

IN THE APPEAL TRIBUNAL OF THE SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT

CASE NO.: SAIDS/2016/11/A10

In the matter between:

THANDANI NTSHUMAYELO

APPELLANT

and

THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

RESPONDENT

APPEAL DECISION

Before the Appeal Panel of:

Ms. Marissa Damons (Chairperson)

Dr. Ephraim Nematswerani (Appeal Board Member)

Ms. Mami Diale (Appeal Board Member)

(hereafter referred to as “the Appeal Panel”)

On behalf of SAIDS:

Ms Wafeekah Begg - Prosecutor

On behalf of The Athlete:

Mr Mpho Sethaba – Attorney of Fluxmans Incorporated.

THE PARTIES:

1. The Respondent is the South African Institute for Drug-Free Sport (SAIDS) established as a statutory body by the South African Institute for Drug-Free Sport Act no.14 of 1997 as amended in 2006 as the independent National Anti-Doping Organisation for South Africa, represented by Ms Wafeekah Begg
2. The Appellant is Mr. Thandani Ntshumayelo, who is a professional soccer player for the Orlando Pirates Football Club, represented by Mpho Sethaba

THE BACKGROUND AND FACTS

3. On 09th January 2016, the Appellant provided a urine sample (3927421) during an 'in-competition' test in the football match between Orlando Pirates and Platinum Stars.
4. The Appellant was subsequently notified of the Adverse Analytical Finding (AAF) in respect of the Non-Specified Prohibited Substance Benzoyllecgonine, a metabolite of Cocaine, which is categorised as a class S.6 Stimulant on the World Anti-Doping Code's 2016 Prohibited List, meaning that it is prohibited 'in-competition'.
5. On 15 July 2016 the Appellant was charged with an Antidoping Rule Violation ("ADRV") for the presence of the Prohibited Substance and its metabolite Benzoyllecgonine found in his sample A analysis which was confirmed in the analysis of the Athlete's B sample.
6. The Appellant was consequently provisionally suspended from competing and participating in any authorised or organised sport by any amateur or professional league or any national or international level event as from the date of the notification of the AAF.
7. The Appellant was given an opportunity to dispute the ADRV and was given seven (7) days from the date of the notice to do so. The Appellant did not elect to dispute the AAF nor the assertion of the ADRV or the provisional suspension. The Appellant entered a plea of guilty to the charge against him and elected not to dispute the presence and use of the Prohibited Substance
8. The Independent Tribunal hearing was held on 16 August 2016. The transcript of the proceedings was made available to the Appeal Panel.
9. The Independent Tribunal delivered a verbal decision followed by a written decision providing reasons for its finding/s.

10. The Independent Tribunal found the Appellant guilty of an ADRV in terms of Article 2.1 of the SAIDS Rules 2016, and more specifically Article 2.1.1, stating that it is each Athlete's duty to ensure that no prohibited substance enters their body. Further that the presence of the Prohibited Substance is sufficient to prove the ADRV, which was established.
11. The Appellant further testified that he indeed had taken the Prohibited Substance three days prior to the date on which he was tested, but did so without any intention to enhance his performance or cheat.
12. The Independent Tribunal found that the Appellant intentionally consumed the Prohibited Substance, engaging in conduct which he knew or should have known constituted an ADRV or would constitute an ADRV and manifestly disregarded that risk.
13. A period of ineligibility of four (4) years was imposed in accordance with Article 10.2.1 of the SAIDS Rules.

APPLICABLE LAW

14. The Anti-doping Rules applicable to the current matter are the 2016 SAIDS Rules adopted in accordance with the World Anti-Doping Agency Code of 2015.
15. In terms of Article 1.2 and 1.3 of the said Rules, they are applicable to National Sporting Federations in South Africa as well as all Athletes and Athlete Support Personnel who are members or license-holders of any National Federation in South Africa, or of any member or affiliate organisation of any National Federation in South Africa or who compete or who participate in such capacity in Events, Competitions and other activities organised, convened, authorised or recognised by any National Federation in South Africa.
16. In terms of Article 2 all Athletes shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods, which have been included on the Prohibited List.
17. Article 2.1.1. states that: *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*
18. In accordance with Article 2.1.2 *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by the mere presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample or in both where the B sample is tested.*

19. The onus is therefore on the Appellant to satisfy the Appeal Panel on a balance of probabilities that there was no intention to enhance his performance or display conduct of recklessness alternatively, that he acted with no significant fault or negligence.
20. In terms of sanction for the finding of the ADRV, Article 10.2 is applicable. In terms of Article 10.2.1 the period of ineligibility for ADRV shall be four years where:
 - 10.2.1.1 The ADRV does not involve a Specified Substance, unless the Athlete can establish that he ADRV was not intentional;
 - 10.2.1.2 is where SAIDs can establish that the ADRV was intentional.
 - 10.2.2 If Article 10.2.1 does not apply, the period of ineligibility shall be two years.
 - 10.2.3 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 ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. An ADRV resulting from an AAF 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. Further an ADRV resulting from an AAF 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 used ‘out of competition’ in a context unrelated to sport performance.

