

WORLD RUGBY

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY UNATHI ELIS MALI (SOUTH AFRICA) CONTRARY TO REGULATION 21

BEFORE AN INDEPENDENT JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.8.2

Judicial Committee:

Nicholas Stewart QC (England - Chairman)
Gregor Nicholson (Scotland)
Dr Margo Mountjoy (Canada)

Representatives and Participants:

Ben Rutherford (Counsel for World Rugby)
Barend Kellerman (Counsel for the Player)

Unathi Elis Mali (the Player)

David Ho (Anti-Doping Science and Results Manager, World Rugby)

In attendance:

Ismael Dollie (MyPlayers)
Nadia Njomba (East Province Rugby)
Clint Readhead (South African Rugby Union)

Hearing conducted by video/telephone conference on 14 November 2018.

REASONS FOR DECISION

Overview

[1] Ms Unathi Elis Mali (the “Player”) is a member and player of the South African Rugby Union (‘SARU’). She was a member of the South African National Women’s Sevens squad which took part in the Hong Kong Sevens in April 2018 and she was subject to Out of Competition testing.

[2] World Rugby alleges that the Player committed an anti-doping rule violation (‘ADRV’) as a result of an adverse analytical finding (‘AAF’) for the presence of Prohibited

Substances methandienone and stanozolol. Both were detected in a sample collected from the Player on 3 April 2018 in Hong Kong as part of World Rugby's Out of Competition Testing Programme.

[3] Methandienone and stanozolol are classified in category S1.1a Exogenous Androgenic Anabolic Steroids on the World Anti-Doping Agency 2018 List of Prohibited Substances and in Schedule 2 to World Rugby's Regulation 21. Neither methandienone nor stanozolol is a Specified Substance. They are non-threshold substances, meaning that detection of any amount will constitute an AAF, and are prohibited at all times.

[4] A preliminary review of the case was performed by Professor David Gerrard MB ChB FACSEP FFSEM in accordance with World Regulation 21.7.2. The Player was notified in writing via SARU on 18 April 2018 that she may have committed an ADRV. The Player was provisionally suspended, pending the outcome of these proceedings, with effect from 19 April 2018.

[5] On 3 May 2018 SARU notified World Rugby that the Player did not require her B sample to be tested and that she requested a hearing.

[6] Nevertheless, World Rugby did arrange for the B sample to be tested at no cost to the Player. That test was done on 23 May 2018 at the Laboratoire Suisse d'Analyse du Dopage in Lausanne, Switzerland. World Rugby notified the Player by letter dated 25 May 2018 that the result of that test confirmed the presence of methandienone and stanozolol, which had also been present in her A sample.

[7] The Player has no previous finding of an AAF or ADRV.

[8] Pursuant to World Rugby Regulation 21.8.2.1 on 29 May 2018 the Judicial Panel Chairman, Christopher Quinlan QC, appointed this Judicial Committee ('JC') to determine the Player's case.

[9] The Player has been represented throughout by Kellerman Hendrikse Inc, Attorneys in Bellville and Stellenbosch, South Africa ('KH Law'). By letter to World Rugby dated 18 June 2018 KH Law wrote: "At this stage we are instructed to admit the adverse analytical finding in the absence of any evidence known to our client pointing to an irregularity in the sample gathering or the testing of the urine sample." There has been no such irregularity identified or suggested by the Player or KH Law. The Player has admitted the AAF and the ADRV.

[10] However, the Player claims that the violation was inadvertent and was caused by her drinking of contaminated water at a gym in Zwede, Eastern Cape Province, where she had been training shortly before going to Hong Kong. As a consequence, she initially said that that the presumptive sanction of four years Ineligibility should not apply and that the appropriate sanction should be no more than the term of her Provisional Suspension, which took effect on 19 April 2018.

[11] World Rugby asserts that the Player has failed to establish that contaminated water was the source of her AAF and that her ADRV was “intentional” in the sense that that term is used in Regulation 21.10.2.3. Accordingly, World Rugby says that the presumptive four year sanction should apply, starting from 19 April 2018 so giving credit for the period of Provisional Suspension served by the Player.

