

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF ALLEGED DOPING OFFENCES BY **MALCOLM MOORE** AND **CAREL SWANEPOEL** CONTRARY TO REGULATION 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.20 and 21.21 CONSISTING OF:

Judicial Committee:

Jean-Noel Courard (France)
Dr. Preston Wiley (Canada)
Graeme Mew (Canada – Chair)

Appearances:

Ben Rutherford for the International Rugby Board
Adv LC Botes for Carel Swanepoel and Malcolm Moore

In Attendance:

Carel Swanepoel (Player)
Malcolm Moore – (Player)
Bradley Basson (President, Namibia Rugby Union)
Sybrand de Beer (Chief Executive Officer, Namibia Rugby Union)
Randall Louw (Interpreter)
David Ho (Anti-Doping Manager – Compliance and Results, International Rugby Board)

Hearing:

14 October 2013 by way of telephone conference; written submissions on 21 October 2013

REASONS FOR DECISION

1. For a number of years the Namibia Rugby Union (the "Union") has provided members of its senior national men's team with a variety of nutritional supplements. Following a 2013 Africa Cup Division 1B match between Namibia and Tunisia in Dakar, Senegal on 15 June 2013, Malcolm Moore and Carel Swanepoel, both members of the Namibian team (the "Players"), underwent doping control procedures which resulted in Adverse Analytical Findings for the Presence of a Prohibited Substance, methylhexaneamine (dimethylpentylamine). The Players assert that their Adverse Analytical Findings result from taking of supplements provided to them by the Union.
2. Methylhexaneamine (dimethylpentylamine), often referred to by the acronym "MHA", is listed in category S6. Stimulants (Specified) on the World Anti-Doping Agency's 2013 List of Prohibited Substances. The presence of MHA in a sample provided during in-competition testing constitutes an anti-doping rule violation.

3. The "A" samples provided by the Players during the course of doping control procedures were analysed at the South African doping control laboratory in Bloemfontein. Preliminary reviews of the documentation relating to each of the Player's results were undertaken in accordance with IRB Regulation 21.20.1. The Players were then notified, via the Union, that it was alleged that each had committed an anti-doping rule violation. The Players were provisionally suspended, pending the outcome of their cases, with effect from 19 July 2013 (the date on which notification letters were sent by the Board to the Union).
4. Pursuant to a request conveyed to the International Rugby Board (the "Board") on 29 July 2013, the Players' "B" samples were analysed.
5. On 14 August 2013 the Board notified the Players, via the Union, that the analysis of their "B" samples confirmed the results of the "A" samples.
6. By a letter from the Union to the Board dated 28 August 2013, the Players advised that they denied that they had committed anti-doping rule violations and requested a hearing by a Board Judicial Committee ("BJC").
7. This BJC was appointed by the Chairman of the IRB's disciplinary panel to consider the Players' cases.
8. Subsequently, and prior to the hearing, the Players acknowledged that they had committed anti-doping rule violations.
9. In preparation for the hearing, the Chairman of the BJC provided directions with respect to the exchange of evidence and provision of written submissions.
10. A hearing took place on Monday 14 October 2013. Written submissions were received from both the Board and the Players prior and subsequent to the hearing.
11. In the reasons that follow, while have considered all of the evidence and submissions that were placed before us, we refer only to the evidence and submissions which we consider it necessary to do so in order to explain our reasoning and conclusions.

Documentary Record

12. The BJC had before it a record which included, in respect of each of the Players, the doping control form, Tournament Manual for the Africa Cup 1B 2013, formal acceptance of the terms of the Tournament Manual, including the eligibility and anti-doping regulations, signed by team members on 9 June 2013, analysis result record preliminary review report, anti-doping circular sent to Unions on 19 August 2011 by the Board and the IRB Anti-Doping Handbook (2013 edition v2-English), together with evidence of shipment of copies of the Anti-Doping Handbook to the Union via DHL Express on 4 June 2013. The record also contained certain correspondence between the Board and Union.
13. Both the Players gave oral testimony at the hearing, as did the following witnesses:

- a. Dr. Vernon Morkel (team doctor);
- b. Danie Vermeulen (head coach, Namibia senior rugby team);
- c. Wayne Marco Damons (head of medical affairs, Namibia Rugby Union); and
- d. Michiel Greeff (biokineticist, strength and conditioning coach).

The Evidence

14. As already noted, the Union ordered, for the use by its teams, certain nutritional supplements. This practice has been going on since at least 2010. The supplements were ordered through a reputable commercial supplier in Windhoek.

