

**IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT**

**ANTI-DOPING DISCIPLINARY COMMITTEE**

HELD AT HOLIDAY INN ROSEBANK (JOHANNESBURG)

In the matter of: Ms Thozama April

Date of Hearing: 28 April 2015

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**RULING**

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**1. INTRODUCTION**

- 1.1 The South African Institute for Drug Free Sports ("SAIDS") brought charges against the Athlete Ms Thozamile April ("the athlete") for adverse analytical findings.
- 1.2 The hearing was held on 28 April 2015 in Johannesburg and the athlete was represented during the hearing by her manager.

**2. COMPOSITION OF THE PANEL**

- 2.1 The Disciplinary Committee was appointed by SAIDS a statutory body created by section 2 of South African Institute for Drug-Free Sport Act 14 of 1997, as amended in 2005 when SAIDS accepted the World Anti-doping code. The SAIDS Anti-doping Rules which were published by SAIDS are applicable to the present proceedings. ("**the Rules**")

2.2 The SAIDS Anti-doping Disciplinary Committee ("**the Committee**") has been Appointed in terms of Article 8.1 of the Rules. The committee consisted of Mr. Mandla Tshabalala, Dr. Selio Motaung and Mr Leon Fleiser.

2.3 The pro-forma prosecutor for SAIDS was Mr. Rahidien Cullis.

### **3. APPLICABLE RULES**

3.1 The prosecutor presented to the panel and the athlete that the rules to dispense with during the proceedings shall be those of SAIDS.

### **4. POINT IN LIMINE**

4.1 prior to the commencement of the hearing and before the prosecutor read the charges, the athlete raised a number of concerns, amongst which were the following:

4.1.1 She enquired about the presence of Mr Fahmy Gallant and Pieter de Jager from Athletic South Africa as she expected them to attend the hearing because she was in communication with them.

4.1.2 She further enquired about the composition of the panel and in fact expected that members from the Athletic South Africa would conduct or form part of the hearing;

4.1.3 She further raised concerns about the venue as she expected the hearing to take place in Pretoria and not Johannesburg as she runs under the colours of Northern Gauteng and not Southern Gauteng;

4.1.4 The Athlete also raised concerns about the procedure for conducting tests on Sample B.

4.2 The Panel and the Prosecutor took time to explain to the athlete, the normal procedure that is followed up to the point where the matter is set down.

4.3 The Prosecutor also explained the procedure of B Sample testing without going into the actual technical details of the testing procedure.

## 5. CHARGE

5.1 The charge against Ms April ("**the athlete**") is contained in a letter dated 27 March 2015, which letter was addressed to the athlete. The charge preferred against the athlete reads as follows:

*"You are formally charged with an anti-doping rule violation in terms of Article 2.1 of the 2009 Anti – Doping Rules of the South African Institute for Drug-Free Sport (SAIDS). On 21 September 2014, you provided a urine sample (2958267) during an in-competition test. Upon analysis, the South African Doping Control Laboratory reported the presence of prohibited substances in your urine sample. The substances identified in your sample were:*

*1. 19-norandrosterone and 19-noreticholanolone, metabolites and/or precursors of the anabolic Agent, Nandrolone – These substances are categorised under **Class S1 Anabolic Agents** on the World Anti-Doping Code 2014 Prohibited List International Standard.*

2. Phentemine – This substance is categorised under **Class S6 Stimulants** on the World Anti-Doping Code 2014 Prohibited List International Standard.
3. Prednisone and Prednisolone – These substances are categorised under **Class S9 Glucocorticosteroids** on the World Anti-Doping Code 2014 Prohibited List International Standard."

5.2 The above charge emanate from an Adverse Analytical Finding from the South African Doping Control Laboratory. The report of the finding was communicated and addressed to the Athlete on 29 December 2014.

## 6. PLEA

6.1 The Athlete pleaded not guilty to the charge.

## 7. SAIDS CASE

7.1 During the cross-examination, and on being asked whether the Athlete received the bundle of the documents, the athlete confirmed that she received the documents.

7.2 The Athlete stated that she disputes the procedure followed in that she ran in Cape Town but was informed by Mr De Jager of the Analytical Findings result and not SAIDS, as she would have expected.

7.3 According to the Athlete she was supposed to have been the first to receive the Analytical Findings result and not the Athletics South Africa.

