BEFORE THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT ANTI-DOPING COMMITTEE

CASE NO : SAIDS/2017/20

In the matter between :

SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

And

APHIWE BOYIYA

DETAILS OF HEARING

Date of hearing :	5 September 2017
Athlete :	Mr Aphiwe Boyiya
Tribunal Chairperson :	Adv RGL Stelzner SC
Tribunal Member :	Dr Gerhard Coetzer
Tribunal Member :	Mr Wendell Domingo
Representative for SAIDS :	Ms Wafeekah Begg
Athlete's Representative (Manager) :	Mr Kholisile Cengani
Observer for Boxing South Africa :	Mr Phakamile Jacobs

INTRODUCTION

1 Aphiwe Boyiya (hereinafter "the athlete") is a 25 year old professional boxer and holder of four national titles in the Junior Lightweight Division.

2 He was tested positively for two prohibited substances, after submitting urine samples during an in-competition test, after a boxing event on 30 April 2017.

3 The samples tested positively for the presence of furosemide and hydrochlorothiazide and its metabolite 4-amino-6-chlor-1,3-benzenedisulfonamide in his A sample.

4 He was offered to have a B sample tested but declined.

5 He was further informed that the substances are prohibited substances and their presence in his urine sample constituted an adverse analytical finding and was *prima facie* a breach of article 2.1 of the 2016 SAIDS anti-doping rules.

6 He was further advised that SAIDS was of the view that an optional provisional suspension was appropriate and he was consequently provisionally suspended from competing and participating in any organised sport, in particular boxing, with effect from 26 May 2017.

7 On 11 August 2017 the athlete, in writing, advised SAIDS that he admitted using "a substance".

8 In his typed submission, in response to the charge sheet of 3 August 2017, the athlete explained that he took "a tablet" on the evening of 29 April 2017 after he came back from the weigh-in on that day.

9 According to the athlete :

9.1 He had a swollen knee which was caused by road running, which he was doing while preparing for the fight ; [1]

9.2 A friend, who is a soccer player, told him that the tablet which his friend secured for him would help him with his swollen knee and ankle ;

9.3 His friend bought the tablets from the chemist over the counter without a prescription and he took it from his friend (without further investigation it appears) ;

9.4 He denied that he took the tablet to harm anyone or to cheat and just wanted to be "ready to fight the following day" ;

9.5 He states that he did not know that the tablet had a banned substance ;

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[1] His representative / manager subsequently explained that the athlete needed to lose some weight and had been told by his trainer to do road running to shake off weight. This ties up with the road running / sore knee explanation but also points to the possible use of the diuretics to lose weight for purposes of the upcoming boxing event.

9.6 He thought that because they were bought over the counter, according to the unnamed friend, there was "nothing wrong" with them ;

9.7 He furthermore states in his affidavit that SAIDS had a workshop on 29 and 30 June 2017 to educate boxers about these matters but by then he had already been suspended and this was after the transgression ; [2]

9.8 He furthermore apologised to all concerned.

10 In response to a follow-up question from SAIDS' legal representative, the athlete's manager informed SAIDS that there were in fact two tablets which had been consumed by the athlete prior to the event, namely Brufen and Amoxicillin 500 mg. "Amoxicillin" is the one which was noted on the Anti-Doping Form completed by the athlete. No mention was made of "Brufen" on the form.

11 At the hearing itself the athlete, through his manager, [3] admitted the various documents and their contents as contained in a bundle of documents presented by SAIDS to the hearing, with numbered items 1 - 8.

12 These included the adverse analytical finding and the doping control form.

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[2] In so doing he in effect pleaded he was unaware that the use of the tablet in question, which he subsequently through his representative sought to identify as Brufen (an anti-inflammatory), was prohibited in terms of the WADA code and the SAIDS anti- doping rules.
[3] Pleading language difficulties the athlete through his manager relied on the statement from him and his answers to questions (which were interpreted by his manager) as his evidence in the hearing.

13 It was confirmed with the athlete's representative that the adverse analytical finding was indeed admitted and that the explanation that was being tendered on the athlete's behalf to explain the manner in which the prohibited substances entered the athlete's body was the one set out in his statement.

14 The athlete as a result pleaded guilty to breaching article 2.1 of the SAIDS anti-doping rules ("the rules"). Doping violations may be proven "by any reliable means". Any reliable means includes admissions of guilt, credible third party testimony, or reliable analytical data from athlete samples.