[12] For the reasons which follow, the Judicial Committee finds that the Player has failed to establish that her AAF was caused by contaminated water; and has failed to prove that her anti-doping rule violation was not intentional. Accordingly, the four year sanction provided for by Regulation 21.10.2.1.1 is applicable.

Procedural directions and hearing

[13] On 15 June 2018, the JC provided the parties with written directions concerning disclosure, written submissions, evidence at the hearing and scheduling. Those directions were supplemented and varied by further directions on 5 July and 6 October 2018 and the hearing took place on Wednesday 14 November 2018 by video and telephone conference.

[14] The hearing took just under five hours. It was lengthened by technical and practical difficulties, including a frequent need for questions to be repeated when not heard or understood first time. The case for World Rugby was presented by its counsel Mr Ben Rutherford. The Player was represented by Mr Barend Kellerman of KH Law. Following the hearing the JC issued a written direction dated 16 November 2018 allowing each party to make further written submissions by Friday 30 November 2018. KH Law did file a further submission but World Rugby made no further submission.

[15] Much of the evidence and the submissions received before and at the hearing concerned the possibility of the water at the gym being contaminated and that being the explanation for the Player’s AAF. Documentary and expert evidence was tendered by World Rugby and evidence was received from the Player and her three other witnesses.

[16] While the JC has considered the entire record and paid careful attention to the evidence of the witnesses and the comprehensive written and oral submissions of the parties, we refer in these reasons only to those matters which we regard as necessary to describe and explain our decision.

Issues

[17] The Player has accepted the AAF, so World Rugby has met its burden of establishing that the Player has committed an Anti-Doping Rule Violation, namely the presence in the player's sample of the Prohibited Substances methandienone and stanozolol.

[18] Because the Player’s ADRV does not involve a Specified Substance, she bears the burden of establishing on a balance of probability that her ADRV was not intentional.

That would then lower the presumptive sanction from four years' Ineligibility to two years.

[19] If the Player had established that her ADRV had not been intentional, she might then have obtained a further reduction of the otherwise applicable sanction if she had proved that there had been No Significant Fault or Negligence on her part. However, in the light of the evidence at the hearing her counsel expressly abandoned any contention of No Significant Fault or Negligence, so we no longer need to consider that issue.

The Evidence

[20] Witness statements were provided for each witness and largely stood as their evidence in chief, with limited supplementary oral examination in chief.

[21] Expert evidence for World Rugby was provided by Dr Tiia Kuuranne, Director of the WADA accredited Laboratoire Suisse d'Analyse du Dopage. Dr Kuuranne gave a written report dated 9 August 2018 and oral evidence by telephone at the hearing. There was no other witness for World Rugby.

[22] The Player herself gave evidence by videolink and the JC could both see and hear her. Her only other witness to give evidence at the hearing was Mr Siyabonga Hlela but although his voice was clear enough there was no picture available.

[23] Although an affidavit had been provided for the Player by Mr Misile Majikia, he was unwilling to give evidence at the hearing so his affidavit was untested by cross-examination. It was following notification of Mr Majikia's unwillingness to give oral evidence that the Player produced an affidavit sworn on 6 November by Mr Hlela, who was cross-examined at the hearing.

[24] The Player's evidence included an affidavit of Dr Holger Wellman sworn on 31 July 2019. He did not dispute any of Dr Kuuranne's report, so was not requested by World Rugby to give oral evidence at the hearing (and did not do so).

[25] For practical reasons of timing and availability, Dr Kuuranne gave her oral evidence before the Player and then Mr Hlela. However, our summary of the relevant evidence will be clearer if we set out the Player's and Mr Hlela's evidence here first.

The Player

[26] The Player's written statement was signed and sworn as an affidavit before a Commissioner of Oaths at Port Elizabeth on 31 July 2018. It included the following points:

- (1) The Player had flown with the team to Hong Kong on 31 March 2018, after being in the training camp in Stellenbosch since 25 March.

