REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING NO. 7 OF 2018

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYA.....APPLICANT

-versus-

SHEETAL JAYENDRA KOTAK..... ATHLETE

DECISION

Hearing : The Athlete waived hearing.

Panel :

John M Ohaga	-	Chair
Ms. Mary N Kimani	-	Member
Gabriel Ouko	-	Member

Appearances: Mr. Erick Omariba, Advocate for the Applicant;

The Athlete was unrepresented. Her is address P. O. Box 21504-00505, Nairobi, Kenya

I. The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, a National Level Athlete whose address of service is as recorded herein (hereinafter '**the Athlete**').

II. Jurisdiction

3. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

III. Applicable laws

4. The Athlete practices body building in a gym in Nairobi; as a National Level Athlete, the KBF and WBF Anti-Doping Rules, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.

IV. Background

5. On 17th January, 2018, ADAK Doping Control Officers in an out-of-competition testing collected a urine sample from the Athlete. This was split into two separate bottles in accordance with the prescribed WADA procedures and were given reference numbers A 4163162 (the "**A Sample**") and B 4163162 (the "**B Sample**").
6. The Samples were sent to a WADA accredited Laboratory in Doha, Qatar. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The

analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of the following:

- ***S1-1A Exogenous AAS/Metenolone and its metabolite 1-Methylene-5a-androstan-3a-ol-17-one***
- ***S1.1B Endogenous AAS/Boldenone and its metabolite 5b-androst-1-ene-17b-01-3-one***
- ***S1-1B Endogenous AAS/19-Norandrosterone***
- ***S1.1B Endogenous AAS/19-Noretiocholanolone***

7. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.
8. The findings were communicated to the Athlete by Mr. Japhter K. Rugut, ADAK Chief Executive Officer through a Notice and Mandatory Provisional Suspension dated 9th March, 2018. In the said communication the Athlete was offered an opportunity to provide an adequate explanation for the AAF by 16th March, 2018 and the option for Sample B analysis (see page 15, 17-18 of the Charge Document).
9. In an undated letter (marked SJK5 and on page 21 in Charge Document), the Athlete responded to the Notice from ADAK accepting the charges and accuracy of the AAF made in respect to her test, (Note: a fresh copy received by Panel from ADAK on January 21st 2019 – on request by the Tribunal at an additional mention held on 17th January 2019 – showed her letter was sent to ADAK via an email dated 12th March 2018). She explained that she had been under medication for a few months and did not have TUEs in place as she was unaware that submission of such was required prior to giving in her test.

10. She went on to say that she had voluntarily asked her gym manager to call ADAK officers and inform them to come and test her when she heard ADAK were carrying out tests. She stated that, *"My conscious was clear hence I called them voluntarily as I had NO knowledge or intention to be on the wrong, however since the medication is banned, I accept the consequences of the same."*
11. The Athlete did not request a Sample B analysis thus waiving her right to the same under WADC Article 7.3 'Notification After Review Regarding *Adverse Analytical Findings* (c) the *Athlete's* right to promptly request the analysis of the B ***Sample or, failing such request, that the B Sample analysis may be deemed waived;'***
12. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule violation and a Charge Document was duly prepared and filed by ADAK's Advocates which charge the Athlete declined to respond to instead, referring the Agency to her initial explanation issued in response to their Notice and Mandatory Provisional Suspension letter dated 9th March 2018 – which letters, in the absence of a hearing, the panel will also rely on to arrive at its decision.
13. A Notice to Charge was filed at the Tribunal on 27th March 2018 by the Applicant. On 6th April 2018 the Tribunal directed the Applicant to serve the Mention Notice, Notice to Charge, the Notice of ADRV, the Doping Control Form and all relevant documents on the Athlete within (14) days. It also formed a panel consisting of Mr. Robert Asembo, Ms. Mary Kimani and Mr. Gabriel Ouko to hear the matter, setting the matter to be mentioned on 25th April 2018.
14. The Charge Document was filed at the Tribunal on 25th April 2018 by the Applicant and at a mention on the same date, the Applicant who was represented by its Counsel Mr. Erick Omariba told the court that the Athlete

had indicated that she did not wish to contest the charge. The Applicant stated that it would like to adopt their Charge Document and leave the matter to the Panel to decide the matter.

V. The Matter Did Not Proceed to a Hearing

15. In her letter dated 12th April 2018, the Athlete variously stated *"Whereas I was under the impression that we had closed this issue, on 12th of April 2018, I received a Mention Notice summoning me to the Sports Tribunal on the 25th of April 2018. I hereby wish to reiterate that I am in no way interested in pursuing this matter further."* See letter, SJK 7 page 24 of the Charge Document, the Athlete was herein responding to a Mention Notice dated 10th April 2018 from ADAK whereby she essentially reiterated her initial acceptance of the charges and expressly waived her hearing.

