

BEFORE THE ANTI-DOPIING APPEAL TRIBUNAL OF SOUTH AFRICA

(Instituted in terms of Section 17(2)(a) of Act No. 14 of 1997, as amended by Act No. 25 of 2006)

Case No.: AT 05/2012

In the matter between:-

WORLD ANTI-DOPING AGENCY (WADA)

(APPELLANT)

versus

Mr JOHAN PIETERSE (Athlete)

(FIRST RESPONDENT)

and

**SOUTH AFRICAN INSTITUTE FOR
DRUG-FREE SPORT (SAIDS)**

(SECOND REPENDENT)

DECISION

1. This is an Appeal by WADA against the Decision of the SAIDS Disciplinary Committee in respect of a hearing held on 6th March 2012.
2. Neither WADA nor the Athlete was present. Mr. Rahidien Cullis represented SAIDS.
3. The Athlete pleaded guilty to a contravention of an anti-doping rule violation in terms of Article 2.1 of the Anti-Doping Rules (ADR) of SAIDS in that in an in-competition test performed on a bodily sample provided by the Athlete at a match of the Tshwane University of Technology Rugby Club (the "Club") on 6 February 2012, a laboratory report of the SA Doping Control Laboratory dated 13 February 2012 revealed that the Athlete had tested positive for methylhexaneamine (dimethylpentylamine).
4. Methylhexaneamine (dimethylpentylamine) is a prohibited substance, which is classified under "S6 (b)" (Specified Stimulants) on the 2012 WADA Prohibited List.

5. The Athlete is a rugby union player, affiliated to the Club which in turn is affiliated to the South African Rugby Union (SARU), the national federation governing the sport of rugby union in South Africa. Although the Athlete does not currently earn his living from playing rugby union, he does receive R500 per match for playing rugby for the Club.
6. The Committee found that the Athlete has established how the substance entered his body and was satisfied on a balance of probability that the Athlete had no real intention to take a performance enhancing substance and imposed a sanction of 4 months ineligibility. It is against this sanction that WADA has appealed.

DETERMINING THE SANCTION

General

7. Pursuant to article 10.5 of SAIDS ADR, an athlete can establish that, in view of the exceptional circumstances of his/her individual case, the otherwise applicable period of ineligibility shall be eliminated (in case of no fault or negligence as per article 10.5.1) or reduced (in case of no significant fault or negligence as per article 10.5.2).
8. With respect to Specified Substances, article 10.4 of the SAIDS ADR further states:

*“Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete’s sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:
First violation: At a minimum, a reprimand and no period of ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. [...]”*

Origin of the prohibited substance in the athlete’s bodily specimen

9. In order to have the period of ineligibility eliminated or reduced under art. 10.4 or reduced under art. 10.5.2 of the SAIDS ADR, the Athlete must first establish how the prohibited substance entered his system.

10. In that respect, the standard of proof imposed upon the athlete pursuant to art 3.1 of the SAIDS ADR is the balance of probability.

11. We accept that the prohibited substance entered the Athlete's system as a result of his voluntary ingestion of the supplement known as Jack 3D (the "**Supplement**").

Explanations of the Athlete

12. The record of proceedings and the decision of the Committee provide more detail as to the circumstances in which the Athlete purchased and ingested the Supplement, as follows:

- 12.1. The Athlete bought the Supplement "off-the-shelf" from a pharmacy known as Dis-Chem, the particular branch of which was located at Waterfront Junction, Pretoria;
- 12.2. The Athlete claims to have asked the shop assistant (but not the pharmacist) whether the Supplement contained any prohibited substance and was informed that it did not;
- 12.3. The Athlete claims to have checked the ingredients of the Supplement and entered each one of them into both the SAIDS and WADA websites prior to ingestion;
- 12.4. The above facts are broadly corroborated by the father of the Athlete, who claims to have assisted his son with the internet checks in relation to the ingredients of the Supplement;
- 12.5. The Athlete's internet research did uncover statements that the Supplement may be illegal. More particularly, the Athlete stated at the hearing: *"Yes, it does tell you that it is illegal, but it also tells you that these are rumours."* When pressed by the SAIDS lawyer as to why he was prepared to accept the risk of taking the Supplement despite indications that it may be illegal, the Athlete responded: *"My research did not indicate that it was an illegal substance, just rumours."*
- 12.6. The Athlete did not ask a member of the Club's coaching staff whether the Supplement was safe and claims that the Club does not have medical support available;

- 12.7. The Athlete claimed that he bought the Supplement because it *"improves energy while playing"*. When asked by the SAIDS legal representative at the hearing whether he took the Supplement to try to "maximize [his] performance", the Athlete responded "yes".
- 12.8. The Athlete did not declare his use of the Supplement on the Doping Control Form. When asked at the hearing why he failed to declare the Supplement, the Athlete claimed that the *"Doping Control Officer said it was not necessary to list Jack 3D."*
13. Even if one accepts the Athlete's version of events, it follows that he took the Supplement to maximize his performance and increase his energy levels whilst playing.
14. The Athlete's basic internet research revealed to him the possibility that the Supplement might contain prohibited substances but he chose to dismiss the relevant indications as rumours. Furthermore and despite being on guard as to the potential risks of the Supplement, the Athlete consulted neither a pharmacist, nor medical doctor nor member of the Club's coaching staff with respect to his use of the Supplement.

