

# **RECORD OF DECISION**

of

**THE SOUTH AFRICAN INSTITUTE OF DRUG FREE SPORT "SAIDS"**

**ANTI-DOPING DISCIPLINARY**

**HEARING COMMITTEE**

comprising of

John Bush	lawyer member, as chairperson
George van Dugteren	doctor member
Norma Nonkonyana	administrator member

In the matter between

**SAIDS**

and

**VIWE MDLETYENI**

**RECORD OF THE DECISION OF THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT  
ANTI-DOPING DISCIPLINARY COMMITTEE**

In the matter of

**VIWE MDLETYENI**

---

**INTRODUCTION**

1. The South African Institute for Drug-Free Sport, "SAIDS" is a corporate body established under section 2 of the South African Institute for Drug-Free Sport, Act 14 of 1997, as amended, "the Act".
2. The main objective which SAIDS has is to promote and support the elimination of doping practices in sport which are contrary to the principles of fair play and medical ethics in the interests of the health and well being of sportspersons.
3. On 25 November 2005 SAIDS, formally accepted the World Anti-Doping Code, "the Code", which the World Anti- Doping Agency, "WADA", had adopted on 5 March 2003.
4. By doing this SAIDS, as the National Anti-Doping Organisation for South Africa, introduced anti-doping rules and principles governing participation in sport under the jurisdiction of SASCOC, the South African Sports Confederation and Olympic Committee, or any national sports federation.
5. The Anti-Doping Rules 2009, as published by SAIDS, ("the Rules"), which are applicable to the present proceedings, incorporate the mandatory provisions of the Code as well as the remaining provisions adopted by SAIDS in conformance with the Code.
6. Boxing South Africa, as the national federation governing the sport of boxing in South Africa, has by agreement with SAIDS and/or under its membership and the auspices of SASCOC, adopted and implemented SAIDS anti-doping policies and rules which conform to the Code and the Rules.

**DISCIPLINARY COMMITTEE & CHARGE**

7. This SAIDS Anti-Doping Disciplinary Committee hearing panel, consisting of Mr John Bush (Chairman), Dr George van Dugteren and Ms Norma Nonkonyana ("the Panel") was appointed by SAIDS in accordance with the provisions of Article 8 of the Rules, to adjudicate whether the boxer Viwe Mdletyeni ("**Mdletyeni**") had violated the Rules and if so what the consequences should be.
8. The charge against **Mdletyeni** is contained in a letter which was addressed and couriered to him on 8 October 2012. (A copy of the letter is attached as Annexure A.)

The relevant portion of the letter relating to the charge reads as follows:

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

On the 28 July 2012 you provided a urine sample (2634578) during an in-competition test. Upon analysis, the South African Doping Control Laboratory at the University of Free State reported the presence of prohibited substances in your urine sample.

The substances identified were: the Stimulant Methylhexaneamine as well as the Diuretic Furosemide. Methylhexaneamine is categorised under the Class S6, Stimulants in specific (b) Specified Stimulants, while Furosemide is classified under Class S5 Diuretics and Other Masking Agents on the World Anti-Doping Code 2012 Prohibited List International Standard.

9. Article 2.1 of the Rules reads as follows:

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

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly it is not necessary that intent, fault, negligence, or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1.

DISCIPLINARY HEARING

PROCEEDINGS – INTRODUCTION & PERSONS ATTENDING

10. The anti-doping disciplinary hearing was convened for the 6 November 2012 and held in the Boardroom, at SAIDS offices, 1 Mona Crescent, Newlands, Cape Town.

11. Apart from the Panel those other persons involved and present at the hearing were

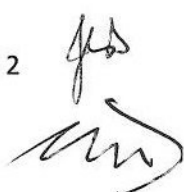
- the prosecutor for SAIDS in this matter Mr Nic Kock "**Kock**"
- Mr Fahmy Galant, "**Galant**" was the SAIDS representative
- **Mdletyeni**
- Advocate Leeann van der Walt, "**van der Walt**", representing Mdletyeni acting under instructions from Mantyi Attorneys;
- Mr Mkudlwana Mantyi, the instructing attorney
- the minute taker Rayanah Rezant.

12. The hearing began at 17h36 with all those present being asked to introduce him/her self - once the Chairman had welcomed all present. The Chairman then questioned whether the commitment for the hearing to be conducted in English was acceptable to **Mdletyeni**, who hailed from the Eastern Cape and spoke Xhosa.

13. After **Mdletyeni** indicated he preferred it to be in Xhosa and a brief adjournment, during which his legal team took instructions, it was agreed that the hearing would indeed proceed in English on condition that in the event of **Mdletyeni** having any difficulty with understanding any matter this would be interpreted by Ms Nonkonyana.

14. After **Kock** had informed **Mdletyeni** that his urine sample which had been taken on 28 July had been tested, **Kock** read the charge and then asked **Mdletyeni** how he pleaded to the charge

2  
MNT



## ADMISSIONS - CURTAILMENT OF PROCEEDINGS

15. **Mdletyeni**, supported by **van der Walt** (who advised that the defence had prepared submissions with regard to sanction) advised that he had received the documentation sent to him, admitted he was guilty of having committed the doping violation - as corroborated by the B sample test result and confirmed that he would not be contesting the chain of custody, the laboratory results (testing process) and the doping control (sample collection process).

## PRELIMINARY EVIDENTIARY MATTERS & EXHIBITS

16. The accepted exhibits were then identified as follows

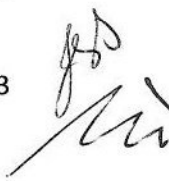
A1-A2	SAIDS letter dated 22 August 2012
B	Doping Control Form 47166 - Test Mission code 100/12
C	Report on A - Sample Analysis – report nr 08081201
D	E-mail correspondence 8/10/12 SAIDS to BSA concerning AAF
E1-E3	Fax cover and letter Mantyi Attorneys dated 31/08
F1-F3	E-mail correspondence 8/10 SAIDS to Mantyi Attorneys
G	SAIDS letter dated 18/9 to <b>Mdletyeni</b> concerning adverse analytical finding “AAF” iro B sample analysis
H	Report on B - Sample Analysis – report nr 18081201
I	E-mail correspondence 8/10 SAIDS to Mantyi Attorneys regarding the hearing date
J1-J2	Formal letter SAIDS to Mdletyeni regarding charge and hearing date
K1-K5	Fax cover notes as well as correspondence from Mantyi Attorneys to SAIDS, excluding the questionnaire, for the reason mentioned below in paragraph 17
L	UFS: Certificate of Analysis: Analysis of supplements
M	E-mail correspondence Fahmy Galant SAIDS to Mantyi Attorneys regarding limits
N	Empty Bottle iro Pharmaton – item 3 on DCF – doping control form
O	Boxing Licence receipt

17. The submissions made in the affidavits of **Mdletyeni** and Mthethunzima Dumezweni, which were tabled by **van der Walt** as part of her evidence bundle, along with the numbered attachments which have been covered in paragraph 16, were accepted as exhibits P and Q respectively.
18. It was agreed that the questionnaire, which **van der Walt** advised she had prepared for the purpose of taking instructions in preparing for the hearing as completed by **Mdletyeni's** attorney, was clearly privileged information – as between attorney and client - be withdrawn, all copies handed over and insofar as they may have been read - “removed from the mind”.

## MDLETYENI'S DEFENCE – IN MITIGATION OF SANCTION

### Opening address/case outlined

19. In her opening address **van der Walt** stated that in her view **Mdletyeni** qualified for a reduction in the specified sanction. This was because
- he admitted responsibility for the prohibited substances found in his system
  - he complied with the requirements to justify a reduction in sanction under Article 10.4 as he would show how the prohibited substances entered his body and his intent - on a balance of probability
  - he had the requisite corroborating evidence to show that he did not intend to enhance his performance or mask the use of a performance enhancing substance

NA 

- the two substances found were specified substances
  - Methylhexanamine was a stimulant not a masking agent
  - the Furosemide was a diuretic and the Panel would be required to consider whether on the facts and surrounding circumstances which would be presented this was used as masking agent
  - the Panel would similarly be required to decide whether there was any fault on **Mdletyeni's** part and if so, what was the degree of fault or negligence having regard to the facts and surrounding circumstances
  - the evidence which would be led was as set out in the **Mdletyeni's** affidavit (copies of which were provided to the Panel members)
  - apart from this evidence it was probable that the Pharmaton (which was provided by Dumezweni his boxing coach and one of the medications/supplements listed on the Doping Control Form) could have been contaminated with the Methylhexanamine, which the defence would endeavour to prove
  - **Mdletyeni** took the Furosemide, which had been recommended by **Mdletyeni's** gym instructor, a week before the fight as he suffered from swollen knuckles. There was case law precedent for this in circumstances where an athlete took a diuretic to reduce swelling
  - hearsay evidence, including that of **Mdletyeni's** coach Mr Dumezweni, ought to be accepted in accordance with not only with the Rules, at the Panel's discretion but more particularly under the Law of Evidence Amendment Act, which provided for this
  - the evidence would show how the substances entered **Mdletyeni's** body.
20. In response to questions raised by the Chairman regarding the availability of Mr Dumezweni (trainer) and the physiotherapist mentioned in the affidavits (exhibits P and Q), who the Chairman viewed as important witnesses, not only for corroborating evidence, for the purpose of assisting the Panel reach a fair decision, **van der Walt** advised that
- arrangements had been made that Mr Dumezweni would be available for a telephone conference call
  - they did not have the name or contact number of the physiotherapist.
- She also added that **Mdletyeni's** weight training (Siyanda) instructor at the gym refused to provide any assistance.
21. In concluding her opening address in outlining **Mdletyeni's** case in mitigation **van der Walt** added that after the defence had shown that **Mdletyeni** had no fault or negligence, a reduction or elimination of the sanction (the period of ineligibility) would be asked for. This would be supported by
- **Mdletyeni** not having had formal doping education
  - the degree of care (required and/or exercised) in determining the applicable sanction
  - the fact that underprivileged or illiterate athlete's did not have the necessary resources - supported by Ngconde Balfour, a former Minister of Sport and now President of Boxing SA.
22. After the Chairman suggested to **van der Walt** that she relax at what was a relatively informal disciplinary hearing seeking to establish the truth, **van der Walt** formally tabled the two affidavits (exhibits P & Q).
23. After reminding the Panel that she had the Pharmaton bottle and the boxing licence receipt **van der Walt** then put questions to **Mdletyeni** for the purpose of providing his evidence-in-chief concerning any mitigation of the sanction.

### Mdletyeni's evidence-in-chief

24. **Mdletyeni's** responses led to the following considered to be relevant (although not exhaustive - as the record will show) regarding **Mdletyeni** himself.

