

IN THE DISCIPLINARY COMMITTEE OF THE SOUTH AFRICAN FOOTBALL
ASSOCIATION
HELD AT O.R. TAMBO INTERNATIONAL AIRPORT

In the matter between:

SOUTH AFRICAN FOOTBALL ASSOCIATION

Complainant

And

LUCKY MASELESELE

Respondent

RULING

INTRODUCTION

1.

The South African Football Association ("SAFA" for convenience) brought charges against a professional footballer registered with the Premier Soccer League of South Africa by the name of Lucky Maselesele ("Mr. Maselesele" for convenience) for contravening the following rules and/or regulations-

- The South African Institute of Drug-Free Sport Act No. 14 of 1997
- South African Football Association Anti-Doping Regulation; and
- FIFA Doping Regulations

2.

At the time the charges were brought and the hearing proceeded Mr. Maselesele was employed by Maritzburg United F.C ("Maritzburg"). Maritzburg is a member of the PSL and consequently both Maritzburg and Mr. Maselesele are bound to the

Constitution and Rules of that association as well as those of SAFA and the Federation of International Football Associations ("FIFA"). The rules applicable to this case will be described as the "football rules" for convenience save where it is necessary to refer specifically to a particular rule or set of rules.

3.

SAFA was represented at the hearing by its pro-forma prosecutor Ms. Dineo Molefe ("the prosecutor" for convenience). Mr. Maselesele initially represented himself and after the postponement of the matter, he was then represented by Advocate Tshepo Nyandeni and Ms Lungiswa Mdzikwa (Attorney). The SAFA National Disciplinary Committee was made up of Mandla Tshabalala who chaired the hearing, Zaid Vally and Farai Razano.

4.

The parties made opening statements which were of assistance in relation to the ambit of the dispute. In summary-

4.1 SAFA's case was that-

4.1.1 On the 12th November 2008, in a league match between Maritzburg and Bidvest Wits F.C, Mr. Maselesele tested positive to a prohibited substance known and described as benzoylecgonine which is a metabolite of cocaine ("the prohibited substance");

4.1.2 The urine sample was collected with the consent of Mr. Maselesele, in accordance with the SAFA rules and the law and the testing done by officials duly and properly authorised to attend to these things and recognised by World Anti-Doping Agency (WADA);

4.1.3 The sample "A" first test yielded positive in relation to the prohibited substance. Mr. Maselesele had a right to request the testing of specimen "B", which he waived;

4.1.4 Consequently says SAFA Mr. Maselesele is guilty of misconduct as contemplated in the football rules and should be sanctioned in terms of the SAFA rules relating to misconduct and disciplinary proceedings which in this instance must be read with the FIFA Disciplinary Code in consequence of rule 3.7.1 which provides, in relation to sanction, that *"In the case of misconduct for which Articles 47 to 75 of the FIFA Disciplinary Code prescribes a mandatory sentence, the Disciplinary Committee shall impose that sentence unless there are compelling reasons not to do so."*

4.2 Mr. Maselesele-

4.2.1 pleaded not guilty to the charges laid against him, he however did not dispute that he tested positive to the prohibited substance, and did not dispute the result of sample "A"

4.2.2 contended that-

4.2.2.1 he had not used a prohibited substance to enhance his performance but had only used Asthma medication which he has disclosed before;

4.2.2.2 that he was tested eight (8) times prior to the said match and on all occasions he tested negative in his twelve (12) years football career

THE EVIDENCE

5.

5.1 SAFA submitted the tests results as evidence of the presence of a prohibited substance. In addition SAFA produced a Doping Control form signed by Mr. Maselesele, the letter Mr. Maselesele addressed to Mr. Hack (SAFA CEO) in which he acknowledge the receipt of the of the test result and that he will not request the specimen B to be tested.

6.