15 In the circumstances the doping violation with which the athlete was charged was in the panel's view satisfactorily (and conclusively) proven.

16 The issue before the tribunal is therefore that of an appropriate sanction.

THE SUBSTANCES

17 Furosemide as well as Hydrochlorothiazide, which was found in the athlete's sample, are diuretics that are classified as specified substances under Class S5 Diuretics and Masking Agents of the 2017 World Anti-Doping Code Prohibited List International Standard.

18 Dr Coetzer, the medical member of the panel, advises that the two substances / products are relatively freely available, although a prescription would be required, from *inter alia* Government clinics.

19 They are regularly used by the State health departments as diuretics (commonly known as "water pills" or "fluid pills") and could also be acquired from hospitals and clinics illegally.

20 Diuretics are drugs that increase the rate of urine flow and sodium excretion in order to adjust the volume and composition of body fluids.

21 Diuretics are often abused by athletes to excrete water for rapid weight loss and to mask the presence of other banned substances.

22 The two substances in question, and when used in combination, have a potent ability to remove water from the body of an athlete, which can cause a rapid weight loss. In the sport of boxing this would assist a boxer to meet the requirements of a weight category in which he or she wishes to compete within a relatively short space of time.

23 Hydrochlorothiazide is a common diuretic used for this purpose as is furosemide, which according to SAIDS is the second most frequently detected diuretic.

24 SAIDS' further submissions, which, as was explained, were based on information obtained from SAIDS' in-house doctor, which were not contradicted or challenged, was that the diuretics are quickly absorbed and have a very short half-life, with the prohibited substances being undetectable in

the urine of the boxer or athlete if the samples are not collected within 24 – 48 hours after their last administration.

25 The reason for these substances being prohibited in sport is because they accelerate the removal of metabolites of anabolic steroids from the system and, where used to temporarily increase the loss of fluid / water weight, gives a boxer an unfair advantage in meeting the weigh-in requirements for his or her weight classification. It was not argued that it enhances performance. The argument in essence was that use of the substances is not in keeping with the spirit of the sport and carries a health risk.

26 The substances also carry a health risk when used for these purposes. They are usually prescribed for patients suffering from heart failure, oedema and high blood pressure and would need to be taken in conjunction with others to alleviate the health risks associated therewith. The use thereof by sportsmen and women for non – therapeutic reasons are in any event and for these reasons prohibited in terms of the WADA code.

DID THE ATHLETE PROPERLY EXPLAIN HOW THE SUBSTANCES ENTERED HIS BODY

27 The fundamental flaw in the athlete's explanation for how the substances entered his body is to be found in the fact that neither Amoxicillin nor Brufen contain any of the substances which were detected in his urine sample.

28 The former is a product which contains penicillin exclusively and Brufen is an anti-inflammatory similar to Voltaren, which would be taken, for example, for a sore knee but contains none of the prohibited substances which were detected in the athlete's sample either.

29 The athlete was also unable to explain in his evidence, which was led with the assistance of his manager who acted as interpreter, why, for example, his doping control form indicated that the Amoxicillin referred to therein was used on two occasions whereas the explanation provided on 11 August 2017 in his written "To Whom It May Concern" statement, makes no reference to the tablets that he said he took, being taken on two occasions.

30 Similarly, the doping control form does not reflect Brufen.

31 The explanation provided in the August 2017 statement that a tablet was taken to reduce the swelling on his knee is consistent with the taking of Brufen anti-inflammatory yet there is no reference to Brufen on the doping control form.

32 Furthermore, it is stated that the tablet for the sore knee was taken on 29 April 2017, yet the Amoxicillin (referred to Amoxyl on the doping control form) is said to have been taken on 28 and 29 April 2017.

33 The explanation the athlete provided for these inconsistencies was as follows.

34 He stated that the 11 August letter was intended to be supplementary to the doping control form and that he intended to thereby add to the information on

the doping control form by providing additional information to that which was on the doping control form and that the 11 August 2017 letter was intended to provide additional information.

35 In doing so, the athlete impliedly conceded that the doping control form was not complete and that no full account for the medical or other supplements taken by him prior to the boxing event was given. He impliedly admitted thereby that he had failed to disclose on that form that he had taken what claims to have been Brufen on 29 April 2017.

