Case No: **SAIDS/2018/07**

In the matter between:

SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT Complainant

and

RETSHIDISITSWE MLENGA Athlete

Held at:

Holiday Inn Express, Rosebank, JHB

On

15 January 2019 and 14 February 2019

RULING

BEFORE:

CHAIRPERSON	MR S NAMENG
PANEL MEMBER	DR D RAMAGOLE
PANEL MEMBER	MR T GAOSHUBELWE

ON BEHALF OF SAIDS:

PROSECUTOR	MS WAFEEKAH BEGG
	and
	MS CORRIEN BERG

ON BEHALF OF ATHLETE:

ATTORNEY	MR G BORUCHOWITZ

THE PARTIES

1. The Complainant is South African Institute for Drug-Free Sport (SAIDS), a public entity established in terms of Act No. 14 of 1997, its objective is to promote participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance.

2. SAIDS has accepted the World Anti-Doping Agency (WADA) code and it implemented its anti-doping rules in accordance with the code. The rules apply to Athletics South Africa (ASA), International Association of Athletics Federations (IAAF) of which ASA is an affiliate and to Mr Retshidisitswe Mlenga (Athlete)

3. The athlete is Retshidisitswe Mlenga

INTRODUCTION

4. On 11 December 2018, the athlete was formally charged with an anti-doping rule violation in terms of Article 2.1 of the 2016 Anti-Doping Rules of SAIDS.

BACKGROUND

5. On 15 March 2018, and at the University of Pretoria, in Pretoria, the athlete was requested by SAIDS Doping Control Officer (DCO) to submit "A" and "B" urine samples during an in-competition test.

6. The athlete's urine samples Ä"and "B" (Sample No. 4176032) were taken to Gent laboratory in Belgium for analysis.

7. The urine sample "A" was analysed by the laboratory and the laboratory issued the results which had adverse analytical finding. The ADAMS Analytical Test Report (Test Report) issued by the laboratory and dated 8 May 2018, stated the following: -

7.1 The sample was collected in a Geneva Berlinger bottle, upon arrival at the lab, the A-sample could be opened. The B-sample was sealed. The results for the A-sample therefore refer to the analysis of an unsealed sample, as it was preferred by the TA not to split the B-sample at this stage and keep it sealed awaiting a possible B-analysis ...

8. Furthermore, the Test Report confirmed the presence of S1.1A Exogenous AAS/Stanozolol Metabolite 3'OH-stanazolol-glucuronide in the athletes urine sample "A" (Number 4176032), which led to adverse analytical finding.

9. On 15 May 2018, SAIDS advised the athlete about the adverse analytical finding in his urine sample.

10. As a result of the adverse analytical findings, the athlete was provisionally suspended from competing and particularly 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 15 May 2018.

11. On 22 May 2018, the athlete through his erstwhile attorney (G. Morgan) advised SAIDS that he wants to exercise his right to have his "B" sample tested.

12. On 6 June 2018, the athlete's urine "B" sample [number 4176032] was tested and the results thereof confirmed the results of adverse analytical finding on urine sample "A".

13. On 7 June 2018, SAIDS advised the athlete of his urine sample "B" results, which confirmed the results of urine sample "A".

14. On 12 June 2018, the athlete, through his second erstwhile attorney (Z Majavu) addressed a letter to SAIDS whereby he advised that he wanted to conduct a test on a supplement named "Curse" he allegedly consumed during the in-competition.

15. The athlete on 18 May 2018, responded to SAIDS letter of notification mentioned above by explaining what he consumed on 15 March 2018, during the Senior Championship Competition. [pages 11 – 12 of the Bundle]

16. The athlete's erstwhile attorney (Majavu) addressed a letter to SAIDS advising that the athlete has financial difficulties to have the Curse supplement he allegedly consumed, be tested.

17. During November 2018, SAIDS volunteered to have the supplement "Curse" be tested without any costs to be incurred by the athlete.

18. The supplement was tested at the Laboratory of the University of Free state and the results confirmed that there was no Stanozolol and Metabolites in the supplement.

PROCEEDINGS BEFORE THE PANEL

19. The hearing was convened and proceeded with on Tuesday 15 January 2019 and continued on 14 February 2019.

20. Ms Berg read the charge to the athlete and the athlete confirmed that he understood the charges brought against him.
21. The athlete did not have a problem taking an oath.

22. The athlete called one witness Mr Radebe and SAIDS called three (3) witnesses: Mr Msomi, Ms Mocwagole and Professor Van Eenoo.

PLEA AND ISSUES FOR DETERMINATION

23. The athlete pleaded not guilty to the charges brought against him, and the issues for determination which the Panel had to consider and make determination were the following:

    23.1 whether the athlete has contravened the Anti-Doping Rules after prohibited substance was found in his urine samples "A" and "B" (Sample No. 4176032) and whether such substance was consumed intentionally or otherwise.

    23.2 If so, whether the appropriate penalty to be imposed for ineligibility should be four (4) years and/or two (2) years and/or any other period legally permissible.

    23.3 whether SAIDS departed from International Standards for Testing (IST) when it tested the athlete.