Art 10.4 SAIDS ADR - Applicability

15. As art. 10.5.2 (no significant fault or negligence) does not apply in cases involving art.10.4 SAIDS ADR (see art.10.5.5 SAIDS ADR including the comment thereto), it is necessary to consider art. 10.4 before art. 10.5.2.
16. For art. 10.4 SAIDS ADR to apply, the Athlete must satisfy the Appeal Board that he did not take the Supplement for the purpose of enhancing sport performance; indeed, he must do so to the higher burden of the comfortable satisfaction of the Appeal Board and provide corroborating evidence in addition to his own word.
17. The Disciplinary Committee was *"satisfied on a balance of probability that he had no real intention to take a performance enhancing substance."* Not only is this finding wholly unsubstantiated, it also (i) erroneously applies the lower standard of "balance of probability" and (ii) seems wholly at odds with the statements of the Athlete at the hearing.

18. Quite apart from the Athlete's own admission that he took the Supplement to maximize his sport performance, the Supplement is manifestly designed and marketed to achieve that very purpose. Indeed, the label of the Supplement purports to bestow "*Ultra Intense Muscle-Gorging Strength, Energy, Power and Endurance*" on those that take it.
19. It is therefore self-evident that the Athlete took the Supplement to improve his sport performance, *a fortiori* when one considers that the requisite standard of proof to demonstrate the contrary is "comfortable satisfaction" and not on the balance of probabilities.
20. The pre-conditions of art. 10.4 SAIDS ADR are therefore not met and art. 10.4 SAIDS ADR is not applicable.

Art 10.5.2 SAIDS ADR – Does the Athlete bear significant fault?

i. *General*

21. Having established that 10.4 SAIDS ADR does not apply in this case, it is necessary to consider whether the Athlete might benefit from a reduction under art. 10.5.2 SAIDS ADR (no significant fault or negligence).
22. If an athlete establishes that he bears no significant fault or negligence (as defined in the Code), then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one half of the minimum period of ineligibility otherwise applicable, in this case a one-year minimum period of ineligibility.
23. A reduction of the otherwise applicable period of ineligibility is meant to occur only in cases where the circumstances are truly exceptional, i.e. when an athlete can show that the degree of fault or negligence in the totality of the circumstances was such that it was not significant in relation to the doping offence (comment to art.10.5.2 World Anti-Doping Code).

ii. *The Athlete took inadequate precautionary measures (if any)*

24. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body (art. 2.1.1 SAIDS ADR).
25. In this case, the Athlete failed to take adequate precautionary measures prior to ingesting the Supplement. Without limitation, he did not consult a medical doctor or conduct significantly detailed internet checks.
26. The Athlete's omissions must be considered as particularly serious on the basis that his internet research did reveal indications that the Supplement contained a prohibited substance. To dismiss such indications as mere rumours without seeking specialised advice is reckless in the extreme.
27. The Supplement manufacturer's website contains the following warning on the webpage relating specifically to Jack 3D

"It's mandatory that athletes or anyone subject to testing check with their governing body before using this product. Read the entire label, including directions, precautions & warnings. Tested athletes make up the extreme minority of the American public and have to follow strict rules on what they can and cannot use in competition. For example, compounds such as caffeine, creatine & 1,3 dimethylamylamine (also known as methylhexanamine, 2-amino-4-methylhexane & 1,3-dimethylpentylamine) may not be allowed by your specific sports organization. It's completely up to the user to get this and any dietary supplement cleared by their organization before using."

28. It seems to us that this warning is the "rumour" that the Athlete speaks about. It is noteworthy that the above warning gives the alternative names of 1,3 dimethylamylamine, including methylhexanamine which is one of the names set out in the WADA Prohibited List.

iii. *The Athlete cannot rely on any assurances of the sales assistant*

29. The Athlete claims that he relied on (or at least derived some comfort from) the assurances of the sales assistant in the pharmacy where he bought the Supplement.

30. Athletes have been held to be at significant fault for relying on the assurances of a general practitioner rather than a doctor specialised in sports medicine (CAS 2008/A/1565 WADA v. CISM & Turrini). In this case, the Panel found that:

"[.....] the Athlete cannot rely on advice from his personal physician in these matters, especially when the doctor is no expert on sports medicine."

