

WORLD RUGBY

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY LESEDI IVAN CHERY and EMMANUEL NTSHIWA CONTRARY TO WORLD RUGBY REGULATION 21 BEFORE A BOARD JUDICIAL COMMITTEE

Board Judicial Committee:

Christopher Quinlan QC, Chairman (England)

Dr Stephen Targett (Qatar)

Clint Readhead (South Africa)

Appearances and Attendances:

World Rugby

Ben Rutherford, Senior Legal Counsel

Yvonne Nolan Legal Counsel

Mike Earl, General Manager Anti-Doping

David Ho, Anti-Doping Manager

Amy Bell,

The Players

Lesedi Chery

Emmanuel Ntshiwa

Sean Irish, Coach Botswana National Rugby 7s Squad

Heard: 11 April 2016 (by way of video conference call)

DECISION OF THE BOARD JUDICIAL COMMITTEE

I. INTRODUCTION

1. World Rugby ('WR') alleges that Lesedi Ivan Chery ('LC') and Emmanuel Ntshiwa ('EN') committed separate anti-doping rule violations ('ADRV') as a result of adverse analytical findings ('AAF') for the presence of the Specified Substance oxilofrine (methylsynephrine).

2. Oxilofrine is listed in category S6.b. Specified Stimulants of World Anti-Doping Agency's ('WADA) 2015 List of Prohibited Substances (which appears as Schedule 2 to the 2015 edition of World Rugby's Regulation 21 ['Regulation 21']).
3. The Prohibited Substance was detected in In-Competition samples collected from the Players at the 2015 Rugby Africa Men's 7s Championship held in Johannesburg, South Africa ('the Tournament'). The players were members of the Botswana National Representative Team at the Tournament. Each player is a member and player of the Botswana Rugby Union ('the Union').
4. Each Player admitted committing an ADRV. The only issue was sanction.
5. The substantive hearing was conducted by video conference call on 11 April 2016. We heard evidence and submissions. At the conclusion thereof we reserved our decision. This document constitutes the Board Judicial Committee's ('BJC') final reasoned Decision, reached after due consideration of the evidence, submissions and Arbitral Awards and authorities placed before it. Each member of the BJC contributed to it and it represents our unanimous conclusions.

II. FACTS

6. The facts were not in dispute. The Prohibited Substance was detected in In-Competition samples collected from the Players at the Tournament.
7. Lesedi Chery
 - a. A urine sample was collected from LC on 14 November 2015 and assigned code numbers 3927272 and 3927290. It was sealed by an authorised Doping Control Officer from the South African Institute of Drug Free Sport in accordance with the International Standard for Testing and Investigations and was split into A and B Samples.

- b. The Player signed a doping control form ('DCF') acknowledging collection of the said samples. On the DCF he declared Hardcore Whey, Nutritech Minerals, Nutritech Vitamins and Nutritech Aminos.
8. Emmanuel Ntshiwa
 - a. A urine sample was collected from Emmanuel Ntshiwa on 15 November 2015. It was assigned the code number 3927261 and was sealed by an authorised Doping Control Officer from the South African Institute of Drug Free Sport in accordance with the International Standard for Testing and Investigations. The sample was split into A and B Samples.
 - b. The Player signed a DCF acknowledging the collection of the said sample. Therein he declared only 'Cramp Block'.
9. The samples were sent to the WADA accredited laboratory in Lausanne, Switzerland. Separate analysis of each sample revealed Adverse Analytical Findings ('AAFs') for the presence of oxilofrine. Oxilofrine is listed in category S6.b. Specified Stimulants in Schedule Regulation 21.
10. Professor David Gerrard, a member of the World Rugby Anti-Doping Advisory Committee, and pursuant to Regulation 21.7.2, undertook a preliminary review of each case. The reviews found that there was no apparent departure from the International Standard for Testing and Investigations and/or applicable provisions of the International Standard for Laboratories which might or does undermine the validity of the AAFs.

III. REGULATORY SCHEME

11. Regulation 21.2.1 provides that the following constitute anti-doping rule violations:
Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

12. Regulation 21.2.1.1 makes it clear that

It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players 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 Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence)

13. Turning to sanction, oxilofrine is a Specified Substance. The starting point is Regulation 21.10.2, headed *Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method*. It states:

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

14. By Regulation 21.10.2.3 Intention is defined thus:

As used in Regulations 21.10.2 and 21.10.3, the term “intentional” is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

15. Regulation 21.10.4 states

21.10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If a Player or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

16. The meaning of “No Fault or Negligence” in Regulation 21 is taken from the WADC 2015 and reproduced in Appendix 1 to Regulation 21. It provides:

No Fault or Negligence: The Player or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Regulation 21.2.1,

the Player must also establish how the Prohibited Substance entered his or her system.