THE RELEVANT RULES AND SANCTIONS ON INDIVIDUALS

24. The Anti-Doping Rules deal with anti-doping violations and have application to Federations, such as Athletics South Africa (ASA), International Association of Athletics Federation (IAAF) and Athletes, such as Retshidisitswe Mlenga.

25. Article 2.1 provides as follows: -

Presence of a prohibited substance or its metabolites or makers in a player's sample

2.1.1 *It is each Player'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 Player's part be demonstrated in order to establish an anti-doping rule violation under article 2.1.*

2.1.2 *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following:- 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 and the B sample is not analysed; or where the Athlete B sample is analysed and the analysis of the Athlete's B sample confirms that the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or where the Athlete's B sample is split into two (2) bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance of its Metabolites or Markers found in the first bottle.*

2.1.3 *Excepting those substances for which a quantitate threshold is specifically identified in the Prohibited List, the presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample shall constitute an anti-doping rule violation.*

Article 10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or prohibited Method

The period for Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 the period of ineligibility **shall** be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or ther Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2. The anti-doping rule violation involves a Specified Substance and SAIDS can establish that the Anti-Doping Rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of ineligibility **shall** be two (2) 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 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**.

ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

SAIDS shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether SAIDS has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation, which is made. 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 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 a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.1 *Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subjects of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. CAS on its own initiative may also inform WADA of any such challenge. At WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within ten (10) days of WADA's receipt of such notice, and WADA's receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae, or otherwise provide evidence in such proceedings.*

3.2.2 *WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred, which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then SAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

3.2.3 *Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or these Anti-Doping Rules, which did not cause an Adverse Analytical Finding or other anti-doping rule violation, shall not invalidate such evidence or results.*

If the Athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then SAIDS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.

The WADA world anti-doping code

26. The WADA World Anti-Doping Code (the "WADA Code") establishes international standards and rules regulating anti-doping testing and enforcement. The contents of the WADA Code are binding on ASA.

27. The introduction to the WADA Code identifies the purpose of the World Anti-Doping Program and Code as follows: -

"The purpose of the World Anti-Doping Program and the Code are:

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus, promote health, fairness and equality for Athletes worldwide; and*
- *To ensure harmonized, coordinate and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping".*

28. The introduction also identifies the 'main elements' of the World Anti-Doping Program. These include: 'Level 2: International Standards'. The Code provide for mandatory compliance with International Standards:

"International Standards for different technical and operational areas within the anti-doping program will be developed in consultation with the Signatories and governments and approved

by WADA. The purpose of the International Standards is harmonisation among Anti-Doping Organisations responsible for specific technical and operational parts of the anti-doping programs. Adherence to the International Standards is mandatory for compliance with the Code. The International Standards may be revised from time to time by the WADA Executive Committee after reasonable consultation with Signatories and governments. Unless provided otherwise in the Code. International Standards and all revisions shall become effective on the date specified in the International Standard or revision".

Article 5.2. Standards for testing

28.1 *Anti-Doping Organisations with Testing jurisdiction shall conduct such Testing in conformity with the International Standard for Testing"*

28.1.1 Section 7.4.1 requires the Doping Control Organisations to collect urine samples from athletes in accordance with procedure in Annex D ('Collection of urine samples'). These include:

28.1.2 *To collect an Athlete's urine Sample in a manner that ensures: .....c) the Sample has not been manipulated, substituted, contaminated or otherwise tampered with in any way".*

EVIDENCE BY THE ATHLETE

29. The athlete testified that on the day of the SA Senior Championship Competition 15 March 2018, he was not feeling well and was "very sick". The Coach advised him to drink amino acid of which he did.

30. He thereafter competed in the semifinals. After he competed in the semi-finals the Coach advised him to consume vitamins which he obtained from his fellow athlete and training partner.

31. He testified that after taking vitamin supplements he felt better.

32. He was approached by people from SAIDS for testing, then he went to the Testing Control Room.

33. After the testing, the next date, he competed in the 100-meter finals and he came on position six (6), which he considers poor performance by his standards.

34. He testified that his running for the 18 months leading up to the testing of 15 March 2015 were consistent, so it wasn't a case of having struggled at one point and performed for much better during the March 2018 SA Senior Championship.

35. He was nervous after finding out about test results and his Coach was hurt.

36. He testified that his first Coach was Jan Strydom whom he left because there was no performance with him.

ATHLETE'S CROSS-EXAMINATION

37. When asked why he left Coach Reneilwe Aphane, he stated that is "*because Coach Aphane has his own problems. He can't train and, he is now working".*

38. Ms Berg posed the question to the athlete for the second time about the reasons why he left Coach Aphane.

39. The athlete's answer was that "*oh he had his problems due to the fact that he has a similar case as mine*"

40. Ms Berg asked the athlete a follow-up question to elaborate on what is meant by "*a similar case*". The athlete's answer was "*I don't know, he was tested, and I don't know what he was found with*".