7.4 The athlete also raised a concern that on about September 2014, she heard rumours that she had been found guilty (of a doping offence) even before she was notified.

7.5 She suspects that SAIDS leaked information about the Analytical Findings, which same was clarified by the prosecutor and informed the

Athlete that SAIDS only received the Analytical Findings on or about 29 December 2014.

- 7.6 During the hearing it came to our attention that the Athlete is 29 years old and that she possesses a certificate in Sports Management.
- 7.7 She is currently employed at Transnet and she runs under the Transnet colours.
- 7.8 The Athlete competes in Half Marathons and has represented South Africa in China and during the World Student Games..implying that she is a professional and competitive athlete.
- 7.9 On being asked whether she has ever received any training on anti-doping, the Athlete stated that she never received any training and had only informally heard about anti-doping.
- 7.10 The Athlete was then asked whether or not she knew how the substance entered her body, to which she replied she did not know. She implied that the only way any substance could have entered her body is through the medication she declared in the Doping Control Form.
- 7.11 She was further asked whether she knew the substances Nandrolone, Phentermine and Prednisone, to which she replied, she did not know but had only heard about them.

#### **ATHLETE CASE**

- 7.12 The athlete stated that prior to the race she had an injury, shin splints and used voltaren to manage the injury.
- 7.13 She further stated that she had been experiencing abdominal pains and back pains and had used unidentified pain killers and further that she used contraceptives. She admitted to having forgotten to record

the abdominal pain and contraceptive medications on the doping control form.

- 7.14 She said that when she went to the doctor she never asked whether the medication the doctor prescribed her contained prohibited substances.

**PLEASE TAKE NOTE SOME OF THE EVIDENCE COULD NOT HAVE BEEN REFERRED TO IN THIS RULING, THE ENTIRE TRANSCRIPT COULD BE OBTAINED FROM SAIDS.**

- 7.15 In its closing argument, SAIDS stated that they would pray for a maximum sanction of two years ban on the athlete from the date of notification which is 29 December 2014.

- 7.16 SAIDS further stated that the Athlete failed to identify the substance she has ingested.

- 7.17 According to SAIDS an Athlete is liable for what enters his body and made reference to Article 2.1.1 and 2.1.2 of the SAID Anti-Doping Rules of 2009.

## **8. BURDEN OF PROOF**

- 8.1 The SAIDS rules places a burden of proof on the prosecution to prove to the comfortable satisfaction of the hearing panel, that the athlete did consume/use a banned substance. In terms of Article 3.1 of the SAIDS anti-doping rules:

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

*beyond reasonable doubt. Where the Anti-Doping rule places burden of proof upon the athlete or other person alleged to have committed an anti-doping rules violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability, except as provided in Article 10.4 and 10.6 where the athlete must satisfy a higher burden of proof".*

- 8.2 Article 3.2 mentions the methods of establishing facts and presumption, and Article 3.2.1 specifically states that "WADA accredited laboratories are presumed to have concluded sample analysis and custodial procedure in accordance with the international standard for Laboratories".

## **9. THE LAW**

- 9.1 The charge against the athlete constitutes a breach of Article 2.1 of the South African Institute for Drug-Free Sport, which rule states that "The presence of a prohibited substance or its Metabolites or Makers in the Athlete's sample." Article 2.1.1 specifically states that:

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

- 9.2 Article 2.2 which is headed "Use or attempted Use by an Athlete of a Prohibited Substance or a prohibited Method". In particular Article 2.2.1 states that:

*"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or prohibited Method."*

9.3 The above provision is founded on strict liability that is applicable to anti-doping violations.

9.4 Athletes are required to adhere to a standard set of anti-doping rules on the basis that they could be held accountable for whatever enters their systems; and the rules do not in any way accept ignorance of the anti-doping provisions or the prohibited list.

9.5 To be able to be successful in reducing the period of ineligibility, the Athlete needed to address the committee on Article 10 of the SAIDS anti-doping rules which deals with sanctions.