16. Pursuant to WADC's Article 8.3 Waiver of Hearing:

> ***The right to a hearing may be waived either expressly*** *or by the athlete's or other Person's failure to challenge an anti-doping organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the anti-doping organization's rules.*

17. The Panel will thus accept the Athlete's express waiver evident in her two communications to ADAK and accede to Applicant's request to decide the matter on the papers. In addition to the two formal responses provided by the Athlete to the Applicant, our legal analysis will take into account all available relevant information and is not restricted to the submissions of the Agency.

VI. Submissions

Applicant's Submissions

18. Mr Omariba, Counsel for the Applicant, informed the Panel that the Agency had preferred charges against the Athlete and he would adopt the Charge Document as presented.

19. The charge preferred against the Athlete by ADAK is:

> ***Presence of prohibited substancesS1.1A Exogenous AAS/metenolone and its metabolite 1-Methylene-5a-androstan-3a-ol-17-one, S1.1B Endogenous AAS/boldenone and its metabolite 5b-androst-1-ene-17b-01-3-one, 19-Norandrosterone and 19-Noretiocholanolone.*** This constituted an anti-doping rule violation as under Article 2.1 of ADAK ADR and WADC: 2.1 *'Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample'*, the Applicant submitted.

20. He submitted that the Athlete is a national level athlete; the Notice of ADRV had been presented by ADAK and the notice of AAF was communicated by the Agency's CEO. She was informed vide the letter appearing at page 15 of the Charge Document. He highlighted the Athlete's responses which appear on Page 21 and 23 of the Charge Document as follows:

21. That the Athlete claimed she was under medication containing the banned substance and she did not seek a Therapeutic Use Exemption for the said medication. That the Athlete admitted to the charges listed in the Notice of Charge and Mandatory Provisional Suspension dated March 9, 2018 and accepted any subsequent sanction.

22. The Applicant said that the Athlete provided a letter from one Dr. Shabbir Hussain, a consultant cardiologist/physician who claimed that the Respondent herein was treated with ventepumin, nibal and carbimizole

medication amongst others to treat her underweight state, acute iron deficiency and early onset osteoporosis (see her 'undated' letter marked SJK5 and Dr. Hussain's letter SJK6 dated 13th August 2017 in Charge Document pages 21 & 22 respectively).

23. The Applicant pointed out that the Athlete in her subsequent letter dated 12th April 2018 (marked SJK7 on page 23 of the Charge Document) admitted to the presence of the prohibited substance in her sample *"and is willing to serve the maximum 4 year sanction prescribed under ADAK rules"* (Our Emphasis). The Applicant contended that the Athlete had failed to explain the presence of the banned substances in her sample neither did she request a sample B analysis thus waiving her right to the same under rule 7.3.1 of ADAK ADR.

24. It was the Applicant's case that there were no departures from the International Standards for Laboratories (ISL) and the International Standards for Testing and Investigations (ISTI) nor any under WADC's Article 3.2.3 that could reasonably have caused the AAF hence the responsibilities, obligations and presumptions of Article 3 of WADC, ADAK ADR applied in her case.

25. The Applicant contended that the Athlete had a personal duty to ensure that whatever entered her body was not prohibited and further even on prescription, she had a duty to be diligent as under WADC's Article 2.1.1.

26. The Applicant surmised that the Athlete did not advance a plausible explanation for the AAF and that *"there cannot be any reasonable explanation from the set of facts provided by the Respondent Athlete that proves that she did not intend to enhance performance"*, (Our Emphasis).

27. The Applicant prayed that all competitive results obtained by the Athlete from and including January 2018 until the date of determination of the

matter be disqualified with all resulting consequences and that she be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code, Article 10 of **ADAK and WADC** Rules.

28. From the Agency's submissions, the Athlete's correspondences and various documentation filed in this case we glean the following, in summary: that the Agency sought a standard four year period of ineligibility for the ADRV as it argued intent to enhance performance, while the Athlete despite accepting those consequence persistently pointed out to her unintentional commission of the ADRV including bluntly reminding the Agency of her prompt admission of charges pressed against her.

VII. Merits

29. The Tribunal will therefore address the issues as follows:

    a. ***Whether there was an occurrence of an ADVR and the Burden and Standard of proof;***
    b. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***
    c. ***Whether there should be a reduction based on the Athlete's prompt admission;***
    d. ***The standard sanction and what sanction to impose in the circumstance.***

VIII. Discussion

A. The Occurrence of an ADRV

30. It is clear from the various responses filed by the Athlete to ADAK that she did not contest the occurrence of the ADRV. In her 'undated' letter SJK 5, in particular she stated, *"In reference and response to letter dated 8th March 2018,*

ref: ADAK/8/2/SJK/65, I would hereby like to accept the charges and accuracy of the AAF made in respect to the test and the consequences as laid out in your letter paragraph 4.1".