41. The athlete was asked again "*was the Coach tested positive*". The athlete's answer was "*yes mam*".

42. The athlete was asked as to why he jumped from one attorney to the other regarding his representation on his case.

43. His answer was that, *oh first attorney (Grant Morgan) didn't have very much influence, so he told me to plead guilty and I was not comfortable with that because I didn't do it. Then I went to Mr Zola Majavu and he told me it is an easy case because the value burden he has seen, but he was not working on helping me, he was more of trying to find out what the Coach is doing, so he was not really helping me.*

44. When the athlete was asked why Mr Majavu was still representing him even after July 2018 to end of October 2018 despite being worried about World Championship in July 2018.

45. The athlete's answer was that "*the date had passed, everything was on freeze. He just kept quite he dropped me. I don't know why he dropped me. He told me he can't help us anymore*".

46. When Ms Berg asked the athlete that "*previously you said the reason why you didn't want Mr Majavu to represent you is because you weren't happy with the way in which he was dealing with the matter*".

47. The athlete's answer was that "*yes, he just dropped us, we don't know*".

48. The question was rephrased again to the athlete whether he doesn't know, his answer was still "*yes*".

49. The athlete was asked as to what happened between the period of October 2018 to November 2018, regarding correspondence between the athlete and Mr Majavu.

50. The athlete said Mr Majavu didn't say anything and also, he didn't know about any follow-ups because he was writing exams.

51. Dr Ramagole (Panel Member) asked the athlete if he could recall when did he feel sick and the athlete testified that *it was around 08h30 in the morning and the Coach gave him amino acids or something to drink in the afternoon around 15h00 or 16h00".*

52. The athlete gave small sample for testing, however, he was advised to drink water in order to give a required sample. He took a sealed bottle of water from the bucket which was placed outside the testing station and was followed by Doping Officer all the time.

53. I asked the athlete about the contents of paragraphs 13 and 14 of the erstwhile attorney of the athlete's letter dated 12 June 2018 which forms part of the bundle at pages 17-20 and his comments.

The paragraphs read as follows: -

53.1 Paragraph 13 "*we place it on record that at this stage, he (athlete) takes no issue with the chain leading to the outcome of the analytical process*".

53.2 Paragraph 14. "*To the contrary, Mr Mlenga intends taking full responsibility for his actions, however at this stage he simply wishes to determine the actual source of such a substance being found in his body*".

54. The athlete's answer regarding paragraph 13 of the letter was that "*I have no comment. Everything went well from my side*".

55. The athlete's answer regarding paragraph 14 of the letter was that "*Oh, at the time Sir, I took full responsibility because I didn't know, I didn't have any other, I don't know how to say. I don't know*".

56. The athlete was referred to his affidavit which is page 50 of the bundle, in particular paragraph 3, which read as follows: - "*Every time I ran, I always drink amino acids on the day. I could not take anything because I was very sick at a point where I was weak, and I wanted to vomit.*

57. The athlete was asked what he meant by saying "I was very sick" his answer was that "I was feeling like nausea, *I wanted to vomit. I couldn't run*".

58. He obtained the vitamins from another athlete and they were in an orange box.

59. Ms Berg asked the athlete why he was concerned that his second attorney, Mr Zola Majavu was focused more on the Coach being tested positive more so the athlete considered himself innocent.

60. His answer was that "*because I wanted to finish my case and go back because he was like- he was going to leave this before World Juniors so that I can go and participate, but he was not helping me and I needed ..... because I couldn't apply the due date because of my case and all my scholarships were down and everything just falling apart*".

61. The athlete testified that world championship was in July 2018 and confirmed after being asked about Mr Majavu's letter that the letter was sent in June 2018 [pages 17 – 20 of the Bundle].

62. The athlete confirmed that he used the product named "Curse" despite being fully aware is written "Curse".

63. He was asked as to any reason he couldn't see the doctor more so that he was very sick and despite the sickness he wanted to proceed with the race. His answer was that he doesn't think there is a doctor at the Stadium and usually he doesn't go to doctors and yes, he was adamant to proceed with the race.

64. The athlete was asked the following: -

"So, one would expect you from the logical point of view to want to see the doctor and call it off from the race, not to proceed with the race. That is only logic, because you can die on the field. You can collapse. Remember you cannot do self- diagnosis and your Coach cannot do diagnosis, he's not a doctor, and in your own words you are saying you were very sick, even from the letter that you wrote, because I think the letter that you wrote to SAIDS you said the same thing that you are sick. So that is what I want to know. A person who is very sick would want to see a doctor. Why didn't you do that".

65. His answer was that *"because I just wanted to run Sir, so I like to run".*

66. When he was asked that in his mind can supplements reduce his sickness or can a drug prescribed by a doctor reduce his sickness.

67. His answer was that *a prescription from a doctor can reduce a sickness".*

68. The athlete was asked as to why he couldn't complete a space for athlete's personal doctor on the doping Control Form [page 8 of the Bundle] more so he was "very sick" on the day.

69. His answer was that "*because I didn't know my doctor. Like I have a doctor that is in the Free State. I don't know, he is in the Free State*".

70. When the question was rephrased, he said "*Like I didn't know how to spell it even, so I didn't write it down but on the other doping control form I did*".

71. When asked that as a person who was very sick on the day, the supplements made him better his answer was that "*No Sir*".

RE-EXAMINATION

72. The athlete testified that Mr Majavu withdrew as attorney of record because his parents were unable to pay his legal fees.