- **Mdletyeni** lived in UMthatha in the Eastern Cape
- he lived with his uncle – (Mthethuzima Dumezweni) - who was also his boxing coach
- he was 24 years
- although his preferred language was Xhosa he could understand and speak English
- his occupation was that of a professional boxer since 2007
- he was in the light weight division
- the fight at which he was tested on 28 July was for the South African title
- he had had 15 (professional) fights
- it was the first time he had been subject to doping control
- he could not remember whether his coach had told him about doping
- his manager signed the doping control form
- the coach told him what to fill in (concerning the medication/supplements taken within 7 days of the fight)

25. **Mdletyeni's** further responses to **van der Walt's** questions relating to the facts and circumstances concerning the anti-doping violation provided that -

- he took Pharmaton for 3 to 4 weeks before the fight. These he took daily, including the day of the fight
- he was shocked when first informed about the results (of the test)
- he did not know where the prohibited substances had come from
- he suspected the little white tablets which his instructor Siyanda, had given him for his swollen knuckles of the right hand and a muscle supplement.
- he had taken one of the small white tablets as there were three left
- his coach had given him the other tablets (ie those listed on the doping control form - DCF)
- the little white tablets were not disclosed on the DCF

26. At this point in the proceedings it was apparent that there was confusion arising from the UFS report, tabled as exhibit L, relating to the little white tablets, which had been reported to contain Furosemide and Pharmaton, initially perceived to have possibly been contaminated and who actually gave these to **Mdletyeni**. The Chairman thus requested a break in the proceedings in order for **van der Walt** to take instructions in order to clarify matters which had given rise to such confusion.

27. After a five minute break for this purpose **van der Walt** continued with her questions. Through these **Mdletyeni** provided the following further evidentiary matter

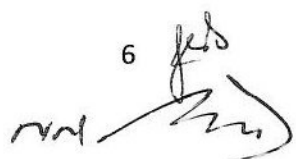
- on the day he was tested the doping control officer (DCO) filled in the form
- his manager (Kolekile Cishe) signed it (as his representative)
- he, **Mdeletyeni** told the DCO what medication/supplements he had taken which his coach had given him to take
- the injury which he had before the fight was that his knuckles were swollen
- he told his coach about his knuckles
- his coach sent him to see a physiotherapist but he didn't get any better
- he then told his instructor Siyanda about his swollen knuckles. He knew him from the gym, where he was employed. He always informed him when he prepared for a fight. He **Mdletyeni** took one pill and felt much better.

- his instructor, who worked at the gym in UMthatha, was not registered to dispense medicines
  - Siyanda gave him four tablets when he complained about his knuckles, one of which he took on the Wednesday before the fight
  - he was first informed about the results by his coach, who had been informed by Boxing South Africa. He then received the documentation
  - his coach had told him that BSA had called him to say that he - **Mdletyeni** - had tested positive. His coach did not say anything else.
28. Concerning exhibit L, the UFS Report, **Mdletyeni's** replies to the questions put to him by **van der Walt** provided that
- the 3 (three) (remaining) tablets which the instructor gave him were sent for testing
  - these he gave to Mr Mantyi, (his attorney)
  - they were sent away for testing because it was thought that they could be the ones that caused the positive result.
29. As further confusion had arisen through the suggestion that the three tablets which had been tested were the same, whereas the report stated they were not, the Chairman sought clarity for what appeared to be a language problem.
30. Under the general discussion which followed the small white tablet (which probably came from the instructor) and was tested and shown to have Furosemide was identified as the likely source of the Furosemide found in **Mdletyeni's** test sample. The names of the capsule and large white pill sent for analysis were irrelevant as they were found not to have methyhexaneamine or Furosemide.
31. It was thus evident that **Mdletyeni's** coach gave him the Pharmaton, which he said the coach recommended all his boxers use.
32. **Mdletyeni** stated further that he did not know what the Prohibited List was, had no GP or medical aid.
33. Dr George van Dugteren then asked **Mdletyeni**
1. whether he took anything else (supplementary energy drinks ?)
  2. what was the name ?
  3. where he got these from ?
  4. how long ago did he use it ?
  5. what weight category he competed in ?
  6. what did he weigh at the time of the fight ?
  7. whether he had any trouble making the weight ?
  8. what his current weight was ?
  9. what he did in order to make the weight ?
  10. whether he used a sweater or ate less / took laxatives

These questions followed his introductory remarks regarding

- the 4 different medications which had been identified, with the one tablet which **Mdletyeni** had taken having helped
  - athletes being bombarded by advertising for supplements promoting muscle building, fast recovery and energy.
34. **Mdletyeni's** reply to these was that

6



1. he did
2. he got it from the gym
3. he was not sure of the name
4. he used it three weeks before the fight, when it was finished and never used it again
5. 61.24kg's
6. he was not sure – but weighed about 60kgs at the time of the fight
7. he had no trouble making his weight
8. 70kgs – presently middleweight
9. roadwork to lose weight
10. no... he (simply) ran on the day before the fight

35. In response to the following questions put to him by the Chairman

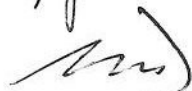
1. do you know the name of the physiotherapist ?
2. why did you not tell your uncle/coach that you were going to see your instructor ?
3. don't you need a doctor's prescription for the Furosemide ?
4. is he a doctor ?

**Mdletyeni** replies were that

- he did not know the name of the physiotherapist he saw
- he did not tell his uncle/ coach that he was going to see the instructor – because he ( uncle coach) knew that the physiotherapist had not helped
- he got the little white tablets established to contain the Furosemide from the instructor
- the instructor was not a doctor

Prosecutor - Kock's cross-examination

36. After seeking to clarify which pills had been put into the packet for analysis by the laboratory at the UFS Kock then put it to **Mdletyeni** that the report (exhibit L) showed that the tablets which were sent for analysis were not the small white tablets but a capsule and two other tablets (one small the other large).
37. **Mdletyeni** replied that only three white tablets were sent. **Kock** stated that this was inconsistent with the report. As there could have been a mix up at the lab, understanding the process Kock then simply asked **Mdletyeni** to confirm that he handed over three small tablets, to which **Mdletyeni** replied that he had done so.
38. Further questioning by **Kock** resulted in **Mdletyeni** providing the following relevant evidentiary matter regarding his weight, diet and training
  - he was not sure what his weight was three weeks before the fight
  - he maintained his weight by running and training (at the gym) not with fat burners
  - he was not in training (at the time of the hearing)
  - he started reducing weight about a month before the fight
  - he took the small white pill (Furosemide) on the Wednesday before the fight
  - on the Friday he went out on a run. This he did after he did not make the weight through having eaten a lot
  - he generally ran every day – twice
  - his food was all boiled or steamed
  - he did not use fat burners, although it was not certain that he knew what these were
  - he dropped about 3kgs before a fight
  - his weight went up and down

nn 7 fob  




- he lost weight through running and training
- there were periods of inactivity
- he started training for the fight in May
- it would be safe to say he needed to drop weight before a fight for he stated he weighed 70 kgs when inactive

39. Concerning his injury and what he did about this **Mdletyeni** provided the following in response to some further questions put to him by **Kock**

- he had “boxing knuckles”
- he did not have this (condition) before
- he got them from his use of the punching bag
- this happened because the gloves which he used were quite hard
- he was not sure whether the physiotherapist treated other boxers
- the physiotherapist, who did not seem knowledgeable about boxing, treated him but did not give him any medication or instructions
- he did not go back to his uncle/coach when the physiotherapy did not work
- he did not see the trainer at the gym on the recommendation of anyone else, he did so on his own
- he saw the instructor because he usually helped with his preparations with weight training
- he did not seek medical advice from the instructor (trainer)
- he asked the instructor to help him with his swollen knuckles
- he asked the instructor because he had told the instructor that he had a problem before he went to see the physiotherapist

40. When **Mdletyeni** was asked by **Kock** why he asked a weight training instructor (Siyanda) for medical advice **Mdletyeni** appeared to avoid answering the question. When confronted with this proposition by the Chairman **Mdletyeni** simply responded by stating that he had just informed the instructor.

41. To a question put to him by the Chairman as to why he had taken pills from a weight training instructor, (which the Chairman mentioned was necessary for the purposes of establishing any degree of fault) **Mdletyeni** said that he needed help and only had two days (before the fight)

42. **Mdletyeni** admitted that taking pills from an instructor was a bit out of the ordinary, adding – in reply to **Kock’s** question in this regard - that

- he knew that he was not supposed to take it
- he was desperate.

He also mentioned that he was the only one (boxer) who trained with the instructor.

43. **Kock’s** further questions dealing with his failure to disclose his taking of the small white tablet on the doping control form resulted in **Mdletyeni** revealing (quite unhelpfully) that

- he did not think about putting it on the doping questionnaire
- he did not know why he did not disclose this
- it was not because he knew that the tablets were not legal that he did not disclose them, as he did not know they were illegal
- his body was in pain (after the fight)

at the same time avoiding answering other questions put to him as to why he failed to make the disclosure such as

- Did you feel guilty when the form (DCF) was filled out ?
- Did you feel wrong about winning the fight ?

44. Further questioning provided that **Mdletyeni**

- got R 15000.00 for the fight
- did not have money to pay the physiotherapist
- did not take supplements / fat burners.  
These, **Kock** had mentioned beforehand, were sometimes found to have methylhexaneamine in them.
- was a professional boxer
- boxing was his only source of income
- he did not ask his instructor what the tablets were which he gave him
- he knew about anti-doping with regard to not using certain things - supplements or substances
- knew it was prudent to find out
- did not know what Prohibited Substances meant
- did not know where to find out
- did not do anything – as a professional boxer - to find out what he took.

45. Following a brief adjournment the answers provided by **Mdletyeni** revealed that

- he knew that professional boxers Molefi Matima and Sinethembe Mncane had tested positive for steroids and dagga respectively
- he had completed matric and 3<sup>rd</sup> year BSc Health Promotion degree course
- some of his subjects were primary health, research, anatomy, physiology, education psychology
- had not graduated as fees were outstanding

- **Kock** noted at this point that it was inexplicable why with such academic qualifications **Mdletyeni**, a “bright guy”, was not aware of what it was that he took -

and further that

- the highest levels that he had competed at were in 2008 as a Featherweight (57.5kgs)- Provincial Champion and currently as Lightweight - SA Champion
- he did not think about asking his coach about what Pharmaton was used for and what was in it
- he took vitamin C for cold
- the Cramp Ease and Vitamin C were all finished
- although uncertain he assumed his attorney had sent whatever he had given him to the lab. He advised that Pharmaton was included and in all likelihood the anti-biotic as well
- he helped other boxers with their diet
- he did not give them advice on supplements
- he did not know about Ludwig Mamabolo, who won Comrades and tested positive, as well as Chiliboy Ralepele and Bjorn Basson test result
- he expected to receive his prize money after the weekend by Wednesday latest by Friday
- he used whats app on his cell phone as well as twitter and facebook applications.

46. In response to questions relating to the use of Pharmaton and other tablets – posed by **Kock** - **Mdletyeni** stated that

- the coach gave Pharmaton to the whole group (the coach trained)

- no one else (of that group) had been tested
  - he did not ask his coach about Pharmaton
  - he started using Pharmaton in training about a month before the fight, taking it on the day of the fight too and stopped when he rested after the fight
  - he took the Pharmaton because the coach gave it to him and he trusted him. He took it without asking any questions
  - his coach was not a doctor or pharmacist and did not have a degree
  - the anti-biotic was for flu
  - he knew that the Pharmaton was a multivitamin but did not know what was in it.
47. **Mdletyeni** accepted that it was irresponsible not to read what was on the bottle in responding to Chairman's question concerning his lack of knowledge in this regard.
48. Following closing questions put to **Mdletyeni** by **Kock, Mdletyeni**
- acknowledged that the Physiotherapist (who did not give him anything to take) was more qualified than the gym instructor and a Pharmacist even more so
  - confirmed that the gym instructor worked at the gym in town not the boxing gym
  - did not know whether the gym instructor gave anyone else tablets
  - did not go to the gym instructor for medication, but accepted what he gave him when he took them out of his bag for the swollenness (to his knuckles).