17. So far as “No Significant Fault or Negligence” is concerned the relevant parts of Regulation 21.10.15 provide:

21.10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

21.10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).

21.10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Player or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player’s or other Person’s degree of Fault.

18. The meaning of “No Significant Fault or Negligence” in Regulation 21 is also taken from the WADC 2015. Appendix 1 to Regulation 21 provides:

No Significant Fault or Negligence: The Player or other Person's establishing that his or her 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. Except in the case of a Minor, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system.

19. As is apparent, in respect of both Regulations 21.10.4 and 21.10.5.1.1 the burden is upon the Player to establish (on the balance of probabilities) the basis for eliminating or reducing the otherwise applicable period of Ineligibility.

IV. PROCEEDINGS BEFORE THE BJC

A. Background

20. Following a preliminary review of the case in accordance with Regulation 21.20.1, the Players were notified in writing via the Union on 11 December 2015 that they might have committed an ADRV contrary to Regulation 21.2.1. The Players were provisionally suspended, pending the outcome of these proceedings, with immediate effect.

21. By undated separate documents each signed respectively by LC and EN, sent to World Rugby via the Union on 6 January 2016, the Players admitted the ADRV.

22. Subsequently the BJC was appointed. By way of a Minute dated 28 February 2016 the Chairman issued Directions. Given the fact the samples were taken at the same Tournament, from players from the same Union and the identical issues raised by both, the two cases had until that stage been dealt with together. Therefore Direction 1a provided:

The parties must notify the BJC in writing no later than 16.00 (GMT) 4 March 2016 if there is any issue with the Player's respective cases being heard together during a joint hearing.

23. Direction 2 thereof required:

By 16.00 GMT on 11 March 2016 the Players shall serve upon World Rugby, the following -

- a. *A written statement setting out in such detail as he will advance at the substantive hearing, the evidence upon which he will rely and his submissions. Those submissions must address the specific grounds for reduction in the otherwise applicable period of Ineligibility as provided*

by World Rugby Regulation 21.10.4 and 21.10.15.

- b. *Any evidence (in addition to their own and that which they have already served) they propose relying upon. Such evidence must be in writing. Alternatively, confirmation that there will be none.*
- c. *A list of any previous Arbitral Awards or Decisions upon which he will rely.*

24. On 11 March 2016 the Union sought and was granted additional time to file its submissions.

25. The Union purported to comply with Direction 2 on 16 March 2016.

26. On 14 March 2016, EN emailed World Rugby expressing concerns in respect of how the Union was handling the issue.

27. On 18 March 2016, World Rugby informed the Union that:

The Chairman of the Judicial Committee has determined that the submissions provided by the Union on 16 March 2016 do not comply with his Directions in that it fails to address the following Direction:

A written statement setting out in such detail as he will advance at the substantive hearing, the evidence upon which he will rely and his submissions. Those submissions must address the specific grounds for reduction in the otherwise applicable period of Ineligibility as provided by World Rugby Regulation 21.10.4 and 21.10.15.

The Chairman is also concerned by an email received from Mr Ntshiwa which suggests that the player has not been properly and fully involved in the process. The Chairman has directed that the Union provides submissions assuring the Committee (by evidence rather than assertions) that each player has been properly and fully involved in this process.

28. On 31 March 2016, the Union lodged a letter of the same date. By that letter it filed two further signed statements, one from each Player. In his statement EN

said that his concerns in relation to how the Union were dealing with the matter had been allayed.

29. Once more the Union failed to comply with Direction 2. Therefore on 1 April 2016, the Chairman requested that World Rugby again inform the Union that the latest submissions did not address his directions in the following respect:

A written statement setting out in such detail as he will advance at the substantive hearing, the evidence upon which he will rely and his submissions. Those submissions must address the specific grounds for reduction in the otherwise applicable period of Ineligibility as provided by World Rugby Regulation 21.10.4 and 21.10.15.

30. On 6 April 2016, Neill Armstrong, an attorney practising in Botswana, submitted affidavits sworn by LC, Sean Irish and EN. In addition, he submitted two unsigned affidavits from Dave Gilbert. It should be noted that in advance thereof, on 7 March 2016, World Rugby provided a warning against self-incrimination to the Union which it asked to be passed to any coach or other third party who intended to provide evidence in this matter.