15. In 2012, Michiel Greeff became the biokineticist, strength and conditioning coach for the senior men's team. In his witness statement, Mr. Greeff states:

"As a result of my qualifications, as well as experience, I have expert knowledge as to the contents of most supplements on the market, as well as their content, performance and effect."

16. In both his witness statement and his oral testimony Mr. Greeff explains that it was his responsibility to supply the Namibian players with adequate supplements in the build up to and during the CAR 1B tournament. His witness statement goes on:

"6. After consultation with various parties, it was decided that the following supplements are safe to use. Most of these supplements have also been used by the previous Namibia teams, as per the statement of Dr Morkel, with no adverse results having been recorded.

6.1 SSN Creapump: It is a pre work out supplement with no illegal substances in it. The players only used it before gym sessions and for a 1 month period before their field sessions. During this time Malcolm Moore tested negative while using it (20 May 2013). This supplement was not used during the Senegal tour.

6.2 Evox-Rapid Recovery: It was a post work out supplement to replenish depleted muscle cells with proteins and carbon hydrates. Players used it after their field sessions. This product was also used after the Senegal game in Dakar to help aid with recovery. It was used again on tour.

6.3 Evox Supercarbo: It is an intra-work supplement used during exercise or games. It helps with the replenishment of carbohydrates and electrolytes. The players used this during both games in Dakar. The use of this product was compulsory.

- 6.4 Rehydrate: This is an electrolyte replacement premix. The players received one or two of these packets, in premixed form, everyday, depending on their weight. The players used it every day while on tour. The use of this product was considered compulsory.
- 6.5 PowerAde: this is also an electrolyte replacement drink. 48 Bottles of PowerAde was [sic] used before and during the game against Tunisia.
- 6.6 Future life meal replacement: This is a protein and energy filled meal replacement that was used during the tour. Players consumed it when they were hungry in between meals. The players also used this product everyday while on tour. The use of this product however was not compulsory.

7. Due to the hot and humid conditions in Dakar, the players were forced to consume adequate water and electrolytes in the form of bottled water (supplied by the Senegalese Rugby Union) and rehydrate premix packets (supplied by the Namibian Rugby Union).

8. The supplements were mixed with bottled water and kept in 500ml water bottles that the Namibian Rugby Union supplied as well as empty water bottles from the previous day. Due to the limited supply of cooling facilities (hot and humid weather in Dakar) and with no ice available, the supplements that was [sic] used during game day was mixed the previous night and stored in the hotel's cooling facilities located in the main kitchen. The unsealed supplement mixtures kept in a cooler box were left with no supervision during the night in the hotel's coolers. The mixtures were mixed under my direct supervision and control with the assistance of some of the other members of management."

17. Mr. Greeff's statement describes the use of certain supplements (Evov Supercabo and Rehydrate) as "compulsory". In oral testimony, it was conceded by him and others that no disciplinary sanctions would have flowed from a refusal by the players to take the supplements. Furthermore, Dr. Morkel's evidence was that if a player did not want to take a supplement, that should be respected.
18. Mr. Greeff explained the rationale for the supplementation programme. Its main objective was to get the nutrition of all players on the squad up to a certain standard. Players came from a variety of social, cultural and economic backgrounds. The goals also included improved energy and a higher intensity of training sessions.
19. Mr. Greeff emphasised that neither he nor anyone else on the team management were aware that the substances provided to the players by the Union contained any banned substances. In his statement he said that the players could rely on him, as the conditioning coach, and the other members of the managerial team, to have made the necessary investigations to satisfy themselves as to the safety of the products used, as well as to take all necessary and reasonable steps to avoid any possible contamination.

20. Surprisingly, given his professed expertise in the contents of supplements, Mr. Greeff conceded that he was not aware of the WADA Code provisions on strict liability and personal responsibility.
21. Mr. Greeff agreed that, ideally, products would have been bought in large batches and each batch would have been tested. The team coach, Mr. Vermeulen was also alert to this. He said that he had advised the Union not to purchase supplements in small quantities and on an *ad hoc* basis as and when needed but, rather, to order supplements in large batches and to send each different product for testing to rule out any contamination of the products supplied. But that is not, what, in fact, happened. The Union purchased the supplements in different quantities as and when its finances allowed it to do so and when the products were required. Furthermore, no batch control was implemented in respect of the substances purchased. Mr. Greeff consulted the local distributor of the Evox products who confirmed that they too, due to the limited stock they had in respect of the products concerned, do not order in batches, but also order on an *ad hoc* basis.
22. By the time that the Players' adverse analytical findings were notified, the only substance that could be retrieved was a small quantity of Evox-Suprcarbo which one of the other players still had in his possession. After becoming aware of the Players' adverse analytical findings, the Union did purchase some additional quantities of each of the substances in question from their suppliers. These were sent to the WADA laboratory in Bloemfontein to be tested. However, because, as noted above, the suppliers purchased the products concerned on an *ad hoc* basis, rather than in batches, it is probable that some if not all of the samples sent for testing to the Bloemfontein laboratory would have originated from different batches to the ones that were used and depleted on the tour. All of the products tested returned negative findings.