Mr. Maselesele's evidence was set out in a written statement and also oral and was in summary that-

6.1 he is employed by Maritzburg as a professional;

6.2 he has been a professional footballer for a period of twelve years;

6.3 throughout his professional career he has never tested positive to any prohibited substance even after a number of tests conducted on him;

6.4 he knows the seriousness of doping and kind of sanctions if found to have used prohibited substances, as result, he would not have jeopardised his career by taking such substances;

6.5 the only medication he has used is the asthma medication which he has disclosed to the Association

6.6 three days prior to the game he had a stomach problem and asked his wife to bring him medication from the pharmacy and he does not think that such medication would contain such prohibited substance;

7.

7.1 on cross examination by SAFA, Mr. Maselesele kept on referring to the fact that it would have been better if his legal representative was present in the proceedings as he does not understand and follow the proceedings;

7.2 On being questioned by the committee whether he would have felt more at ease if the his legal representative was present, and his answer was in the affirmative;

7.3 on that note, the Committee ordered an adjournment to further discuss the request made by Mr. Maselesele

7.4 the Committee decided to postpone the hearing sine die, to offer Mr. Maselesele an opportunity to brief his legal representative so that Mr. Maselesele could have a fair hearing that is justifiable in accordance with principles of natural justice;

7.5 SAFA objected to the matter being postponed sine die and requested the Committee to provide a new date for the hearing and that such date should be before the 15th February 2009

7.6 On further consultation amongst the Committee members, the Committee

decided to postpone the matter to the 12th February 2009 at 16h00 at the same venue

8.

- 8.1 The matter between SAFA and Mr. Maselesele continued on the 12 February 2009 as set down by the SAFA panel.
- 8.2 Mr. Maselesele was duly represented by Advocate Nyandeni and Ms. Mdzikwa
- 8.3 As the matter was about to proceed, Mr. Maselesele made an application for the postponement of the matter, and the reasons for the application were-
 - 8.3.1 Mr. Maselesele wanted time in order to consult an expert to confirm the validity of the sample "A" test result of Mr. Maselesele and see if a different result can be achieved;
 - 8.3.2 Mr. Maselesele wanted an expert to be available when tests are conducted to ensure that the procedure followed is the correct one
 - 8.3.3 That if the application is denied, Mr. Maselesele would have grounds to take the matter up for review on the basis that the procedure was unfair;
 - 8.3.4 That Mr. Maselesele's representatives' instructions were only to come before the Committee to postpone the hearing and it would be unfair to continue without proper instructions;

8.3.5 That Mr. Maselesele received the charge sheet and all attached documents late;

9.

SAFA objected to Mr. Maselesele's application for postponement of the hearing based on the following reasons-

- 9.1 That Mr. Maselesele took the matter very lightly and only realised the seriousness of the charges during the proceedings of the hearing;
- 9.2 That the charge sheet and other documents were sent to Mr. Maselesele's employers timeously and it is deemed to have been received by Mr. Maselesele;
- 9.3 SAFA contended that Mr. Maselesele's application should be denied and made a further application not to start the matter de novo;
- 9.4 That the test was conducted by an institution accredited by WADA (World Anti Doping Agency), so their results are prima facie evidence and exclusive evidence of an anti-doping regulation violation.

10.

Mr. Maselesele's application for a postponement was denied based on the following reasons;

- 10.1 That the first page of the charge sheet, paragraph two (2) states that:

1.....

2. In this regard it is the duty of the parties to come to this hearing ready and prepared to proceed. It is worth noting in this regard that Article 18 of the FIFA Disciplinary Code (the FDC) is in the following terms:

The parties are obliged to collaborate to establish the facts. In particular, they shall comply with the request for information from the judicial bodies

10.2 Further paragraph seven (7) state that

7. should a party intending to dispute the content of any of these documents the party should, in writing, indicate to SAFA at least 3 (three) days before the hearing the nature and extent of the objection and/or challenge Should that party fail to object to the content of the report the Disciplinary Committee will in most instances accept the report as being true and correct and there would be no need for SAFA to bring witnesses to testify to the report