31. No response or objection *per* Direction 1a (above) was filed. At that start of the substantive hearing on 11 April 2016 both Players and the Union confirmed that they were content for the matters to be heard together. That is the course the BJC adopted.

B. Players' Cases

32. The Players' cases were set out in statements and sworn affidavits. They were very similar though not identical.

33. Lesedi Chery

- a. The following is taken from his affidavit sworn on 4 April 2016.
- b. LC is 23 years old. He has played for the Union's representative teams since 2010.
- c. He said he has not received any anti-doping education, either from any club he has played for or the Union. He said he relied upon advice from the Union through the 7s team coach and a person he describes (paragraph 14) as a "third party, a marketing agent for products".
- d. As for his case, in his affidavit he stated:

15 In the course of preparation for the Final African Olympic Sevens Championship in Johannesburg, the players selected requested the coach that they given training supplements, and in doing so relied on the coach as representative of the organising authority, the Botswana Rugby Union, to ensure that any Anti Doping Regulations which were applicable (of which we were ignorant) were complied with.

16 The coach approached a local retailer of supplements, who came to a training session and who discussed with the team including myself, what we sought, and what was recommended.

17 I am advised that the retailer did check with the supplier of the products, which included the supplement "Berserker" which contained the Prohibited Substance, and was advised all products including the "Berserker" were athlete friendly.

18 I am advised that the coach did search the internet for information on the products and found that the product Berserker did contain Methylsynephrine, and then checked that substance on the list of Prohibited Substances in Regulation 21, under "M" and failed to locate it, as it is classed in brackets behind "Oxilofrine".

- e. He denied taking the Prohibited Substance intentionally. His case was that he relied upon the assurances of his coach that the product was 'safe' to use.

34. He also relied upon his statement signed and dated 31 March 2016. Therein he made it clear that the source of the oxilofrine was a supplement called "Berserker" which he took and which was supplied to him by his Union coach. He said he took it at the "*beginning of the Tournament once*". He also stated: "*I did though ask if it was cleared and the response was that it was*".

35. He did not wish to expand on that account before us. When asked he said he did not declare it on the DCF because he had forgotten its name and was told he did not need to.

36. Emmanuel Ntshiwa

- a. The following is taken from his affidavit also sworn on 4 April 2016.
- b. He is 26 years old. He has played for the Union's representative teams since 2008.
- c. He said he has not received any anti-doping education, from club or Union. He said he relied upon advice from the Union through the 7s team coach and a person he (also) describes (paragraph 13) as a "*third party, a marketing agent for products*".
- d. As for his case, it was materially consistent with LC. In his affidavit he too stated:

14. In the course of preparation for the Rugby Africa Men's Sevens Championship in Johannesburg, the players selected requested the coach that they given training supplements, and in doing so relied on the coach as representative of the organising authority, the Botswana Rugby Union, to ensure that any Anti Doping Regulations which were applicable (of which we were ignorant) were complied with.

15 *The coach approached a local retailer of supplements, who came to a training session and who discussed with the team including myself, what we sought, and what was recommended.*

16 *I am advised that the retailer did check with the supplier of the products, which included the supplement "Berserker" which contained the Prohibited Substance, and was advised all products including the "Berserker" were athlete friendly.*

17 *I am advised that the coach did search the internet for information on the products and found that the product Berserker did contain Methylsynephrine, and then checked that substance on the list of Prohibited Substances in Regulation 21, under "M" and failed to locate it, as it is classed in brackets behind "Oxilofrine".*

- e. He denied taking the Prohibited Substance intentionally. His case was that he relied upon the assurances of his coach that the product was 'safe' to use.

37. He also relied upon his statement signed and dated 31 March 2016. Therein, like LC, he said the source of the oxilofrine was a supplement called Berserker which he took and which was supplied to him by his Union coach. He said he took Berserker once before the Tournament.

38. He did not wish to expand on that account before us.

39. Sean Irish, the Union 7s coach, provided an affidavit also dated 4 April 2016. Therein he states that he had not "*educated [himself] on the contents of and purport of Regulation 21*". He confirmed the truth of the Players' accounts and accepted that he supplied the Berserker. He said they relied upon him for "*advice in researching the composition of*" Berserker. He said he was not "*thorough enough*". He said the Players took it once on the Friday before the Tournament started. It made some of the squad feel sick so was not used again.