- (2) She had been at home in Port Elizabeth for six days from 19 to 25 March and during that time had trained once or twice a day at a gym in Zwide known as Misili's Gym and owned by Mr Misile Majikia.
- (3) At the time the Player travelled to Hong Kong she had been taking three supplements (named in her affidavit). She also took some flu medication and sinus spray given to her by the tournament doctor.
- (4) After her AAF, those three supplements had been tested by her and none was found to contain methandienone or stanozolol. Accordingly, she did not offer contamination of those supplements as an explanation of the AAF.
- (5) She told Mr Majikia about her AAF. He told her that the steroids, i.e. those prohibited substances, could have been in the water that she had drunk at his gym.
- (6) A road was being built for buses in Zwide and the water supply for the gym was affected. Water was being brought to the gym in 20 litre containers and placed in the gym for customers to take water. The Player would bring her own water bottle to the gym and then pour water from those containers into her water bottle to drink.
- (7) After her test and AAF, Mr Majikia had told the Player that bodybuilders who trained in his gym mixed their preparations, which included steroids, in those water containers, despite his asking them not to.
- (8) The Player had not previously been aware of that practice.
- (9) She had eaten and drunk carefully in the days before her doping test in Hong Kong. There could have been nothing else but contaminated water at the gym to cause her AAF.
- (10) The Player admitted the ADRV and accepted that she bore the burden of proving that she had not ingested the prohibited substances intentionally.
- (11) She had received doping education from a Dr Leigh Gordon in 2017 and understood her responsibility for what she put into her body.

[27] The Player had also submitted two photographs of water containers, apparently made from plastic material rather than metal or glass. One of the photographs shows three containers placed close to each other on the floor of the gym. All three do appear to be about the right size for 20 litres. One is white but opaque, another is blue and opaque. The nearest appears blue, although that may be the effect of light and floor colouring on a clear container, and is not so opaque. It is only with that nearest container that it might have been possible to see anything of the water inside the container.

[28] The Player gave about half an hour of supplementary evidence in chief and was cross-examined for over an hour.

[29] A striking departure from the Player's affidavit was that in her oral evidence she told us clearly that she had herself seen bodybuilders grinding tablets and then putting them in those water containers from which the Player had poured out her own drinking water at the gym. Although she also said she had not known those tablets contained steroids, that evidence meant it was no longer realistic for her counsel to make a submission of No Significant Fault or Negligence. Mr Kellerman abandoned that submission at the start of his closing oral submissions.

[30] Mr Rutherford had understandably directed a good part of his cross-examination of the Player (and Mr Hlela) to that issue while it was still a live issue. However, that particular line of cross-examination became largely irrelevant once Mr Kellerman had dropped that submission, so does not need scrutiny here.

[31] That marked change of tack by the Player does also give the JC significant doubts about the overall credibility of her evidence. If that part of her oral evidence was true, it was remarkable that it had not been said in her affidavit, which had clearly been prepared with appropriate assistance from her lawyers.

[32] The Player described how she poured water from one of those larger containers into her own water bottle, which you could not see through. She had not brought water from home because there she had only a limited supply which she needed for her own use including cooking; and she could not afford to buy bottled water.

[33] She insisted that she did not know that the bodybuilders at the gym were using steroids or that she had thought there was anything wrong with what she saw them grind and put into the water containers.

Mr Siyabonga Hlela

[34] Mr Hlela is a former rugby player and has been training as a bodybuilder for the past three years. He and the Player only met in late 2017 and do not appear to have a friendship outside the gym. He knew she was a top rugby player. Until the second or third week of February 2018 they had trained together in the gym from time to time. Mr Hlela had then been away and was not around at all in March 2018.