Carel Swanepoel

23. Mr. Swanepoel is a farmer and an amateur rugby player. He lives approximately 200 kilometres from Namibia's capital, Windhoek. He plays for the Trustco United Rugby Club. He trains with his team once a week. Otherwise he trains by himself. He is presently 25 years old and has been playing the game since he was 6.
24. The only supplements that Mr. Swanepoel has ever used have been those supplied to him by the Union. He claims very little knowledge of anti-doping matters, notwithstanding his membership of the testing pool since the fourth quarter of 2012 and his signed acknowledgment on 6 April 2013 and again on 9 June 2013 that he had received and read the IRB's Anti-Doping Handbook.
25. Mr. Swanepoel claims to have been uncomfortable about using any supplements. He says that he objected to taking one of the drinks that was provided to him prior to playing in Senegal. He claims, however, that he was told by Mr. Greeff that he had to drink it. He took this as a "command". Mr. Swanepoel relied on the Union not to provide him with any drink or supplement which could result in an anti-doping rule violation. He did no due diligence of his own. He states that if he had known that the possibility existed that a supplement provided by the Union might contain a prohibited substance, he would have protested and refused even more than he did about taking any substance.

Malcolm Moore

26. Mr. Moore is presently 21 years old. He has been a member of the high performance squad since October 2012. He had undergone anti-doping procedures twice before the test that gave rise to the adverse analytical finding which is the subject of these proceedings. Mr. Moore also plays for the Trustco United Rugby Club.
27. Mr. Moore also acknowledged having signed a formal acceptance form on 9 June 2013 recognising all of the terms of the Tournament Manual including the eligibility and anti-doping regulations. However, like Mr. Swanepoel, Mr. Moore claims to have signed the form without seeing the Tournament Manual.
28. Furthermore, Mr. Moore claims that the first time he ever saw the IRB's Anti-Doping Handbook was after he had tested positive.
29. Mr. Moore denies having used any supplements other than those provided by the Union. At the tournament in Senegal, the Players had been told by coaching staff that they should use the supplements provided otherwise they would feel very tired. Mr. Moore complied with this instruction without protest. Mr. Moore was aware that Mr. Swanepoel had concerns about taking supplements. Indeed, he was the only Player who had raised a complaint.
30. Mr. Moore is currently a student. However, he also works as a physical education instructor and a rugby and cricket coach at the Windhoek Gymnasium school. He hopes to become a PE teacher. He is concerned that he will not be able to continue his work at Windhoek Gymnasium if he is subject to a long period of Ineligibility as a result of his anti-doping rule violation.

Doping Education

31. There was an acknowledgment by all of the Union's representatives who gave evidence that the Players had not received a great deal by way of formal anti-doping education. Mr. Damons, a qualified physiotherapist and the Union's head of medical affairs, warned the whole tour group, approximately six weeks before the tournament, that drug testing would take place (he formed this belief after his review of the tournament documentation). He acknowledged, however, that hard copies of the IRB Anti-Doping Handbooks were not distributed to the Players. He also corroborated the evidence of the Players that they simply signed the form without reading the tournament documents.
32. Mr. Vermeulen, the team coach, said this:

"I have to admit that no proper education regarding the use of medication, supplements and doping was provided to the players. We however did, on numerous occasions, reminded [*sic*] them to only use the supplements that we supply to them and to consult Dr Morkel when getting medication for illnesses."

33. In his witness statement, Mr. Vermeulen continued:

"This case, in my respectful opinion, is a typical example of amateurism, from not only my and the team management's side, but as well as that of the players and therefore, without doubt, served as a huge wakeup call. It again stresses the importance to have education sessions with all our representative teams regarding doping the doping protocols, which education sessions should also involve the clubs and their members in Namibia."

34. As previously noted, the IRB furnished evidence of having sent multiple copies of the Anti-Doping Handbook to the Union prior to the subject tournament. It also pointed to documentation signed by Mr. Moore and Mr. Swanepoel in connection with his membership of the IRB out-of-competition testing programme and to anti-doping circulars and previous copies of the Anti-Doping Handbook sent to the Union.