40. Questioned by the BJC he said he obtained the supplement Berserker for the squad. He said the supplier and wholesaler assured him that the product was “legal”. He said that in a squad meeting LC asked whether the supplements were ‘safe’ to use (i.e. did not contain any Prohibited Substance) and they assured him that they were.
41. He said that during a management meeting the product’s ingredients were checked against the WADC Prohibited List. He said they “*skimmed through*” the list alphabetically, one calling out the names as another checked against the WADC Prohibited List. He said none of the playing squad was present when those checks were carried out. He said they did not find any ingredient that was listed as Prohibited. One of the product’s listed ingredients is Methylsynephrine. That appears in the WADC Prohibited List thus: “***oxilofrine (methylsynephrine)***”.
42. He also told us that the Union has started an anti-doping education programme.
43. We also had two statements from David Gilbert, the Union Chairman. Therein he asserted that he had read and agreed with the contents of the Player’s affidavits. He also confirmed that the Union had not “*carried out any education programme in respect of Regulation 21 amongst coaches and players at national, regional or club level*”. He asserted that the Union must take responsibility for the ADRVs. He also undertook therein to “*immediately commence education of all official player and coaches in the Anti-Doping regime...*”.
44. The Players contended that in the circumstances they were not significantly at fault or negligent. Mr Irish invited us to impose on each Player a period of Ineligibility of “*may be one year*”. It is of note that Regulation 21.10.5.1.1 applies to Specified Substances (such as oxilofrine) and if established, permits a range of action from a reprimand to two years Ineligibility. Regulation

21.10.5.2 applies to Prohibited Substances and permits a sanction (on these facts) of not less than twelve months.

C. World Rugby's Case

45. World Rugby did not challenge any aspect of the Players' evidence or cases. It did not seek to establish that either ADRV was intentional. It put its position on that as follows:

World Rugby does not seek to argue in the present case that the Players intended to cheat. Accordingly, Regulation 21.10.2.1 applies in this case and the required sanction is therefore two years.

46. On the Players establishing grounds or eliminating or reducing the two year sanction it submitted that their "*cases do not give rise to any potential for a reduction under Regulations 21.10.4 and/or 21.10.5 (and/or otherwise)*". Ms Nolan submitted that their "*cases do not demonstrate No Significant Fault or Negligence pursuant to Regulation 21.10.5*".

V. MERITS

47. We have considered all the material put before, and submissions advanced to us, both orally and in writing.

48. In addition to the evidence and other written materials, we had regard to the following Arbitral Awards:

- a. *Knauss v International Ski Federation ('FIS'), CAS, 20 July 2005*
- b. *Despres v Canadian Centre for Ethics in Sport ('CCES'), CAS, 30 September 2008*
- c. *WADA v Hardy & USADA, CAS, 21 May 2010*

- d. *South Africa Rugby Union ('SARU') v Ralapelle and Basson, SARU Judicial Committee, 27 January 2011*
- e. *World Rugby v Nuñez Lasalle 1 July 2011*
- f. *Kutrovsky v ITF CAS 201/A/2804*
- g. *International Rugby Board v Gurusinghe, Kumara & Swarnithilak, 16 September 2011*
- h. *UKAD v Warburton and Williams, 12 January 2015*
- i. *World Rugby v Ralapelle 16 June 2015*

A. Anti-Doping Rule Violation

49. The burden of establishing the ADRV is upon World Rugby. Pursuant to Regulation 21.3.1 the standard of proof is as follows:

“The standard of proof shall be whether World Rugby or its Union has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which 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.”

50. As Regulation 21.2.1.1 makes clear establishing an ADRV does not require proof of intent, fault, negligence or the knowing use of the Prohibited Substance on the athlete's part.

51. Pursuant to Regulation 21.2.1.2 sufficient proof of an ADRV under Reg. 21.2.1 is established by, *inter alia*, the presence of a Prohibited Substance in the player's A and (if tested) B samples.

52. The commentary to Article 2.1.1 of the WADC provides as follows:

Under the strict liability principle, an Athlete is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete's Sample. The violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.

53. Oxilofrine is listed in category S6.b. Specified Stimulants in WADA's 2015 List of Prohibited Substances and in Schedule 2 to Regulation 21).

54. Neither player has a registered Therapeutic Use Exemption for oxilofrine.

55. We considered the case for and against each Player separately.

56. In his affidavit dated 4 April 2016, LC raised an issue in relation to the A Sample Analysis from the WADA accredited laboratory in Lausanne, Switzerland dated 20 November 2015. He stated that the reference "ATF" is an abbreviation for Atypical Finding. The relevant entry read:

Total LH concentration during ITP was estimated below 1 mIU/mL. According to WADA Guidelines

"Reporting & Management of Urinary Human Chorionic Gonadotrophin (hCG) and Luteinizing Hormone (LH)

Findings in Male Athletes, v2.0" the result is reported as ATF.