36 As stated before, the fundamental problem, however, is that neither Amoxicillin nor Brufen contain the prohibited substances and the prohibited substances would have had to enter the athlete's body in some other manner.

37 The probabilities are that diuretic tablets were taken by the athlete prior to the weigh in for the boxing event in order for him to make the applicable grade, which he narrowly achieved. His case appears to be that he thought he was taking Brufen, but at the same time he claims that he took this for purposes of treating his sore knee. He has not admitted taking the diuretics nor explained the circumstances in which this was done – who supplied him with the diuretics (as opposed to the anti-inflammatory which his soccer playing friend allegedly gave him).

38 Neither the athlete nor his manager, or any other witnesses on behalf of the athlete, therefore provided an explanation as to how the substances which were detected and which have been admitted entered the athlete's body.

CONSEQUENCE

39 In accordance with article 2.1.2 sufficient proof of an anti-doping rule violation under article 2.1 IS established by the presence of a prohibited substance or its metabolites in the athlete's sample.

40 The anti-doping rule violation has accordingly been established by SAIDS to the comfortable satisfaction of the hearing panel.

41 In determining the appropriate sanction regard needs to be had to rules 10.2.1.1 and 10.2.1.2.

42 The athlete did not prove that the Amoxicillin or the Brufen was the source of the prohibited substances. He did not suggest that these products were contaminated either. It is abundantly clear that they were not the source of the prohibited substances.

43 Given that the athlete did not establish how the prohibited substance entered his system, the athlete cannot claim a reduction in the prescribed sanction of two years' ineligibility and there need be no enquiry as to whether there was a

significant degree or fault in his ingesting whatever he ingested and which gave rise to the prohibited substances entering his body and the degree of such fault.

44 The period of ineligibility shall be four years where the anti-doping rule violation involves a specified substance (as is the case here) and SAIDS can establish that the anti-doping rule violation was intentional.

45 In terms of rule 10.2.3 the term "intentional" is intended to apply to those athletes who cheat.

46 The definition of the term further requires SAIDS to prove that the athlete 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.

47 The question therefore is whether SAIDS has proven that the prohibited substances were taken intentionally in contravention of the code.

48 Intentional in the sense used by article 10.2 of the rules includes recklessness, which would require SAIDS to prove that there was a realisation on the part of the athlete that there was a real possibility that he would be contravening the rule and a reconciliation by him with the occurrence of the eventuality in the

sense of a deliberate decision to proceed with the act, in this case taking of diuretics, with indifference to its appreciated consequences.

49 SAIDS would need to prove the manner in which the rule was contravened and ideally that the athlete knew he was taking diuretics for the specific purpose which was in contravention of the rules.

50 The standard of proof in this regard is further for the anti-doping organisation, *in casu* SAIDS, to establish the intentional anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made.

51 This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

THE ARGUMENTS

52 SAIDS argued that the athlete was not a minor, an experienced boxer athlete, competing at national level. He was an *"educated athlete and is aware of anti-doping regulations and the purpose it serves"*.

53 In support of this argument it was stated that *"he has access to many resources such as WADA or SAIDS, Boxing South Africa, sports medical doctors, his manager, his promoter, etc to enquire if whatever medication is being*

administered before his fight was in fact safe to take and is not a prohibited substance". [4]

54 It was conceded by SAIDS that if the panel decides that SAIDS has not established the requirements of article 10.2.1.2, then in terms of article 10.5.1.1 (specified substances), the athlete will need to establish no significant fault or negligence in order for the period of ineligibility to be at a minimum a reprimand and a maximum period of ineligibility of 2 years, depending on the athlete's or other person's degree of fault.

55 "However, if he fails to establish that there is no significant fault or negligence, then the period of ineligibility shall remain at 2 years only, with no possibility of reduction of sentence."

56 With reference to decisions such as *UCI v Jack Burke Canadian Cycling Association* and *FISA v Abdel Mohsen Massoud*, amongst others, SAIDS sought to argue that a sanction of 4 years would be appropriate.

57 It did so with reference to what was submitted to be the following "aggravating factors", being :

[4] There was no proof submitted in support of any of these submissions. These are simply statements and arguments without evidence. The athlete's manager contended, to the contrary, that the only workshop he had attended was after the athlete had already been tested and the prohibited substances found in his urine sample.