9.6 Specifically, if the athlete wants to be successful in his/her quest for elimination or reduction of the period of ineligibility, the athlete must address the committee on Article 10.4 which deals with elimination or reduction of the period of ineligibility for specified Substances under Specific Circumstances

9.7 Article 10.4 Specifically states that:

*"Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of ineligibility found in Article 10.2 shall be replaced with the following: first violation: at minimum, a reprimand and no period of ineligibility from future events, and at a maximum, two (2) years ineligibility."*



9.8 The above provision places the onus on the Athlete to specify the Substance which entered her body and that such substance was not intended to enhance her performance, taking into account Article 2.1 which places strict liability on the Athlete for whatever enters the Athlete's body.

9.9 Firstly the Athlete must identify the Prohibited Substance and secondly the Athlete must prove that the very same Prohibited Substance was not intended for performance enhancement. As it was stated in the **Dimatar Kutrovsky v ITF**<sup>1</sup> that:

*"and athlete does not need to prove an intent to enhance his sport performance, since he cannot be said to have this intent if he is not aware that the product he is taking contains a specified substance."*

9.10 This simply means that if an Athlete fails to specify the substance, there is no reason to further enquire whether it was for performance enhancement as the provision of Article 10.4 specifically says "such" as a follow up to a specified substance.

9.11 Article 10.5 addresses the Elimination or reduction of period of ineligibility based on exceptional circumstances and Article 10.5.1 states that:

*"If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of ineligibility shall be eliminated. When a Prohibited Substance or its Markers or its Metabolites is detected in an Athlete's Sample in violation of the Code Article 2.1 (Presence of Prohibited Substance), the Athlete shall also establish how the Prohibited Substance entered their system in order to have the period of*

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<sup>1</sup> CAS 2012/A/2804 Dimatar Kutrovsky v ITF, par 9.12

*ineligibility eliminated. In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of ineligibility for multiple violations under Article 10.7."*

9.12 for the committee to consider elimination or reduction of period of ineligibility, the Athlete must meet either of the following conditions set out in Articles 10.4 and 10.5:

9.12.1 that the Athlete must establish how the Prohibited Substance entered his/her system; and that there was no intention to enhance performance.

9.12.2 That the Athlete must establish that he/she bears No (significant) Fault or Negligence.

9.13 The anti-doping rules requires an Athlete to exercise a standard of care and to know exactly what enters his/her body.

9.14 it was held in **Kowalczyk v FIS**<sup>2</sup> that:

*"the duty of care resting upon any 22 year old athlete engaged in world class competition requires, at the very least, that she provide her treating physician a copy of the 2005 Prohibited List and that she enquire with the doctor whether any of the medication and treatments which he/she prescribes contain substances contained on the list."*

9.15 In casu, the Athlete could not identify the substances and in fact she alleged that the Adverse Analytical Findings might have been as a result of outside influences.

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<sup>2</sup> CAS 2005/A/918 at par 12.5.2

9.16 The Panel came to the conclusion that the Athlete has in fact failed to identify the prohibited substance(s) she ingested. Therefore there was no need to further enquire whether such substance was used to enhance her performance.

9.17 Having failed to meet the aforesaid requirements it is the finding of the committee that SAIDS has proved its case to the comfortable satisfaction of the panel, therefore the Athlete is hereby found guilty as charged.

## **10. SANCTIONS**

10.1 In imposing the sanction, the panel was guided by Article 10.2 which is headed

*"Imposing of ineligibility for Prohibited Substances and Prohibited Methods." It specifically states that "The period of ineligibility imposed for the violation of the Code Article 2.1(Presence of Prohibited Substance or its Metabolites or Markers) Article 2.2 (Use or Attempted Use of the Prohibited Substance or Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Method) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided for in Article 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided for in Article 10.6, are met: First violation: two (2)years-ineligibility."*

10.2 After the committee thoroughly deliberated on the possible sanction, the panel could not find any condition raised by the athlete for elimination or reduction of period of ineligibility.

10.3 Of interest is the fact that the Athlete continued to compete during March 2015, though she claims it was for recreational purposes.

10.4 The committee found that the athlete did not suffer any prejudice as she continued to compete and in the process won competitions which SAIDS does not argue for disqualification of their results.

The Committee therefore unanimously came to the following sanction:

That the Athlete is hereby suspended for a period of two (2) years from the date of the notification which is 29 December 2014.

Date: 28 April 2015

A handwritten signature in black ink, appearing to be 'M. Tshabalala', written over a horizontal line.

Mr. Mandla Tshabalala

**For and on behalf of  
Dr. Sello Motaung and Mr Leon Fleiser**