

**THE SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT ("SAIDS")
DISCIPLINARY HEARING HELD AT JOHANNESBURG ON 15 NOVEMBER 2012**

RULING ON SANCTION

INTRODUCTION

1. The South African Institute for Drug Free Sport ("SAIDS") Disciplinary Panel convened at the offices of Edward Nathan Sonnenbergs in Sandton at 17h30 on 15 November 2012 to deal with the issue of sanction in the case of Mr Livingstone Jabanga.
2. The hearing commenced soon after 17h30 and ended at 18h50.
3. The Panel comprised:
 - 3.1. Michael Murphy;
 - 3.2. Yusuf Carrim;
 - 3.3. Dr Sello Motaung.
4. SAIDS was represented by its Proforma Prosecutor, Advocate Nic Kock. Mr Livingstone Jabanga was present in person and represented by his attorney, Mr Moses Rankooa.
5. Prior to commencing the proceedings the Panel enquired from whether there would be evidence in respect of sanction. Mr. Rankooa and Advocate Kock confirmed that they would be submitting argument but not leading evidence.

SUBMISSIONS OF THE PARTIES

6. **The SAIDS Submissions**
 - 6.1. Advocate Kock referred firstly to the relevant anti-doping rule as contained in the Anti Doping Code – in respect of guilt or innocence – being Rule 2.8. This case concerns the administration or attempted administration to an athlete of a prohibited substance rather than the presence of a prohibited substance and the appropriate rule is consequently that referred to.

- 6.2. Secondly, said Advocate Kock, the appropriate rule in respect of sanction, in the context of a Rule 2.8 case was Rule 10.3, and in particular 10.3.2. It is worth recording the content of Rule 10.3, including the comment thereto in full –

"10.3 Ineligibility for other anti-doping rule violations

The period of ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows:

10.3.1 For violations of Code Article 2.3 (refusing or failing to submit to sample collection) or Code Article 2.5 (tampering with doping control), the ineligibility period shall be two years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6 are met.

10.3.2 For violations of Code Article 2.7 (trafficking), Article 2.8 (administration of prohibited substance or prohibited method) the period of ineligibility imposed shall be a maximum of four (4) years up to life time ineligibility unless the conditions provided in Article 10.5 are met. An anti-doping rule violation involving a minor shall be considered a particularly serious violation, and, if committed by athlete support personnel for violations other than specified substances referenced in Article 4.2.2 shall result in life time ineligibility for such athlete support personnel. In addition, significant violations of such Articles that also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.

Comment to Article 10.3.2: Those who are involved in doping athletes or covering up doping should be subject to sanctions which are more severe than the athletes who test positive. Since the authority of sport organisations is generally limited to ineligibility for credentials, membership and other sport benefits, reporting athlete support personnel to competent authorities is an important step in the deterrence of doping."

- 6.3. Advocate Kock submitted that 10.3.2 was the pertinent rule and that the panel were bound to apply the rule. In his view that meant that the sanction

had to be between four years and life but that the portion of the rules which relate to particularly serious cases specifically contemplated in the rule (where a minor athlete was involved) did not apply.

- 6.4. Advocate Kock drew the panel's attention to a previous matter which called for consideration because consistency is important – and it was the only local case he was aware of – being a case of a Mr. Pretorius who had administered a prohibited substance – being a scheduled drug – to his minor daughter. In that case the Panel, said Advocate Kock, had regarded the fact that a minor was involved *inter alia* as an aggravating circumstance and had increased the period of ineligibility from the minimum of four years to a period of six years.
- 6.5. Advocate Kock submitted that that case should serve as guidance when it comes to the parameters of an appropriate sanction but that it raised specific aggravating features not present in this matter and in his view, here, the appropriate period of ineligibility here, and this was the sanction sought by SAIDS, was four years.
- 6.6. Advocate Kock made particular submissions dealing with aggravation as follows:-
 - 6.6.1. Whilst the athlete to whom the prohibited substance was administered was not a minor, there had been a very specific power relationship in play and this was a factor of importance;
 - 6.6.2. Mr Jabanga had abused the trust that the particular athlete, and other athletes (including the minor who testified on his behalf), had in him and primarily thought of his own interests;
 - 6.6.3. Mr Jabanga had had various opportunities to tell the truth, he had not provided any assistance to the athlete when she had to face a hearing, he has remained *reluctant to come forward and make plain what happened*, and even went so far as – said Advocate Kock – to coerce the minor witness and even Mrs Jabanga to give evidence on his behalf.
 - 6.6.4. Mr. Jabanga's conduct has not only affected him, there have been serious consequences for the athlete to whom the

prohibited substance was administered and there is a very real risk of her sanction being increased consequent upon a WADA appeal;