Sanctions

35. The presumptive sanction for a first violation of Regulation 21.2.1 (Presence of Prohibited Substance or its Metabolites or Markers) is two years Ineligibility. However, it is possible for the presumptive sanction to be reduced if the substance involved is a Specified Substance (Regulation 21.22.3¹). In order to take the benefit of Regulation 21.22.3, each of the Players must (a) establish to the satisfaction of the BJC, on a balance of probabilities, how the MHA entered his body; and (b) establish to the comfortable satisfaction of the BJC that his individual Use of MHA was not intended to enhance his sport performance or mask the Use of a performance-enhancing substance². Furthermore, in order to justify any reduction or elimination of the period of Ineligibility, the Player, as a mandatory condition, must also produce corroborating

¹ 21.22.3 Where a Player or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Player's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility; and at a maximum, two years.

To justify any elimination or reduction from the maximum period of Ineligibility set out above, the Player or other Person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Judicial Committee the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Player's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

² The nature of the burdens the Player must satisfy are set out in the Comments to Article 10.4 of the WADA Code which is available at www.wada-ama.org. The Comment also elaborates in relation to the type of circumstances which in combination might lead a hearing panel to be comfortably satisfied of no-performance-enhancing intent, for example "the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport- related prescription for the Specified Substance..."

evidence in addition to his word which establishes to the comfortable satisfaction of the BJC an absence of intent to enhance sport performance or mask the use of a performance-enhancing substance.

36. If the Players are able to meet these conditions, the Players' degree of fault shall be the criterion which governs the assessment of any reduction of the period of Ineligibility. If the Players cannot establish how the Prohibited Substance entered their systems, then not only is the opportunity to seek a reduced sanction under Regulation 21.22.3 foreclosed but, so, too, is the possibility of seeking an elimination or reduction of the period of Ineligibility based on exceptional circumstances, pursuant to Regulation 21.22.4 (No Fault or Negligence) or Regulation 21.22.5 (No Significant Fault or Negligence).

Issues

37. Having regard to the sanctioning provisions, the following issues fall for consideration:
- a. Have the Players established how the MHA entered their systems;
 - b. If so, have the Players established that the presence of MHA was not intended to enhance their sport performance or mask the use of a performance-enhancing substance, and is there corroboration for such a conclusion;
 - c. If the Players can discharge the burdens of (a) and (b) above, what is their degree of fault; and
 - d. If the Players can establish how the MHA entered their systems but cannot establish a lack of intention to enhance their sport performance, can they establish the existence of exceptional circumstances which would warrant an elimination or reduction of the period of ineligibility.

The Players' Position

38. The Players acknowledge that they cannot scientifically prove the source of the MHA. They argue that, on a balance of probabilities, there is sufficient evidence to establish that MHA entered the Players' bodies through the oral consumption of the same substance (each of them having consumed, with one exception, the same supplements provided by the Union) during the relevant period. Specifically, the Players submit that their consumption of the pre-mixes of Rehydrate and Supercarbo on the day of the test as well as during the match itself are the most likely source of their positive tests.
39. Additional facts and circumstances which support the Players' contention of unintentional consumption of a MHA contained in a supplement supplied by the Union include:
- a. Members of the squad, including both Players, had been warned before the tournament that they may be tested;

- b. Both Players tested positive for the same banned substance (no other Namibian players were tested);
 - c. Both Players used only the substances provided to them by team management;
 - d. All members of the Namibian team were instructed by team management to drink the pre-mixes, which had already been mixed during the previous evening, of Rehydrate and Supercarbo, on match day, as well as during the match;
 - e. Taking into consideration the limited period in respect of which MHA would remain the body of a person in detectable quantities, the MHA must have found its way into the body of both Players through the oral consumption of the substances provided by Mr. Greeff during the relevant period; and
 - f. The pre-mixes provided by the Union may have been contaminated with MHA during the manufacturing process or during the period when it was left unsupervised and unsealed in the hotel's cooler room.
40. The taking of supplements was intended to address the effects of dehydration and varying qualities of nutrition amongst members of the Namibian team. Both Players took only the supplements provided by team management. Team management, as well as the Players, were unaware that any of the supplements used by the Players contained MHA. Accordingly, it could not be said that the supplements were used with the intent to enhance sport performance because no one had any notion that the supplements contained MHA.
41. In addition, Mr. Swanepoel has a vehemently articulated aversion to the taking of supplements. He has only ever done so when he felt he had no choice due to team instructions.
42. Mr. Moore, who has been following the Namibian team supplementation programme since becoming a member of the squad, has been tested on two previous occasions, with negative results.
43. The evidence of the various members of the team support personnel presented to the BJC corroborates the lack of intent to enhance sport performance by the use of nutritional supplements.
44. The Players' degree of fault is low:
- a. Both Players relied on management to ensure that the supplements provided were legal;
 - b. There was no plausible reason to suspect that the supplements provided to the Players during the tour, and in particular the pre-mixes of Supercarbo or Rehydrate, would contain MHA, or would be contaminated or tampered with;
 - c. Both Players took care not to take any supplements or medicine other than those provided by the team;