[35] Paragraph 6 of his affidavit describes how the Player told him about her positive doping test; and that she had also told him that the steroids could have been in the water she drank in the gym. The JC notes that Mr Hlela's affidavit clearly describes the Player as telling him what she had been told by Mr Majikia (also known as Madala) about gym users dissolving their steroids in the water containers. Mr Hlela says he confirmed to the Player that what Madala had said was true. We recognise that the Player's oral evidence at the hearing, although differing from her affidavit, was still saying that she did not know that there were steroids in the material she saw being ground and put into the water containers by other gym users. Nevertheless, that account by Mr Hlela does nothing to allay the JC's concerns about the change of tack in the Player's evidence at the hearing.

[36] Mr Hlela's evidence was that he had used steroids himself, by dropping tablets into water (or in the case of creatine, grinding tablets). But he only used his own water

bottle for that purpose and did not put anything himself into the larger water containers. He named products called Trainor, Winstrol and Dbol among those he said had been used by bodybuilders at the gym, although he was not sure what products they put into the water containers.

Dr Holger Wellman

[37] Dr Holger Wellman is a highly qualified specialist physician and endocrinologist. He was commissioned by KH Law to produce a report, which he did in the form of an affidavit sworn on 31 July 2018. His report considered two questions:

- Whether stanozolol and methandienone could be ingested orally or, more accurately, whether they had a high bio-availability.
- Whether it was possible for those substances to remain detectable in a person's urine 10 days after ingestion.

[38] Dr Wellman had been provided with the Player's version of how the substances came to be ingested and with the laboratory test reports provided to her by World Rugby. His opinion was that both substances had high bioavailability, making them ideal drugs to ingest orally. As to methandienone, the metabolite detected in the Player's urine was hydroxymethyl, a single 5 mg dose of which could be detected up to 19 days and at a steady state for at least double that period. As to stanozolol, a single dose of its metabolites could have been detected in urine 10 days after ingestion and at a steady state a lot longer.

[39] Dr Wellman therefore concluded that the Player's explanation of how the substances were ingested was possible.

[40] He added that stanozolol was a very popular anabolic steroid among bodybuilders, usually sold and known as Winstrol; and that methandienone was probably even more popular as an oral steroid and was sold as Diabol or Dianabol.

[41] Dr Wellman did not know of the laboratory having reported any level of metabolites, so no reverse calculations could be made to determine how much of the substances the player would have had to ingest to produce the test results on her sample.

[42] Mr Kellerman did not tender Dr Wellman for cross-examination and that was not required by World Rugby. Mr Kellerman expressly confirmed that Dr Wellman did not dispute anything in Dr Kuuranne's evidence. [3:12]

Dr Tiia Kuuranne

[43] Dr Kuuranne produced a written report dated 9 August 2018. She recorded that she had studied material regarding the Player's explanation as well as a summary of Dr Wellman's report. She then answered five specific questions addressed to her in an

email from World Rugby's counsel Mr Rutherford on 3 August 2018. There is no need to go through all those questions here.

[44] Points made by Dr Kuuranne in her report are:

- (1) In accordance with the applicable codes and standards, the laboratory was not required to quantify or report a concentration for an analyte of these non-threshold prohibited substances. However, she was able to give an indicative estimate of the concentration in the Player's sample: 50 ng/ml for the *hydroxymethyl* metabolite of methandienone and 1.5 ng/mL for the *hydroxystanozolol* metabolite of stanozolol.
- (2) Stanolozol is not soluble in water, so it was not likely that contaminated water would contain evenly distributed quantities of stanozolol.
- (3) Methandienone is soluble in water but not highly soluble. The maximum amount which could be dissolved in one litre of water is approximately 10 mg.
- (4) The procedure of grinding Winstrol (stanozolol) and Hellfire anabols (methandienone) into 20 litre shared water containers did not seem a rational approach to intentional administration in any context, taking into account the scarce solubility of methandienone and the insolubility of stanozolol.
- (5) Dr Kuuranne disagreed with Dr Wellman in that she would not consider methandienone or stanozolol as ideal drugs to ingest. In comparison to drugs other than steroids they are certainly more complicated for oral administration.
- (6) The Player's sample contained an estimated concentration of the methandienone metabolite which was 25 times higher than the minimum sensitivity limit required by WADA and 250 times higher than the detection limit. A study by Parr et al, Toxicology Letters 231 (2012) 381-391 indicated that the metabolite concentration would drop relatively fast and that after day 7 the analyte concentration would be close to the detection limit.