Evidence of witness Mr Mthethunzima Dumezweni, "Dumezweni"

(provided by 'teleconference call'/ speaker phone – as agreed)

49. Dumezweni provided the following evidence in response to questions put to him by **van der Walt**
- **Mdletyeni** was his sister's child (his nephew)
  - he was a boxing trainer
  - he had coached **Mdletyeni** since he started boxing. He was now the SA Champion
  - they don't have a doctor they used anyone who could give them help
  - the reason why they didn't have a doctor was that they didn't have money
  - they did not have medical aid either
  - he was responsible for choosing which doctor and medicines
  - he provided Pharmaton (to those he coached) on the advice of a professional doctor who said it was good
  - he did not do any tests on whether it was safe to use the Pharmaton
  - he knew a little about anti-doping as some things which athletes are not supposed to take
  - he was not clear about the education he had received. He recalled an Anti-doping Awareness Programme in 2004 at which they got some booklets and were made aware of the need to check anything we gave the athletes
50. Regarding the facts and reasons behind why **Mdletyeni's** hearing was taking place Dumezweni responses to questions put to him were such that
- the problem started at the health club, where **Mdletyeni** was given the thing which caused the trouble
  - **Mdletyeni**
    - had problems with his knuckles, which were swollen three weeks before the fight
    - went to the gym instructor and told him about his knuckles
    - had been to the physiotherapist twice before that without success



there were serious consequences for an anti-doping violation, asked **Mdletyeni** whether he had remembered by any chance having taken a supplement, which could have had methylhexanemine in it.

55. **Mdletyeni's** reply was Evox 3DT Muscle Punch.

56. Having regard to the time it was agreed that

- **van der Walt** and **Kock** would meet to determine further questions concerning this "11<sup>th</sup> Hour" disclosure as the more likely source for the methylhexaneamine. This rather than the Pharmaton which had originally suggested as a likely source as it could have possibly been contaminated.
- the Panel would have the opportunity to add to these
- such questions as had then been finalised be put to **Mdletyeni** for his replies which would be contained in an affidavit to be prepared by his attorney Mantyi.

57. As matters turned out

- the questions were duly submitted to Mantyi for **Mdletyeni's** consideration and reply
- it was then agreed that instead of his providing his responses by affidavit **Mdletyeni** provide these by telephone conference call
- for the purposes of due process the hearing was thus duly re-convened on 4 December at the SAIDS boardroom
- during this teleconference/ speaker phone call **Mdletyeni** was assisted by Advocate Adiel Nasrodien and Dumasile Lonwabo at Mantyi Attorneys - in the absence of **van der Walt** and Mantyi respectively.

58. The following is a summary of evidentiary matters - as reflected in the Chairman's notes and/or minute taken by Rayanah Rezant - which were provided by **Mdletyeni's** replies, following his first having been sworn in. The Panel, **Kock** and Fahmy Galant of SAIDS were also present.

- ❖ **Mdletyeni** had taken the sport supplement Evox Muscle Punch 3DT in the week before the fight
  - he used this
    - every day for three weeks until the Tuesday before the fight when it ran out
    - for energy before he trained
    - as his first and only other supplement, he took no others
  - he did not
    - check the label before he used it
    - google the name
  - he did not know that
    - he had to google the name
    - he could google the name to check the ingredients online
    - the SAIDS website had a medicine / ingredients checker
    - SAIDS had a website
  - he did not know what
    - 1.3 Dimethylamylamine was
    - Methylhexaneamine was
    - He also did not know
      - before the fight and his having tested positive that methylhexanimine was a prohibited substance and that he should not have taken it
      - how long it took for the methylhexanemine to leave the system
    - Geranium root extract was

- DMAA was
- he got the Evox sport supplement
  - from the gym
  - for free – he did not buy it – it was one container
  - from people in general whom could not remember
  - on advice from Siyanda, his gym instructor, who
    - he worked with
    - he trusted, as he had been working with him since 2008
    - had checked the ingredients on the leaflet or the bottle/container
- ❖ **Mdletyeni** waited until Dr George van Dugteren pointed out that he had failed to show how the Methylhexaneamine had entered his system to finally disclose his use of the Evox 3DT Muscle Punch because
  - the focus was on the Furosemide (3 white tablets)
  - he felt that the question about Methylhexaneamine was only asked at the end
- ❖ Additional answers by **Mdletyeni** provided that he –
  - stopped taking the Evox because he ran out of it
  - did not take any other supplements
  - did not give the name of physiotherapist and contact details in his affidavit because he did not know them
  - did not provide the very important corroborating evidence of the physiotherapist regarding his two visits for treatment to his injured knuckles because he did not know he had to and his attorney did not assist
- ❖ Furthermore in response to questions relating to his use of the Furosemide (small white pills) **Mdletyeni** advised that
  - he did not know that the Furosemide was used as a diuretic in order to lose water through urinating and thus weight
  - he did not use the Furosemide for such purposes as he never had a problem making his weight,
  - he ran off any weight which he had to lose and 1.5 kgs was not a problem
  - he got the Furosemide from his gym instructor
  - he took it for his knuckles
  - he only took one pill even though his uncle had said he took two
  - he felt better even though his uncle had said he was still in pain
- ❖ To a final question put to him by the Chairman as to who he had got the Evox from - finding it strange that he had got the Evox from someone who he did not know, as a donation and his gym instructor's go ahead to use it as he had said it was okay to take it - **Mdletyeni** replied that this was so.

#### ARGUMENT / SUBMISSIONS

59. As agreed the heads of argument / submissions made by both **van der Walt** and **Kock** were then submitted for the panel's deliberation and verbal decision provided on 6 December 2012
60. The reasons for the decision reached by Panel follow the consideration, analysis and evaluation of
  - ✓ the submissions made - recorded for ease of reference

- ✓ the admissibility of the evidence led, having regard to considerations relating to credibility and the weighting thereof
- ✓ all other evidence led, including corroborative and hearsay evidence in applying the legal principles having regard to the Rules and decided cases / precedent.

#### Defence submissions

61. The essential aspects of **Van der Walt's** submissions on behalf of **Mdletyeni**, concerning the determination of the appropriate sanction, in referring to Articles 10.4 and 10.5.1 and 10.5.2 of the Rules concerning the possible reduction of the period of ineligibility, provided as follows

- **Mdletyeni** accepted
  - the presence of the Methylhexaneamine and Furosemide in his system
  - he had committed an anti-doping violation
  - all the International Standards had been complied with
  - that there had been no departure which could reasonably have caused an adverse analytical finding.
- **Mdletyeni** admitted that he had used
  - one of four white tablets which Siyanda, his gym instructor, had given him to reduce the swelling in his knuckles, in the week before the fight  
One of these tablets had tested positive for Furosemide – exhibit L
  - the sport supplement known as Evox Muscle Punch 3DT, “Evox”, until the Tuesday before the fight  
It subsequently became known that 1,3 - Dimethylamylamine – a synonym for Methylhexaneamine – was an ingredient of Evox
- Methylhexaneamine and Furosemide were classified as Specified Substances on the 2012 Prohibited List.
- There were specific and exceptional circumstances relating to **Mdletyeni's** use of the Methylhexanemine and Furosemide which needed to be considered by the Panel in determining whether there was any basis for reducing the standard sanction of a 2 year period of ineligibility for **Mdletyeni** as a first time offender.
- Although more fully set out in paragraphs 21-50 of **van der Walt's** submissions and **Mdletyeni's** affidavit, exhibit P, some of the more pertinent circumstances relating to **Mdletyeni** have been listed below, for ease of reference –
  - he was 24 with sober habits
  - his home language was Xhosa
  - he had not been previously tested for prohibited substances
  - his first interaction with anti-doping control procedures was on the night of the fight
  - he had not received any formal doping education from Boxing South Africa (BSA) or his coach
  - he only became aware of the dangers of doping after he received the positive test results of his A-sample
  - he read some research material given to him by his attorney after his positive test
  - he had limited internet access, using his cell phone for social networking and downloading music
  - his coach gave him medicines and supplements
  - he did not have medical aid and access to a specialist sports doctor or doctor

- his access to the physiotherapist to try and relieve his swollen knuckles was due to the goodwill of a patron/supporter
- he lived with his uncle/coach in UMthatha, who his guardian after his mother died
- he attempted to better his life through higher education which he could not complete due to financial constraints
- none of his coach's boxers have tested positive
- he took the tablets which his instructor gave him to relieve the swelling in his knuckles, after the physiotherapy treatment had not helped because he trusted him
- it was only after he had been informed about the adverse analytical finding that he considered that the tablets which the instructor gave him could have contained a prohibited substance
- the instructor excused himself from talking to the coach about the tablets and refused to answer calls and speak to the coach or him
- he received the Evox free
- he asked his instructor if it was 'okay' to use it and he had indicated it was 'okay'
- he used the Evox continuously for three weeks before the fight

➤ In **van der Walt's** dealing with the question of how the Specified Substances entered **Mdletyeni's** system (in paragraphs 51-62) **van der Walt** submitted, concerning

1. Furosemide that

- **Mdletyeni** had ingested tablets given to him by the instructor during the week of the fight
- the sample he gave for testing after the fight had produced an adverse analytical finding for Methylhexanamine and Furosemide
- the laboratory report exhibit L showed that the one small white tablet tested positive for Furosemide
- it had therefore been established that the Furosemide entered his system by means of one of the tablets given to him by the instructor.

2. Methylhexanamine that -

- the sample which **Mdletyeni** gave for testing after the fight had produced an adverse analytical finding for Methylhexanamine
- he had used Evox in the week of the fight containing the listed ingredient , 1,3-Dimethylamylamine
- as this was the only supplement which he had used in the weeks preceding the fight and up to the Tuesday before the fight and Evox contained Methylhexanamine, it was more probable than not (quoting Lord Denning in Miller v Minister of Pensions) that the Methylhexanamine entered his system by means of the Evox.

She thus argued that it was thus more probable that the Furosemide entered his system by means of the small white tablet given to him by his instructor and the Methylhexanamine entered his system by means of the Evox.