57.1 The athlete failed to provide an explanation or evidence as to how Furosemide and Hydrochlorothiazide was found in his urine sample ;

57.2 He did not show in general the duty of care of exercise of utmost caution to ensure that the substances were firstly not on the prohibited list and did not take reasonable steps to enquire whether the taking thereof constituted a doping offence ;

57.3 Two prohibited substances were found in his system ;

57.4 He failed to demonstrate that these two substances did not enhance his performance or give him an advantage over his opponent and the occurrence of the circumstances and evidence upon which he relied was highly improbable that there was any other possible explanation that would have resulted in the doping offence (other than that he had taken these two diuretics knowingly) ;

57.5 It was further argued that these two prohibited substances did not just *"land in the athlete's system by accident. It is not a coincidence that two diuretics happened to be identified in his urine sample, just after his fight. He does not suffer from high blood pressure and is considered to be in good health"*.

58 These were the submissions which were made in support of the 4 years sanction, which were submitted to be aggravating factors justifying, it appears, an increase in the 2 year suspension.

59 In order to impose a sanction of 4 years, it is not simply a matter of looking at aggravating circumstances. The panel needs to be comfortably satisfied that the athlete took the substances in question, knowing that they were prohibited, alternatively when he should have known they were prohibited, acting recklessly as to the consequences.

60 The athlete's representative, on the other hand, argued that the athlete did not intentionally take diuretics knowing that they were prohibited.

61 In her written submissions reference was made in paragraph 31 thereof to a FISA decision in the matter of *FISA v Massoud* in which it is submitted the FISA panel imposed a 4 year period of ineligibility

62 The reported decision, that of members John Boultbee, Jo Hannafin and Mike Tanner, in the case of Abdel Mohsen Massoud arising out of out of competition testing in Egypt on 22 June 2015 revealed that the outcome of that hearing, according to the finding as published on the internet report, was as follows: *The FISA Doping Hearing Panel finds: 1. The period of ineligibility will be two years from 3 September 2015, the date of the hearing.*

63 It was explained that a summary of the report elsewhere indicated incorrectly that the sanction was suspension for four years, but that that summary was incorrect.

64 The panel also requested that it be provided with a copy of the CAS decision in the case of the Australian woman boxer Bianca Elmir which is referred to inter alia in the report published at http://uk.reuters.com/article/uk-olympics-boxing-doping-australia/australian-woman-boxer-elmir-banned-for-doping-idUKBRE84F00F20120516 and https://www.asada.gov.au/news/media-statement-one-year-sporting-ban-boxer-bianca-elmir

65 This and certain other decisions of CAS relating specifically to the use of diuretics such as those for which the athlete was tested positive in the sport of boxing and the type of sanctions which have been imposed on boxers in the past in circumstances similar to those which SAIDS is arguing apply in the present matter were requested and this was subsequently provided.

66 The panel was further advised that the technical assistant at Boxing South Africa who had previously provided information to SAIDS which information was disallowed and the argument based thereon disregarded when the athlete and his manager and the representative from Boxing South Africa disputed this

and SAIDS was unable to call the technical assistance to give evidence in this regard, had "made an error".

67 It was confirmed that the athlete had not been present at pre-medical / weigh in a week before the fight for which he was subsequently tested and the doctor who had filled in the weight on that form as having been that of the athlete had "made a mistake" and wrote the weight under the athlete's name on the form instead of under a certain "Mcotheli".

68 It transpired from this that the athlete and his manager had been truthful in their claim that the athlete had only been weighed once before the fight and that was immediately before the fight for which he was tested.

69 SAIDS confirmed further that this was the first time the athlete had been tested.

70 In a supplementary note SAIDS argued that the reasons SAIDS was "still adamant on the 4 years" were the following (that which is in parenthesis hereafter has been inserted) :

70.1 The athlete had not established that he bore no significant fault or negligence ;

70.2 He did nothing to ensure that no prohibited substances entered his system ;

70.3 He did not consult a doctor, his team manager or Boxing South Africa ;

70.4 The prohibited substances were not listed on his doping control form (nor the source thereof, for example not even with reference to the colloquial term "water pills") ;

70.5 He did not investigate or question the substances entering his body (put differently he simply took the tablets which were the source without question) ;

70.6 No reasonable steps were taken to exercise the utmost caution ;

70.7 He left out information or contradicted himself a few times such as –

70.7.1 he failed to mention prior to the hearing that he had flu (for which the Amoxyllin probably was taken) ;

70.7.2 he said that after he was tested his friend told him what medication he provided him but this could not have been true because he had written "Amoxyl" on his doping control form

(unless that was with reference to the Brufen he subsequently advised SAIDS was the tablet he claims to have taken for his swollen knee) ;

70.7.3 he also said his friend brought the medication to him the day before the fight but then this contradicts the information on the DCF which states he had been taking this "Amoxyl" 2 days before the fight (once again this is so unless the medication which was given to the athlete the day before the fight was a reference to the Brufen he subsequently advised SAIDS he had taken for his swollen knee).