73. He testified that it was unnecessary to go to the doctor and had not taken anything or given anything by anyone to eat or drink.

74. He testified that he was happy with how the testing was conducted as evidence on Doping Control Form. [page 8 of the Bundle]

75. The athlete testified that he felt strong about his case hence he went to a third (3rd) attorney for assistance.

76. He testified that he feels that his urine sample may have been mixed up with someone else.

EVIDENCE OF TEBOGO RADEBE

77. Mr Radebe testified that he was the Sports Organiser at the High School the athlete attended. On the 15th March 2018, he accompanied the athlete to the Testing Station.

78. Mr Radebe testified that the athlete when he had to provide urine sample for the second time, he was given water and cool drink to drink.

79. He confirmed that the bottles for samples were sealed by the athlete himself.

80. Mr Radebe testified that on arrival at the Testing Station with the athlete, the procedure regarding testing was explained to the athlete

EVIDENCE BY SAIDS WITNESSES

EVIDENCE OF BERNARD MSOMI

81. Mr Msomi testified that he has been a Doping Control Officer (DCO) for eight (8) years and a lead DCO for a number of times. Mr Msomi was the lead DOC during testing of the athlete. He testified that as a lead DCO one of the things he does at Doping Control Station is to check the Doping Control Form if it's completed properly and there are no mistakes. He testified that he was the lead DCO for three (3) consecutive days, being Thursday 15 March, Friday 16 March and Saturday 17 March 2018.

82. Mr Msomi explained testing procedures at Doping Station and confirmed that if it was a test mission over more than one day, the procedure would be different in that each and every single day has its own bag, and each and every single bag has to have its own seal number as the old bad (previous day) cannot be brought to the test mission and add the new samples. Each bag has its own seal number and its own chain of custody.

83. He testified that seal number in the chain of custody form, which is page 10 of the Bundle, was A052976, and that is the seal which was used to close up the bag with all the urine samples that were collected on the day. The athlete's urine sample number 4176032 was collected in the same bag with other samples.

84. He testified that, he personally completed chain of custody and explained the omission of waybill number, seal number, no signature or courier name as well as Friday's chain of custody whilst on Saturday's chain of custody there's a waybill number, seal number and courier signature. He testified that he left it blank because he was waiting for the samples of the whole test mission and not only for a specific day (15 March 2018) to be all couriered to SAIDS offices. He normally put a waybill number only if that bag leaves him.

85. He testified that placing urine samples in a home fridge is a normal standard practice.

86. Mr Msomi testified that when he completed chain of custody forms during the test missions on 15th, 16th and 17th March 2018, it was the same process he normally follow and had never deviated from normal process.

87. He explained that the athletes are instructed to make sure that the bottles are closed and there is a second click sound on the bottle when is being closed, thereafter the athlete is given a toilet paper and the athlete is requested to place a piece of a toilet paper on the bottle cap, whereafter the athlete is instructed to put the bottle face down to check if there is any leakage. The athlete gets asked if he sees something on the toilet paper, and if there is nothing it means the bottle is not leaking.

88. Mr Msomi was referred to ADAMS Analytical Test Report and was asked why the bottle was unsealed when it reached the laboratory.

89. Mr Boruchowitz read the following paragraph which appears on ADAMS Analytical Test Report: -

"The A sample could be opened. The B sample was sealed. The results for the A sample therefore referred to in the analysis are of unsealed sample as it was preferred by the TA not to split the B sample at this stage, and keep it sealed, awaiting a possible reanalysis. The lab waives all responsibility in case the result of the A and B sample differ. The tentative 20 starting date for the B sample analysis to set on Wednesday, June 6th at 08:00 a.m. Please inform us whether or not the athlete would waive his rights as costs (indistinct) Euros excluding VAT. So, what's your feeling having seen this for the first time?"

90. Mr Msomi answered as follows: -

Nothing much I can say because I was not at the lab. Secondly, when the athlete — when we do our job from the Doping Control Station, that has never happened. Like I've explained earlier. You, the athlete, will close the bottle to the last click of the bottle. Then that specific bottle will be face down while the athlete is busy maybe opening that plastic pack where we need to get that specific bottle inside. Then they seal it, then put it back in that little box where 10 our bottles we — where we normally get our boxes out from".

91. A further question was asked to Mr Msomi: -

"I mean, are quite shocked by seeing this, that there was an unsealed bottle, and would you say this is a deviation from what's expected practice?"

92. His answer was that: -

I wouldn't say it was open. I - When I read here, it says "could be".

EVIDENCE OF MS REFILWE MOCWAGOLE

93. Ms Mocwagole testified that she is a local Control Coordinator at SAIDS and her job description amongst others include signing of all the paperwork and the equipment to the DCO's to conduct the tests. She also receives the urine samples and paperwork documents.

94. She testified that she is the one who received the urine samples in a bag including the urine sample of the athlete, sample number 4176032.

95. She explained her role after receiving the sample bags as follows: -

"The bags, when I receive the bags, I receive the bags sealed. So, what I do is I first break the seals and open and see what is inside. So, in the case of this chain of custody, I received two bags from this mission, one had the equipment and the paperwork and the one had the samples inside. So, what I did I opened the bags and the ones with the samples, I opened the samples, I placed the samples inside the fridge, then the one with the equipment, I unpack the equipment and put it back. Then from there I wrote the seal numbers on each chain of custody".