31. Further, in waiving her Sample B analysis, the Athlete was deemed to have accepted the analytical results of her Sample A, consequently accepting the presence of prohibited substance found in her A Sample. The Applicant therefore established an ADRV against the Athlete through her admission and the presumption of scientific validity under WADC's Article 3.2.1, see *CAS 2016/A/4626 WADA v. Indian NADA & Mluskar Meghali,* **Para. 41.** *'According to Article 2.1 of the NADA Rules, "the presence of a prohibited substance or its metabolites or markers in the Athlete's sample" constitutes an ADRV. Pursuant to Article 2.1.2 of the NADA Rules, sufficient proof of such ADRV is established by the presence of a prohibited substances or its metabolites or markers in the Athlete's A-sample where the Athlete waived the right to have the B-sample analysed'.*

32. The burden henceforth shifted to the Athlete in the matter of intent and we examined the Athlete's explanation(s) to judge whether she could possibly have adduced any reasonable account and/or evidence of lack of intent regarding the ADRV preferred against her by the Agency and it naturally followed that the Athlete had also to establish how the substance entered her body.

33. Pursuant to Article 3.1 of ADAK ADR, the standard of proof is on a balance of probability. The Article provides as follows:

> *[...] Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability.*

34. The Panel notes that this standard required the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relied was more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

C. Was the Athlete's ADRV intentional?

35. The Athlete's 'undated' letter (SJK5, Page 21 of Charge Document) is short and we shall therefore lay it out in full:

> *"Dear Damaris*
>
> *In reference and response to letter dated 8th March 2018, ref: ADAK/8/2/SKJ/65, I would like to accept the charges and accuracy of the AAF made in respect to the test and the consequences as laid out in your letter paragraph 4.1.*
>
> *I had been under medication for a few months and I did not have a TUE in place. I was completely unaware of the provision for submitting of a TUE & of its existence or requirement prior to giving in my test*
>
> *I had **voluntarily** asked my gym manager to call the ADAK officers and inform them to come and test me when I heard ADAK were carrying out tests. My conscious was clear hence I called them voluntarily as I had NO knowledge or intention to be on the wrong, however since the medication is banned, I accept the consequences of the same.*
>
> *Thanking You,*
>
> *Sincerely,*
>
> *Sheetal Kotak."*

36. In her letter the Athlete claimed she had voluntarily requested for the test and as this was an out-of-competition testing, hers may not be a wild assertion. In its Charge Document, ADAK did not refute the Athlete's claim. The Athlete went on to say that when she made the request to be tested she

had, *"NO knowledge or intention to be on the wrong"*, language which conveyed ignorance and lack of intent. While outing the admissibility of the plea of ignorance, her innocence and greenness to this whole matter of doping in sports cannot be completely overruled especially since the Applicant has not vigorously prosecuted against her claim of being the initiator of the testing conducted on her, short of the Applicant's recital at their No. 21 of Charge Document, *"that there cannot be any reasonable explanation from the set of facts provided by the Respondent Athlete that proves that she did not intend to enhance performance"*.

37. It is true, that one of those facts, from the set of facts (referred to by the Applicant) provided by the Athlete did not provide collaborating evidence to her assertions, for example, the medical document adduced did not seem to contain the substances traced in her urine sample. In consensus with the Applicant, it is in our opinion, one of the useful collaborative instrument used to gauge intent or lack thereof – in terms of establishing origin. That notwithstanding, was it impossible or even unreasonable that the Athlete could have as a matter of fact, voluntarily requested for the test and that fact be counted as collaborative evidence to her assertion that she did not know nor intend to cheat as defined under WADC's Articles:

> ***As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. 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 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 Athlete 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 Athlete can establish that the Prohibited Substance was unrelated to sport performance.

38. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

> *'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.*
>
> *Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, for specified substances, it is also four years if an ADO can prove the violation was intentional.*
>
> *Note: Specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system.*

39. Additionally, if the Athlete was unwell as she claimed, and had been treated albeit without taking out a TUE, why then did she not indicate that medication in her DCF? On further scrutiny of her DCF we noticed that indeed she had declared *'Refer to the Supplementary Report Form"* which was an indication that what she declared was a substantial amount of

information that needed expression in supplementary format, (we shall revert to this aspect in detail presently).

40. Without undue delay, the Athlete responded in her first letter set out above, stating she had been under treatment and to support her contention she attached a letter apparently signed by a Consultant Cardiologist/Physician, Dr. Shabbir Hussain based at the Nairobi Hospital.

41. Further, we note that Dr. Shabbir Hussain's letter (SJK6 on page 22 of Charge Document) the Athlete submitted to ADAK was not challenged as a fraud by the Applicant. It was observed that the said letter by Dr. Shabbir addressed "To Whom it may Concern" was dated 13th August 2017 way before the Athlete was tested by ADAK. In it was a curious passage written by the doctor who treated the Athlete; herein the doctor listed only the three drugs therein "***amongst others***", thereby leaving other 'unnamed' drug(s) which was rather strange because a call for information To Whom It May Concern would normally be a disclosure of the total range he prescribed.