10.3 Chapter II 5(2) of the FIFA Anti-Doping Regulations state that:

*2. sufficient proof of an anti-doping rule violation under this article is established by either of the following: **the presence of a Prohibited Substance or its metabolites or markers in Mr Maselesele's "A" sample where Mr Maselesele waives analyses "B" sample and the "B" sample is not analysed;** or where Mr Maselesele's "B" sample is analysed and the analyses of Mr Maselesele's "B" sample confirms the presence of the Prohibited Substances or its metabolites or markers found in Mr Maselesele's "A" sample (**emphasis ours**)*

10.4 Chapter III, paragraph 14 of the FIFA Anti-Doping Regulations states that:

1. *WADA accredited laboratories are presumed to have conducted sample analyses and custodial procedures in accordance with the International Standards of Laboratories. Mr Maselesele or other person may rebut this presumption by establishing that a departure from the International Standard of Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*

2. *Departure from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such result. If Mr Maselesele or other person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, the FIFA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping violation*

10.5 In his application for a postponement Mr. Maselesele does not satisfy any of the above provisions. He failed to prove to the Committee that there was any violation of Chapter III paragraph 14 which SAFA would then have to rebut. Instead, Mr. Maselesele based his application on assumptions that his expert may find the results to be incorrect or a departure from the international standards.

SAFA's application not to start the hearing de novo was denied. The matter started

de novo and SAFA presented their case first. SAFA's case was that-

11.1 On the 12th November 2008, in a league match between Maritzburg and Bidvest Wits F.C, Mr. Maselesele tested positive to a prohibited substance known and described as benzoylecgonine, a metabolite of cocaine ("the prohibited substance");

11.2 The urine sample was collected with the consent of Mr. Maselesele, in accordance with the SAFA rules and the law and the testing done by officials duly and properly authorised to attend to these things and recognised by World Anti-Doping Agency (WADA);

11.3 The sample "A" first tested yielded a positive in relation to the prohibited substance. Mr. Maselesele waived his right, as was his right, that the "B" sample also be tested;

11.4 Consequently says SAFA Mr. Maselesele is guilty of misconduct as contemplated in the football rules and should be sanctioned in terms of the SAFA rules relating to misconduct and disciplinary proceedings which in this instance must be read with the FIFA Disciplinary Code in consequence of rule 3.7.1 which provides, in relation to sanction, that *"In the case of misconduct for which Articles 47 to 75 of the FIFA Disciplinary Code prescribes a mandatory sentence, the Disciplinary Committee shall impose that sentence unless there are compelling reasons not to do so.*

11.5 Mr. Maselesele-

11.5.1 pleaded not guilty on the charges laid against him, he however did not dispute

that he tested positive to the prohibited substance, and did not dispute the result of sample "B"

11.5.2 contended that-

11.5.2.1 he had not used a prohibited substance to enhance his performance but had used Asthma medication which he has disclosed before

11.5.2.2 that he was tested eight (8) times prior to the said match and on all occasions he tested negative in his 12 years football profession

THE EVIDENCE

12.

12.1 SAFA submitted the tests results as evidence of the presence of a prohibited substance. In addition SAFA produced a Doping Control form signed by Mr. Maselesele, the letter Mr. Maselesele addressed to Mr. Hack (SAFA CEO) in which he acknowledge the receipt of the of the test result and that he will not request the specimen B to be tested

13.

Mr. Maselesele's evidence was set out in a written statement and also oral and was in summary that-

13.1 He is employed by Maritzburg as a professional;

13.2 He has been a professional footballer for a period of twelve years

13.3 throughout his professional career he has never tested positive to any prohibited substance even after a number of test conducted on him

13.4 he knows the seriousness of doping and kind of sanctions if found to have used the prohibited substance, as result, he would not have jeopardised his career by taking such substances;

13.5 the only medication he has used is the asthma medication which he has disclosed to the Association;

13.6 three days prior to the game he had a stomach problem and asked his wife to bring him medication from the pharmacy and he does not think that such medication would contained such prohibited substance;

14.