6.6.5. Consequently, said Advocate Kock, if it would be argued by Mr Rankooa that Article 10.5 in respect of the elimination or reduction of a period of ineligibility should apply, that could not be countenanced in this case. It could not be countenanced because for Article 10.5 to apply would require that there be a full and proper explanation of what had happened so that the Panel considering elimination or reduction would be in a position to consider the question of fault or negligence. Just as an athlete is required to show how a substance entered his/her body for there to be a reduction in a generally applicable sanction, so too someone in the position of Mr Jabanga would have to explain how it was that he had administered a prohibited substance, show that in doing what he did he had not intended to enhance performance or had simply made a mistake for which there was no significant fault or negligence. In being selective, in not telling the truth and in seeking to avoid explaining what had happened, Mr Jabanga, said Advocate Kock, had precluded the Panel from having evidence before it which would enable a reduction in sanction.

6.6.6. Advocate Kock concluded, however, by saying that in this case the appropriate sanction would be a period of four years. He said that the facts were different to those in the Pretorius case, and consequently SAIDS view was four years would be appropriate here.

7. Questions from the Panel

7.1. The Chairman asked Advocate Kock to take the Panel carefully through the rules which applied in this case and Advocate Kock did so. He referred to Article 10.7 for guidance in relation to terms that are used in the rules and in particular the concept of a TRA (trafficking and administration) where the reference is to Article 10.3.2 in respect of sanction.

- 7.2. Article 10.3.2 then, in any event, makes plain that it deals with sanction in respect of Article 2.8 offences.
- 7.3. Advocate Kock furthermore said that in SAIDS view the aggravating factors specifically mentioned in Article 10.3.2 and in particular the provision dealing with a minor and/or an offence in respect of a minor by athlete support personnel, did not apply.
- 7.4. However, in this case, the appropriate sanction, according to Advocate Kock would be one of four years.
- 7.5. Dr Motaung enquired whether in light of the aggravating factors mentioned by Advocate Kock he was not looking for an increased sanction of over four years. Advocate Kock said that he had raised these factors to illustrate why the Panel should not consider any sanction other than – i.e less than - four years. He felt, however, that these factors were not as aggravating as those which were present in the Pretorius case, and consequently that in the interests of consistency it would be appropriate here to hand down a four year sanction.
- 7.6. Furthermore, said Advocate Kock, he had raised these issues to illustrate the difficulty with any reliance by Mr Rankooa on Article 10.5 rather than because he believed the sanction should be more than four years.

8. **Submissions by Mr Jabanga**

- 8.1. Mr Rankooa submitted that the Panel should take into consideration the following factors:
- 8.1.1. The Panel was dealing with a man, Mr Jabanga, who had played a significant role in the lives of young South Africans and had effectively done so without reward. He had shown a love for sport and an interest in athletics and had done so selflessly in circumstances in which not many people in society would have acted as he had.
- 8.1.2. Mr Jabanga was the manager of Gauteng Striders and had been in that position since 2006. In that position he had not been found guilty of any offence. There are in excess of 300 athletes who are members of Gauteng Striders and there have been no

complaints concerning Mr Jabanga in respect of any conduct in respect of these athletes at all. This in fact was the first complaint and should be considered as a strong mitigating factor warranting a deviation from the penalty clause in the SAIDS rules.

- 8.1.3. Mr Jabanga had been a runner for two decades and he had not been disciplined for contravention of a similar rule. He knew the consequences of breaching the rules and a man who was playing the sort of role he was in taking youth off the streets and out of crime was not the sort of person who would knowingly contravene rules in such a manner.
- 8.1.4. Mr Jabanga had produced successful athletes, including professional athletes, amongst those he had trained and this was a factor which should be considered.
- 8.1.5. The manner of the finding in this case was relevant, said Mr Rankooa. It was relevant because one should have regard to the fact that the athlete who gave the statement which resulted in the charge against Mr Jabanga was someone who herself had been subjected to disciplinary proceedings and who had pleaded guilty albeit that she gave contradictory versions of what had happened. This was a factor which should be taken into account being that she did not give a clear explanation from the start of exactly what it was that she said had happened. She in fact talked about going to a doctor where she had received a certain substance and then changed her version later.
- 8.1.6. In light of the manner in which the offence occurred, against the background of Mr Jabanga's circumstances and his role in the community, Mr Rankooa submitted that there were compelling circumstances to deviate drastically from the rules. The appropriate sanction, said Mr Rankooa, would be a wholly suspended sentence. In other words, a four year period of ineligibility as provided for in Rule 10.3.2, but wholly suspended for a period of five years.