96. Ms Mocwagole testified that the reason she completes chain of custody form, paragraph 4 under the heading "if transferred to another DOC/SAIDS personnel" is as follows: -

I need to complete this just to have like record of where the - who had access and who were access to the sample. It is like a trace of and the samples, where the samples have been and I was the next person from the courier because from the courier, the courier company guys do not open the bags, I am the one to open the bags. So, I am supposed to document that I am the one who opened the bags and held the samples and placed them in the fridge".

97. She testified that she never scratched out seal number A052976 and confirmed that she wrote seal number A052979 and forgot to write her name, which was an error on her part. She also wrote the date and time.

98. She testified that when she received the samples, none were leaking even when she sent them to the laboratory *via* courier there was no leakage.

EVIDENCE OF PROF PETER MORRIS VAN EENOO

99. Prof Van Eenoo testified that he graduated from Gent University with a degree in Bio-Engineering in Agricultural Sanitation. Obtained PHD as Veterinary Scientist on Levitation of doping control in horse racing. He has been at the lab for over twenty-two (22) years in various capacities as Junior and Senior Scientist and the Director of the laboratory.

100. He has been a President of World Association of Anti-Doping Scientists, the Scientific Organisation of all anti-doping Scientists in laboratories worldwide. He is the member of WADA laboratory expert group.

101. He testified that he recognised urine sample number 4176032 and confirmed that the words written on ADAMS Analytical Testing Report (page 9 of the Bundle) which reads "A - sample could be opened" means:

"that while the sample was closed the sealing for some reason did not fully lock and in so far as that sometimes this was in so that you could try after 10/15 minutes to open it and it would be sealed and two or three days later it might be opened. So, the bottle was closed, but the sealing did not - I do not know how to put it really in the best possible description but did not fully click into the sealing system. At some point, you could open the bottles again. That is why

"the sample bottle type was also get removed from the market by Berlinger and there have been multiple communications about this by WADA".

102. He testified that both bottles "A" and "B" when they arrived at the laboratory were closed and none of the bottles had signs showing that someone tried to tamper with them. If they had been tampered with, there would be scratches and marks on the bottles.

103. In the event whereby one comes across a sample that seems that could be easily opened but is not opened and there are no scratch marks on the bottle, he stated that:

Well on 31 January 2018, there was an instruction coming from WADA which was available on their websites, perhaps it is still is, which literally states that: "Should you identify Berlinger Geneva security bottles, either A or B that can be opened manually, please document the finding. and the analysis details/explanation/opinions/test field on WADA's anti-doping administration systems, ADAMS and then inform the ADO's as to that (indistinct) options and then there are a few options and it says, says the (indistinct) is relevant here and the A sample opens manually on receipt at the laboratory and the B sample does not, Please proceed as per standard protocol with analysis of the A sample." And that is exactly what we did. The B sample was intact, was sealed and this remained sealed and stored safely until the B analysis. So, the rights of the athlete so far are guaranteed that the B sample, he could verify, or she could verify, whenever there is a B analysis, that has not been tampered with and nothing has happened in between collection and the analysis of the B sample.

Because in fact if you have an (indistinct) finding in an A sample, that result really does not matter anymore as soon as you start with the B analysis. That is the B analysis who is going to determine the final results. And so, in this case the B analysis was sealed, and we could start with the A analysis as if nothing had happened.

104. He testified that he advised SAIDS about the observations on sample "A" and SAIDS gave him a go ahead to analyse sample "B".

105. Prof testified that it was the first batch from SAIDS of Geneva Berlinger bottles and has not come across any from SAIDS.

ANALYSIS OF EVIDENCE

106. It is trite that when an athlete's urine sample is tested positive for a prohibited substance, a principle of "strict liability "is invoked. Consequent to the invocation of this principle, it is the athlete's duty and/or responsibility to discharge a burden of proof.

107. Similarly, should the athlete raise an issue about SAIDS' departure from International Standards for Testing, the burden of proof shifts to SAIDS.

108. In this regard, the Hearing Panel was faced with two principal issues *viz* strict liability principle against the athlete and departure from International Standards for Testing by SAIDS.

109. The first question that arose from the first principal issue which is "strict liability" was whether the athlete is guilty of contravening the anti-doping rule. As a point of departure, it was upon the athlete to discharge this onus. The athlete in discharging this onus provided *viva voce* evidence. The evidence provided by the athlete in this regard was contradictory and the athlete appeared to be an unreliable witness.

110. Firstly, the athlete in his evidence-in-chief testified that he left to train with Coach Strydom because he was not getting the desired results. The athlete went further to confirm this in the cross-examination. However, on the 14th February 2019 when the hearing resumed, the athlete requested an indulgence from the Panel to lead and provide further evidence. The purpose of this evidence was to proof to the Hearing Panel that the athlete's performance

during the period he tested positive and coached by Coach Aphane was below par compared to a period he was coached by Coach Strydom.