14.1 Mr. Maselesele relies on assumptions on his application for postponement and as result failed to rebut the exclusive evidence of the test result conducted by an accredited Doping Institution

14.2 Mr. Maselesele received the documents four (4) days before the hearing, and such days were still within the required prescribed period to dispute any documents received from SAFA

14.3 It was evident that Mr. Maselesele was not prepared for the hearing, and to Mr. Maselesele fairness, he himself said he did not realise the seriousness of the hearing until the proceeding took place.

15.

15.1 Mr. Maselesele-

Mr. Maselesele was sworn as a witness and his Legal Representative conducted an examination in Chief

15.1.1 Pleaded not guilty on the charges laid against him, he however did not dispute that he tested positive to the prohibited substance.

15.1.2 contended that-

15.1.2.1 he had not used a prohibited substance to enhance his performance but had used medication for Asthma which he has disclosed before

15.1.2.2 that he was tested 8 times prior to the said match and on all occasions he tested negative in his 12 years football profession

THE APPLICABLE RULES

16.

16.1 The SAFA rules relating to misconduct and disciplinary proceedings provide that, *inter alia*, misconduct is a breach of the Statutes or Regulations of FIFA.

16.2 The FIFA Disciplinary Code provides in Article 63 that

1. *Doping and doping offences are defined in the FIFA Doping Control Regulations.*
2. *These acts constitute doping whether detected during or out of a*

competition.

16.3 The FIFA Doping Control Regulations provide in Chapter II that *"the following shall constitute anti-doping rule violations:*

1. *It is each player's personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily samples. Accordingly it is not necessary that intent, fault, negligence or conscious use on Mr Maselesele's part be demonstrated in order to establish an anti-doping violation under.. item 1.*

2. *sufficient proof of an anti-doping rule violation under this article is established by either of the following: the presence of a Prohibited Substance or its metabolites or markers in Mr Maselesele's "A" sample where Mr Maselesele waives analyses "B" sample and the "B" sample is not analysed; or where Mr Maselesele's "B" sample is analysed and the analyses of Mr Maselesele's "B" sample confirms the presence of the Prohibited Substances or its metabolites or markers found in Mr Maselesele's "A" sample*

3.

4.

16.4 .Appendix A includes as a prohibited substance, *benzoyfecgonine*. Importantly this substance is not one of those in respect of which a quantitative reporting threshold is identified. Consequently the presence of

the substance is in itself an anti-doping violation.

16.5 Where there is a finding of guilt the FIFA Disciplinary Code deals with sanction in Article 65 the relevant portion of which read as follows-

1. *The following sanctions will, in principle, apply to doping offences ...*
 - a. *Any violation of Chapter II.1 (the presence of a prohibited substance or its metabolites or markers), ..., shall incur a two year suspension for the first offence and a lifelong ban in the case of repetition.*
 - b. *If any specified substances contained in the list of prohibited substances and methods (cf. appendix A of the FIFA Doping Control Regulations are detected, for which proof can be produced that the specific substances were not intended to enhance sporting performance, at least a caution shall be given for the first offence and at least a two-year suspension in the case of repetition. A third offence shall incur a lifelong ban..*
2. *If the suspect can prove in each individual case that he bears no significant fault or negligence, the sanction may be reduced, but only by up to half of the sanction applicable under par. 1; a lifelong ban may not be reduced to less than eight years.*
3. *If the suspect can prove in an individual case that he bears no fault or negligence, the sanction otherwise applicable under the terms of par. 1 become irrelevant.*

4. ..
5. ..
6. *A fine may also be imposed in all cases.*

APPLICATION OF THE RULES TO THE FACTS

17.