57. In the said affidavit he sought to argue that there should have been a further investigation before an adverse atypical finding was delivered. He did not pursue that argument before the BJC.

58. In fact the said wording relates to the concentration of luteinizing hormone (LH) in accordance with reporting requirements for human chorionic gonadotrophin (hCG) and LH reporting. The finding is an "ATF" according to the WADA Guidelines which usually requires further investigation. It is unrelated to the finding for the stimulant oxilofrine. hCG and LH are a different

class of Prohibited Substance (Peptide Hormones, Growth Factors, Related Substances And Mimetics (S2)) from Stimulants (S6).

59. In light of all the evidence, including the Players' admissions, we were comfortably satisfied that in respect of both LC and EN World Rugby discharged its burden and established that each committed the ADRV as alleged.

B. Sanction

60. We considered the case for and against each Player separately. However, there are issues and conclusions common to both.

(1) General observations common to both Players

61. This is each Player's first ADRV.

62. Regulation 21.2 makes clear

Players or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

63. Each Player has personal responsibility. That responsibility cannot be delegated. It includes (*per* Regulation 21.2.1.1):

It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players 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 Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1

64. Further, World Rugby Anti-Doping Advisory Committee's underlined the concept of personal responsibility in its memorandum to all Unions:

World Rugby considers it necessary to remind all Players and Player Support Personnel that the principle of personal responsibility cannot be abdicated because of the actions of coaches or medical advisers or any other person associated with the Player's Union or its Team.

65. The risks involved in taking supplements are well known. The said memorandum continued:

Specifically, the fact that supplements are provided by a Player's Club, Union or other Rugby Body, will not absolve the Player of his or her responsibility for the consequences if the use of such supplements results in an anti-doping rule violation. This will be the case even if there was no reason to suspect that the supplement contained a prohibited substance. Accordingly, in most, if not all such cases, a degree of Fault or Negligence should be attributed to the Player for the consequences of using any supplement that is subsequently found to contain a prohibited substance.

Unions are asked to remind all Players and Player Support Personnel that supplement use carries with it the risk of breaching anti-doping rule violations and that even where efforts have been made to ensure that such supplements are 'safe', Participants are liable to be held responsible if supplements in fact contain Prohibited Substances.

(2) Conclusions common to each Player – intention

66. The meaning of “Intentional” is found in the second sentence of Regulation 21.10.2.3, subject to two specific situations provided for later in the

Regulation. The first sentence sets the context for the second, namely that it is aimed at those who intend to cheat. Intention means or requires (*per* the second sentence and subject to the two specific situations provided for) that the Player (or other Person) engaged in conduct (a) which he/she knew constituted an anti-doping rule violation or (b) knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

67. Oxilofrine is a Specified Substance. The samples were taken In-Competition. As is clear from Regulation 21.10.2.1.2 in such circumstances the burden is upon World Rugby to establish that the ADRV was intentional.

68. World Rugby did not seek to prove that either Player doped intentionally. World Rugby accepted that neither Player intentionally ingested the Prohibited Substance. Therefore World Rugby must be taken to have accepted (applying the meaning of intention) that each Player did not know

- a. He was taking a Prohibited Substance or
- b. That there was a significant risk that his conduct (taking the supplement) might constitute or result in an ADRV and manifestly disregarded that risk.

69. Ms Nolan submitted that World Rugby had not assumed any burden under, Regulation 21.10.2.1.2. During the hearing we sought help from her on that stance and the reasons for it. We did so for it seemed to us that such a decision – important as it is – should be evidence-based. It should not be a subjective one, based on simply personal opinion nor on some arbitrary basis or bases. Such an approach would result in an inconsistent approach to the application of the WADC/Regulation 21 and be unfair.

70. Ms Nolan accepted that analysis. She confirmed that it was. World Rugby did not challenge any aspect of the Player's evidence or that called on their behalf. World Rugby accepted the Players' accounts as to the source of the oxilofrine

in their samples and the circumstances (as they said they were) in which they came to use Berserker.

71. It follows that we are in no proper position to go behind it either¹. We did not assume the burden. We set that out to explain the approach we adopted to the evidence, some of our conclusions and the reasons for them.

72. Therefore we did not consider further the question of intentional doping. We (like World Rugby) approached the cases on the basis that neither Player intentionally committed an ADRV. The result is that pursuant to Regulation 21.22.2 the starting point for sanction is a period of Ineligibility of two years. That is subject to either (or both) Player/s establishing the conditions for eliminating or reducing the period of Ineligibility, as provided for in the Regulations 21.10.4 and 21.10.5.1.1.