42. On reviewing these sets of explanations, we found it rather odd that the Athlete would invite ADAK to conduct a test on her person, again incidentally, her very first test ever, only so that she could set herself up to be caught and without much ado admit and accept the set four year ban. That would be a bizarre form of suicidal behavior to say the least.

43. Another compelling matter that caught the attention of this Panel was the rendering on the Doping Control Form (DCF); in uniform handwriting which seemed to be that of the Doping Control Officer who handled the Athlete's testing procedure, one Maureen Wanjau, it was penned at No. 3 ***"Refer to Supplementary Report Form."***

44. At the mention called for by the Tribunal in regard to the 'prompt admission' matter, an enquiry about this particular reference from the

Applicant under whose auspices the out-of-competition testing on the Athlete was conducted yielded no additional information, leaving the Panel wondering what may have occasioned need for a supplementary report and why the same was not attached to the DCF in the first place so it could be available for reference/use at this stage of the results management process.

45. Considering the Panel was seized of this matter based on the papers only, it was our view that the Supplementary Form was an equally significant piece of evidence especially given the contents of the letters the Athlete addressed to the Applicant; in these letters, the Athlete spiritedly recorded that she had no intention to be on the wrong which was essentially a denial by the Athlete of the claim by the Applicant that she intended to cheat.

46. This state of affairs indicated a discordance not usual in 'normal' waivers of hearings, see ***Results Management, Hearing and Decisions Guideline Version 1.0 (October 2014) 5.1.4 Waiver of hearing:*** *'Often there is no dispute between an ADO and an Athlete or Athlete Support Personnel as regards an ADRV charge. The Athlete or Athlete Support Personnel may admit the wrongdoing and accept the ADO's case regarding the Consequences to be imposed. In such situations, there is no need for a hearing to be conducted no dispute to resolve. If this is the case, the relevant Anti-Doping rules might make provision for the matter to be resolved without a hearing, for example, by the parties agreeing that an ADRV has been committed and the Athlete or Athlete Support Personnel accepting the Consequences. But as Section 5.2.3 below notes, such resolutions require a "reasoned decision" for the ADOs with a right of appeal and the Athlete to understand the outcome. In particular, if an ADO has applied the provisions in Code Article 10 that allow for the imposition of a reduced sanction, it should explain how these have been applied on the basis of the facts and any legal justification, such as reference to similar cases decided by Anti-Doping disciplinary tribunals.'*

47. Shepherded by the Guidelines we examined the matter further; assuming that the Athlete had totally assented to commission/consequences of the ADRV and had no need 'to understand the outcome', the Panel still at the very least required the full evidence such as the actual date(s) in documents in order to adjudge promptness of admission and/or all relevant testing process information to be presented before it so that it could do its due duty of rendering it's 'reasoned decision' for other parties with right of appeal.

48. Further at No. 2 at ATHLETE INFORMATION in the DCF, under 'DOCTOR'S NAME', one "***DR. SHABBIR***", which name coincided with the first name of the doctor from whom the Athlete later sourced 'inconclusive' medical evidence collaborating her claim to medical treatment after being notified of her ADRV – see SJK6 in the Charge Document – is clearly legible, an eerie coincidence that left the Panel to ponder further on the mystery shrouding the initial voiding of date on the Athlete's ostensibly 'undated letter' and a supplementary report form no longer available for our interrogation as supposedly the same was not in the records held by the Agency and whether they were all interconnected in some way.

49. On requisition of a copy of the Supplementary report, the Agency in email feedback of February 5th 2019 to the Tribunal responded thus "*[…]. We have perused our records and noted that there is no Supplementary Doping Control Form as alluded to by the Respondent. We therefore urge you to proceed and deliver Decision as is.*"

50. We observe that it is rather astounding that a DCO who is the official custodian of all testing documents recorded during the testing process deliberately penned (or even allowed the Athlete to pen) that clear reference to Supplementary information, then failed or forgot to attach the same to the Agency's copy of the DCF and/or file such additional detail among the

records of the Agency, including failed to record that despite the same being alluded to, it was not filed in the final testing bundle and for what reason.