[45] Dr Kuuranne was cross-examined by Mr Kellerman, although in the light of his confirmation that Dr Wellman did not dispute her evidence Mr Kellerman stated that his cross-examination would be just to clarify points in her report [8:30]. Dr Kuuranne was examined in chief for about 20 minutes and then cross-examined for about another 20 minutes.

[46] Because Dr Kuuranne gave her evidence before the Player, she was questioned throughout on the footing that the Player had not been aware of any substances being added to the water in containers at the gym. There was therefore considerable exploration of the effects of the solubility or insolubility of stanozolol and methandienone on the visibility or other detectability of such additives. However, in the light of the Player's subsequent change of tack and her clear assertion that she had actually seen bodybuilders grinding substances and putting them in the containers, that particular area of her evidence became irrelevant.

[47] Otherwise, Dr Kuuranne confirmed everything in her written report.

[48] Dr Kuuranne was invited by both counsel to express a view on the likelihood of the source of the detected substances being contaminated water from those containers. She made it clear that the scientific evidence did not enable an answer to that question with any precision. She did not know the level and frequency of such contamination; and there would be variations in test results according to the metabolism of the individual.

[49] However, Dr Kuuranne did emphasise the concentrations noted in point (6) in paragraph 45 above. She accepted that it was possible that the water had been contaminated in the way described in the Player's statement, but given the concentrations found in the test sample she did not consider it likely. She also noted that normally stanozolol and methandienone were injected or taken orally. Using them in the way described in the Player's statement would make accurate dosage more difficult and there would be a high risk of their losing efficacy.

Applicable Provisions

[50] The following provisions of World Rugby Regulation 21 are engaged:

Strict Liability

21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

21.2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence).

Burden of proof

21.3.1 Burdens and Standards of Proof

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Player 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 a balance of probability.

Supplements

21.4.8 Nutritional Supplements and Medications

21.4.8.1 The use of nutritional supplements by Players is a risk. In many countries regulations either do not exist or are limited in nature in relation to the manufacturing and labelling of supplements. This may lead to a supplement containing an undeclared substance that is prohibited under these Anti-Doping Rules. Nutritional supplements may not be regulated or could be contaminated or suffer from cross contamination or may not have all the ingredients listed on the product label. Players are advised to exercise extreme caution regarding the use of nutritional supplements.

21.4.8.2 Many of the substances in the Prohibited List may appear either alone or as part of a mixture within medications or supplements which may be available with or without a doctor's prescription. Any Player who is concerned about the appropriateness of treatment being administered to him, or medications or supplements being ingested by him, should seek clarification from his doctor or other relevant authority as to whether such treatment is or such medications or supplements are prohibited prior to taking possession of or using such item. For the avoidance of doubt nothing herein shall displace the Player's responsibility to ensure he does not commit an anti-doping rule violation.

Sanctions

21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

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

21.10.2.1 The period of Ineligibility shall be four years where:

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

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

21.10.2.3 As used in Regulations 21.10.2 the term "intentional" is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

The Player's position

[51] The Player, through her counsel's submissions, accepts that as she no longer relies on there having been No Significant Fault or Negligence on her part, there must be a minimum a two years Period of Ineligibility.

[52] She also accepts that the Period of Ineligibility can only be reduced from four to two years if she shows, on a balance of probability, that:

- (a) The Player did not know that her conduct constituted an ADRV; and
- (b) She did not manifestly disregard the significant risk of engaging in conduct which might constitute an ADRV.

That is a summary of what is required by the definition of "intentional" in regulation 21.10.2.3. Both those points must be established by the Player. Although the wording of paragraph 4 of the Player's final written submissions might suggest that only one need be established, the JC does not understand that to be her counsel's submission (which would not be correct anyway).

