structures that were supposed to provide him with support and guidance to ensure that he would be able to escape his cycle of poverty.

There can be no disputing that the Athlete is at fault. There is also no disputing that the facts of this case have caused the Panel significant emotional turmoil given the implications of any period of ineligibility on the life of the Athlete. The provisions of the WADC must be respected, but the exceptional social circumstances that many black athletes encounter in South Africa cannot be ignored. To ignore these circumstances would be an infringement on the personal rights of the Athlete. The Panel therefore finds that there are exceptional social circumstances that are relevant to the degree of fault.

In reviewing the totality of circumstances above, the sanction on the finding of Guilty is as follows:

1. The Athlete is ineligible to participate in any organised sport, club or higher level or as envisaged in Article 10.10 of the Rules, for a period of eighteen (18) months;

2. The period of eighteen (18) months commence as of 20 March 2012 (being the date of sample collection), in accordance with Article 10.9.4 of the Rules, as the Athlete made a timely admission of his transgression and error, to terminate on the 20 September 2013;

3. The above anti-doping violation occurred during the Yellow Pages Series Athletics Meeting on the 20 March 2012. The rule violation is therefore related to an in-competition test. In terms of Article 9 of the Rules an anti-doping violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition, including forfeiture of medals, points and prizes. In accordance with this Article, the Athlete therefore forfeits his performance in the said Yellow Pages Series Athletics Meeting.

In making the above finding, the Panel would also like to recommend that copy of this finding to be forwarded to the Minister of Sport, in so far as the various sporting bodies (ASA, SASCOC) have failed to fulfil their mandate to manage and nurture the Athlete. Furthermore, we believe that there is an obligation on the relevant authorities to ensure that a support structure is put in place to assist this Athlete during the period of ineligibility. This support should relate to his rehabilitation, as well as his need for mentoring and education in his capacity as a professional sportsman.

This done and signed at Cape Town, June 2012

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Andrew Breetzke (Chair)

For and on behalf of the Tribunal Panel

Dr George van Dugteren, Mr Hasnodien Ismail