51. This Panel expresses its apprehension as to why the Supplementary report form indicated in the DCF would suddenly disappear as though into thin air and we hasten to restate that this was an 'anomaly' not captured as mandated in the ISTI (and if this was done, such evidence was not provisioned the Tribunal); meticulous documentation and preservation are requirements stated in the ISTI, see appended relevant 2017 ISTI – January 2017 excerpts:

- ***6.2 General;*** *The* Sample *Collection Session starts […]. The main activities are: […] c) Documenting the* Sample *collection*
- *7.4.5 In conducting the Sample Collection Session, the following information shall be recorded as a minimum:*
- *q) Medications and supplements taken within the previous seven days and (where the Sample collected is a blood Sample) blood transfusions within the previous three months,*

  as declared by the Athlete;
- *Comment to 7.4.5: All of the aforementioned information need not be consolidated in a single Doping Control Form but rather may be collected through the Doping Control and/or other official documentation such as a separate Notification form and/or Supplementary report. In addition to this information, additional requirements for the collection of Blood Samples for the ABP can be found in Annex K of this Standard.]*
- *7.4.7 The DCO shall provide the Athlete with a copy of the records of the Sample Collection Session that have been signed by the Athlete.*
- *8.3.2 The Sample Collection Authority shall develop a system to ensure that the documentation for each Sample is completed and securely handled.*

- *9.3.5 If the Samples with accompanying documentation or the Sample Collection Session documentation are not received at their respective intended destinations, or if a Sample's integrity or identity may have been compromised during transport, the Sample Collection Authority shall check the Chain of Custody, and the Testing Authority shall consider whether the Samples should be voided.*
- *9.3.6 Documentation related to a Sample Collection Session and/or an anti-doping rule violation shall be stored by the Testing Authority and/or the Sample Collection Authority for the period specified in the International Standard for the Protection of Privacy and Personal Information.*

52. Analysis of the highlighted mandatory ISTI requirements above:
    - In the Athlete's DCF, exactly at the space designated for 'minimum' declaration at (q) – namely medication used, the DCF referred to the Supplementary Report Form as well guided by Comments to 7.4.5. From this we deduce that the information recorded in the missing supplementary document was necessarily also a minimum requirement, (any additional data therein notwithstanding);
    - That the Athlete had a copy of the Supplementary report we could not ascertain as we did not receive copy requested to check if it was one of documents she signed;
    - Bullet 8.3.2 states the Agency is responsible for completion and secure handling of the document;
    - Last but not least, 9.3.6 indicates it (Agency) shall also store such including the period it must do so.
53. Given the above ISTI mandatories, the Panel wonders why when the matter was flagged, a copy was not tracked down and made available for its scrutiny even more so when it is acknowledged that it forms one of the fundamental documents ADAK uses or is supposed to use when it reviews

the testing results management process to identify if a serious obvious departure from the ISL could have resulted in the AAF as the Guidelines illustrate; see *'3.4.2.3 **Apparent departure from the ISTI and/or ISL and related notification:** One of the fundamental purposes of the ISTI and ISL is to establish processes and procedures that help ensure that an AAF is a genuine finding, not open to question or doubt. Therefore, the RMA must review if any apparent departure from the ISTI and/or the ISL could have caused the AAF [...] Similarly, the RMA must review relevant documentation, particularly the Doping Control form and any Supplemental Reports, to ensure that there have not been any apparent departures from the ISTI that could have caused the AAF or otherwise put its validity into serious question.*

54. Whilst the Panel, satisfied with the establishment of the ADRV, does not see that there is any need to confirm departures that may have caused the AAF, it is cognizant that information contained in relevant documents attached to the DCF could shed further light which would greatly assist the Panel arrive at a fully reasoned and comprehensive decision.

55. Hence the Panel, advised by the WADA Guidelines quoted extensively herein, stresses that results management includes the hearing process and crucial results management documentation must of necessity be provisioned when requested for by the Panel: *The term Results Management is not defined in the* Code, *but according to* Code *Article 7, this process encompasses the time frame between pre-hearing administration of potential Anti-Doping rule violations (ADRVs), Laboratory analysis (or the collection of other evidence establishing a potential ADRV), notification and charge, through to resolution of the process. Sections on the hearing phase, appeals and Substantial Assistance are therefore also included in these Guidelines.*

56. The Panel also notes that a review from an expert/doctor would have greatly assisted the Panel contemplate the cocktail of substances traced in the Athlete's sample and their consistency with performance enhancing and/or medical application for restoration of health.

57. Nevertheless, the Panel will proceed to review the matter of intent to enhance performance as follows guided by ***CAS2016/A/4626WADA v. Indian NADA & Mhaskar Meghali***, *Para. 45. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, she did not know that her conduct constituted an ADRV or that there was no significant risk of an ADRV. According to established case-law of CAS (e.g.CAS2014/A/3820, par. 77 et seq.) the proof by a balance of probability requires that one explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation (CAS 2014/A/3820, par. 79).* In the case of the Athlete, alternatively constructed, and bearing in mind her 'voluntary' action to call in the 'hang-man', there might have been a possibility that she did not know her conduct constituted and ADRV and that in street parlance, she was setting her herself up.