[53] The Player realistically accepts that as Mr Majikia did not give oral evidence, less weight can be attached to his sworn affidavit than to the oral evidence of other witnesses. The JC has heard the evidence of Mr Hlela covering the same ground and we do not regard Mr Majikia's affidavit as adding any useful weight at all.

[54] The Player maintains her position that bodybuilders in the gym were putting substances into the water containers from which she got her drinking water at the gym; and that this was the only possible source of the stanozolol and methandienone found to have been in her body, as she never ingested either substance anywhere else or in any other circumstances. She says that she did not know that her conduct in drinking that contaminated water constituted an ADRV because she had no idea that it was contaminated with by any prohibited substance. That would establish point (a) in paragraph 52 above.

[55] She submits that she has also established point (b), because she did not know that there was any risk in drinking that water; and that she could not have disregarded a risk of which she was not even aware.

World Rugby's position

[56] World Rugby's primary position is that the Player has not established that the source of the two prohibited substances was contaminated water from those containers in the gym. It points to a number of flaws in the Player's case which it says are fatal to that conclusion.

[57] World Rugby points to a line of cases before the Court of Arbitration for Sport holding that for an athlete to prove that her ADRV was not intentional requires her to show how the substance entered her body: see for example *WADA v Alvarez* CAS 2016/A/4377. It acknowledges that there are also CAS decisions which leave open the possibility that an athlete might be able to rebut the presumption of intentionality without proof of the origin of the prohibited substance: see for example *Villanueva v FINA* CAS 2016/A/4534. However, it

is also clear from *Villanueva* and other such cases that this will only be achieved by an athlete in exceptional circumstances, which World Rugby say do not exist here.

[58] That was World Rugby's position before the hearing at which the Player's evidence changed significantly by her assertion that she had actually seen other gym users adding substances to the water container.

[59] World Rugby's secondary submission is that even if the JC does accept that the contaminated water at the gym was the source of these prohibited substances, the Player has still not met the burden of disproving intention. It submits that the definition of "intentional" does not require the Player to have known that there was any specific substance in that water. It was sufficient that that she was or should have been aware of the significant risk that consuming that supplement might result in an anti-doping rule violation and that she manifestly disregarded that risk in proceeding to drink that water. The Player's burden is to prove on a balance of probability that she "did not manifestly disregard the significant risk of engaging in conduct which might constitute an anti-doping rule violation": [World Rugby v Campomar](#) (10 October 2016) at para. 18.

Discussion and Analysis

[60] The Player's burden is to prove on a balance of probability that her anti-doping rule violation was not intentional: Regulation 21.10.2.2.1 The classic formulation of the application of the balance of probability was stated by Denning J. in *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 in these terms:

If the evidence is such that the tribunal can say 'we think it more probable than not' then the burden is discharged, but if the probabilities are equal it is not.

[61] The JC has carefully considered all the evidence and all the detailed submissions of the parties. That includes the specific points made in the Player's final written submissions in answer to what World Rugby had submitted were fatal flaws in the Player's contention that the source of the prohibited substances was the water containers in the gym. It is not necessary to refer specifically to all the separate points in those submissions.

[62] The JC does not find it probable that the source of the stanozolol and methandienone was the water containers in the gym.

[63] The JC does accept Mr Kellerman's submission that there were bodybuilders at the gym who were likely to lack a high level of education, scientific knowledge or sophistication in the use of supplements. We also recognise that users of supplements may well use them in careless ways which would not be adopted by an athlete alive to his or her anti-doping responsibilities as well as to the risks of severe punishment if caught by testing. Such careless behaviour is particularly likely at times to apply to bodybuilders who are not personally affected by any anti-doping regime or the risk of potential testing or sanctions.