- 17.1 The undisputed factual position is that Mr. Maselesele tested positive for a prohibited substance. In the circumstance and as is apparent from a reading of the excerpts from the FIFA Doping Control Regulations cited above he is guilty as charged. .
- 17.2 The question then becomes one of sanction and here the FIFA Disciplinary Code sets out, firstly, a sanction which will generally apply that being the two year suspension envisaged in Article 65 (1) (a). To avoid such a sanction the individual in question must prove one of the exceptions set out in Article 65 (1) (b); Article 65 (2); or Article 65 (3). Absent proof of the facts necessary to bring these exceptions into play it appears that the two year suspension will apply and a fine may also be levied as provided for in Article 65 (6).
- 17.3 The difficulty Mr. Maselesele faces is that to bring himself within one of the exceptions he would need to explain;
 - (a) how the prohibited substance came to be present in his body and, thus his urine samples, and

- (b) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substances.

17.4. The proof of (a) and (b) would eliminate Mr Maselesele's two year sanction.

17.5 in order to establish that he bears, *no significant fault of negligence*, in addition to the proof of (a) above, Mr Maselesele must prove:

- (c) that his fault or negligence, when viewed in the totality of the circumstances and taking into account the requirement of (b) above, was not significant in relation to the anti-doping rule violation.

17.6 proof of both (a) and (c) would reduce Mr Maselesele's sanction to a penalty ranging between one year and two years Article 65, paragraph 2, FIFA Disciplinary Code).

17.7 with regard to the standard of proof required from Mr Maselesele, the Committee observes that Mr Maselesele must establish the facts that he alleges to have occurred by a "*balance of probability*". The balance of probability standard means that Mr Maselesele bears the burden of persuading the Committee that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence.

- (a) Evidence of how the prohibited substance entered Mr Maselesele's body

17.8 In this instance, Mr Maselesele does not give a clear indication of how the prohibited substance came to be in his body. Instead Mr. Maselesele has

referred to medication which he did not disclose at the time the samples were taken as well a 'conspiracy theory' of his drink having been drugged at a party and submits that these might have given rise to the test result. This does not assist Mr. Maselesele in any way. It is insufficient to plead ignorance of how the prohibited substance entered his body. He should have given the Committee a clear and concise explanation of how this prohibited substance entered his body. The Committee has before it clear and acceptable evidence which suggests that the medication he took for his stomach problems could not possibly have been contaminated by the prohibited substance. In fact, Mr Maselesele himself conceded, in answering a question from the Committee, that the stomach medication could not have been contaminated by benzoylecgonine which is a metabolite of cocaine. Mr Maselesele had no medical reasons to take the prohibited substance. Were the substance used for medical reasons' this would have been preceded by investigations and there would consequently not be any doubt on his part of what he was taking and why.

- 17.9 Given the stringent requirement for Mr Maselesele to offer persuasive evidence of how the positive finding of benzoylecgonine occurred, the Committee finds that Mr Maselesele's explanation failed to pass the balance of probability test. In other words, the Committee is not persuaded that the consumptions of stomach medication alleged to have been taken by Mr Maselesele would have resulted in a positive test of benzoylecgonine. Similarly, the Committee is not persuaded by the 'conspiracy theory' put forward by Mr. Maselesele. The Committee has no reason to think Mr. Maselesele is a cheat given his record of negative tests on a number of occasions prior to this positive test. However, in view of the testimony of Mr Maselesele and reasons given above, the Committee finds the entry of the

prohibited substance into his body less likely a result of the explanations he gives than a result of a possible deliberate administration of benzoylecgonine or cocaine to Mr. Maselesele.

- 17.10 Accordingly, the Committee holds that, on the balance of probabilities, Mr. Maselesele failed to establish how the prohibited substance entered his body.