31. If relying on specific advice from a doctor is not sufficient to cause the standard two-year sanction to be reduced, this is the case *a fortiori* where an athlete relies on the instructions of a non-medically qualified sales assistant. In any event, the Athlete's subsequent internet checks revealed the potential risks of the Supplement.

iv. *The Athlete did not disclose his use of the Supplement on the Doping Control Form*

32. Although the Doping Control Officer did not provide oral or written testimony to the Disciplinary Committee, we have great difficulty in accepting that any reasonable Doping Control Officer would tell an athlete not to declare a supplement or medication, especially as Jack 3D does actually contain a prohibited substance and has featured in numerous anti-doping cases. We also have difficulty in accepting that the Athlete asked whether he should declare the use of Jack 3D but at the same time he declares that he took other medication.

33. We are of the view that the Athlete knowingly withheld his use of Jack 3D. This was because the Athlete knew or suspected that the Supplement contained a prohibited substance.

v. *The risks associated with nutritional supplements are well-publicised*

34. Regarding nutritional supplements, CAS has always been reluctant to accept a plea of no significant fault or negligence in view of the numerous warnings of the well-known risks linked to the use of such substance (see CAS 2003/A/484 Vencill v. USADA; CAS 2005/A/847 Knauss v. FIS; CAS 2008/A/1629 WADA v Malta Football Association & Claude Mattocks; CAS 2008/A/1510 WADA v Despres, CCES & Bobsleigh; CAS 2007/A/1445 WADA v Qatar Football

Association & Ali Jumah A.A. Al-Mohadanni; CAS 2009/A/1915 WADA v. PWF, Blonski & Zieziulewicz).

35. WADA submitted that despite the finding of the Disciplinary Committee, that the websites of WADA and SAIDS do not contain warnings with respect to the use of nutritional supplements, WADA's website contains inter alia the following warning:

"Extreme caution is recommended regarding supplement use.

The use of dietary supplements by athletes is a concern because in many countries the manufacturing and labeling of supplements may not follow strict rules, which may lead to a supplement containing an undeclared substance that is prohibited under anti-doping regulations. A significant number of positive tests have been attributed to the misuse of supplements and taking a poorly labeled dietary supplement is not an adequate defense in a doping hearing."

36. Furthermore, the Athlete was asked by Dr. van Dugteren at the hearing whether he had ever been instructed "*on being careful about taking supplements*". He confirmed that he had been.

vi. *Relevance of case law on methylhexanamine in assessing fault*

37. WADA further submitted that the alternative names of methylhexanamine (3-dimethylamylamine, geranium oil etc) have been cited by various Panels within the context of art.10.4 as a mitigating factor in assessing an athlete's fault for ingestion of the substance.

38. With regard to art. 10.5.2 however, WADA cited the recent case of UK Anti-Doping Agency v Christian Laing which has made it clear that, even in a case where the label of the product refers to an alternative name (i.e. not set out on the Prohibited List) and the athlete cross-checks such name against the Prohibited List, there will be no "truly exceptional circumstances" for the purposes of art. 10.5.2. Whilst this case is not binding on us, the following paragraph from the Laing case is particularly apt and is worth setting out in full:

"The dangers of taking supplements are well-known; the fact that he carried out his own check illustrates that he was aware of his responsibilities and something of the risks. But, that single check was inadequate. There was more he could and should have done. For example, he did not check with the club, WRU website, any anti-doping internet resource or even the suppliers of Nox Pump. Accordingly, the Respondent has not established that he bore no significant fault or negligence under ADR Article 10.5.2."

Conclusion

39. The fact that an anti-doping violation has occurred is not disputed between the parties. We accept that the prohibited substance (methylhexaneamine or dimethylpentylamine) entered the Athlete's system as a result of his ingestion of the Supplement.
40. The Athlete manifestly took the Supplement in order to improve his sport performance. Art. 10.4 SAIDS ADR does not therefore apply.
41. There are not truly exceptional circumstances in this case which might justify a reduction of the sanction on the basis of no significant fault (art. 10.5.2 SAIDS ADR). The Athlete's internet checks revealed the potential risks associated with the Supplement but the Athlete chose to dismiss those risks as mere rumours rather than take additional precautionary measures.
42. In short, the athlete voluntarily took a performance enhancing Supplement with the precise aim of enhancing his performance. He was on guard as to the potential risks but still apparently satisfied himself with scant and inadequate internet checks. The athlete failed to disclose his use of the Supplement on the Doping Control Form.
43. To hold that the Athlete's fault is not significant in these circumstances runs counter to an established body of case law on art. 10.5.2.

DECISION

1. The Appeal of WADA is admissible.
2. The decision rendered by the SAIDS Anti-Doping Disciplinary Committee on 6 March 2012 is set aside.
3. The Athlete is sanctioned with a two-year period of ineligibility starting on the 20th September 2012. Any period of ineligibility, whether imposed on, or voluntarily accepted by the Athlete before such date shall be credited against the total period of ineligibility to be served.
4. No order is made as to costs

DATED AT NEWLANDS ON THIS 20th DAY OF SEPTEMBER 2012.



ALEX ABERCROMBIE

Dr E Nematswerani

Prof. D Hendricks