73. We approach sanction therefore on the basis of the Players' accounts. It follows that we accept (as World Rugby did) that the Berserker supplement was the source of the oxilofrine in each Player's sample.

(3) Conclusions common to each Player – No Fault or Negligence

74. The starting point is the definition of "Fault". Once more Regulation 21 provides it. It is taken directly from the WADC 2015. Appendix 2 provides:

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the

¹ See for example the Appeal Committee's decision in *Ford & Gray* RWC 20 October 2015

Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Regulation 21.10.5.1 or 21.10.5.2.

75. In paragraph 24 of his affidavit LC accepted that, *"I understand that the facts may no [sic] disclose 'No Fault or Negligence' as defined, that I did not exercise utmost caution"*.

76. Paragraph 23 of EN's affidavit contained an identical concession (including the typographic error) namely *"I understand that the facts may no [sic] disclose 'No Fault or Negligence' as defined, that I did not exercise utmost caution"*.

77. The reality of the case is that neither Player submitted that he was not at fault. Mr Irish acknowledged that at the start of the hearing. That was, in our judgment, a concession properly made in respect of each.

78. We are satisfied that neither proved that he was not at fault or negligent for the purposes of Regulation 21.10.4.

79. The next question is whether either Player established that his fault or negligence was not significant.

(4) Discussion common to both Players – No Significant Fault or Negligence

80. Regulation 21.10.5.1.1 is derived from Article 10.5.1.1 WADC 2015. The commentary to Article 10.4 and 10.5 states:

Comment to Article 10.4: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.

81. We appreciate that the commentary is just that but it is illustrative of the personal nature of individual responsibility and the demanding standard expected of athletes. The WADC (and by extension Regulation 21) imposes on an athlete a duty of utmost caution to avoid a Prohibited Substance entering his/her body. That standard of care is demanding.

82. As to the exacting nature of that standard, some assistance on approach is to be found in the CAS decision in *Despres*:

7.8 The Panel is not suggesting that an athlete must exhaust every conceivable step to determine the safety of a nutritional supplement before qualifying for a “no significant fault or negligence” reduction. To that end, the Panel recognizes Mr. Despres’ argument that taking reasonable steps should be sufficient since “one can always do more.” The Panel in *Knauss* followed this logic when it determined that even though Mr. Knauss could have had the nutritional supplement tested for content, or simply decided not to take it altogether, “these failures give rise to ordinary fault or negligence at most, but do not fit the category of “significant” fault or negligence.” Similarly, the Panel distinguishes between reasonable steps Mr. Despres should have taken and all the conceivable steps that he could have taken. In light of the risks involved, the Panel finds that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested Kaizen HMB.

83. The CAS Tribunal in *WADA v Hardy & USADA* applied that approach approvingly.

84. It is clear from the definition of “Fault” that the Players’ inexperience is not irrelevant. This was EN’s first international tournament. Further, we accept that both Players have had no anti-doping education. That is a significant failing by the Union, which it acknowledged.

85. While a genuine lack of anti-doping education is a factor that we can properly take into account in assessing his fault, we do not attach much weight to it. The WADC has since it was first published in 2003, applied to rugby. Its requirements apply to professional and amateur, or whether he/ she is in a developed or a less developed country.

86. In addition, each Player signed the Team Member Consent Form for the Tournament on 12 November 2015. The said form specifically drew attention to World Rugby’s education materials, and required them to acknowledge, that they had “*read/opportunity to read Rugby Africa Tournament Manual*” and had “*access to [keeprugbyclean.com/other anti-doping education](http://keeprugbyclean.com/other-anti-doping-education)” . The Anti-Doping Procedures in respect of the Tournament are set out in Section 7 of the Rugby Africa Tournament Manual and state:*

Each Player nominated in the Participating Union’s player list scheduled to participate in the Rugby Africa 7s are required to read and accept all the IRB anti-doping rules.

IRB Anti-Doping educational information and resources and are available in English, French and Spanish on the anti-doping section of the IRB website via www.irb.com/keeprugbyclean

87. Having signed that form they cannot now pray in aid ignorance based on their failure to read and understand that which they said they had. Arguably neither did. In their affidavits both (in this identical sentence) accept: *“I concede that it was for me to enquire as to the Regulations and Rules to which I would be bound”*.