71 SAIDS concludes its further submissions with "However if the Panel, feels 4 years is too harsh considering the personal circumstances of (the athlete), notwithstanding the above, then 2 years, without reduction because he has not established how these prohibited substances entered his system" would be the sanction SAIDS seeks.

72 The issue is not one of harshness or personal circumstances or the panel members' sympathies. The issue is what the Rules, read with the WADA Code and body of law which has been built up around that in *inter alia* the Court of Arbitration for Sport (CAS), require.

73 The response to these arguments from the athlete's manager (some of which is paraphrased hereunder and that which is set out in parenthesis has been supplied / added as being implied in the express argument) in support of an argument that the athlete did not intentionally take the diuretics was as follows:

73.1 The athlete and his manager had never been invited to attend a workshop which would have guided them or clarified for them which tablets or medication they could use "when an athlete is having a problem similar to this one" (which appears to still be a reference to the sore knee ailment but which it is assumed is also be the argument in respect of the use of diuretics) ;

73.2 This was confirmed by BSA provincial manager who attended the hearing. He admitted that the last time they had workshop to equip the boxers was 10 years ago ;

73.3 The manager had started his club in 2013, which meant it had only been going for four years ;

73.4 The workshop that BSA conducted was on 29 June 2017, after the fight in question ;

73.5 The athlete's fight was on the 30 April 2017, which meant that the workshop was done 59 days after he had fought ;

73.6 They had never attended any session before that ;

73.7 The athlete could not have known that the tablets (medication) which he took contained prohibited substances ;

73.8 The athlete could not have asked his manager because he was "also clueless .... on the matter" ;

73.9 The athlete could not have made any other investigations because he "does not have a clue about the substances (accepted or unaccepted) rules" ;

73.10 "How was he going to know which steps must he take to exercise utmost caution if he does not have a clue about what he must use or not use?"

73.11 The athlete lives in a "disadvantaged area" and is part of a community in which "if you are sick and your neighbour or friend (especially who is a fellow athlete) has medication that has helped them, you do not hesitate to take it" ;

73.12 He took medication that he thought will help him with his swollen knee ;

73.13 It was argued by SAIDS that the substances that were found in the athlete's urine can only be obtained on prescription, and that this was contrary to what Dr Gerhard Coetzer advised namely that tablets with these substances can be found "even in public clinics" ;

73.14 The reason for the athlete not mentioning in his statement that he had flue (for which he took the Amoxyllin) was that he had mentioned this when they were taking the urine from him, so he felt there was no need to mention it again as he had mentioned it in the doping control form;

73.15 Any contradictions there may have been in his evidence was because of "nervousness" – "this was his first hearing and banned substances were found in his urine which he did not expect because he thought he was clean and the discovery of the banned substance shocked and made him not think straight".

73.16 He had only received a list of the "banned substances" the day before, which would be used "to avoid such incidences from happening in the future" (but had not been made available to him before).

EVALUATION

74 The panel has considered all these arguments.

75 As set out above anti-doping organisations such as SAIDS bear the onus of proving doping offences to the "comfortable satisfaction" standard. This standard is "greater than a mere balance of probability but less than proof beyond reasonable doubt."

76 It was submitted in *French v. Australian Sports Commission & Cycling Australia 2004/A/651,* CAS that for serious doping offences "comfortable satisfaction" requires "a very high standard almost approaching beyond reasonable doubt." [5] In that case the CAS appeal tribunal ruled as follows in respect of the onus of proof in a matter involving serious charges with potentially serious consequences –

> It is further submitted that given the serious allegations with respect to trafficking and aiding and abetting, and the consequences thereof, a very high standard almost approaching beyond a reasonable doubt is required for the Panel to accept that the offences have been proven. The Panel accepts that the offences are serious allegations and that the elements of the offence must be proven to a higher level of satisfaction than the balance of probabilities.