(b) Player's caution and degree of fault or negligence

18

- 18.1 With regard to the duty of caution required under the rules, no fault means that Mr Maselesele has fully complied with the duty of care. No significant fault on the other hand means Mr Maselesele has not complied with the significant duty of care. The Committee will have to determine the reasons which prevented Mr Maselesele in a certain situation from complying with his duties of care. The Committee may evaluate the specific and individual circumstances. Departure from the standard sanction may only be justified if the circumstances show that the departure of Mr Maselesele from the required conduct under the duty of utmost care was not significant.
- 18.2 By way of example a footballer such as Petrus Mahlatsi some time ago was given an injection which was clearly not performance enhancing, which was in fact acceptable accompanied by an application for an exemption, and where the failure to obtain the exemption was an oversight by his doctor. That is the sort of case the exceptions contemplate and that is the sort of evidence required to bring them into play.
- 18.3 The Committee notes that the WADA Code, which Mr Maselesele has knowledge of as a result of campaigns by Drug Free Sport South Africa,

provides at article 2.1.1 that it *"is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body"*. In addition Chapter II of the FIFA Anti-doping regulations at paragraph 5(1) provide that, *"it is each player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its metabolites found to be present in their samples..."*

18.4 The Committee finds it extraordinary that despite Mr Maselesele's twelve years experience in the football profession and his knowledge of anti-doping rules and the possibility of 'foul play' from his friends and colleagues, he still takes medication without due care as to what that medication may contain. In addition, he still conducts himself in a way that makes him more susceptible to being drugged at social gatherings or at work.

18.5 Therefore the Committee finds that, even the Committee were to accept the explanations given by Mr. Maselesele, his degree of *"fault or negligence"*, viewed in the totality of the circumstances, is clearly *"significant"* in relation to the anti-doping rule violation.

(c) Period of Sanction

19

19.1 The Committee has found that, on the balance of probabilities, Mr Maselesele did not discharge the burden of proving how the prohibited substance entered his body nor was he able to demonstrate that he bore no significant fault or negligence.

19.2 Benzoyllecgonine seems to the Committee to be precisely the sort of

substance that the doping rules are attempting to proscribe. The fundamental aims of doping control are set out in the Preamble to the FIFA Doping Control Regulations as follows-

The fundamental aims of doping control are threefold:

- *To uphold and preserve the ethics of sport;*
- *To safeguard the physical health and mental integrity of players;*
- *To ensure that all competitors have an equal chance.*

19.6 While there may be disputes where these fundamental aims would compete this is not such a case. It seems to the Committee that the prohibited substance in issue here is precisely the sort of substance that the football rules aim at proscribing.

19.7 The consequences for a professional footballer like Mr. Maselesele of a two year suspension will clearly be severe to say the least. He will no doubt lose his job; he will probably lose his right to work in South Africa and elsewhere in the world.

17.8 The difficult the Committee face is that the rules apply to all who participate in the sport of football. The rules are clearly valid, they do not violate any legal principles that the Committee is aware of, and the Committee cannot simply ignore them or interpret them as it sees fit. It must apply the rules to the facts.

17.9 In this instance the Committee has no option but to find Mr. Maselesele guilty

as charged. As regards sanction it is so that he pleaded not guilty to the charges. He did not however disclose how the prohibited substance actually found his way into his system. He would have been better served had he done so.

- 17.10 Taking Mr. Maselesele's personal circumstances into account, the fact that this is the first instance of misconduct of this nature, and the consequence which the sanction will have upon him it does not appear that in this instance a fine should accompany the sanction provided for as a guideline in Article 65 (1) (b).

RULING

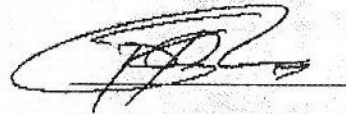
18.

18.1.1 Mr Maselesele is found guilty of transgressing the FIFA Doping Control Regulations;

18.1.2 Mr. Maselesele is suspended for two years from the sport of football and such suspension commences on Mr. Maselesele and his employee "Maritzburg" receives this ruling;

18.1.3 Mr. Maselesele is ordered to pay the costs of the first hearing which amount will be determined by SAFA and such amount is to be paid 14 days after the receipt of this ruling.

Dated and signed at Johannesburg this 14 day of February 2009



Mandla Tshabalala

Chairman