➤ Concerning whether there was an absence of intention to enhance sporting performance and evidence corroborating this, **van der Walt** submitted in argument, with reference to the decided cases of CAS 2010/A/2107 Olivierav. USADA (6 December 2012) and CAS 2009/A/1918 Jakub Wawrzyniak v HFF (21 January 2012), that

- the absence of intent needed to be established on a balance of probabilities



- corroborating evidence of the absence of any intention (on the part of **Mdletyeni**) to enhance his sporting performance, or mask the use of a performance enhancing substance, had to be established to the comfortable satisfaction of the tribunal (Panel)
  - because Furosemide and Methylhexanamine were Specified Substances there was a greater likelihood of a credible, non -doping explanation for the use thereof
  - **Mdletyeni** maintained that he was not aware that the Evox or tablets he took contained Methylhexanamine or Furosemide or any other prohibited substance
  - he was thus unaware that Methylhexanamine or Furosemide was an ingredient of the Evox and tablets respectively and could not (therefore) have used the specified substances (for which he had been charged with the anti-doping violation) with the intention of enhancing his sporting performance
  - **Mdletyeni** took Evox without any doubt as to its quality and without suspicion that it could contain Methylhexanamine, with the intention of it providing him with energy before he trained
  - there was no indication that when he took the Evox or the tablets that these may be contaminated with Methylhexanamine or Furosemide respectively
  - he did not have the necessary knowledge and education about prohibited substances and doping to look out for those substances and to use them to enhance his sport performance.
- In concluding argument regarding **Mdletyeni's** intention to enhance sporting performance or rather the lack thereof, **van der Walt** submitted further as regards –

- Methylhexanamine
  - the Evox was not labelled in any way as which indicates or could be suspected of indicating that it contained a prohibited substance
  - even had **Mdletyeni** checked the ingredients label he could not have identified 1,3 Dimethylamylamine as a prohibited substance as he testified that he did not know what it, along with Methylhexanamine, DMAA or geranium root extract, was
  - the Evox could not have been taken as a masking agent as it is not the nature of Methylhexanamine to be used as such
  - quoting the case of UKAD v Matt Schneck (17 December 2010) in which the athlete had established to the satisfaction of the tribunal that he did not use the substance with the intention of enhancing his sporting performance, *because at the time of use*
    - *the athlete was unaware that the Methylhexanamine was a constituent ingredient of the dietary supplement*
    - *Methylhexanamine was not labelled as being a constituent ingredient*
    - *the athlete made enquiries with his coaching staff to ensure that the dietary supplement was permissible for use in connection with out-of-competition training.*

That It therefore cannot be said that **Mdletyeni** used Methylhexanamine with the intention to enhance his performance, taking into consideration

- ✚ he was unaware that Methylhexanamine was a constituent ingredient of Evox
- ✚ Methylhexanamine was not labelled as being a constituent ingredient of Evox
- ✚ he had asked the instructor whether the Evox was 'okay' to use
- ✚ he used Evox for the purposes of obtaining energy before his training
- ✚ he did not take Evox on the day of the fight
- ✚ his level of doping education or the lack thereof.

○ Furosemide

- Similarly that **Mdletyeni** had established that he did not have the intention to enhance his sporting performance or mask the use of performance-enhancing substance through

- ✚ his not having known that the tablets which the instructor had given him contained Furosemide
- ✚ his not having suspected anything as he trusted his instructor
- ✚ his lack of doping education had not thought of asking the instructor whether it contained prohibited substances
- ✚ the instructor having informed the coach that he was just helping to heal his swollen knuckles when confronted by the coach

taking into consideration

✚ **Mdletyeni**

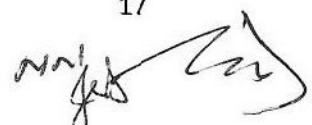
- having used the tablets to reduce the swelling in his knuckles
  - having felt better after using the tablets
  - not having known that the tablets he took to reduce the swelling had a prohibited substance in it
- ✚ existing case law which supported that Furosemide has the effect of reducing swelling and water retention, having earlier referred to the following cases of

*New Zealand Federation of Bodybuilders v Annette Sloog STD10/04*  
*WADA v Sloane Goosen and SAIDS (5 July 2012)*  
*IRB v Evgeny Pronenko (14 November 2011)*

relating to its use in circumstances of fluid retention, water retention and significant odema to reduce swelling respectively.

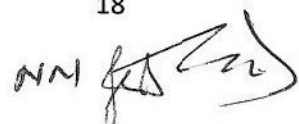
- **Van der Walt** then addressed **Mdletyeni's** degree of fault - as the criteria to be considered by the Panel in assessing any reduction of the period of ineligibility. She did this by reference to decided cases considered relevant and the commentary to Article 10.4, pointing out that the requirements that specific and relevant circumstances must be considered to explain the departure from the expected standard of behaviour. In addition **Van der Walt** submitted the Panel consider that

- **Mdletyeni** was 24, dependent upon his coach as his guardian, since his mother had passed away
- he had no formal or any kind of anti-doping education
- he was not aware that the Evox/tablets could have contained prohibited substances
- he would specifically in respect of the Methylhexaneamine, even if he were able with the necessary checks, not have been able to identify that Methylhexaneamine was an ingredient of Evox
- although a professional boxer he was not an elite athlete
- he did not have the resources/experience in respect of doping to take informed decisions
- even though his coach had had some anti-doping education and stated that he had talked to his boxers about this **Mdletyeni** ..... did not remember ever receiving anti-doping education from his coach



- although naive to trust his coach and instructor to provide him with tablets he did not have sport doctors/ specialists with the necessary knowledge to help him with advice on prohibited substances
  - without the necessary anti-doping education he would not be able to ask a doctor/any other person the right questions to ensure no prohibited substances entered his body even if he had a doctor at his disposal
  - **Mdletyeni** acted as any athlete in his position and with his experience and knowledge would have
  - had he been educated by the national federation and been able to access doctors with the necessary knowledge he could have made an informed decision with the standard of care reasonably expected of him
  - he did not come from an affluent background where he had the means and resources at his disposal to make informed decisions on sound advice, on every step of the doping process.
- See: SARU v MC.Ralepelle and BA. Basson (27 January 2011); FA v Kolo Toure 28 May 2011 and CAS 2009/A/1918 Jakub Wawrzyniak v HFF 21 January 2012)*
- in assessing the degree of fault /negligence the Panel should emphasise the reality that he received no anti-doping education, was not wilfully blind and accepted responsibility for what he did and did not do
  - given his life and training circumstances it was not strange that he took the Evox which was donated at the gym and did not know who it was who gave it to him. Most of his supplementation, medication and visits to doctor/physiotherapist were sponsored as neither he nor his family could pay for these resources readily available to most professional athletes
  - having regard to WADA v Sloane Goosen and SAIDS (5 July 2012) and USADA v Brunemann AAA No. 77190E44708 (26 January 2009), where the athletes were national /elite athletes and had no anti-doping education but had been tested twice and four times respectively before, the degree of care **Mdletyeni** was expected to act with should decrease ...with the effect that no significant fault or negligence could be attributed to him
  - the fact that he was Xhosa speaking and there were clearly communication problems which should not be held against him, as also the fact that his demeanour could not be assessed when he could not come to Cape Town again (for the teleconference call) due to financial constraints. See SAIDS v Russell Lund (30 January 2012), where the panel gave the witness Mr Makwatini the benefit of doubt when language was clearly an issue.
  - with this in mind and **Mdletyeni** not very articulate due regard be had to Article 8.4.9 relating to the receipt of hearsay evidence as best available evidence in the light of the instructor's refusal to testify and being able to subpoena him
  - his shocked reaction when told about the results
  - his feelings of remorse for his actions and the positive test – having learned from this
  - although he admitted he was irresponsible and should not have taken the tablets, he ought not to be held responsible for what he could not reasonably have known what degree of care was expected of him
- **Van der Walt** then concluded her submissions regarding the circumstances relating to the assessment of degree of fault or negligence displayed by **Mdletyeni**. This followed further referral to **Mdletyeni's** lack of resources and access to doctors impacting on his ability to have exercised the required degree of care.

In doing so **van der Walt** submitted that



- it was evident that **Mdletyeni** showed no significant fault / negligence for his positive test
- the sanction to be imposed by the tribunal (Panel) should be proportionate to the moderate degree of fault/negligence shown by him

### Conclusion

Van der Walt then concluded by submitting that

1. **Mdletyeni** had discharged the burden on him of proving to the comfortable satisfaction of the Panel that
  - Methylhexaneamine had entered his system as a result of the ingestion of Evox he had received free at the gym and the Furosemide entered his system by means of the ingestion of the tablets given to him by the instructor
  - he had no intention to enhance his sporting performance
  - he had presented corroborating evidence of the fact that he did not take the Methylhexaneamine or Furosemide to enhance his sporting performance or mask the use of performance enhancing substances, and
  - no significant degree of fault or negligence can be attributed to him

**Mdletyeni's** sanction be reduced to a maximum of two months ineligibility in respect of Article 10.4 for each of the specified substances found in his sample ...a total of 4 months of ineligibility.

*alternatively*, that

2. exceptional circumstances had been set out and it had been proven to the comfortable satisfaction of the Panel that in respect of Article 10.5.2
  - Methylhexaneamine had entered **Mdletyeni's** system as a result of the ingestion of Evox he had received free at the gym and the Furosemide entered his system by means of the ingestion of the tablets given to him by the instructor
  - he bore no significant fault or negligence for the adverse analytical finding

the period of ineligibility (in respect of **Mdletyeni's** sanction) should be at the minimum of one year period of ineligibility for each of the specified substances found in his sample.....a total of 2years of ineligibility.

Furthermore that where the Panel found that in respect of 10.4 the evidence in respect of one of the specified substances fulfilled the requirements of 10.4 and the evidence for the other specified substance fulfilled the requirements for 10.5.2 the sanction should be a period of 14 months of ineligibility ie two months + 12 months.

### Prosecutor's submissions

62. **Kock's** submissions followed - and in doing so accepted - those prepared by **van der Walt**- except for the following points of difference
  - **Mdletyeni** had completed a BSc degree at the Walter Sisulu University which had not yet been awarded to him due to outstanding fees owed

- he visited a physiotherapist to treat his sore knuckles, but felt that the treatment was not harnessing the desired results fast enough and hence approached his gym instructor Siyanda for medical advice
- he admitted that he was overweight less than 24 hours before the fight
- **Mdletyeni's** assertion concerning the number of tablets consumed was in conflict with his coach's version of events
- as there were two specified substances Article 10.7.4 dealing with multiple violations was applicable and read together with Articles 10.4 and 10.6 in determining the appropriate sanction under aggravating circumstances
- exceptional circumstances under Article 10.5 were not considered to be applicable
- despite never having been tested **Mdletyeni** had an above average knowledge of fellow boxers and the anti-doping transgressions they had been found to be guilty of, recalling Molefi Matima's nandrolone case to name but one
- it was his contention that he only read some research material on doping after testing positive, given to him by his attorney
- **Kock** called into contention the averment that **Mdletyeni** only became aware of the dangers of doping after he received the positive test results of his A-sample
- **Mdletyeni** primarily has access to the internet via his cell phone
- It was **Mdletyeni** initial contention that the medicines and supplements used by him were given to him by his coach Mthethunzima Dumezweni. This assertion was contradicted through later testimony (in which) he stated that he also approached his gym instructor for medical and supplement advice as well as accepting supplements from benefactors at the gymnasium where he did weight training
- **Mdletyeni** had indeed completed his degree but had not yet received it due to outstanding class fees
- despite his tertiary qualification in science the athlete (**Mdletyeni**) did not enquire from the instructor as to the source of the tablets nor the legality of the tablets.  
**Kock** called into contention the assertion that **Mdletyeni** trusted his instructor and advice. (Para 44 vs 39)
- **Mdletyeni** did not take these tablets to a pharmacy to establish the nature of the tablets
- **Mdletyeni** chose not to declare the use of the supplement Evox on the Doping Control Form
- the assertion that **Mdletyeni's** first interaction with doping control procedures was after the fight, when he was called to provide a sample for anti-doping testing was called into contention by **Kock**
- similarly the assertion that it was only after the adverse analytical finding that **Mdletyeni** considered that the tablets given to him by the instructor could have contained a prohibited substance were also called into contention by **Kock**
- after being confronted with the positive test **Mdletyeni's** coach engaged the instructor about the tablets. (See Para 50 v 44)
- **Mdletyeni** received the Evox free from a benefactor at the gymnasium (see Para 54 v 47)
- he did no due diligence into the nature of the product either through speaking to a pharmacist in the area or checking up on the phone despite his appreciation for the risk involved through his broad knowledge base re positive tests in South Africa boxing and tertiary qualification in science. (See Para 54 v 48)
- **Mdletyeni** merely asked the instructor if it was 'okay' to use, which the instructor indicated that (it) was 'okay' – according to him. There is no corroborating evidence in this regard (see Para 55 vs 48)
- **Kock** called into contention the submission that there is a greater likelihood of a credible non-doping explanation (Para 71 vs 66)
- the context of the intake of the Methylhexanamine and Furosemide is reliant on the evidence of **Mdletyeni**. Evidence which was contradicted itself (see Para 72 vs 66)