- d. The Players have not received any formal or informal anti-doping education from the Union and/or team management in respect of anti-doping. They have not been provided with the IRB Anti-Doping Handbook by the Union;
- e. Although Mr. Swanepoel admitted that he had received an e-mail from the IRB in October 2012, to which the IRB Anti-Doping Handbook was attached, he did not realise that the Handbook was included as an attachment until after he became aware of his adverse analytical finding and revisited the e-mail as received; and
- f. While the Players accept the consequences of not having taken advantage of the education materials the IRB made available, their failing was understandable given the instructions provided by team management and, in particular, the instructions given by Mr. Greeff. It was reasonable for the Players to rely upon the managerial team of the Namibian squad to make the necessary investigations and to satisfy themselves as to the safety of the substances provided.

Position of the Board

- 45. The Board asserts that the Players have not established on a balance of probability the route of ingestion of the MHA found in their samples.
- 46. It is not enough to show that the Players are not the sort of people who would use banned substances (*IRB v. Vikilani*, 16 January 2013, at para. 41; *ITF v. Hood*, ITF Tribunal, 8 February 2006). Nor will mere speculation that a substance may have been contaminated or sabotaged be sufficient to discharge the Players' burden (*CCES v. LeLièvre*, SDRCC, 7 February 2005, at para. 51).
- 47. There was other evidence which would militate against the Players' arguments:
 - a. The Namibian Junior World Trophy had been simultaneously competing in a tournament in Chile. The athletes on that team were on the same supplementation programme. None of them returned an adverse analytical finding;
 - b. None of the containers used by the Union's teams or those tested following the Players' adverse analytical findings were found to have been contaminated; and
 - c. Although some of the bottles of pre-mix supplements had been stored overnight unsupervised in a hotel refrigerator in Senegal, there was no direct evidence of any tampering with the bottles used by Messrs. Moore and Swanepoel.
- 48. There is divided authority on the question of whether a lack of knowledge that a supplement contains a Specified Substance can form the basis of a finding that there was no intent to enhance sport performance (*The Football Association v. Marshall* (NADP, 8 May 2012), *IRB v. Hitch* (Board Judicial Committee, 10 August 2012) and *IRB v. Murray* (Post-Hearing Review Body, 27 January 2012)).
- 49. The Players did not pay attention to the anti-doping educational material available to them. It was not sufficient to blame the Union. Mr. Swanepoel had actually received a copy of the IRB Handbook via e-mail but he (or his wife) failed to open it. Both of the Players had signed documents acknowledging that they had read the Tournament

Manual including the anti-doping regulations. Personal responsibility for anti-doping rule violations includes the responsibility to be informed on anti-doping matters. This is an obligation not just of professional athletes but, also, amateurs such as the Players.

50. The Players were not under any obligation to take the supplements provided by the Union. The alleged "commands" issued by "team management" were overstated. There would have been no disciplinary sanctions if the Players had declined to take the supplements provided.
51. The Players did no due diligence of their own. They blindly accepted what they were told by others. This is an abdication of the principle of personal responsibility.

Discussion

(i) Source of Ingestion

52. The burden is on the Players to establish, on a balance of probability, how MHA entered their bodies.
53. The thrust of the Board's submission was that although the Players had referred to a number of supplements which they were allegedly provided with by the Union, when remnants or subsequently purchased same-brand samples of the supplements were tested they returned negative results. Accordingly, the Players have failed to "establish" the route of ingestion because of the lack of evidence pointing to a specific supplement containing MHA.
54. While we agree that the absence of any direct evidence that any of the supplements consumed by the Players contained MHA makes it harder for the Players to discharge their burden, we do not regard the absence of such evidence as fatal.
55. In *IRB v. Vikilani* (Board Judicial Committee, 16 January 2013) a player had tested positive for the presence of two diuretics, furosemide and hydrochlorothiazide. Diuretics can be used as masking agents to allow prohibited substances (for example anabolic steroids) to be flushed out of the bodily system. The player provided evidence that he had ingested creatine, caffeine pills and a Red Bull energy drink at a training session earlier on the day on which his Sample was provided. The Board Judicial Committee accepted a submission that arguably there were factors which could give rise to the suspicion that creatine and the caffeine pills could possibly have been the source of the banned substances. Set against this, however, was the fact that the player had tested positive for not one but two diuretics. The Board Judicial Committee noted that generally the medical use of diuretics in younger patients would be limited to the management of chronic kidney disease when the function of the kidneys is so impaired that excessive fluid can only be eliminated through the use of high dose diuretics and thus there would be an exceptional need to employ two different acting agents. The chance of creatine and caffeine pills being the source of not one but two diuretics seemed highly improbable. Furthermore, although the player gave the name of an individual from whom he had obtained the creatine and caffeine pills, there was a lack of evidence supporting that assertion.