[64] Having said that, the pattern of behaviour by users of the gym, as described by the Player and Mr Hlela, is one which the JC finds improbable. No doubt there was a bond and a spirit of sharing among the bodybuilders at this gym, although one effect of that would be a

tendency to bring the whole group's knowledge up to the level of their more switched-on members. The JC also applies its common sense knowledge that within such a group there is bound to be an exchange of information and views about the most effective supplements as well as issues concerning illicit substances (noting here the Player's submission that non-prescription use of methandienone is illegal in South Africa).

[65] The JC does not think it likely that bodybuilders at this gym would have used such a crude and unreliable method as to add steroid-containing supplements to the large, shared water containers. In stating that view, we do not need to rely on the expert evidence about the insolubility of stanozolol and the limited solubility of methandienone (although we accept Dr Kuuranne's evidence on those points, not contested by Dr Wellman). We simply consider the more straightforward and more effective practice followed by Mr Hlela, which was to put the substances into his own water bottle. We accept Dr Kuuranne's view that the supposed method of putting the substances into the larger containers would have made accurate dosage more difficult and would have involved a high risk of losing efficacy and control. It is no disparagement of the expert evidence if we say that her view accords with obvious common sense.

[66] The JC accepts the Player's explanation of why she did not bring her own water from home, where she has a limited daily supply for her needs there, and how she could not afford to buy bottled water. Our primary finding is not that she acted irresponsibly in taking her drinking water from the water containers. It is that we find that the water in those containers was not contaminated at all in the way she describes. We reject her explanation of how she came to have these prohibited substances in her body. She has offered no other explanation and the JC finds that she has failed to discharge her burden of disproving intentionality.

[67] The whole issue of visibility or other detectability of these substances in the water, whether still in the containers or on being poured from them, has become irrelevant. If anything had been added to the water containers as described by the Player and Mr Hlela, it would have had at least some noticeable effect on the appearance of the water (although the water containers were opaque and it is doubtful that the contamination would have been noticeable anyway when contaminated water was poured into other containers). However, the reason this is now irrelevant is that:

- On the JC's primary finding, such substances were never added to the containers anyway so there was nothing to see. We do not believe the Player's or Mr Hlela's evidence on that main issue.
- If that primary finding is wrong and substances were put in the water containers as described by her and by Mr Hlela, and this was the source of the stanozolol and methandienone as she contends, then on the Player's own evidence she actually saw that being done. So she knew that the water was contaminated, whether or not that contamination was visible or otherwise detectable.

[68] The JC's primary finding is itself sufficient to remove any basis for reduction of the Period of Ineligibility from four years.

[69] Nevertheless, we go on to consider the position even if that finding were wrong and the water in those large containers had been contaminated as described by the Player and Mr Hlela.

[70] On that issue, the Player has failed to prove that she did not manifestly disregard the significant risk of engaging in conduct which might constitute an anti-doping rule violation: see [World Rugby v Campomar](#) (in paragraph 59 above). She has therefore failed anyway to disprove intentional ingestion of the prohibited substances, so the Period of Ineligibility must still be four years.

[71] The JC's reasoning on this issue can be brief and no elaborate explanation is needed.

[72] Mr Kellerman, faced with an extremely difficult task, put it this way in paragraph 14.3 of his final written submissions:

14.3.1 Ms Mali testified that she saw the body builders grind substances into the water containers; and

14.3.2 Ms Mali testified that she was under the impression that the substances that the bodybuilders put into the container were safe supplements.

[73] Under cross-examination Mr Hlela said that he had warned Ms Mali about the bodybuilders. [3:03] The precise terms of that warning were not clear although he did say he had told the Player to be careful because bodybuilders were using "all these steroid kind of things". When cross-examined on this point [3:38], the Player admitted such a conversation and did not deny the mention of steroids. At first she placed that warning in her discussion with Mr Hlela after she had received the results of her Hong Kong test. However, when pressed by Mr Rutherford she did not maintain that position. The JC is satisfied that, whether or not our primary finding is correct, such a conversation did take place as described by Mr Hlela; and that it was when they were together at the gym before March 2018.