- the only other evidence surrounding the ingestion of these specified substances is from the coach and here it also materially differs from **Mdletyeni** ie the amount of Furosemide tablets that was ingested by **Mdletyeni** (see para 73 vs 66)
- when confronted with these anomalies **Mdletyeni** indicated that his version should stand where it conflicts with his coach
- the assertion by **Mdletyeni** that he was not aware that the Evox or the tablets he took from the instructor contained Methylhexaneamine or Furosemide or any other prohibited substance was a very convenient assertion indeed
- it was not inconceivable that **Mdletyeni** had used the Furosemide to ensure that he made the weight category given that he had admitted to being overweight less than 24 hrs before the crucial weigh-in. The coach's assertion that he used more Furosemide tablets makes sense.
- there is no corroboration for the intake of Furosemide apart from **Mdletyeni's** version
- **Mdletyeni** testified that he took the pre-workout supplement Evox to provide him with energy before he trained. The enhanced ability to train would be (able) to prepare him better for the national title fight than without it hence the intention to enhance his performance
- he made no attempt to do any type of due diligence how basic it may have been that Evox may have been contaminated with Methylhexaneamine or Furosemide
- in respect of Methylhexaneamine or Furosemide **Mdletyeni** did have the necessary knowledge and education about prohibited substances and doping as was evident in how well he versed he was in the anti-doping rule transgressions by his fellow boxers. He chose not to perform any form of due diligence
- the *Foggo case CAS A2/2011* seemed to have application in this matter where **Mdletyeni** took Furosemide in a weight based sport as well as Evox to facilitate improved preparation for his national title bout. In Foggo it was stated that
  - “The lesser sanction scale for specified substance cases cannot be applied if an athlete believes that the ingestion of the supplement will enhance his/her performance although the athlete does not know that the supplement contained a prohibited substance.”
- **Mdletyeni** assertions that he unknowingly took these substances could mean that he escaped the application of Article 10.6 concerning aggravating circumstances, provide the Panel is satisfied with the credibility of his evidence

**Kock** then recommended on behalf of the SAIDS prosecution that **Mdletyeni** be sanctioned with a two year period of ineligibility as from the date of notification under Article 10.4.

Defence response – further & final submissions

64. In further argument in reply to **Kock's** submissions, **van der Walt** submitted that

- those boxers - who **Mdletyeni** had admitted to having knowledge of their having tested positive for prohibited substances – were found to have tested positive for serious non-specified substances, such as steroids
- **Mdletyeni** had not contradicted himself as
  - his use of medicines and supplements provided by his coach was limited to those listed on the Doping Control Form, “DCF”
  - he had not asked the instructor for advice on medicine
  - the little white pills had been given to him by the instructor, who knew about his swollen knuckles without his having asked

- a distinction needed to be drawn accordingly between subsequent statements, which referred to the tablets and Evox and initial statements which related to the medication and supplements mentioned on the DCF.
- **Mdletyeni** could not have been expected to approach a pharmacist to establish the nature of the tablets, as
  - he did not know or had the suspicion that these tablets contained prohibited substances
  - did not have the necessary anti-doping education to make an informed decision to take the tablets to a pharmacist
  - he did not have the financial backing to do so.
- There was no evidence presented during the hearing - whether by indication or statement in his testimony, or otherwise, which established that **Mdletyeni** consciously chose not to declare the Evox on the DCF.
- **Mdletyeni's** evidence that he could not remember why the tablets (and thus the Evox too) were not disclosed because he was in a lot of pain after the fight should be accepted.
- it was speculative to suggest that no due diligence had been carried out by **Mdletyeni**, whether through a pharmacist or on his phone, as
  - he had not been questioned about why he (**Mdletyeni**) had not asked a pharmacist for advice or knew he could do so.
  - Furthermore - with specific reference to the questions he had answered relating to the use of "Google" or the SAIDS web site, which had been put to him relating to whether he had used his phone (cell phone) to obtain relevant information and his not having had the knowledge and formal doping education that he could do so.
  - the instructor's "okay" regarding **Mdletyeni's** use of Evox should be accepted as hearsay evidence under Article 8.4.9. This particularly because the instructor had avoided **Mdletyeni** and his coach and could not have been subpoenaed as an unwilling witness to have testified at the hearing.

## 65. THE PANEL'S DECISION

The Panel met on Monday 3 December 2012, following the hearing proceedings of 6 and 14 November and receipt of the minutes and submissions and minutes, for the purpose of deliberating upon the appropriate sanction.

The following verbal decision was unanimously agreed by the Panel concerning such sanction for the anti-doping violation which **Mdletyeni** had been charged with.

It was reached following

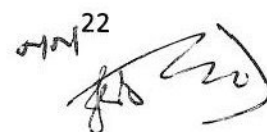
- admissions made by **Mdletyeni** at the hearing
- evidence having been led and argument subsequently brought by way of written submissions concerning possible mitigation of sanction.

### VERBAL DECISION

((issued on 6 December 2012 in accordance with Article 8.3.8 of the SAIDS Rules))

#### 1. Mr Viwe Mdletyeni

- 1.1 serve a period of ineligibility of 4 (four) months for the Stimulant – Methylhexanemine;

22  


- 1.2. serve a period of ineligibility of 15 (fifteen) months for the Diuretic – Furosemide.
2. Such periods
    - 2.1 to run concurrently;
    - 2.2 commence from the date of notification of the adverse analytical finding “AAF” being 22 August 2012 by reason of the Panel having decided under Article 10.9.3 to allow the time which Mdletyeni has already served under provisional suspension under the AAF to be taken into consideration and credited in full against such period of ineligibility.
    - 2.3 to thus terminate on
      - 2.3.1 on 22 December 2012 for the Methylhexanamine;
      - 2.3.2 on 22 November 2013 for the Furosemide.
  3. Mdletyeni shall, in addition, be liable and responsible for the consequences of such anti-doping violation as provided under the SAIDS Rules, which require
    - 3.1 the automatic disqualification and thus invalidation of the result of the title fight in Mdletyeni’s favour, as well the forfeiture of any medals, points or prizes which Mdletyeni won in such fight - Articles 9 and 10.1.1;
    - 3.3 Mdletyeni’s status as an athlete during the period of ineligibility is such that Mdletyeni shall not be entitled to participate in any capacity under any other SASCOC affiliated sporting code, other than authorised anti-doping education or rehabilitation programs - Article 10.10;
    - 3.4 Mdletyeni will be required as a condition of regaining eligibility to make himself available for out-of-competition testing - Article 10.11.
  4. The Panel’s decision with written reasons, as provided under Article 8.3.8.3, shall be prepared and written up by John Bush as Chairperson and submitted to the remaining Panel members for possible comment and/or amendment, as well as signature.
- 

66. What follows records the Panel’s full finding and decision with regard to Mdletyeni’s admission of the anti-doping rule violation, the applicable law / governing rules and reasons relating to what the Panel considered to be the appropriate sanction.

67. GUILTY FINDING / ANTI-DOPING VIOLATION



The **Panel** having accepted that **Mdletyeni's** violation of Article 2.1 of the **Rules** had been admitted by **Mdletyeni** at the outset of the hearing accordingly found **Mdletyeni** had in fact committed the anti-doping violation referred to in the charge.

## SANCTION

### 68. Introduction

In the light of such finding the **Panel** was thus required to consider and decide

- 68.1 what the appropriate sanction ought to be having regard to Articles 10.1 and 10.2 of the Rules;
- 68.2 whether, once this was determined, there was any basis for any possible elimination or reduction of any period of ineligibility imposed upon **Mdletyeni**, under either of Articles 10.4, 10.5.1, or 10.5.1.2 of the Rules, by his having established

68.2.1 no intent to enhance sporting performance - Article 10.4,

68.2.2 no fault or negligence - Article 10.5.1,  
or

68.2.2 no significant fault or negligence – Article 10.5.2,

as well as having met such other prescribed requirements, what this period, or such periods should be.

This the **Panel** did in making its further findings through the evaluation of all the evidence, within the totality of the circumstances giving rise thereto, having regard to all applicable laws – the governing Rules, precedent and South African law, as follows.

### 69. Applicable law/ governing rules

The essential governing Rules which the Panel was obliged to consider- in the light of the South African Constitution, common law and decided cases (precedent) in reaching its decision, apart from Articles 10.6 - Aggravating Circumstances Which May increase the Period of *Ineligibility* and 10.7 - Multiple Violations, are as follows:

#### 69.1 *Article 3.1*

##### ***Burdens and Standards of Proof***

SAIDS has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

Where these Anti-Doping Rules place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the *Athlete* must satisfy a higher burden of proof.

69.2 **Article 10.4**

***Elimination or reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances***

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 reprimand and no period of ineligibility from future events and at a maximum 2(two) years' ineligibility.

To justify any elimination or reduction the *Athlete* or other *Person* must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing Committee the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The *Athlete* or other *Person's* degree of fault shall be the criteria considered in assessing any reduction of the period of *Ineligibility*.

69.3 **Article 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 *Markers* or its *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.

69.4 **Article 10.9**

**Commencement of *Ineligibility* Period**

10.9.1 Except as provided below, the period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed

AM 25  
JES [Signature]

10.9.2 Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served.

10.9.3 Delays Not Attributable to the *Athlete* or other *Person*.

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the SAIDS *Anti-Doping Disciplinary Committee* may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred.

10.9.4 Timely Admission.

Where the *Athlete* promptly (which, in all events, means before the *Athlete* competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by SAIDS, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the *Athlete* or other *Person* shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* or other *Person* accepted the imposition of a sanction or the date of a hearing decision imposing a sanction.

10.9.5 If a *Provisional Suspension* is imposed and respected by the *Athlete*, then the *Athlete* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed.

10.9.6 If an *Athlete* voluntarily accepts a *Provisional Suspension* in writing from SAIDS and thereafter refrains from competing, the *Athlete* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete's* voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of a potential anti-doping rule violation under *Code* Article 14.1.

10.9.7 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *Athlete* elected not to compete or was suspended by his or her team.

69.5 **Article 18.2**  
**Interpretation**

18.2.1 The headings used in these Anti-Doping Rules are for convenience only and shall not be deemed part of the substance of these Anti-Doping Rules or to affect in any way the language of the provisions to which they refer.

18.2.2 The INTRODUCTION and the APPENDIX 1 DEFINITIONS shall be considered integral parts of these Anti-Doping Rules.

18.2.3 These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the *Code* and shall be interpreted in a manner that is consistent with applicable provisions of the *Code*. The comments annotating various provisions of the *Code* shall be referred to, where applicable, to assist in the understanding and interpretation of these Anti-Doping Rules.

69.6 **Article 20.3**  
**Governing Law**

South African law governs these Anti-Doping Rules.

