

BEFORE THE ANTI-DOPING APPEAL TRIBUNAL OF SOUTH AFRICA

(Instituted in terms of Section 17(2) (a) of Act No. 14 of 1997, as amended by Act No. 25 of 2006)

Case No: SAIDS/2015/01/A04

In the matter between:-

ZANMARE TERBLANCHE (Athlete)

(APPELLANT)

and

**SOUTH AFRICAN INSTITUTE FOR
DRUG-FREE SPORT (SAIDS)**

(REPOENDENT)

Before

Mr. Alex Abercrombie (Chairperson)

Dr Ismail Jakoet

Mr. Rebaone Gaorelwe

DECISION

1. The Athlete attended the hearing via a telephone link and represented herself. SAIDS was represented by Ms. Palesa Motene and Adv. Nicolas Kock.
2. On the 22nd September 2015 the Athlete/Appellant was convicted of an anti-doping rule violation in terms of Article 2.1 of the 2015 Anti-Doping Rules of Respondent in that a urine sample provided by her after an in-competition event at the Gauteng Provincial Track Cycling Championships on 15th March 2015 tested positive for the presence of Methandienone LT (long term metabolite of methandienone). The Analytical Test Report from the South African Doping Control Laboratory (the Laboratory) dated 16th April 2015 contains comments stating that the samples were analysed for substances on the WADA 2015 Prohibited List (Classes S1 to S9) and concludes that it constitutes an adverse analytical finding.
3. On the 30th April 2015 SAIDS informed the Athlete of the Adverse Analytical Finding stating that the laboratory confirmed the presence of Methandienone LT, which is a metabolite of the Anabolic Agent Methandienone in her urine sample.

4. SAIDS also informed her that the adverse analytical finding constituted a breach of Article 2.1 of its Anti-Doping Rules. The Athlete was also informed of the possible sanctions for such a breach and she was also invited to submit a response and also told that she could have her "B" sample tested as well. She was also informed that she was provisionally suspended.
5. The substance Metandienone (17 β -hydroxy-17 α -methylandrosta-1, 4-dien-3-one) on the WADA 2015 Prohibited List is not a Specified Substance.
6. The Athlete did not make any submissions nor did she request her "B" sample to be tested.
7. A charge sheet was prepared and the hearing was set down for the 22nd September 2015. The athlete failed to attend the hearing and it proceeded in her absence,
8. The Committee imposed a sanction of 4 years ineligibility. It is against this sanction that the Athlete has appealed and requested the Appeal Board to impose a maximum period of ineligibility of 2 years.

PRELIMINARY ISSUE

9. On the 29th April 2016 the Chairperson sent the following note to the general Manager of SAIDS:

"As you know the Athlete was unrepresented at the hearing and it seems she will represent herself at the Appeal.

Whilst she appears not to challenge the finding of Guilty but only the Sanction I am of the view that "Fair Play" demands that we look after the overall interests of the Athlete.

Given the fact that the notion of strict liability must apply both ways, kindly ask SAIDS and the Athlete to comment as to whether or not SAIDS has proved the presence of a prohibited non specified substance. In this regard I point out that the substance found to be present does not appear to be on the prohibited list of WADA. The spelling is different

10. The Athlete jumped on the bandwagon and submitted that a doping violation was not proved as the substances were different.
11. SAIDS submitted that it was merely a spelling issue in that the original spelling comes from the English spelling but the substance found in the Athlete's urine is the same as the substance indicated on the WADA 2015 Prohibited List, namely Metandienone (17 β -hydroxy-17 α -methylandrosta-1, 4-dien-3-one).
12. No supplementary Laboratory report or affidavit was filed by SAIDS in support of their submission.

DECISION ON PRELIMINARY ISSUE

13. The Appeal Board was split on the issue:

13.1. Dr Ismail Jakoet a medical doctor was of the view that the different spelling made no difference as the substances were one and the same. Mr. Rebaone Gaorelwe approached the matter on the basis that Dr Jakoet was there to guide the Tribunal on medical issues and he went along with Dr Jakoet. They also held the view that the Athlete did not contest the conviction and we should deal only with the sanction.

13.2. The Chairperson was of the view that the issue wasn't a medical one but the question to be answered was whether SAIDS has discharged the burden of proof of establishing that an anti-doping rule violation has occurred.

13.3. Article 3.1 states that: *"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 which is made"* (Chairpersons underlining). Having regard to the fact that no supplementary report or affidavit was submitted by SAIDS to explain that there is no difference in the substances or to indicate that the substance found in the Athlete's urine has a similar chemical structure or similar biological effect(s) as the listed substance, the Chairperson is of the view that SAIDS failed to discharge its burden of proof. On the principle of "Fair Play" towards the Athlete the Athlete should be found Not Guilty.