56. By contrast, in the present case, we have two Players, both of whom tested positive on the same day, for the same substance, and who were taking, with one exception, the same supplements, all of which had been supplied by their Union (in this regard we accept the evidence of the Players that they used only supplements supplied by the Union). While the assessment of credibility when hearings are conducted by telephone is somewhat challenging, there was nothing in the accounts given by the Players or the manner in which they presented their evidence, which led us to question the veracity of what they were telling us in respect of the substances they had consumed.
57. Each case will, ultimately, turn on its circumstances. Where the evidence of the route of ingestion is circumstantial, a judicial panel will necessarily examine that evidence critically. In doing so in this case, we do not feel we need to, ourselves, speculate on which of the supplements provided by the Union was the cause of the positive test, nor whether those supplements were contaminated during the manufacturing process or interfered with while left unattended in a hotel refrigerator. Rather, looking at all of the circumstances, we have to determine whether it is more probable than not that the supplements supplied by the Union were the cause of the Players' ingestion of MHA, a stimulant which is commonly encountered in supplement cases³.
58. In our view it is more probable than not that the source of the MHA detected in the Players' Samples resulted from their use of one or more of the supplements identified in the evidentiary record and taken by the Players shortly before they were tested. Accordingly the Players have met their burden of establishing how the MHA entered their systems.

(ii). Intention to Enhance Sport Performance

59. There continues to be a division of opinion on the issue of whether an individual has to prove: (a) that the Specified Substance was not intended to enhance the person's performance (as applied in the cases of *Oliveira v. USADA*, CAS 2012/A/2107; *Qerimaj v. International Weightlifting Federation*, CAS 2012/A/2822; *IRB v. Murray* (IRB PHRB, 27 January 2012); *IRB v. Hitch* (IRB BJC, 10 August 2012)); or (b) that the supplement or product (as opposed to a Prohibited Substance in the supplement or product) was not intended to enhance the athlete's performance (as applied in the cases of *Foggo v. National Rugby League*, CAS A2/2011, *Kutrovsky v. International Tennis Federation*, CAS 2012/A/2804; *The Football Association v. Marshall* (Football Association Doping Tribunal, 8 May 2012; or *UKAD v. Llewellyn* (NADP Appeal Tribunal, 14 February 2013).
60. The most recent pronouncement on this issue by the Court of Arbitration for Sport is in the case of *WADA v West*, CAS 2012/A/3029, a case involving a motorcycle rider who used an energy drink called "Mesomorph". He had used other drinks – "Red Bull" and "Monster" – in the past, but was attracted to Mesomorph because of its lower sugar content. Unknown to him it contained MHA. He assumed because he had bought the product at a nutritional store in Australia that it would not contain a Prohibited

³ See, for example, *SARU v. Ralepelle and Basson*, SARU Judicial Committee, 27 January 2011, where players used a supplement, provided by their team, which resulted in positive tests for the presence of MHA. The particular batch of the supplement in question had been purchased while the team was on tour in the UK. Subsequent testing of a sample from a batch supplied in the UK, and a sample from a batch produced in South Africa, were tested. The sample manufactured in South Africa tested negative and the UK sample tested positive for MHA.

Substance, but undertook no other due diligence. He used it just prior to the competition in which he was tested. He relied on his ignorance of the presence of MHA as an ingredient of Mesomorph in support of his contention that he had not intended to enhance his sport performance by consuming a Specified Substance. The CAS panel rejected the athlete's argument, preferring the Foggo line of authorities. At paragraph 53 of its decision the CAS panel stated:

"The present Panel is unpersuaded (as were other Panels, such as the those in *A2/2011 Kurt Foggo v. National Rugby League* and *2012/A/2804 Dimitar Kutrovsky v. International Tennis Federation*) by the line of reasoning in *Oliveira*. It does not accept that an athlete's ignorance that a product contains a Specified Substance can establish absence of intent for the purposes of Article 10.4. In plain words, and in contradiction with *Oliveira*, if an athlete believes that a product enhances performance he cannot invoke the benefit of Article 10.4 just because it is accepted that he did not know that the product contained a banned substance. This would have the absurd result of rewarding competitors for being -- and remaining -- ignorant of the properties of the products they ingest, contrary to a fundamental objective of the anti-doping regulations, namely to create powerful incentives for competitors to take active and earnest initiatives to inform themselves."