26  
JLD

## 69.7 DEFINITIONS

### 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.

## 70. Issues for determination

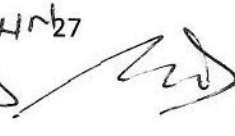
The issues for determination were

- A. whether **Mdletyeni** was entitled to the possible elimination or reduction of the mandatory 2 (two) year period of ineligibility, as provided under Article 10.4 read with Article 10.2, by reason of his having possibly
- i. established *on a balance of probability* both how the Methylhexaneamine and Furosemide had entered his body or came into his possession and that he had not intended that the Methylhexaneamine and Furosemide enhance his sport performance or mask the use of a performance enhancing substance
  - ii. produced corroborating evidence which had established *to the comfortable satisfaction of the Panel* the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.
- and if this was so in **Mdletyeni's** case -
- B. the degree of fault (on his part) as the criteria the Panel was required to consider in assessing the reduction of any period of ineligibility;
- failing which,
- C. whether there was any basis for the elimination or reduction in the applicable period of ineligibility under Articles 10.5.1 or 10.5.2
- and finally
- D. whether **Mdletyeni's** anti-doping violation, which involved the use of both Methylhexaneamine and Furosemide, amounted to aggravating circumstances under Article 10.6 and/or multiple violations under Article 10.7 of the Rules, justifying the imposition of greater periods of ineligibility as the appropriate sanction.

## 71. Panel's findings concerning the evaluation of evidence & submissions made

### 71.1 Introduction

HR27  
jed



- The Panel's assessment of the evidence led to the following findings made by the Panel, with reference to such evidence and the submissions made by **van der Walt** and **Kock** in relation thereto.
- It is important to note that such findings were based upon
  - the best available evidence having regard to inherent financial, language and other constraints, of which the inability to subpoena witnesses under the Rules and testimony given telephonically are noteworthy;
  - not having a full transcript of the hearing, with reliance having been made on the minutes of the proceedings, the Chairman's own notes, the submissions and matters clarified in e-mail exchanges.
  - there was considerable agreement between the defence and prosecution on the established facts

#### 72.2 Evidence relating to how the prohibited substances entered **Mdletyeni's** body

- The following undisputed evidence relating to the origin/source of the Furosemide and the Methylhexaneamine, (being Specified Substances) and how these entered **Mdletyeni's** body, although not exhaustive, was accepted by the Panel as relevant.

##### Furosemide

- Four little white tablets were given to **Mdletyeni** by Siyanda, his weight training instructor, to reduce the swelling in his knuckles
- Siyanda had obtained these from his grandmother who had high blood pressure
- **Mdletyeni** took at least one of these on the Wednesday before his SA Title Light Weight title fight on 28 July 2012
- **Mdletyeni** did not tell his coach Dumezweni about this at the time
- Once the results of his test had been made known he handed the remaining tablets to his attorney Mantyi for testing at the University of the Free State
- The test results showed that of the three items (being the small and large tablest and capsule) sent in the small plastic bag a small white tablet tested positive for the diuretic Furosemide.
- **Mdletyeni** failed to declare his use of the small white tablets, alternatively did not know were, as one of the medications/supplements taken within the last seven days before the declaration and its dosage were not disclosed on the Doping Control Form.  
His explanation for this was that he had not disclosed this because he had been in so much pain after the fight.

##### Methylhexaneamine

- It was speculated in **van der Walt's** opening address and initial line questioning that the possible source of Methylhexaneamine was the Pharmaton which had possibly been contaminated.  
This approach was discontinued when it became clear that the coach provided Pharmaton to all his boxers on a daily basis to help with maintaining muscle energy.  
The excessive preoccupation with the legitimate multivitamin Pharmaton was, in the Panel's opinion, largely responsible for not exploring the (infinitely more likely) possibility that a sports supplement was the source of MHA. It was only 'the 11<sup>th</sup> hour revelation' that completely negated the "Pharmaton theory", and

supports the athlete's view that there was minimal discussion on other possibilities such as "supplements" until late in the proceedings....

- Although **Mdletyeni** had seemingly alluded to his use of supplements obtained from the gym earlier in the proceedings it was only at the close of the proceedings on 6 November that **Mdletyeni**, confronted by the reality that he had failed to establish how the Methylhexaneamine had entered his body, testified in response to Dr George van Dugteren having
  - advised about the serious consequences for an anti-doping violation;
  - asked whether he had taken any supplements which could have had Methylhexaneamine in them,that he had taken the sport supplement Evox Muscle Punch 3DT.
- His explanation for testifying about this so late in the hearing was that the focus was on the Furosemide and he felt that the question about supplements as a possible source of Methylhexanemine had not been asked before then
- Evox contained the listed ingredient 1.3 Dimethylamylamine, a synonym for Methylhexanemine
- **Mdletyeni's** further testimony concerning Evox was that
  - he had used it in the week before the fight
  - he had started using it three weeks before the fight and took it every day until it ran out on the Tuesday before the fight
  - he got it from the gym for free
  - he did not know who he had received it from (ie who the benefactor was)
  - this was the only supplement he had taken in the weeks before the fight
- Whether conscious or not **Mdletyeni's** failed to declare his use of Evox as one of the medications/supplements taken within the last seven days before the declaration and its dosage on the Doping Control Form.
- It appears from the answers to line of questions posed by Dr George van Dugteren – refer to paragraph 33 and 34 above – following questions relating to whether he had a GP and Medical Aid, that **Mdletyeni** had admitted earlier in the hearing to taking supplementary energy drinks, which he got from the gym and was not sure of the name.

- This evidence was largely uncontested by **Kock** on behalf of the prosecution Although there were some areas of possible contradiction these were explained.

### 72.3 *Evidence relating to whether **Mdletyeni** had not intended the prohibited substances to enhance his sport performance or mask the use of a performance enhancing substance.*

- In contrast to the undisputed evidence referred to in paragraph 72.2 above **Kock** disputed some of the evidence which **Van der Walt** argued had provided proof on a balance of probability that **Mdletyeni** had not intended the prohibited substances to enhance his sport performance or mask the use of a performance enhancing substance.
- As regards his use of **Furosemide** the following evidence was considered relevant by the Panel, as being
  - ❖ *established or uncontroverted and thus not in dispute*
    - **Mdletyeni** was a professional boxer whose only source of income was from boxing
    - he suffered from swollen knuckles ("boxing knuckles") before the fight, caused by his use of hard gloves on the punching bag

- he had seen a physiotherapist, on the recommendation of his coach, who had treated him for this condition twice without success
- **Mdletyeni** did not have problems making the weight limit for his fights
- he received the little white tablets from his instructor Siyanda, who worked in the Umtata gym and helped him prepare for his fights
- Siyanda knew about his swollen knuckles, as he had told him. Siyanda gave him 4 (four) little white tablets, later identified as having the prohibited substance Furosemide in them to deal with the swelling
- there was a precedent in anti-doping case law *IRB v Evgeny Pronenko (14 November 2011)* in which an athlete had used a prescribed diuretic, which had contained Furosemide as an ingredient, to reduce swelling
- **Mdletyeni** did not ask his instructor what the pills were
- **Van der Walt** argued that in addition to such other evidence before the Panel, the Panel ought to accept the hearsay evidence provided by **Mdletyeni** as satisfying the requirement that he had produced corroborating evidence - proving to the comfortable satisfaction of the Panel - the absence of intent (on his part) to enhance his sport performance or mask the use of a performance enhancing substance
- he took at least one of these tablets on the Wednesday before the fight
- he did not seek medical advice from his instructor
- he took the pills because he needed help with the fight just two days away
- although he knew he should not take the tablet he was desperate
- he had felt much better after taking the tablet
- he failed to declare his use of the tablet on the DCF
- he did not think of declaring these. He did not know why but his body was in pain after the fight
- he did not tell his coach that he had taken the little white tablet until after the test results were made known
- he suspected that the little white tablets were the cause of the positive tests after the test results were made known to him by his coach
- Furosemide is a diuretic
- he did not have a GP or medical aid
- he did not see a pharmacist or 'surf' the web or SAIDS web site to establish what the pills were or whether he could take them
- the doping control officer filled in the medication/supplements on the DCF which **Mdletyeni** told him to on the advice of his coach. His manager signed the DCF
- he started reducing weight about a month before the fight
- he was 1.5kgs over the weight limit 24 hrs before the final weigh-in. It was not a problem for him to lose 1.5kgs
- he ran the day before the fight, Friday, in order to make the limit as he had eaten a lot
- his food was all boiled or steamed
- he did not use fat burners
- he dropped about 3kgs before a fight
- he did have periods of inactivity between fights when his weight went up to 70kgs
- he maintained his weight by roadwork / running – generally twice a day and training in the gym
- **Mdletyeni** had completed his Science degree – BSc Health Promotion but had not graduated because of unpaid fees

- he knew about
  - anti-doping with regard to his not using certain supplements or substances,
  - his being responsible and it being prudent to find out about these
  - the anti-doping violations committed by Sinethembe Mncane and Molefi Matima
- ❖ *controverted and remaining in dispute or possibly speculative*
  - the number of the tablets **Mdletyeni** took – one as he said or two as testified by his coach
  - whether he had used the little white tablet(s) to help him lose weight before the fight
  - whether he knew that a doctor's prescription was required for his use of the little white (Furosemide) tablets....as he simply responded to the question put to him about this that he had received the pills from his instructor
  - whether **Mdletyeni's** non-disclosure of his use of the little white tablet(s) on the DCF was because he knew these were illegal, or did he not declare them because he did not know what they were and could not name them
  - whether **Mdletyeni** felt guilty when filling out the DCF or wrong about his winning the title fight
- As regards his use of **Methylhexaneamine** the following admitted or uncontroverted and thus undisputed evidence was considered relevant by the Panel
  - **Mdletyeni** took a supplementary energy drink
  - he got this from the gym
  - although he appeared not know the name of this in his evidence-in-chief he later disclosed this to be Evox Muscle Punch 3DT
  - he did not pay for this, it was provided by a benefactor / persons unknown to him
  - he used it after he had asked his instructor (Siyanda), who he trusted and had checked the label whether it was 'okay' for him to use it
  - he used it for a period of three weeks before the fight up until it ran out on the Tuesday before the fight
  - he used it for energy before training
  - he did not
    - check the label,
    - Google the name to check the ingredients
    - visit the SAIDS web-site medicine ingredients checker
    - know he could do this
  - he did not know what 1.3 Dimethylamylamine, Methylhexaneamine, DMAA, Geranium root extract was
  - he did not have the necessary knowledge or education about prohibited substances to look out for these and to use them to enhance his sport performance

Although there is no direct evidence on whether **Mdletyeni** told his coach, or his defence legal team, about his use of Evox, it is apparent that the defence team had initially considered contaminated Pharmaton as the possible source of the Methylhexaneamine, hence producing the bottle at the hearing.



Whether or not **Mdletyeni** had the necessary knowledge or education about prohibited substances was called into dispute by **Kock** who argued that he had.