111. It must be noted that Coach Aphane had tested positive around the same period as the athlete, and it was incumbent upon both the athlete and SAIDS to either proof or disproof whether Coach Aphane's conduct was a source of the athlete testing positive. As a result of this perceived inference, correctly so or not, the athlete provided evidence amongst others to proof that his association with Coach Aphane did not improve his performance. Little did the athlete realise that the evidence he provided to the hearing panel on 15 January 2019 regarding the reasons which led him to leave Coach Strydom to Coach Aphane would follow him to the next hearing, which was 14 February 2019.

112. At the rescheduled hearing, the athlete testified, and also provided documentary proof to show the Panel that in fact his performance was better when he was coached by Coach Strydom. This evidence completely contradicts the evidence provided by the athlete on the first hearing, whereby he testified that, he was not getting desired results from Coach Strydom hence he switched to Coach Aphane.

113. The athlete in his evidence-in-chief was able to voluntarily disclose the reasons as to why he left Coach Strydom, though for some reasons he could not voluntarily disclose the reasons as to why he left Coach Aphane for Coach Gomolemo Shugaman.

114. The athlete was not forthright when asked why he changed from Coach Aphane to Coach Gomolemo. The athlete was fully aware that Coach Aphane had tested positive, but it took the athlete to be asked five (5) times to provide a direct answer.

115. The athlete under cross-examination stated that he left his first legal representative (Grant Morgan) because Mr Morgan advised him to plead guilty and he felt strong about his case as a result he couldn't plead guilty. Under the circumstances he withdrew his mandate and

appointed Mr Majavu as his new legal representative. Mr Majavu was appointed around May/June 2018 to represent the athlete and his mandate terminated around October/November 2018. The reasons the athlete provided to terminate Mr Majavu's mandate was that, Mr Majavu was more focused on the test results of Coach Aphane rather than helping him to finalise his case with SAIDS.

116. Furthermore, he felt nothing was done about his case and he wanted to compete at the World Championships which was going to be held in July 2018, as a result he was pressed for time.

117. When the athlete was asked during re-examination, he testified that he never terminated Mr Majavu's mandate, in fact, according to him Mr Majavu withdrew as his legal representative because the athlete and his parents were unable to place Mr Majavu on funds. This evidence completely contradicts the evidence provided by the athlete in his cross-examination.

118. It is important to note that the athlete's response was preceded by comments and/or oral submissions made by his legal representative during the hearing whereby his legal representative stated that he personally spoke to Mr Majavu and Mr Majavu told him that he withdrew as a legal representative of the athlete because of the funds.

119. In fact, it is important to quote verbatim what the legal representative of the athlete said:

"What was said in consultations between Mr Majavu, you know, I am not aware of, but what I do know is that the reason because I could see the line of questioning is try and draw an inference from attorneys on record and how many basically saying well, Mr Morgan thought he didn't have a good case so he is withdrawing. Mr Majavu thought he didn't have a good case, so he is going to withdraw and then he's come to a third attorney because this seems to be the line of questioning.

No, I am doing this matter on pro bono because he qualifies as a pro bono client and he cannot afford to pay fees and that is the reason why Mr Majavu withdrew as an attorney of record and

so I mean that is just to clear up. If there is an inference that they are shopping for an answer from an attorney, that is not the case."

120. This statement could have been objected to, however any objection could have taken place after the fact as the athlete was present in the hearing and heard his attorney's comment.

121. Once again, Mr Majavu wrote a letter to SAIDS dated 22 October 2018 [page 25-26 of the Bundle]. At paragraph 2, Mr Majavu stated the following:
"*We have not heard from our client's parents or received any new instructions, and we have therefore withdrawn from this matter".*

122. This is a further proof regarding the reasons as to why Mr Majavu withdrew as attorney of record for the athlete. Mr Majavu was not a witness at the hearing and there was no proof, either by way of a letter that confirms the alleged discussion between him and Mr Boruchowitz. In the absence of such letter, the statement made by Mr Boruchowitz cannot be accepted as a fact moreso he was also not a witness.

123. The evidence of the athlete's conduct regarding changing of attorneys is relevant in that attorneys firstly act in accordance with their client's instructions. Although, whether the opinion was provided as to whether the athlete didn't have a good case or not is irrelevant in this case. What is of relevance is that, Mr Majavu wrote a letter to SAIDS expressing his client's instructions that his client take no issue with the chain leading to the outcome of the analytical process, and his client further takes full responsibility of his actions.

124. The athlete testified that he was very sick during the competition and still elected not to consult the doctor. The athlete relied on the advice of his Coach Aphane about his sickness despite the athlete being fully aware that Coach Aphane was not a doctor. The athlete on the date in question testified that he took amino acids, vitamins, curse and/or supplements. The vitamins were provided by his fellow athlete, but for the reasons unbeknown to the Panel, the athlete

failed to call a fellow athlete who gave him the vitamins to testify and he never even bothered after having tested positive to verify with his fellow athlete on the types of vitamins he received. This conduct does not reflect a conduct of an athlete who wants to demonstrate on how he does not know how the metabolite of Stanozolol ended up in his urine.

125. When the athlete felt that he was sick, the first person he went to was his Coach Aphane, the Coach advised him to take amino acids and when he was still not feeling better, he went back to the same Coach and the Coach advised him to take vitamins, which he obtained from his fellow athlete.