88. In fact neither was ignorant of the anti-doping regime. LC asked whether the supplement was *“cleared”*. In his first (and unsigned) statement he said, *“I am quite aware that it is my responsibility to ensure whatever supplements I ingest or dose should be in line with the anti-doping code”*. In his signed statement dated 31 March 2016, EN observed, *“I believe it is my responsibility to monitor whatever I ingest is cleared on the banned substance”*.

89. We also accept that each Player obtained the Berserker supplement from the Union’s coach. That too is a significant failing on both the Union’s part and the coach who supplied it. For reasons set out below, we take the view the ‘checks’ carried out in respect thereof were lamentable.

90. We agree with the *Gurusinghe, Kumara & Swarnithilak* BJC’s analysis of and approach to the *Ralapelle and Basson* decision. As the *Gurusinghe, Kumara & Swarnithilak* BJC (correctly) observed (in paragraphs 81 & 83 of its decision):

81. The decision of the SARU tribunal is at odds with the provisions of Regulation 21 and with the WADA Code. There is no indication in the reasons of the tribunal that it considered the guidance provided in the WADA Code where, in relation to the issue of “No Fault or Negligence” under Article 10.5.1 of the Code

...

83. In our judgment, therefore, the decision in Ralapelle and Basson should not be relied upon as authority for the proposition that players who rely on the professional assistance and judgment of team medical advisers in respect of supplement use will not be at fault if the supplements they use subsequently turn out to be the cause of an anti-doping rule violation.

91. It was subjected to a similarly robust analysis by the BJC that decided *World Rugby v Ralapelle* 16 June 2015. It is factually different from this case and in any event it does not serve as a useful or helpful precedent.

92. The definition of "Fault" states:

...In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour..."

Thus it is the degree of the Player's own fault alone that is relevant. It requires an assessment of that individual's conduct, namely what he did and did not do. Therefore we considered their cases separately

(5) No Significant Fault or Negligence - Lesedi Ivan Chery

93. For the reasons set out, we approach this on the basis of LC's account, as supported by the other unchallenged evidence.

94. It is incumbent upon the Player to prove (on the balance of probabilities) that he was not significantly at fault or negligent.

95. We concluded that in all the circumstances (including the following) the Player failed to establish to the requisite standard that he was not significantly at fault or negligent:

- a. He (as part of the squad) sought supplements.

- b. He was aware that there was some risk associated with or inherent in taking a supplement. He must have been for otherwise he would not have asked if it was “*cleared*”.
- c. He was part of the playing squad who requested the supplements. It was not a case of the Union or its employees or officers volunteering them and/or encouraging the consumption thereof. Having done so and knowing of the risk, he should have made proper enquiry as to what the supplement contained.
- d. In that regard (making proper enquiry) he failed so to do:
 - i. It was and is inadequate to simply ask another (even someone in authority such a coach) if the supplement is “*cleared*”, ‘safe’ or does not contain any Prohibited Substance. The responsibility is that of the individual player.
 - ii. Having made such an enquiry it is not sufficient simply to rely upon what one is told. The risk of doing so is obvious. It is dependent on the quality of the advice and the knowledge of the supplier. Here Mr Irish said he had no knowledge of Regulation 21 and the checks he carried out were wholly inadequate. They failed (apparently) to notice the Prohibited Substance even when it was listed as an ingredient. That failing was not LC’s but it demonstrates the risk of relying on another or others.
 - iii. He failed in the following respects:
 - 1. He did not, but could and should have carried out his own researches. A simple Internet search would have quickly identified the oxilofrine and that it was prohibited. This is not a contaminated supplement case.
 - 2. He could and should have sought medical or other expert advice.
 - 3. No check was made with the manufacturer of the supplement. The wholesaler and retailer have commercial interests to serve in selling the product.
 - 4. As CAS observed in *Hardy* he could have had the supplements tested. There was no independent

certification that the supplement was 'safe' (which is hardly surprising given that it was not). There is no evidence it was batch tested or any enquiry was made in that regard.

5. We note also that he failed to disclose it on the DCF. We found his explanation for that failure, in the context of listing four others, unpersuasive.
6. All of this is in the context of having available to him the Tournament Manual which pointed him to the Keep Rugby Clean website and the wealth of informative materials available there.

96. LC failed to establish grounds for eliminating or reducing the mandatory period of Ineligibility. Accordingly pursuant to Regulation 21.10.2.2 a period of Ineligibility of two years must be imposed.

(6) No significant fault or negligence - Emmanuel Ntshiwa

97. For the reasons set out, we approach this on the basis of EN's account, as supported by the other unchallenged evidence.

98. It is incumbent upon EN to prove (on the balance of probabilities) that he was not significantly at fault or negligent.