72.4 *Evidence relating to whether **Mdletyeni** had produced corroborating evidence which had established to the comfortable satisfaction of the Panel the absence of an (sic) intent to enhance sport performance or mask the use of a performance enhancing substance.*

- ❖ As regards the use of the small white tablets (containing Furosemide) **Mdletyeni's** coach – Dumezweni - provided the following uncontroverted evidence in support of **Mdletyeni's** evidence in this regard, namely that **Mdletyeni**
  - had swollen knuckles
  - had seen the physiotherapist twice without success
  - would have fought with one hand
  - had told him (Dumezweni) about his use of the tablets after the test results were made known to him.

further that

- the problem had started at the health club where he was given the thing which caused the trouble
- he knew that Siyanda
  - who gave **Mdletyeni** the tablets worked at the gym
  - got the tablets from his grandmother who had high blood pressure
  - gave the tablets to **Mdletyeni** to help with the swelling of his knuckles
  - was an uncooperative and reluctant witness
- **Mdletyeni** did not struggle to make his weight as a featherweight or lightweight
- he gave Pharmaton to all his boxers on a daily basis for energy

In dealing with the use of Evox (containing Methylhexanamine) **Van der Walt** argued that in addition to such other evidence before the Panel, the Panel ought to accept the hearsay evidence provided by **Mdletyeni** as satisfying the requirement that he had produced corroborating evidence - proving to the comfortable satisfaction of the Panel - the absence of intent (on his part) to enhance his sport performance or mask the use of a performance enhancing substance.

This 'hearsay' evidence which **Mdletyeni** provided and **van der Walt** argued should be accepted by the Panel under Article 8.4.9 as sufficient corroboration to meet the requirements of Article 10.4, particularly as the instructor was a reluctant witness and had not been helpful in making contact, was that

- **Mdletyeni** had asked his instructor Siyanda whether it was 'okay' to use the Evox
- Siyanda, who had checked the label, had told him that it was 'okay' to do so.

**Kock** argued to the contrary by submitting that **Mdletyeni** had failed to produce the corroborating evidence which was required under 10.4 in leading evidence that he had in simply having asked his instructor whether it was 'okay' to use the Evox and that he had said it was 'okay'.

72.5 *The degree of fault – the criteria for assessing any reduction of the period of ineligibility*

**Mdletyeni's** specific and relevant circumstances were considered by the Panel in determining

1. whether **Mdletyeni** had departed from the standard of care which he (ie. a person in his position – both objectively and subjectively speaking) ought reasonably to have exercised in order to ensure that the prohibited substances would not have entered his system, and if he had
2. the extent or degree of **Mdletyeni's** departure from such standard.

The evidence in support of both **van der Walt's** submissions suggesting that **Mdletyeni** had been at fault or negligent – to a moderate degree but not significantly so - and **Kock's** submissions - in contrast thereto - suggesting that he had failed to exercise due diligence is set out below.

❖ **Van der Walt's submissions**

**Mdletyeni's** conduct ought to be assessed in the light of his

- being 24
- uncle and coach being his guardian since his mother's death
- not being able to remember the limited anti-doping education which his uncle had given him
- having had no formal anti-doping education
- having been unaware that the Evox and tablets contained prohibited substances
- not having been able to identify Methylhexanemine as an ingredient of Evox even if he had checked the label
- being a professional boxer and not an elite athlete (the latter seemingly facing regular doping tests as part of a testing pool)
- having had limited resources – financial or otherwise – to make informed decisions
- having no GP or access to sports experts for advice
- background and life circumstances being reliant on benefactors
- accepting what sponsorship and support he had been given for access to the doctor/physiotherapist
- being unable to ask the right questions and for that matter access information
- clearly having communication difficulties as a Xhosa speaker which should not be held against him
- shock at and remorse for the positive test. He had had learned from this experience
- acceptance and admission of being irresponsible but not responsible for what he could not reasonably had known was his responsibility

❖ **Kock's submissions**

**Mdletyeni's** conduct ought to be assessed in the light of his

- having completed his BSc degree at Walter Sisulu University although not yet awarded to him due to unpaid fees
- admitting to being overweight 24 hours before the fight
- evidence regarding the number of tablets consumed conflicting with his coach's testimony

- having an apparently above average knowledge of fellow boxers and their anti-doping violations
- averment that he only became aware of the dangers of anti-doping after he had received the positive test results of his A – sample, which **Kock** called into contention
- failure to ask the instructor as to the source and legality of the tablets
- having trusted his instructor and his advice which **Kock** called into contention.
- not having taken the tablets to a pharmacist to establish what they were
- having failed to declare his use of Evox on the DCF
- not having exercised due diligence into the nature of the product
- evidence alone being relied upon as setting the context for the intake of the two substances (Methylhexanemine and Furosemide) in spite of the conflict regarding the number of Furosemide tablets he had taken
- assertion that his version should stand in the event of conflict
- further assertion that he was not aware that the Evox or the tablets he took contained Methylhexaneamine or Furosemide was a very convenient one indeed
- not having corroboration for the intake of Furosemide apart from his version
- having failed to take any due diligence steps to establish whether the Evox may have been contaminated with any Prohibited Substances
- his having chosen not to perform and due diligence when he had the necessary knowledge and education about prohibited substances as was evident through his understanding of the anti-doping transgressions of his fellow boxers.

In **Kock's** view the *Foggo case (CASA2/2011)* which he quoted seemed to have application. In such case

*The lesser sanction scale for specified substances cases cannot be applied if an athlete who believes that the ingestion of a supplement will enhance his sport performance although the athlete does not know that the supplement contained a prohibited substance.*

72.6 *The credibility of the witnesses and thus the admissibility and/or weighting of the evidence led.*

❖ Credibility & admissibility

The Panel's findings concerning the credibility of **Mdletyeni** and **Dumezweni** were such that their evidence was to be relied upon.

The Panel's reasons for this are that such evidence was given consistent, given without hesitation and significantly corroborative.

❖ Weighting of evidence

Furthermore there was no need to apply any weighting to any of their evidence even though the Panel was aware of

- a few inconsistencies, some inexplicable replies to questions raised, the delay concerning his use of Evox and possible contradictions in the evidence led by **Mdletyeni** himself
- a conflict between both **Mdletyeni's** and Dumezweni's (his uncle and coach) evidence regarding the number of white tablets which he had taken (ie 1 or 2)

The Panel's reasons for this being that in the final analysis these were either of no real consequence for the purpose of the Panel reaching its findings and /or decision, or explained as arising from

- ✓ difficulties in communication and lack of understanding (even with the assistance of Ms Nonkonyana providing support in interpreting matters that required attention)
- ✓ the use of the telephone when Dumezweni gave his testimony as a witness
- ✓ a line of questioning which brought about the delay in **Mdletyeni** admitting to the use of Evox
- ✓ the inability to subpoena witnesses such as the physiotherapist and instructor, whether for corroboration or credibility purposes or to clarify speculative thoughts, propositions made and inferences drawn.

❖ Hearsay evidence

The Panel's findings on the question of whether or not the Panel should accept the 'hearsay' evidence provided by **Mdletyeni** concerning the instructor's provision of the white tablets (containing the Furosemide) for reducing the swelling in his knuckles and in particular the 'okay' for his use of Evox as being 'okay' is that such hearsay evidence be received into evidence.

The Panel's reasons for this being that

- ✓ the instructor had refused to make contact with and distanced himself from **Mdletyeni**
- ✓ the instructor had seemingly not been prepared to provide any assistance in his defence
- ✓ the instructor ran the risk of possibly being criminally charged for his having given **Mdletyeni** the white pills without prescription
- ✓ there was no mechanism whether under the Rules or otherwise by which the instructor could be subpoenaed to provide testimony as a witness at the hearing - whether he was reluctant to do so or not
- ✓ **Mdletyeni** certainly did not have enough financial resources to support the flying of witnesses to Cape Town to testify in his defence
- ✓ although there was Dumezweni's corroborating evidence and other supporting evidence concerning the white tablets this was the only evidence available supporting his use of Evox as being 'okay'

it ought to be accepted - even though as far as the Evox is concerned this be with caution as it was the only corroborating evidence supporting **Mdletyeni's** contention that he had not intended to enhance his sport performance in using Evox.

73. Panel's findings on the issues for determination  
(refer paragraph 70)

Having made its findings on evidentiary matters the Panel's further findings relating to the issues for determination, as recorded in paragraph 70, are set out below.

- A. **Mdletyeni** is entitled to the reduction of the mandatory 2 (two) year period of ineligibility, as provided under Article 10.4 read with Article 10.2.

This is because he had

1. *established on a balance of probability*

- 1.1 how the Prohibited Substances, being the Methylhexaneamine and Furosemide as Specified Substances, had entered his body;

The reason for this is based upon the Panel's findings concerning the undisputed evidence set out in paragraphs 72.2, which was either accepted or uncontroverted by both the defence and prosecution.

- 1.2. that he had not intended that the Methylhexaneamine and Furosemide enhance his sport performance or mask his use of a performance enhancing substance;

In reaching this decision the Panel found the evidence, as set out in paragraph 72.3, concerning **Mdletyeni's** intention relating to his use of both these Prohibited Substances being Specified Substances was disputed.

It thus first considered whether **Mdletyeni** had used the little white tablet (containing the Furosemide) with the intent of, either

- reducing his weight before the fight and to that extent enhancing his sport performance by making the weight limit at the weigh-in, as postulated and argued by **Kock** (no matter what his weight might have been at the time of the fight), or
- reducing the swelling in his knuckles, as submitted by the defence

In considering the totality of the evidence the Panel then applied the test formulated by *Lord Denning in Miller v Minister of Pensions 147 All ER 372 at 374* as to which of the evidence (generally and as specifically recorded in paragraph 72.3 ) was more probable than not.

The Panel's found that the evidence pointed in favour of it having been more probable than not that **Mdletyeni's** intent in having taken the little white tablet was to reduce the swelling in his knuckles.

The Panel was thus satisfied that **Mdletyeni's** intent was thus not to enhance his sport performance or mask the use of a performance enhancing substance.

In the same vein the Panel thereafter reached a similar conclusion when it applied the same test in determining whether **Mdletyeni** had taken the Evox

containing the Methylhexaneamine with the intent of enhancing his sport performance or to mask his use of a performance enhancing substance.

The Panel, having accepted that Methylhexaneamine was not capable of being a masking agent, found that **Mdletyeni** had not intended to enhance his sport performance through his use of Evox (containing Methylhexaneamine a Specified Substance as an ingredient) but to provide him with energy before he trained.

The Panel found further that this was supported by the evidence led on **Mdletyeni's** behalf in his defence he did not know at the time of his taking Evox that it contained the Specified Substance Methylhexaneamine.

**Kock** argued that by taking the supplement Evox **Mdletyeni** would have enhanced sport performance at the time of **Mdletyeni's** fight. Although this could be said of nutrition generally speaking in the Panel's view in the absence of evidence supporting such proposition such argument was more speculative than proven.

**Van der Walt** argued, apart from the remaining supporting circumstantial evidence, that because **Mdletyeni** did not know Methylhexaneamine was an ingredient of Evox this meant that **Mdletyeni** lacked the intention to use the specified substance for the purpose of enhancing his sport performance

**Kock** argued that the *Fozzo case* might have had application. In which event **Mdletyeni** would not have been able to rely on his not knowing that the Evox contained Methylhexaneamine to obtain a lesser sanction as a Specified Substance.

The Panel decided this was not the case in reaching its finding on the facts concerning **Mdletyeni's** intention / state of mind at the time he took the Evox supplement.

It reached its decision based upon the cases quoted by **van der Walt** of *CAS 2010/A/2107 Oliviera v USADA* in which the panel found that Article 10.4 of the WADA Code requires an athlete to only prove that her ingestion of the prohibited substance (oxilofrine) was not intended to enhance her sporting performance.