61. The reasoning of the CAS Panel in *West* seems to ignore the fact that an athlete who remains wilfully ignorant of the properties of the products that he or she ingests is unlikely to be rewarded, because such an attitude would be indicative of a high degree of fault on the athlete's part. This point was made by the Post Hearing Review Body in *IRB v Murray* (at para 69):

"The concern that the policy of the WADC would be defeated if the athlete could avoid the consequences of the Code by simply refraining, deliberately or otherwise, from making enquiries as to the content of the supplement and so claiming ignorance of the offence is misplaced.⁹ First, it overlooks the fact that even if the athlete can meet the burden of showing no intent to enhance sport performance, the athlete's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. An athlete who is wilfully blind, or worse, is likely to be assessed as having a high degree of fault. This will then be reflected in the sanction. At the upper end, that sanction could be the same two year period of Ineligibility that would have applied if the athlete could not establish a lack of intent to enhance sport performance. Second, it fails to take account of the guidance, provided in the Commentary to Article 10.4 of the WADC, which equates the burden placed on the athlete to establish a lack of intent to enhance sport performance with the performance-enhancing potential of the substance involved:

Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance."

62. Until the introduction of the revisions to the World Anti-Doping Code in 2015, athletes facing allegations of anti-doping rule violations involving the use of supplements which, unknown to them contained Specified Substances, will, depending on the lottery of whether the hearing tribunal they draw prefers the "*Oliveira*" or "*Foggo*" lines of

authority, face the possibility of being unable to obtain a reduced sanction.

63. We are in the position of not being bound by *West* or other decisions of the Court of Arbitration for Sport or the UK's National Anti-Doping Panel which have followed the *Foggo* approach. For matters falling under the jurisdiction of the International Rugby Board the matter has, for the time being at least, been settled by the Post-Hearing Review Body decision in *IRB v. Murray* that as long as athlete was unaware that a supplement contained a Specified Substance, the fact that the supplement was used to enhance sport performance (as arguably anything taken to benefit nutrition, conditioning, endurance, strength or even hydration would), will not preclude a tribunal from considering a reduced sanction under Regulation 21.22.3.

64. Following this line of authority, and having regard to the evidence in this case we accordingly find that the Players have met their burden of satisfying us that they did not, by their ingestion of MHA, intend to enhance their sport performance because they did not know that one or more of the supplements they were taking contained MHA.

(iii). Corroboration

65. There was ample corroborating evidence of the athletes' consumption of the supplements and the circumstances in which the supplement use took place. The corroboration requirement of Regulation 21.22.3 is therefore met.

(iv). Fault

66. Having met the prerequisite required before a reduced sanction under Regulation 21.22.3 can be considered, the evaluation of an appropriate sanction therefore falls to be determined with regard to the Players' degree of fault.

67. In evaluating fault, we have taken into account both what appeared to us to be aggravating as well as mitigating factors.

68. Aggravating factors include the failure of the Players to familiarise themselves with the IRB Anti-Doping Handbook, notwithstanding that they had signed one or more documents confirming that they had done so. Furthermore, appreciating that the Players may not have fully understood (at least before they became aware of their adverse analytical findings) the principles of personal responsibility and strict liability in anti-doping situations, the Players nevertheless undertook no independent research with respect to what they were taking.

69. There are, however, a number of mitigating factors.

70. The lack of anti-doping education by the Union is very unfortunate. Accepting, as already noted, that the Players share some of the responsibility for their lack of anti-doping knowledge, it is disappointing in the extreme to hear that despite the efforts of the Board to disseminate hard copies of the IRB Anti-Doping Handbook to the players participating in the Africa Cup Tournament in Senegal, the Union did not distribute the Handbooks (even though it had received them). It is equally disappointing, given the

experience of previous anti-doping rule violations by Namibian rugby players⁴, that the Union had still not implemented effective anti-doping education for its elite players (let alone its members as a whole).