9. **Questions from the Panel**

- 9.1. The Chairman enquired from Mr Rankooa whether he could be of assistance in pointing to a particular rule which allowed for a suspension of a period of ineligibility in circumstances such as these. Mr Rankooa could not point to such a rule, but said in his view that the circumstances were compelling and he was asking for a deviation from the rules themselves.
- 9.2. Mr Carrim enquired from Mr Rankooa whether his submission was not really a reference to Article 10.5. Mr Rankooa said no his submission went further than that, in other words he was saying it went beyond 10.5.
- 9.3. Mr Carrim said that he thought perhaps that 10.5 involved a situation in which there was some sort of admission. Put differently, there had to be some explanation of what had transpired so that the questions raised by 10.5 could be considered. Mr Rankooa responded that in his view this was a hearing dealing with sanction, it was not a hearing dealing with the question of an admission, but that he had made submissions on the circumstances and factors which should be taken into account, and he in fact thought that Articles 10.4 and 10.5 were relevant and that there could be a reduction or a suspension as he had submitted.

THE SANCTION AND REASONS

10. The Panel have come to the conclusion that an appropriate sanction in this matter would be one of five years ineligibility. The Panel is alive to the fact that Advocate Kock and SAIDS requested a period of four years, but is of the view that it is the responsibility of the Panel to consider all relevant circumstances and fix a sanction which it believes is fair and appropriate in the circumstances.
11. If regard is had to Article 10.3.2, read with the comment to the Article, it is apparent firstly that the four year period of ineligibility is an absolute minimum. Four years up to a lifetime is a wide range, and the Panel is required to fix the period of suspension somewhere in between in a case such as this.
12. As the comment makes plain; those involved in doping athletes or covering up doping should be subject to sanctions which are more severe than the athletes who test positive. There have often been cases, and this is particularly so in a country with the wide disparities in education and access to information that South Africa has, about

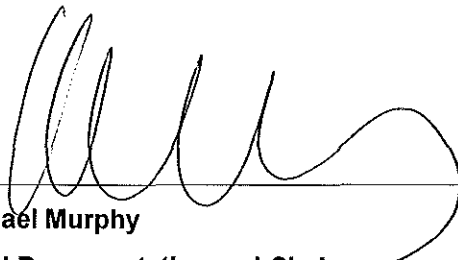
athletes who have little or no exposure to the sort of education or information that would enable them to fully understand anti-doping measures being sanctioned severely for a first offence.

13. Where one is dealing with a person in a position of authority, such as Mr Jabanga who was a coach with vast experience of athletics and knew about anti-doping rules, it is difficult to feel the same degree of sympathy as one would in such a case.
14. The Panel seriously considered a far more significant period of ineligibility, but had regard to the following features in arriving at a period of five years:-
 - 14.1. While the comment in 10.3.2 makes plain, and the Panel agrees that the sanction should be more severe, the sanction provided for in 10.3.2 is already more severe than that which would apply to the first offence of an athlete.
 - 14.2. SAIDS sought only four years and did not suggest a more lengthy period and the Panel would be uncomfortable going far beyond what SAIDS sought.
 - 14.3. The Pretorius case referred to by Advocate Kock is relevant in relation to consistency – although it seems that the sanction there may well have been too low in that the conduct complained could well have called for a peremptory lifetime period of ineligibility – but absent sufficient understanding of the relevant factors the Panel cannot be certain- and if in that case involving a minor a sanction of six years was handed down, it would seem inappropriate and unfair not to have regard to the differences between the two cases as advanced by Advocate Kock.
 - 14.4. Mr Jabanga is a person who in certain respects has contributed to his community and particularly to athletes although it must be said that there are features of his relationship with the athletes under his care which are of significant concern. In this case, in particular, if he felt a serious concern for the athlete in question, there is little doubt that he would have attended at the hearing she was called to, not avoided it as he did, and explained what had happened to the best of his ability at the very first opportunity. This is a factor, however, in the South African context and it has been taken into account, particularly in view of Mr Rankooa's submissions regarding the number of athletes Mr Jabanga has assisted and the fact that he clearly does not receive significant amounts of compensation for what he does.

14.5. Mr Jabanga is a first time offender in respect of the sort of issue that is of application here. That is certainly a very relevant and material factor in any assessment of sanction.

15. In all of these circumstances the Panel, after much debate, have decided upon a sanction of five years, and that is the sanction that has been handed down in this case.

Dated at SANDTON on 20 November 2012



Michael Murphy

Legal Representative and Chairperson



Yusuf Carrim

Sports Administrator Representative



Dr Sello Motaung

Medical Representative