The panel further held that *"this construction of the article harmonises the clear language of clause one with the differing and ambiguous language of clause two, and that this construction is consistent with the explanatory comment which uses the term "Specified Substances" in providing "examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance enhancing intent"*

*UKAD v Matt Schenck (17 December 2010)*, in which the athlete established to the satisfaction of the tribunal that he did not use

the substance with the intention of enhancing his sporting performance ...

*“because at the time of use the athlete was unaware that Methylhexaneamine was a constituent ingredient of the dietary supplement; Methylhexaneamine was not labelled as being a constituent ingredient of the dietary supplement; the Athlete made enquiries with his coaching staff to ensure that the dietary supplement was permissible for use in connection with out of competition training”*

as well as having been assisted by the principles contained in the cases of

ITF v Koubek (18.01.2005)\* in which it was stated that  
*“It does not matter whether the prohibited substance actually enhanced the player’s performance or not, or whether it was by nature apt or likely to do so. The issue relates to the player’s state of mind when he ingested the prohibited substance”*

WADA v FIBA & M (22.06.2005) \* in which it was stated  
*“(...) the player must convince the sanctioning authority – to a certain degree - of the presence of the inner fact, namely that he did not intend to enhance his performance. Although it must be admitted that the Respondent is right that the inner facts are not events which can be perceived externally and cannot therefore be proven directly, the legal system considers inner facts as legally significant in many areas (....) Such facts can, in state proceedings in any event, be established by establishing circumstances which according to experience allow one to conclude the presence of facts to be established (...) Of course admitting circumstantial evidence for (indirectly) proving inner facts also involves imponderables. However - state law – takes these imponderables sufficiently into account by means of the rule of freedom in the assessment of circumstantial evidence and by means of the standard of proof and the burden of proof if the fact cannot be proven. In the Panel’s opinion, these principles developed for state proceedings also apply to the present internal proceedings of an association (...)”*

*\*cases referred to in the article written by Oliver Niggli and Julien Sieveking titled Selected Case law Under the World Anti-Doping Code*

2. produced corroborating evidence which had established to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.

The Panel reached its decision on this aspect based upon the Panel’s findings outlined in paragraph 72.4 above and the decisions in the cases of CAS 2010/A/2107

*Oliviera v USADA and UKAD v Matt Schenck (17 December 2010)*, as referred to in 1.2 on page 37 above.

The Panel was comfortably satisfied that as regards the burdens of proof that rested upon **Mdletyeni**

2.1 **Mdletyeni** had firstly established on a balance of probability that he had not intended to enhance his sport performance or mask the use of a performance enhancing substance - through his credible testimony - that he had taken

- the white tablets (containing the Furoseminde as an ingredient) which he had received from his trainer Siyanda to reduce the swelling in his knuckles
- the Evox (containing the Methylhexaneamine) to provide him with energy to help him train

2.2 **Mdletyeni** had provided sufficient direct and circumstantial corroborating evidence to the comfortable satisfaction of the Panel concerning

- the instructor's provision of the white tablets (containing the Furosemide) for reducing the swelling in his knuckles
- his use of the Evox to provide him with energy based on the instructor's 'okay' for his use of Evox as being 'okay', which although it was hearsay evidence was received into evidence by the Panel because
  - ✓ the instructor had refused to make contact with and distanced himself from **Mdletyeni**
  - ✓ the instructor had seemingly not been prepared to provide any assistance in his defence
  - ✓ the instructor ran the risk of possibly being criminally charged for his having given **Mdletyeni** the white pills without prescription
  - ✓ there was no mechanism whether under the Rules or otherwise by which the instructor could be subpoenaed to provide testimony as a witness at the hearing - whether he was reluctant to do so or not
  - ✓ **Mdletyeni** certainly did not have enough financial resources to support the flying of witnesses to Cape Town to testify in his defence
  - ✓ although there was Dumezweni's corroborating evidence and other supporting evidence concerning the white tablets this was the only evidence available supporting his use of Evox as being 'okay'

#### 74. Determination of appropriate sanction and reasons

74.1 As a result of the Panel's findings listed in 73 above the Panel was required to consider **Mdletyeni's** degree of fault as the sole criteria in assessing the reduction of the period of ineligibility in determining the appropriate sanction.

74.2 Although not fully exhaustive of the reasons for its decision concerning an appropriate sanction the Panel considered **Mdletyeni's** degree of fault by reference to paragraph 72.5 and the decided cases - which **van der Walt** had so thoughtfully put together in a bundle for the Panel's convenience and ease of reference.

#### 74.3 Methylhexaneamine



The Panel first turned its attention to the extent to which **Mdletyeni** had departed from the duty of care which rested upon him, being the standard of care which a person in his position would reasonably have been required to exercise towards ensuring that he would not have allowed Methylhexaneamine to have entered his system through the taking of Evox.

Having regard to the principles followed and decisions reached in the following cases, quoted by **van der Walt**

*CCES v Jasdeep Toor (3 February 2012),*  
*USADA v Brunemann AAA No 77190E0044708 (26 January 2009)*  
*SARU v MC. Ralepelle and BA. Basson 27 January 2011)*  
*FA v Toure (28 May 2011)*  
*CAS v Kakub Wawrzyniak 21 January 2012)*

the Panel considered such cases and took the following factors into account in considering **Mdletyeni's** the degree of fault in assessing the period of ineligibility which it decided upon as an appropriate sanction.

- **Mdletyeni's** age - 24
- his level ie whether an elite or national athlete - SA Champion and first doping test
- his level of support - professional boxer dependent upon income from fighting
- his education - BSc
- his lack of training and information in relation to the use of prohibited substances - no formal anti-doping education
- his personal circumstances – he did not come from an affluent background; had no financial backing or support other than that provide by Dumezweni – his uncle and coach; although he had a cell phone (android) he generally lacked resources, both financial and other wise; no GP or medical aid; reliance on the generosity of others being dependent to an extent on donations and benefactors
- his naivete and the fact that he was unduly trusting of his instructor
- his sense of shock and his acceptance of responsibility and accountability for what he had done
- his inability to subpoena or call witnesses to testify on his behalf

The Panel decided to impose a 4 (four) month period of ineligibility on **Mdletyeni** for his admitted anti-doping violation relating to his use of the supplement Evox Muscle Punch 3DT (containing Methylhexaneamine as an ingredient)

The reason for this was based on the Panel having assessed **Mdletyeni's** degree of fault - being his departure from the standard which he could reasonably have been expected to have applied relating to his use of Evox at slightly above moderate (around 20 %) having regard to the decided cases.

#### 74.4 Furosemide

Applying the same principles the Panel then assessed the extent to which **Mdletyeni** had departed from the duty of care which rested upon him in relation to his ingestion of the little white pill (containing the Furosemide as an ingredient)

In the Panel's view **Mdletyeni** had departed from the standard that he ought reasonably to have applied to a person in his circumstances – both objectively and subjectively speaking – to a medium and greater degree at between 60% and 70 %.

The principal reasons for the Panel having assessed the degree of fault on **Mdletyeni's** part at such a significantly higher level with regard to his use of the Furosemide through his taking of the little white pill - as opposed to his use of Evox (containing Methylhexanamine as an ingredient) – were that **Mdletyeni**

- had in fact finished his BSc degree in Health Promotion – in spite of **van der Walt** lack of emphasis on this as being as significant as it was in his case
- had studied and passed primary health, research, anatomy, physiology and education psychology as some of his degree courses
- sought help from, took advice (even if it was not medical) and received the white pills from his instructor, who he had previously told and knew about his swollen knuckles and helped him to prepare for his fights - against such background and qualification
- received the little white pills from the instructor who was not a doctor qualified to give him these
- failed to ask his instructor what the pills were or what was in them
- blindly trusted his trainer in this regard
- had failed to see a doctor when it was clear that the physiotherapist's two treatments had not helped, even though he was desperate and according to his coach would have "fought with one hand" as he would not have cancelled the scheduled fight.
- he failed to exercise the necessary due diligence to establish just what such tablets or what the ingredients were, notwithstanding **van der Walt's** contentions that he was under no duty to see a pharmacist and this had not been proven the Panel was entitled to draw this inference in the light of available evidence establishing this
- knew about anti-doping and that it involved him not being able to take certain things – supplements and substances
- knew it was prudent to find out
- helped other boxers with their diets
- had had 15 professional fights and had boxed at the highest level for the SA Title as a light-weight
- knew about the anti-doping violations of professional boxers Sinethembe Mncane and Molefi Matima
- did not 'surf the net' or seek out any other source to establish what the little white pills were when he first became suspicious that the A-sample test results could have resulted from what his trainer had given him,
- failed when it would possibly have been prudent to do so to establish from Siyanda's grandmother, who suffered from high blood pressure, or with her consent what the pills were that she had been taking. Although no evidence was led concerning this the Panel has drawn the inference against all the available evidence led.

## PANEL'S DECISION

The Panel thus confirms the following decision given on 6 December.

1. Mr Viwe Mdletyeni, having admitted the anti-doping violations
  - 1.1 serve a period of ineligibility of 4 (four) months for the Stimulant – Methylhexanemine;
  - 1.2. serve a period of ineligibility of 15 (fifteen) months for the Diuretic – Furosemide.
2. Such periods
  - 2.1 to run concurrently;
  - 2.2 commence from the date of notification of the adverse analytical finding “AAF” being 22 August 2012 by reason of the Panel having decided under Article 10.9.3 to allow the time which Mdletyeni has already served under provisional suspension under the AAF to be taken into consideration and credited in full against such period of ineligibility.
  - 2.3 to thus terminate on
    - 2.3.1 on 22 December 2012 for the Methylhexaneamine;
    - 2.3.2 on 22 November 2013 for the Furosemide.
3. Mdletyeni shall, in addition, be liable and responsible for the consequences of such anti-doping violation as provided under the SAIDS Rules, which require
  - 3.1 the automatic disqualification and thus invalidation of the result of the title fight in Mdletyeni's favour, as well the forfeiture of any medals, points or prizes which Mdletyeni won in such fight - Articles 9 and 10.1.1;
  - 3.3 Mdletyeni's status as an athlete during the period of ineligibility is such that Mdletyeni shall not be entitled to participate in any capacity under any other SASCOC affiliated sporting code, other than authorised anti-doping education or rehabilitation programs - Article 10.10;
  - 3.4 Mdletyeni will be required as a condition of regaining eligibility to make himself available for out-of-competition testing - Article 10.11.

**The Panel also decided**, as a result of its findings and decision under Article 10.4 of the Rules, that

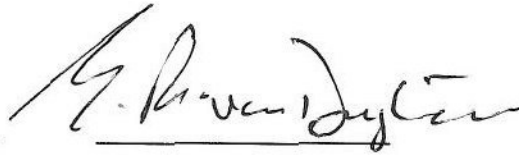
- there was no need for the Panel to consider the application of *Articles 10.5.1 or 10.5.2* of the Rules

- *Article 10.6* relating to Aggravating Circumstances did not apply as it had been shown to the comfortable satisfaction of the Panel **Mdletyeni** did not knowingly commit the anti – doping violation
- *Article 10.7* relating to Multiple Violations did not have application in **Mdletyeni's** case as in the Panel's opinion this article referred to further anti-doping violations and not those which had been established under tests conducted at the same time.



John Bush

Chairman



George van Dugteren

Member



Norma Nonkonyana

Member

14 January 2013