71. Without in any way wishing to diminish the principles of a player's personal responsibility for what ends up his system and strict liability for the consequences of any Prohibited Substance found on board a player, as a practical matter, the Players did not have a great margin of freedom in terms of their supplement use. The evidence of Mr. Greeff was unequivocal. The supplementation programme was mandatory, not voluntary. While it may be that there would not have been a disciplinary sanction for failure to use the supplements provided by the Union, it is clear on the evidence that the Players would have to have directly refused to follow a team order, something that they were understandably reluctant to do.
72. It does not help matters that some of the Players' Support Personnel had, themselves, a limited understanding of some basic anti-doping principles. The gist of the Union's evidence was that the Players were, indeed, entitled to rely upon the supplements provided by the Union being safe. Mr. Greeff acknowledged, in a question put to him by the panel, that he was not aware of the WADC provisions on strict liability and the personal responsibility of Players. Team personnel also left mixed supplements in a non-secure refrigerator in a hotel to which others would have had access.
73. To visit upon the Players all of the consequences of the failure of the Union and Player Support Personnel to discharge their duty of care to the Players would be unjust.
74. Doping tribunals at all levels have repeatedly emphasised that each case will turn on its own particular facts and circumstances. That must always be borne in mind when looking at other cases for guidance as to the sanction to be imposed.
75. In our view, the circumstances warrant imposing a period of Ineligibility on the Players. They failed to meet the fundamental principle of personal liability for their consumption of the supplement or supplements that gave rise to their adverse analytical findings.
76. In *IRB v Slimani* (BJC, 14 October 2008) a player used a nasal spray provided by the team doctor, which contained a Specified Substance. The BJC nevertheless found some fault on the Player's part:

"...we do not find the Player entirely blameless. While, as indicated already, we think it was reasonable for him to have trusted the team doctor, it did not absolve of his personal responsibilities. The Player took no steps to verify what was being given to him. The container he was given had no label and no instructions."
77. The player in *Slimani* was, perhaps, fortunate to receive a reprimand and warning, with no period of Ineligibility (although he in fact served a term of provisional suspension of a little over three months). The trend since the *Slimani* case has been a gradual increase in the severity of sanctions, no doubt based upon higher expectations of awareness on the part of athletes that have developed over time.

⁴ *IRB v. De Klerk*, (BJC, 4 April 2012 (Second Offence); 23 February 2010 (First Offence)); *IRB v. Thompson* (BJC, 7 June 2007).

78. Ultimately, we have concluded that an appropriate sanction would be six months Ineligibility for each Player. We feel that this strikes an appropriate balance between the need to send the message that the principle of personal responsibility is paramount, but also recognising the mitigating factors in this particular case and, ultimately, to impose a penalty that is proportionate in all of the circumstances.

(v) Exceptional Circumstances

79. Because we have concluded that the Players are eligible for a reduced sanction under Regulation 21.22.3, it is not necessary for us to consider the application of Regulations 21.22.4 or 21.22.5. However, to illustrate the unsatisfactory consequences of applying the *Foggo* approach in cases like the present ones, we would observe that the Players would not, on these facts, have been able to establish "No Fault or Negligence" on their part. As noted in *IRB v Slimani* (at para 52) "[c]ases in sports jurisprudence in which there has been a conclusion of no fault or negligence are few and far between."⁵ Under Regulation 21.22.5 (No Significant Fault or Negligence), the maximum reduction of sanction available to the Players would be 12 months. In our view a 12 month or greater term of Ineligibility for these Players would be a disproportionately severe sanction given the nature of their infractions.

Decision

80. On 15 June 2013 the Players each committed anti-doping rule violations by reason of the presence in their bodily Sample of methylhexaneamine (dimethylpentylamine). Methylhexaneamine (dimethylpentylamine) is listed in Category S6. Stimulants (specified) on the World Anti-Doping Agency's 2013 list of Prohibited Substances.
81. The sanction imposed on each of the Players for their anti-doping rule violations is a period of Ineligibility of six months, commencing on 19 July 2013 (the date on which notification letters were sent by the Board to the Union) and concluding on (but inclusive of) 18 January 2014.
82. The Players' attention is drawn to IRB Regulation 21.22.13 which provides, *inter alia*, that:
- "No Player...who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a match and/or tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by the Board or any Union or Tournament Organiser. Such participation includes but is not limited to coaching, officiating, selection, team management, administration or promotion of the Game, playing, training as part of a team or squad, or involvement in the Game in any other capacity in any Union in membership of the IRB".

The full text of Regulation 21.23.13 concerning status during Ineligibility should be consulted.

⁵ Reference was made to *Pobyedonostev v. IIHF CAS 2005/A/990* and *Adams v. CCES CAS 2007/A/1312*

Costs

83. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr. Ho by 17:00 Dublin time on 6 December 2013, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 13 December 2013.
84. This Decision is final, subject to referral to a Post-Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit, to a Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is also directed to Regulation 21.24.2, which sets out the process for referral to a Post-Hearing Review Body, including the time within which the process must be initiated.

29 November 2013

A handwritten signature in black ink, appearing to read 'Graeme Mew', with a horizontal line underneath the name.

Graeme Mew, Chair