77 In a matter such as this where SAIDS is asking for a period of suspension to be imposed which is the maximum for intentional use of a specified substance, [6] and very much out of kilter with the cases supplied by SAIDS, in its first set of written submissions and those requested thereafter, the panel has been careful to ensure that it is indeed comfortably satisfied the athlete committed the contravention intentionally in the sense required by the Rules and Code.

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[5] French / Australian Sports Comm'n & Cycling Austl., CAS 2004/A/651

[6] Specified Substances" are all prohibited substances except those in classes S1, S2, S4.4, S4.5, S6.a and prohibited methods M1, M2, and M3. Examples include diuretics or masking agents such as Furosemide; stimulants such as cathine, ephedrine and pseudoephedrine; narcotics such as morphine and heroin, and cannabinoids (marijuana).

78 What counts against the athlete in this regard is the following:

78.1 The athlete failed to take the panel into his confidence, and provide an explanation, let alone any evidence, as to how the diuretics entered his body and were found in his urine sample. This failure on the part of the athlete cannot be attributed to any language difficulty or "nervousness" as claimed elsewhere, since his written statement / explanation is in English, was probably drafted with the assistance of someone and was prepared in advance of the hearing in what is assumed to have been a relatively stress free environment. [7]

78.2 Two diuretics were found in his sample, which in combination, have a potent effect in reducing weight.

78.3 Dr Coetzer advises that the one is usually used in cases of heart failure, to remove excess water from a patient's body, the other works on different basis but, in combination, both are very effective in reducing water loss and dehydration.

78.4 The two can be obtained from Government clinics, but for that a prescription is required since they are Schedule 4 drugs. They are freely available from these clinics but, in order for them to be used in

[7] At the same time some allowance needs to be made for the fact that the athlete was not legally represented, did not have an interpreter to interpret his every word (his manager assisted him in this regard, but largely spoke on his behalf, rather than allowing him to speak for himself and then simply interpreting his words verbatim).

combination in the manner in which it appears they were used in this case, a certain degree of knowledge and insight and "smartness" (as SAIDS called it) is required.

78.5 Someone would not take the combination of these diuretics by accident.

78.6 They would have been taken with the very specific purpose of reducing weight through dehydration and water loss.

78.7 The probabilities are that he took diuretics before the weigh in (which was the day before his scheduled fight) in order to lose weight [8] – this would have in all probability been at the time he claimed to have obtained the Brufen from his friend, the unidentified soccer player. It is not suggested however that the friend gave him the diuretics in question with the result that it can be inferred they were obtained from some other source which was not disclosed to the panel.

78.8 Whether the athlete ingested the diuretics in addition to the Brufen or whether he took only the diuretics claiming it to have been Brufen is neither here nor there. It is not suggested he took the diuretics mistakenly thinking they would help with his swollen knee either.

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[8] The panel was also not favoured with an explanation as to who secured the medication, who assisted him in this regard with the administering thereof, how this was all explained to the athlete at the time and whether the necessary precautions, such as administering other agents to make for the dehydration, loss of body fluid and everything which went with that, was

78.9 The athlete is 25 years of age and has at least four national titles under his belt.

78.10 He is a former featherweight champion and former South African junior lightweight champion and has contested internationally for inter alia the IBF Youth junior lightweight title. He is currently rated number 2 in South Africa in the junior lightweight division.

78.11 A weight class is a measurement weight range for boxers. The lower limit of a weight class is equal to the upper weight limit of the class below it. The upper weight limit for the junior lightweight division is 58.97 kilograms. The next category above that is lightweight.

78.12 The athlete's manager stated that his trainer advised the panel that one of the reasons the athlete had a sore knee was that he was required to do some road work in order to get into shape for the fight and that he was generally lazy.

78.13 This all pointed to the fact that he needed to lose weight for the fight that he was scheduled to participate in.

78.14 As a result of his experience as a professional boxer he would have had, in the panel's estimation, knowledge of the rules against the use of diuretics and that by taking medication in order to lose water and body fluids in order to make a weight grade, that that was contrary to not only the rules but also the spirit of the sport.

78.15 The fact that the diuretics were used in the manner in which they were used and in combination, reveals that they were used in all probabilities for that very purpose, i.e. to optimise fluid loss and in all probability in order to make the weight grade.

78.16 Some thought would have had to have gone into the use of the diuretics in combination and the athlete in the panel's view would probably have had to have either received advice from someone or would have had to have had some previous experience of what to use.