CONDONATION

21. The Appellant filed his initial intention to Appeal the decision of the Disciplinary Committee setting out the grounds therefor within the twenty one (21) day period as indicated in the Rules, which request was denied by the then Chairperson of the Appeals Board.
22. On 17 April 2018, the Appellant addressed a letter to SAIDS requesting reconsideration of his request to Appeal. This was finally acceded to on 10 July 2018.
23. On 17 July 2018 the Appellant’s further Notice of Appeal setting out the grounds therefor was filed together with an application for condonation indicating his reasons for the late filing of his Notice of Appeal.
24. The application was not opposed by the Respondent.
25. The Appeal Panel has condoned the late filing of the Appellant’s Notice of Appeal in the interest of fairness towards the Athlete as well as the fact that the Respondent was not materially prejudiced thereby and did not oppose same.

THE ISSUE FOR DETERMINATION ON APPEAL

26. The only issue for determination by the Appeal Panel is whether or not the Independent Tribunal correctly found that the Appellant had intentionally contravened the Rules as contemplated in Article 10.2.1
27. In terms of the foregoing, whether the exception contained in 10.2.3 is applicable in the circumstances. If found to be in the affirmative, effectively means that the period of ineligibility shall be two (2) years.
28. The Parties have agreed and requested that the matter be dealt with on the papers alone by the Appeals Panel, which the Chairperson approved.

SUBMISSIONS BY THE APPELLANT

29. In terms of the issues highlighted as not being in dispute, to which the Respondent acceded, include the following:
- i. The Appellant's ADRV resulted from the Adverse Analytical Finding as contemplated in the Rules;
 - ii. The Prohibited Substance is only prohibited "In – Competition" as contemplated in the Rules and is not a Specified Substance.
 - iii. The Prohibited Substance was used 'Out of Competition' in a context unrelated to sport performance.
 - iv. It was not disputed that the Appellant had used the Prohibited Substance 3 days before the competition and the source of the Prohibited Substance was established.
 - v. It was further not disputed by the Respondent that the Prohibited Substance was not used with an intention to obtain an unfair advantage in terms of his performance¹.
 - vi. In terms of Article 10.2.1 of the Rules, the period of ineligibility shall be four years unless the Appellant can establish that the ADRV was not intentional, in which event the period of ineligibility shall be two years.²
30. In order to ascertain what is 'intention' in Article 10.2.1., regard must be had to Article 10.2.3, which defines the word "intentional" to mean that it is meant to identify those athletes who cheat. While

¹ See page 22 of the Transcript

² As set out in Article 10.2.2 of the Rules

cheat can be used in different contexts regard should be had to the fact that the Rules give effect to the Act³, which was promulgated ‘to promote the participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance, thereby rendering impermissible doping practices which are contrary to the principles of fair play...’

31. It was not the Appellant’s intention to enhance his performance in any way, given that the Prohibited Substance was taken for recreational purposes. In this regard it was submitted that Article 10.2.3 should be read in its proper context taking into account the fact that the use of the Prohibited Substance was ‘Out of Competition’.
32. It was submitted that the latter portion of Article 10.2.3 deals with the onus for “intention” as contemplated in Article 10.2.1 and distinguishes between Specified Substances and Non-Specified Substances. With regards to substances that are Not Specified, Article 10.2.3 mentions certain factors which, if proven, will establish a refutable presumption of “not intentional” in favour of the Athlete. These include:
 - a. The violation must result in an AAF (which is not disputed);
 - b. The substance must only be prohibited ‘In Competition’(which is the position);
 - c. The substance is Not Specified (which is the position)
 - d. The Prohibited Substance is used “Out of Competition” (which is not disputed)
 - e. The Prohibited Substance was used in a context not related to sport performance (not disputed in casu).
33. If all the aforementioned factors are satisfied Article 10.2.3, being pre-emptory, means then that the ADRV shall not be regarded as ‘intentional’.
34. On analysis of the facts, the aforesaid provision gives credence to the Appellant’s argument that ‘intentional’ is used to deal with those Athletes who have an intention to cheat in the context of obtaining an unfair advantage in the sport they are playing, which was clearly not the case with the Appellant.
35. Two cases were highlighted by the Appellant namely that of 1) *Nlikola Radjen V Federation Internationale de Natation (FINA)*⁴ and that of 2) *FIFA v Confederation sudamericans de Futbol and Brian Fernandez*⁵. In both cases the Athletes had both committed ADRV’s having used cocaine in a social setting which was not related to sport. Both Athletes appealed the decisions of the Anti-