[74] That evidence is enough on its own to destroy the Player's case on the crucial issue of manifest disregard of significant risk (point (b) in paragraph 52 above). The Player confirmed that she had received anti-doping education in 2017 and that she was aware of her responsibilities under the World Rugby anti-doping code. Regulation 21.4.8 (set out in paragraph 50 above) contains explicit guidance and is largely common sense anyway. An athlete needs to be very careful about any supplement which she chooses to use herself even where entirely independently of any other user. Where, as here, it was a question of some unknown substance being chosen and used by others, who were bodybuilders and not professional athletes like the Player in a rigorously controlled sport, it would have been frankly foolish for the Player to drink water contaminated with those unknown substances. Of course, in the light of the JC's primary finding we do not believe that is what happened at all. Nevertheless, if that happened at the Player described, she acted recklessly and comes nowhere near satisfying the *Campomar* test. On this alternative basis, she has therefore failed to rebut the presumption of an intentional ADVR.

[75] We note the way Mr Kellerman puts the point in paragraph 14.4 of his final written submissions: "World Rugby finds it inconceivable that the bodybuilders could have done what they appear to have done, [so] why should Ms Mali not have found it inconceivable?" There is a fallacy here. What World Rugby were suggesting as inconceivable was that the bodybuilders had been using the larger water containers for mixing and taking their supplements. Whether inconceivable or not, the JC has found that improbable. That does not make it inconceivable, or even unlikely, that if the Player actually saw substances being put

into those containers, those substances were unsafe and contained illicit ingredients. That is a different thing altogether.

[76] Accordingly, we find that the Player has not established that the anti-doping rule violation was not intentional.

[77] The applicable sanction for the Player's anti-doping rule violation is four years Ineligibility.

Findings and Conclusions

[78] The Player committed an anti-doping rule violation as a result of the presence in her tested sample of stanozolol and methandienone, both Prohibited Substances.

[79] The JC finds, further, that the Player has failed to establish that her anti-doping rule violation was not intentional.

[80] The Player has been provisionally suspended since 19 April 2018 and appears to have fully observed the terms of that suspension.

[81] As a result, the applicable sanction is a period of Ineligibility of four years, starting on 19 April 2018 and ending at midnight on 18 April 2022.

[82] The Player's attention is drawn to Regulation 21.10.12 which provides, inter alia, that:

21.10.12.1 Prohibition Against Participation During Ineligibility

No Player or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programmes) authorised or organised by World Rugby or any Member Union, Association or a Club, Rugby Body or other member organisation of World Rugby or any Association or Member Union, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency".

...

A Player or other Person subject to a period of Ineligibility shall remain subject to Testing.

21.10.12.2 Return to Training

As an exception to Regulation 21.10.12.1, a Player may return to train with a team or to use the facilities of a Union, Club, Rugby Body or other member organisation of World Rugby, an Association or a Union during the shorter of: (1) the last two months of the Player's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed".

[83] The full text of Regulation 21.10.12 and the related commentaries should be consulted. In the case of the Player, she would be able to return to training at the start of month 47 of the four-year period of Ineligibility, so on 19 February 2022.

Right of Appeal

[84] This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.13.8) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.13.2). The regulations set out the timelines within which any referral or appeal must be commenced.

[85] The JC notes here that during the hearing the Chairman referred more than once to a transcript being made available. In fact, it is a full audio and video recording and not a transcript which has been produced. However, there has been no suggestion that either party has been put at any disadvantage by not having a transcript. The JC has gone through the whole recording; and although the recording is much slower to use than a transcript, it is otherwise a superior resource.

Costs

[86] Should World Rugby wish us to exercise our discretion in relation to costs under Regulation 21.8.2.10 or 21.8.2.11, its written submissions should be provided to the JC via Mr. Ho within 10 business days of the receipt by World Rugby of this decision. The Player will then have 10 business days to respond.

A handwritten signature in black ink, appearing to read 'Nicholas Stewart', written in a cursive, flowing style.

Nicholas Stewart QC

Chairman

18 January 2019