126. The athlete also obtained amino acids from his Coach. What I find strange is that once again, the athlete fails to call Coach Aphane to testify. Now one has to ask himself a question, is it because Coach Aphane tested positive and his presence may be of detriment to the athlete's case? For an athlete who wants to proof his innocence and demonstrate fully as to how the substance ended up in his urine sample, Coach Aphane was key to that effect.

127. It is quite correct that the importance of a chain of custody forms cannot be disputed, however, the information which was not recorded even though how important it is, it was not material on the outcome of the test results.

128. SAIDS may have admitted on an e-mail dated 22 January 2019 that there were errors on the chain of custody forms which errors were also confirmed by the witnesses, but the question that arises is whether such errors were material towards the outcome of the test results, which was not.

129. It is common knowledge that the chain of custody forms in dispute were completed by Bernard Msomi and Refilwe Mocwagole who are both duly authorized employees and/or agents of SAIDS. Consequently, the absence of their names or the presence of their names on the

wrong space is not a material error that constitute serious departure from International Standards for Testing. It must be noted that the Rules do not impose absolute standards.

130. It is common cause that WADA issued a notification advising Anti-Doping Agencies that the new BEREG-KIT Geneva bottles be recalled for safety reasons and that the Anti-Doping Agencies continue using the old kit. However, the new BEREG-KIT maybe used in the absence of old bottles.

131. SAIDS was waiting for the old stock hence they used the new bottles in the meantime as directed by WADA.

Analysis of evidence regarding the departure from international standards for testing

132. Both Mr Msomi and Ms Mocwagole demonstrated satisfactorily to the Panel their knowledge of testing procedure within their area of work and the Panel has no reason not to believe their testimony.

133. The error they made regarding completion of chain of custody forms is not material to the extent of affecting the athlete's urine sample.

134. Whether Ms Mocwagole used a different bottle is neither here nor there. In fact, Professor Van Eenoo testified and elaborated on that and also confirmed that sample "B" in the presence of perceived controversy regarding sample "A", the results of sample " B" will be the ultimate provided it confirms the results obtained in sample "A".

135. The legal representative for the athlete made submissions and referred to a case of Mamabolo and quoted the words of Mr Murphy who was Chairperson of the hearing.

136. I must emphasise that the facts of Mamabolo case and this present case are different, without going into details regarding the difference, I want to firstly point out that both the athlete and his witness confirmed that there was nothing untoward regarding the procedure at the Doping Control Room, whereas in Mamabolo case it was a complete mess.

137. Secondly Professor Van Eenoo, who is regarded as an expert confirmed that there was no tampering, and in any event, there was no issue with sample "B".

138. The athlete was accompanied by DOC at all times and even when he completed the Doping Control Form under comments the athlete said it was "good".

139. The evidence of Professor Van Eenoo remains unchallenged and there is no reason why the Panel should not believe it.

140. The evidence of both Msomi and Mocwagole proofs that there was no material departure from the International Standards for Testing by SAIDS and placing the samples in a home fridge is a normal standard practice.

DEGREE OF FAULT

141. The athlete was, according to him fully aware that he was sick on the day of the competition and despite being sick he instead relied on people who were not physicians to provide him with supplements.

142. Despite these people having a first-hand knowledge of his condition on the day of the competition and provided him with supplements he still failed to call them as witnesses to collaborate his evidence.

143. All what the panel is aware of is that the athlete has tested positive for a prohibited substance, but the panel does not have the athlete's version on how the substance ended in his urine.

144. The athlete says he has no idea how the prohibited substance got into his system, he says either the sample was tampered with or somebody may have provided him with the substance. This is a clear indication of a person clutching at straws. The athlete's allegations still lack explanation.

145. The athlete has failed to proof to the panel that his degree of fault was not significant. The saddest part is that the athlete's testimony amount to someone who has said nothing.

Relevant case law: the panel considered regarding departures from international standards for testing

In WADA v Wium, CAS 2005/A/9085 *a DCO accidentally left the Respondent's urine sample at the Respondent's premises at the conclusion of the collection procedure. The sample was left unattended for 45 minutes in a sealed and tamper-proof 'Berlinger test kit. The CAS: held that departures from IST 'did not cast any doubt on the reliability of the test results', since the Panel 'cannot imagine any hypothesis under the given circumstances that would indicate that any other person, whether identified or not, might have used the period during which the samples were unattended, for any act of sabotage with a possible impact on the result of the laboratory analysis' (para 6.7).*

In IAAF v Da Silva, CAS 2012/A/2779*, the athlete provided a partial urine sample following a post-race anti-doping test. The anti-doping officials who conducted the test permitted the athlete to leave the doping control station carrying her unsealed sample bottle. The athlete then took pan in a media interview. During the interview, she placed the sample on the floor and covered it with a cloth. She then returned to the doping control station and provided the remaining portion of her sample. The sole arbitrator did not find that any departure from the IST had occurred. However, he held that, even if a departure had occurred, 'it is doubtful whether such departure led or would reasonably have led to the adverse analytical finding'.*

This was because: (i) the athlete was always in control of the sample bottle during the media interview, (if) she had signed the Doping Control Form indicating her satisfaction in the manner in which the sample had been collected, (if) she 'did not summon any expert to rebut Prof. Christiane Ayotte's expert evidence which explained that even if the sample had been spiked with recombinant EPO, it would have been strikingly obvious at the time of the analysis because the analytical image would have been overloaded with recombinant EP (Y and (iv) the athlete 'has not summoned or adduced expert evidence proving that the unsealed Sample Bottle could still have been contaminated despite the fact that it was covered with a white cloth' (para. 210).