³ The South African Institute for Drug Free Sport Act, 14 of 1997

⁴ CAS 2015/A/4200

⁵ CAS 2016/A/4416

doping panels on the basis that the last sentence of Article 10.2.3 ought to have been applied and the sanction ought to have been in terms of Article 10.2.2.

36. In analysing and applying Article 10.2.3, the CAS held that “cheating” is a key element of “intent”. By using a Prohibited Substance an athlete’s will must be directed towards achieving an advantage in comparison to other athletes. This must relate to the will of the athlete using a Prohibited Substance which is prohibited only ‘In-competition’. Use of the Prohibited Substance ‘Out of competition’ in a context unrelated to sports performance and which is not directed towards achieving such unfair competitive advantage, in terms of Article 10.2.3, does not mean “cheating”, and in such cases there is no “intent” to be found.
37. The CAS in both cases found, on a balance of probabilities, that the Appellants took the cocaine in a private social context. Further that the Appellant had established to the comfortable satisfaction of the Panel that the substance was taken outside of the ‘in - competition’ period, which as confirmed by the Respondent started twelve (12) hours before the relevant competition/s.
38. Thus all the requirements of 10.2.3 were fulfilled. Thus Article 10.2.1 does not apply and the period of ineligibility shall be two years in accordance with Article 10.2.2 of the Rules.
39. Based on the foregoing Radjen and Fernandez cases, it is clear that where the elements set out in the final sentence of Article 10.2.3 are present, the athlete shall not be deemed to have acted with “intention” and the applicable sanction shall be two years in terms of Article 10.2.2.

SUBMISSIONS BY THE RESPONDENT

40. The Respondent confirmed and agreed to paragraphs 5 - 11.8 of the Appellant's Heads of Argument which has been highlighted in paragraph 29(i)-(iv) above.
41. That while the Appellant intentionally took the Prohibited Substance and accepted the risks thereof, it is accepted that this was not related to sporting performance in order to gain an unfair advantage.
42. The Respondent concurred that Benzoyllecgonine, a metabolite of cocaine is prohibited 'in-competition' only, and acknowledges that there may have been a misinterpretation of this fact in the Tribunal hearing.
43. The Respondent further accepted the Appellant's reliance on the Radjen and the Fernandez cases and did not contest that the sanction be applied in terms of 10.2.2 based on the fact that the factors contained in 10.2.3 had been met.

DECISION:

44. Athletes have a responsibility to ensure that prohibited substances do not enter their system. The Rules are therefore applied in terms of strict liability and all the Respondent was required to prove was the presence of the prohibited substance in the athlete's system.
45. While the source of the Prohibited Substance was sufficiently established based on the Transcript and the evidence of the Athlete, the Prohibited Substance as a Non-Specified Class S.6 Stimulant on the WADA Prohibited List, was only prohibited 'In-competition'. In-competition meaning the period commencing twelve hours before a competition in which the Athlete is scheduled to participate through to the end of such competition and the sample collection process related to such competition.
46. It was established that the Appellant had ingested the Prohibited Substance outside of the the 'In-competition' period and did not have the requisite "intention" to cheat.
47. Thus all the requirements for the application of the last sentence of Article 10.2.3 have been fulfilled. Therefore in terms of the sanction that is applicable, Article 10.2.1 of the SAIDS Rules does not apply and the peiod of ineligibility shall be two years, in accordance with Article 10.2.2. of the Rules.

ORDER

It is hereby ordered that:

1. The Appeal is upheld.
2. The period of ineligibility to be imposed against Mr Thandani Ntshumayelo is two years.
3. The period for which the Appellant was on provisional suspension shall be credited to the period of ineligibility imposed.
4. Each party to pay its own costs in regard to the Appeal.

Dated at **DURBAN** on the **07 SEPTEMBER 2018**.

Ms Marissa Damons

Dr. Ephraim Nematswerani

Ms. Mami Diale