79 As argued by SAIDS the ingestion of the combination was not something which could have occurred accidentally or at random and if not prescribed, would also had to have been obtained illegally.

80 In the circumstances, the athlete's sport, his position in the sport, the circumstances in which the substances were detected, the purpose of the diuretics, the fact that two were used in combination in the manner in which they were used, and the fact that no innocent explanation for the diuretics having been ingested was provided, all point to a deliberate and intentional use of the diuretics in order to lose weight / body mass through dehydration in order to make the requisite weight grade.

81 The fact that the diuretics were taken intentionally and in all probability for the purposes of this weight loss is one thing.

82 The remaining question is whether the athlete knew or should have known the diuretics were a specified substance and his use thereof was a breach of the applicable Code or rules.

83 The suggestion that the athlete was ignorant of these rules was not something that the athlete himself gave evidence of. It was the argument presented on his behalf by his manager.

84 The high level at which the athlete (assisted by his manager and undoubtedly a trainer and others) participated in the sport, his years of experience also at international level, all suggest it is highly improbable that the athlete (and his manager and one assumes the trainer) did not know that the use of diuretics was contrary to the applicable rules.

85 What counts in the athlete's favour in this regard (i.e possible ignorance as to the prohibition) is the following:

85.1 When cross examined on their knowledge of other high profile sporting stars having been suspended from their sports for doping transgressions, the athlete and his manager proclaimed to have had no knowledge of that.

85.2 In this day and age simply searching the phrase "boxing furosemide" for example or "boxing doping" on the internet via Google would provide an athlete with sufficient information to make him or her aware of the

fact that this and other diuretics are prohibited substances. There is however no evidence that the athlete has ready access to the internet and is sufficiently able to engage in such research. There is no evidence as to this level of education, only of having come from an impoverished background and having to provide for unemployed parents and numerous unemployed siblings.

85.3 At the same time it appears from one's own searches on the internet that various boxing federations in various states in America and in countries elsewhere have been lagging behind other sports in educating or informing their members of the extent of the anti – doping regulations and the implications of a contravention thereof for boxers in particular.

85.4 On the SA Boxing website for example there is no link to SAIDS or WADA nor is there a reference to the Code or the Rules and also not a list of prohibited substances such as the one would find at https://en.wikipedia.org/wiki/List_of_drugs_banned_by_WADA#Diuretics

85.5 There is also no evidence that the athlete was informed of any of these things by either his federation or his manager.

85.6 His manager, to the contrary, claims he was as ignorant as the athlete and has only recently been informed by SAIDS of the extent of the Code and the Rules and the types of prohibited substances.

85.7 Dependent on his level of education and familiarity with technology and access to it one could have argued that notwithstanding all of the above the athlete should have known or at least suspected that which is set out above, namely that the pills he was taking for his weight loss could be prohibited and by not making any investigations in this regard, on the internet for example or from medical personnel attached to the sport, he displayed a total disregard for the consequences verging on recklessness – knowledge of the risk that the use of the medication could be a contravention and an acceptance of the consequences regardless.

86 That evidence was however not placed before the panel – the extent to which the athlete could have familiarised himself with the WADA and SAIDS requirements and prescripts based on his own level of education, his familiarity with technology and access to.

87 There is also no proof of any performance enhancing benefit in the taking of the diuretics which are specified substances. If they were taken to make the weight grade, the "cheating" element was in using it to qualify for the class. At the same time there would not have been a performance enhancing benefit though, only the detrimental effect of severe dehydration. [9]

[9] At the same time it is understood and appreciated that under the 2017 WADA Code and the Rules Article 10.4 no longer permits an athlete to prove that there was no performance enhancing motive and argue for a reduction in the period of suspension on that basis.

88 Previously where an athlete could establish that the use of such a specified substance was not intended to enhance sport performance, a doping violation could result in a reduced sanction. The 2009 Code provided that all prohibited substances, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the Prohibited List, shall be "specified substances" for the purposes of sanctions. This meant that where an athlete can establish how a specified substance entered his/her body or came into his/her possession and that such specified substance was not intended to enhance sport performance, the sanction may be reduced to a reprimand and no period of ineligibility at a minimum, and a 2-year ban at a maximum.