58. According to *CAS 2008/A/1515: "the balance of probability standard entails that the athlete has the burden of persuading the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of positive testing".*

59. The Athlete's assertion that she had been under medical attention for a few months seemed to us to hold some water only the 'set of incongruent circumstances' that the Athlete would rely on seemed convoluted beyond measure:

a) that she had asked for the test was not denied by the Agency;

b) the doctor from whom she sourced her inconclusive evidence of treatment and who was listed in her DCF had for reasons best known to himself (and perhaps to her) 'neglected' to indicate the full list of drugs he had administered to her; ...

c) the Supplementary Form indicated in her DCF presumably by the hand of the DCO who tested her was missing and with it so were whatever facts that gave rise to the need for a supplementary report in the first place.

Two of these factors i.e. (a) & (c) were in the Athlete's favor, one was not; Note: absence of Supplementary Report Form was a responsibility of the Agency and therefore in case of doubt, the benefit went to the Athlete, just in case in it there were mitigating elements that could support her claim to non-intention to cheat and perhaps even point to origin. On the other hand, the Applicant lay stake to the other 'most probable', with the bare claim of intent backed by no other evidence save the analytical lab results already adduced to establish the AAF. The Applicant's lack of a rebuttal to assertion by the Athlete that she requisitioned this particular testing indeed stood out like a sore thumb.

60. Further, the Athlete pleaded complete unawareness of the TUE regimen and stated that she had no knowledge and had no intention to be on the wrong. At that moment that the Athlete chose to participate in the sport of body building she automatically signed herself up for due obligation to the Code and became bound under WADC's Article 21 *'to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code'*. For the fact that she initiated/instigated the test, it also meant she had an inkling about sports anti-doping and thereby the strict liability hammer clamped down on her in exactly same manner as it did all other athletes.

61. That she attached the doctors letter and it were to be found that the information in the Supplementary report was a full disclosure, that still would not absolve her from the ADRV, see ***CAS 2017/A/5139 WADA v. CBF & Olivio Aparecido da Costa,*** *115. The Athlete attempted to shift his responsibility onto the doctors that treated him, but this is not an acceptable defense. The CAS's consistent jurisprudence is that athletes cannot shift their duty onto their doctors. As a result, the Athlete bears a personal reasonability to ensure that no prohibited substance reaches his system, regardless of whether a doctor prescribed it (CAS 2012/A/2959; CAS 2006/A/1133; CAS 2005/A/951; CAS 2005/A/828). This has been summarized in CAS 2012/A/2959: "8.19 (...) Dr. Tachuk's role does not relieve Mr. Nilforushan of responsibility. In CAS 2008/A/1488, the CAS panel commented at paragraph 12 that "in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances". In CAS 2005/A/872, a CAS panel ruled that for a reduction based on no significant fault or negligence there must be more than simply reliance on a doctor. Further, Koubek (...) makes clear that an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist". 116. As a result, it must be held that the Athlete cannot rely on delegating his responsibility to his doctors.*

62. As such, ignorance is not a valid plea, as exemplified in various CAS law, for example, ***CAS2016/A/4377WADA v. IWF & Yenny Fernanda Alvarez Caicedo, in Summary No.*** *2. 'In anti-doping cases the athlete bears the burden of establishing that the violation was not intentional; it naturally follows that the athlete must also establish how the substance entered his or her body. The athlete is*

required to prove his or her allegations on the "balance of probability", which, according to long established CAS jurisprudence, means that the athlete needs to convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their nonoccurrence. To establish the origin of the prohibited substance it is not sufficient for an athlete merely to protest his or her innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question. Necessary are for example details about the date of the intake, the location and route of intake or any other details of the ingestion.'

63. Yet her ignorance was tempered by an obvious proactive-ness which was highly inconsistent with the definition of a 'cheat' in that she asked for the test 'voluntarily'; essentially, the letters from the Athlete portray an athlete who was keen on matters affecting her sporting career, one who actively engaged ADAK apparently in an attempt to 'know' and try to steer in the 'right' course in matters regarding sports doping.

64. Most important according to this Panel, was that the Athlete was not inconsistent, that the information she recorded and apparently expressly in both instances flowed despite the concrete evidence, (which might or might not have been in her custody) doggedly precluding even the Panel's inspection and on this aspect the Panel leans on ***CAS 2017/A/5139 WADA v. CBF & Olivio Aparecido da Costa*** *111. The theories put forward by Dr. Mazzoni, are more likely to meet the standard balance of probability, as opposed to the inconsistent accounts given by the Athlete....'*

65. Further, this panel holds that intention to cheat derived at the point the prohibited substance was introduced into the body and if at that particular

point in time the intention was divergent or inconsistent with performance enhancement then the intent to cheat cannot be claimed by the Applicant, as held by panel in ***CAS A2/2011 Kurt Foggo v. NRL***, *Para 14. [...] 'We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance. The time at which the absence of intent is to be shown is the time of ingestion of the substance. The athlete must negate an intention at that time to enhance his or her performance in the relevant sport, in this case rugby league, by the taking of the substance. The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Whether or not the link will be established will depend on the particular circumstances of the case.'*