14. In the result the preliminary issue is decided in favour of SAIDS on a 2 to 1 vote.

DETERMINING THE SANCTION

15. The prescribed sanction for the violation by the Athlete of Article 2.1 is a period of Ineligibility of four (4) years (10.2.1) unless she can establish that the anti-doping rule violation was not intentional (10.2.1.1) in which case the period of ineligibility shall be two (2) years

16. The Athlete exercised her right under Article 13.2.2.2.6 to present evidence and stated the following with regard to her personal circumstances and how it came about that she ingested the prohibited substance:

16.1. She is a 25 year old nursing theater sister having completed a nursing degree in 2015 and works at a Mediclinic Hospital in Pretoria.

16.2. She was overweight since school days and in matric she weighed 104kgs. Approximately two years ago (2014) she decided to do something about her weight. She searched the internet and came across a product called

Extreme Lava on the eBay site. The product was said to contain a secret formula for weight loss and energy. This was approximately 4 months prior to the adverse finding. She understood it to be a fat burner.

- 16.3. It was in a capsule form and she took it daily for 4 months until the container was empty. At the time of the adverse finding she had lost considerable weight and weighed 70kgs. She has not taken it since and she now weighs 77kgs.
 - 16.4. She is an amateur recreational cyclist. She started cycling 2 or 3 years ago. She is not a good cyclist. She does not belong to a club and does not have a coach. As a consequence of this she has not had any education around doping issues and was totally unaware of the existence of SAIDS and WADA or the Rules.
 - 16.5. The first time she heard about these institutions was when she was asked for a urine sample. She was surprised and even forgot to tell the doping official about the capsules she took 4 days earlier. She was unaware of any publicity around anti-doping and in particular she never heard about the anti-doping scandal around Lance Armstrong.
 - 16.6. The only reason she took the capsules was for weight loss and nothing else. As a nursing sister in theater she spent 12 hours a day on her feet and being overweight was becoming unbearable and it was not good to be obese.
17. The question to be decided is whether or not the Athlete established that the anti-doping rule violation was not intentional. Article 10.2.3 defines "intentional" for the purposes of Article 10.2 as meaning *"to identify those Athletes who cheat"*. It goes on to explain the term as follows:
- "The term, therefore, requires that the Athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*.
18. There are two parts to the definition of "intention", namely:
- 18.1. Direct Intention: and
 - 18.2. Indirect Intention.
19. In order to establish either of these two types of intention one must have regard to the evidence of the Athlete relating to her state of mind (direct intention) and also to the relevant circumstantial evidence placed before us in order to establish whether she knew there was a risk but manifestly disregarded that risk (indirect intention).

20. The standard of proof the Athlete faces is on a balance of probability. The Athlete stated that the first time she heard about SAIDS and WADA and Anti-doping Rules was when she was asked for a urine sample. This cannot be gainsaid by anyone so she cannot be found to have had direct intention to ingest a prohibited substance to cheat.
21. If one accepts that she was unaware of the existence of the aforesaid Institutions and the Rules then unless the circumstantial evidence indicates otherwise it would be impossible to impute indirect intention to her.
22. There might well be aspects of her evidence which could result in an inference that that she knew there was a risk but disregarded that risk, for example, that she had a degree in nursing; that the degree included a course in pharmacology; that she knows that the use of anabolic steroids will increase one's strength and muscle mass and would therefore enhance an athlete's performance.
23. In discharging the burden of proof on the Athlete relating to the so called indirect intention, it is not necessary for her to prove that the inference that she relies on, namely that she had no indirect intention is the only reasonable inference. All that she has to do is to convince us that the inference she proffers is the most readily apparent and acceptable inference from a number of possible inferences. (Vide AA Onderlinge Assuransie Bpk v De Beer 1982 (2) AA 614 G – H.)
24. Having regard to the totality of the evidence before us we are of the view that the Athlete has established that the Anti-Doping Rule violation was not intentional.
25. It must be noted that the Independent Doping Hearing Panel (the Panel) did not have the benefit of the evidence of the Athlete as she failed to attend the hearing and therefore we can find no fault with the sanction imposed by the Panel.
26. However having regard to our finding that Article 10.2.1 does not apply, we are compelled to impose a sanction in terms of Article 10.2.2.
27. The Athlete is a first offender and showed remorse for her ignorance to the extent that she became emotional but this has no bearing on the sanction as Article 10.2.2 makes no provision for the exercise of a discretion.

DECISION

28. The finding of Guilty of a violation of Article 2.1 of the Rules by the Panel is confirmed.
29. The sanction imposed by the Panel is set aside and replaced with the following:

The Athlete is, for a period of **two (2) years**, calculated from 30 April 2015, (the date on which she was provisionally suspended), declared ineligible to participate in any capacity in any professional or amateur sports competition or

activity (other than authorised anti-doping education or rehabilitation programmes) as contemplated in Article 10.11 of the Rules.

DATED AT NEWLANDS ON THIS 3rd DAY OF MAY 2016.



ALEX ABERCROMBIE

Dr Ismail Jakoet

Rebaone Gaorelwe