89 The defined specified substances were not necessarily less serious agents for purposes of sports doping than other prohibited substances (for example, a stimulant that was listed as a specified substance could be effective to an athlete in competition). For that reason, an athlete who did not meet the reduction criteria could receive up to a 4-year period of ineligibility in case of aggravating circumstances. However, there was a greater likelihood that specified substances, as opposed to other prohibited substances, could be susceptible to a credible, non-doping explanation.

90 The fact that the diuretics in question are some of the specified substances seems to have played a role in the past in many decisions which found that there was no proven performance enhancement associated with the use thereof, it had the opposite effect in many cases, could be taken innocently to treat

swollen knuckles (and presumably swollen knees) or for other medical reasons, and was not necessarily employed as a masking agent, particularly in a sport such as boxing in the lower weight categories where the athlete is not trying to gain wait, but the opposite.

91 The other difficulty the panel is faced with is that CAS has stated that "*although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.*" [10] The same would apply to any tribunal hearing a matter such as this.

92 Although each case is to be decided with proper regard to the facts of the matter, and the facts can never be the same in all respects, regard does need to be had to the following :

92.1 The decision of *SAIDS v Viwe Midletyeni* of 14 January 2013 in which a Xhosa speaking athlete who also claimed he was unfamiliar with the Code and the Rules was suspended for 15 months for taking a single diuretic which he claimed was taken on medical advice for swollen knuckles in his hand ;

[10] Arbitration CAS 2008/A/1545 Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC) award of 16 July 2010

92.2 In the SA Anti – Doping Appeal of *WADA against Sloane Goosen and SAIDS* Case 04 / 2012 the appeal body increased the sanction against a wrestler who used Lasix which contains Furosemide in order it appears to lose weight from suspension for a period of 1 year to 18 months in circumstances where WADA was arguing for 2 years.

92.3 In the decision of CAS in *ASADA v Elmir CAS A5 / 2012* a female boxer whose in-competition testing revealed two diuretics which she claimed had been used by her to treat swollen ankles and which she thought had anti – inflammatory properties was suspended from boxing for one year.

92.4 In the *Massoud* matter referred to above a light weight rower who wanted to lose more weight and bought Lasix on the advice of someone in a gym for that very purpose thinking that using a product which caused you to lose weight / fluid was not doping was suspended for two years.

92.5 The case of *Peter Nyide* which SAIDS relies on as the only case in which an athlete was suspended for 4 years is, as best as can be gleaned from the 1½ page determination, one in which the athlete used a masking agent to disguise the use of other substances and revealed an intimate knowledge of the anti – doping regime. It appears to be entirely distinguishable from the present.

CONCLUSION

93 The conclusion reached by the panel is therefore firstly that the athlete did not prove the source of the prohibited substances and as a result cannot be considered for a reduction in the prescribed sanction of two years' ineligibility.

94 SAIDS on the other hand did not prove to the comfortable satisfaction of the panel that the athlete intentionally took the diuretics, knowing that to be in breach of the Rules (and the Code).

95 There is also not sufficient proof in the panel's view (in that there is some doubt as to whether he knew that the use of the diuretics could constitute an anti – doping offence) to conclude that he acted with reckless disregard for the possibility that the use of the diuretics was in contravention of the Code.

96 There is no proof that he had access to the information referred to above or ever thought of making the necessary investigations in this regard, and his manager too claimed he was ignorant of these provisions until his being informed thereof at the June workshop referred to above only after the athlete had been tested.

97 The panel therefore concludes that SAIDS has not established "to the comfortable satisfaction of the panel" that the athlete ingested the diuretics which were found in his urine intentionally in the sense set out above -

knowing that it was in contravention of the Code and the Rules or with reckless total disregard for whether it was prohibited or not.

98 A 2 year period of ineligibility is accordingly imposed on the athlete, commencing on the date of his provisional suspension, which was 26 May 2017 and therefore concluding on 25 May 2019.

99 Any associated sporting results and benefits flowing from his participation in the boxing match on 30 April 2017 are disqualified automatically.

100 There is no order as to costs.

101 The athlete is informed of his right to appeal.

SIGNED AT CAPE TOWN THIS 15th DAY OF SEPTEMBER 2017

RGL STELZNER SC

Cape Town

SIGNED AT ~~EAST~~ LONDON THIS 15th DAY OF SEPTEMBER 2017

DR GERHARD COETZER

Cape Town

SIGNED AT EAST LONDON THIS 15th DAY OF SEPTEMBER 2017

WENDELL DOMINGO