99. We concluded that in all the circumstances including the following the Player failed to establish to the requisite standard that he was not significantly at fault or negligent:

- a. Like LC he was part of the playing squad who requested the supplements. Having done so and knowing of the risk, he should have made proper enquiry as to what the supplement contained.
- b. Unlike LC he appears to have made no specific enquiry as to whether the supplement was 'safe' though on the evidence was present in the meeting when it was made.

- c. He was not ignorant of the existence of an anti-doping regime. In his unsigned statement he said, "*I am quite aware that it is my responsibility to ensure whatever supplements I ingest or dose should be in line with the anti-doping code*". That also recognises the risk inherent in taking supplements.
- d. Further, and as with LC, he failed in the following respects:
 - i. It was insufficient to rely on assurances from another (even someone in authority such a coach) that a supplement is 'safe' or does not contain any Prohibited Substance.
 - ii. He did not, but should have carried out his own researches. An Internet search would have quickly identified the oxilofrine and that it was prohibited. This is not a case of a contaminated supplement.
 - iv. He should have sought medical or other expert advice.
 - v. No check was made with the manufacturer of the supplement. The wholesaler and retailer have commercial inserts in selling the product.
 - vi. As CAS observed in *Hardy* he could have had the supplements tested. There was no independent certification that the supplement was 'safe' (which is hardly surprising given that it was not). There is no evidence it was batch tested or any enquiry was made in that regard.
 - vii. We note also that he failed to disclose it on the DCF.
 - viii. The Tournament Manual pointed him to the Keep Rugby Clean website and the wealth of informative materials available there.

100. Therefore EN failed to establish grounds for eliminating or reducing the mandatory period of Ineligibility. Accordingly pursuant to Regulation 21.10.2.2 a period of Ineligibility of two years must be imposed.

(7) Commencement

101. As for the starting point of that period of ineligibility, the Players were

provisionally suspended by World Rugby on 11 December 2015. Neither has played since.

102. In accordance with Regulation 21.10.11.3 we direct that the period of ineligibility imposed on the Respondent will commence on 11 December 2015.

(8) Status during ineligibility

103. The Respondent's status during the period of Ineligibility is as provided by WR Regulation 21.10.12.1.

(9) Review

104. This decision is final, subject to referral to a Post Hearing Review Body or an appeal, where the circumstances permit (Regulation 21.13).

VI. COSTS

105. We make no order for costs.

VII. SUMMARY

106. For the reasons set out above, the BJC determines:

- e. In respect of Lesedi Ivan Chery –
 - iii. The anti-doping rule violation has been established.
 - iv. The period of Ineligibility of two years commencing on 11 December 2015.

- f. In respect of Emmanuel Ntshiwa –
 - i. The anti-doping rule violation has been established.

- ii. The period of Ineligibility of two years commencing on 11 December 2015.

VIII. POSTSCRIPT

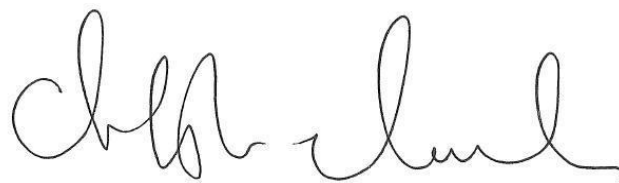
107. Aspects of these cases have caused us unease and concern. One need only record one: the facts, in their simplest form. We had to deal with two international 7s players supplied at an international tournament by their Union coach with a supplement which contained a Prohibited Substance listed as an ingredient. While the Players have personal responsibility, which they cannot delegate, so the Union and coach have their own responsibilities. Having said that it is right to record that Mr Irish did not seek to shy away from such nor did the Union seek to avoid its own responsibilities. They and we are conscious that it is the Players who suffer the (direct) consequences.

108. We remind the Union (if that be necessary) of its obligations under Regulation 21.19.2 namely:

Each Union shall within its means and in co-operation with its constituents, plan, implement, evaluate and monitor information and education programmes for doping-free rugby and shall support the programmes of World Rugby set out above

109. We would also recommend that the Union:

- a. Within 28 days of the date hereof, inform World Rugby in writing of the full details of the anti-doping education programme it has implemented.
- b. Not later than 31 December 2016 inform World Rugby in writing of the full details of the scope of, work carried pursuant to, and progress made of its anti-doping education programme.

A handwritten signature in black ink, appearing to read 'Chris Quinlan', written in a cursive style.

Christopher Quinlan QC, Chairman,

Bristol, England

22 April 2016

Signed on behalf of the BJC