66. The Applicant at page 11 of the Charge Document (see SJK3) referred the Panel to a print out from a publisher delineating the use of anabolic-androgenic steroids (AAS). A perusal of the same indicates that some athletes use such to enhance performance. AAS are also used for relieving pressure and possible pain and that most studies show that AAS can accelerate muscle growth (size) and strength, as well as increase aggressiveness amongst others. Our attention was also drawn to their potential side effects on health and well-being including depression, chronic anxiety, poor concentration, hypertension and severe mood disturbances according to the authors. However, whether it is possible that athletes who abuse such prohibited substances risk and/or, some do actually acquire the side effects and may then require rehabilitative medication is not expounded upon by the print out though, we are inclined to believe that such occasions may arise.

67. That left to conjecture, with a piece of evidence from the testing session missing - which should automatically have been available for this stage of the results management process – the Panel wonders whether that one document did not substantially mask crucial information required to establish lack of intent as held in various CAS case law above and in this particular case, especially given the "jumble" of the Athlete's 'invite' then spirited denial of intent, her prompt admission and acceptance of consequences in her letters.

68. It is the view of this Panel that something transpired at that 'relevant/crucial time' of testing to warrant extra recording in supplementary form, which may be the reason for the Athlete's simultaneous vehement denial of intent to cheat therefore, what would seem a rather express 'prompt admission', and an equally 'strange' full admission of the accuracy of the AAF including consequence thereof for an athlete who claims she had no knowledge of TUE (a strange juxtaposition indeed) and which vital 'happening' could serve as collaborative evidence, see CAS A2/2011 ***Kurt Foggo v. NRL***, *'16. Rule 154 (WADC 10.4) also requires the production of corroboration evidence in addition to the athlete's word which establishes "...the absence of an intent to enhance sport performance". Accordingly, the corroborating evidence must be sufficient to demonstrate the absence of intent, e.g. conduct inconsistent with intent* ***at the relevant time****. This is to be determined by the Panel undertaking an objective evaluation of the evidence as to the facts and circumstances relevant to the issue of intention.'*

69. Our attention is drawn to CAS 2016/A/4377WADA v. IWF & Yenny Fernanda Alvarez Caicedo, *'57. The Athlete's explanations here have virtually no evidentiary basis supporting them. Missing are details about the date of the injection, the location where the injection was given, or a description of any details concerning it*

other than the effects of the injection later.' Unlike Yenny above, in this case there is evidentiary basis to support the Athlete's explanation of ill health based on a medical declaration during testing session, (regardless of whatever other unknowns that may be in that declaration) on account of prima facie evidence of a Supplementary report notated on her DCF, but reportedly a non-existent allusion according to the Agency which is legal custodian of testing session documentation.

70. It could also be that the Athlete latched onto the prompt admission rebate via her super quick first letter and that, in the opinion of the Panel, should be a valid fallback for all athletes in as far as the Code is concerned. Regardless, it is actually finding the crucial date missing on the accountable document to affirm if indeed hers was a prompt admission that raised the red flag. The initial voiding of the 'prompt' date and disappearance of the supplementary report form, whether this happened intentionally or not, coupled with the mixed signals of 'hearing waiver'/intent denial (evident in correspondences) of the Athlete planted serious doubts in the minds of the Panel regarding fair prosecution of this matter, and we are constrained to pass a verdict of lack of intention despite the Athlete having not established the origin of the prohibited substances as recommended in case law.

D. Reduction Based on the Athlete's Prompt Admission?

71. Her first supposedly 'undated' explanation letter also posed a challenge to Panel in gauging the promptness of her admission. The Applicant in its notification letter to her – which variously imposed her Provisional Suspension – Ref: ADAK/8/2/SKJ/65 of 9th March 2018 had given her a

deadline of 5.00pm on 16th March 2018 within which to provide an adequate explanation.

72. In view of the seriousness of the allegation leveled by the Applicant against the Athlete, the Panel mentioned the matter on 17th January 2019 in order to seek from the Agency further information concerning her 'undated' letter so as to satisfy itself if the same achieved the threshold set in WADC's Article 10.6.3 (or at least, if indeed her response was within the deadline imposed by ADAK in its Notification letter, let alone the other twin matters of taking into account 'seriousness of the violation and her degree of Fault'), see Article 10.6.3:

> *'**Prompt Admission of an Anti-Doping Rule Violation** after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1. An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization, and also upon the approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.'*

73. The Athlete's email submitting her initial explanation in respect to the notification was dated Monday 12 March 2018 well within ADAK's 16th March 2018 deadline. The Athlete succinctly captured it thus in her second letter to ADAK, see SJK 7 on page 23 of the Charge Document, *"[...] I promptly wrote back to the Agency where I accepted the said charges and consequences which included a 4 year ban from active competition as per my initial response to you."* The 'initial response' the Athlete was alluding to was that

first email response to ADAK Notice of Charge and Mandatory Provisional Suspension whose deadline therein she was well within but which the Panel could only confirm on request/receipt of copy of her email inclusive of date(s) details.

74. Suffice it to say the Athlete promptly admitted the ADRV levelled against her by ADAK and therefore WADC's Article 10.6.3 would be applicable in her case.

Summary:

75. Starting with the claim that she had invited ADAK to conduct the test on her the Athlete then stubbornly held onto the stand she did not intend to be on the wrong while in the meantime she accepted the ADRV and resultant consequences, a mix of reactions that led the Panel to delve into matter to try and put in perspective the seemingly strange contortions in this case

76. That the Athlete eschewed court appearances making the Panel's task of trying to piece together the puzzle more burdensome will only draw comment, as the Athlete in the alternative, corresponded in writing which, in any case, with standard waivers would suffice.

77. Crucially, having heard that ADAK was testing, the Athlete invited the Agency to test her. In the absence of a rejoinder/evidence to the contrary by the Applicant this behavior bespoke of an athlete who was either brutally honest and groping in the dark in matters anti-doping or 'impaired' or suicidal or all combined and perhaps more. We opine that there is a possibility that, had she not brought herself out of the woodwork, no test would have been done on her and therefore the AAF would not have come to light (at least not in exactly the time or same manner it now presented).

78. Voiding crucial details on the Athlete's documentation was also an unwelcome defense tactic toward an athlete who apparently was cooperating to the best of her ability with the Agency; let it be noted that, had the Charge Document reflected consideration of this fact of prompt admission then this particular inference would not have been arrived at by the Panel.

79. As stated in WADC's Article 10. 2.2 *'If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.'*, and therefore the Athlete's baseline sanction will be 2 years since the Athlete's AAF is as a result of non - Specified Substances and she has established that the ADRV was not intentional, albeit unconventionally.

80. Turning back to the prayers of the Applicant which were for a 4 year period of ineligibility as provided by ADAK's Article 10, it is noted that that since lack of intention was established by the Athlete, it behooved the Panel to examine whether there were factors observed in this case that lent themselves to consideration of further reduction under the said article in the interests of proportionality.

81. On a technicality, having established lack of intention then WADC's Articles 10.4 or 10.5 could be applicable. It was our observation though, that No Fault or Negligence and No Significant Fault or Negligence would require varied information of an objective and subjective nature to establish whether relevant thresholds set in the Code could be surmounted, but in the event of the 'waiver of hearing' coupled by suppression of accountable document there was precious little facts on which the Panel could premise its assessment.

82. While navigating the nuances of this case, the Panel's perusal of Code moves it to comment that it is not the intention of the Code for athletes to be in the

dark or flounder helplessly or hopelessly in regard to this dragon called anti-doping. It in fact requires their education as addressed under WADC's Article 18 to empower and thereby disabuse such notions, see Article *18.1 [...]'The basic principle for information and education programs for doping-free sport is to preserve the spirit of sport, as described in the introduction to the Code, from being undermined by doping. The primary goal of such programs is prevention. The objective shall be to prevent the intentional or unintentional use by athletes of Prohibited Substances and Prohibited Methods.* Hence the less than ideal levels of doping awareness still apparent require redress by implementing Agency so that more athletes develop the confidence to step up and be tested or just approach the Agency to learn in order to free themselves from vice should they have been immersed through backstreet advice.

IX. Decision

Sanctions in the Code are of necessity retributive, therefore in the interest of proportionality, in order to preserve justice to all parties involved, we hereby rule adversely against the Applicant's non-cooperation in availing the Supplementary Form whose prima facie evidence was crucial all around in gauging various aspects of vital importance and great ramifications in this case.

X. Sanction

83. The following orders commend themselves:
    a. The ADRV has been sufficiently proved;
    b. The applicable sanction is set at Article 10.2.2 of the WADC;
    c. The Athlete's period of ineligibility shall be for a period of 2 years with effect from 17th January 2018.

d. All results obtained by the Athlete from and including January 2018 inclusive of points and prizes are disqualified;

e. ADAK shall bear the costs of these proceedings.

84. The right of appeal is provided for under Article 13.2.1 of the WADA Code and Article 13 of ADAK rules.

Dated at Nairobi this 7th day of *March*, 2019

Signed:

John M Ohaga, FCIArb; C.Arb

Chairman, Sports Disputes Tribunal

Signed:

Gabriel Ouko

Member, Sports Disputes Tribunal

Signed:

Ms. Mary Kimani

Member, Sports Disputes Tribunal