In CAS 2010/2277 *the Appellant underwent an in-competition doping test. The sample obtained tested positive for a prohibited anabolic androgenic steroid. The Appellant claimed that the sample had been collected in violation of the IST relating to the collection of partial samples, since he had not been asked to check that his partial samples had been properly sealed before attending a medal ceremony, and had not been accompanied by a chaperone fo the ceremony. The CAS rejected the appeal. The Panel accepted the evidence of the DCO as to the circumstances in which the Appellant's partial samples were collected, including the DCO's compliance with the relevant partial sample IST procedures under Annex F (para 4.8). The Panel then went on to explain that, even if there had been a departure from the IST (which the Panel did not accept there had been), the Appellant was unable to prove that the alleged departure could reasonably have caused the adverse analytical finding. The Appellant contended that, due to his attendance at the medal ceremony, 'the chain of custody had been broken' and there was therefore no proof the urine that was tested in the lab had come from him. The Panel rejected this submission on the basis that the argument 'amounts for mere speculation without any supporting facts. The DCO had 'made it clear that there had always been at all times a DCO to supervise and to secure the samples, so that there has never been any break in the chain of custody'. The Appellant did not actually allege that the samples referred to in the Doping Control Form were not his own, and he admitted that there was no*

basis to argue that someone had deliberately sought to incriminate him. The Appellant had not presented any evidence that Someone could have tampered with his sample, nor how such tampering could have occurred (para 4. 10).

***In Wilson v UK Anti-Doping (NADP Appeal Tribunal decision dated 19 January 2012)**, the Appellant's urine sample tested positive for two prohibited anabolic steroids. She challenged the finding of the NADP Tribunal that she had committed an anti-doping violation. The Appellant contended, inter alia, that the DCOs had failed to comply with the IAAF rules regarding the collection of partial samples. The alleged departures included instructing the Appellant to remove the strip sealing the partial sample container and leaving an unsealed partial sample in a shower room. The Appeal Tribunal noted that UKAD had established that none of the alleged departures had occurred (para 36.12). It further noted that, for adulteration to have taken place, the DCOs would have had to be involved in a conspiracy. The DCOs both denied adulterating the Appellant's sample and the Appellant disclaimed any suggestion that anyone at UK Athletics or UKAD had a motive to harm her (para 36.13). In these circumstances, the UKAD Appeal Tribunal rejected all of the Appellant's grounds of challenge and upheld the finding of an anti-doping rule violation. Again, unlike in the present case, in Wilson the existence of an IST departure was rejected by the Appeal Tribunal. Nor was any evidence adduced regarding the possibility of inadvertent environmental contamination.*

CONCLUSION

146. As the burden of proof lies on SAIDS regarding departure from international Standards for Testing, SAIDS was able to proof that no departures occurred, even if they occurred such occurrence was of no material value.

147. The athlete has failed to provide any evidence whatsoever regarding the departure from International Standards for Testing.

148. The error committed by Ms Mocwagole not to insert her name is not material and same was in any event cured by her testimony by confirming that she is the one who completed the chain of custody forms.

149. The evidence of Prof Van Eenoo was never challenged, and the athlete didn't call an expert witness to rebut Prof Van Eenoo's evidence.

150. The athlete made written submissions regarding sanction, he explained that he has no idea how the prohibited substance entered his body or whether someone tampered with the sample. No evidence by the athlete was led in this regard, understandably moreso that at the beginning of the hearing it was made clear that the athlete wants to challenge SAIDS' departures from International Standards for Testing and not the merits.

151. Once it is proven that SAIDS did not depart from International Standards for testing, it became a problem for the athlete to proof his innocence regarding violation of anti-doping rules, hence he is able to state under oath that the *previous Coach at the time Reneilwe Aphane may have provided me with a substance which unbeknown to me was a prohibited substance and which I utilized, ingested or consumed with no knowledge that it was prohibited substance.*

152. These allegations by the athlete were stated for the first time on the written statement dated 22 March 2019 after he had long testified.

153. I have considered the athlete's conduct in relation to his case and what is of interest is that the athlete at all material times was represented by lawyers which some how it can be assumed that he understood the charges he was facing, the evidence he wanted to present and whether

he was not denying the charges for the sake of it. As a result, the athlete was fully aware whether he had to plead guilty or not guilty.

154. The athlete does not realize that other than being a junior athlete, first offender, a minor two weeks before he was tested, naïve, lacking of experience and maturity to understand the degree of risk, he has not provided the panel with a probable evidence on how the prohibited substance entered his body. The burden of proof was on the athlete and from the beginning when he was charged, he was fully aware of this burden as he was always represented by lawyers, but he elected not to discharge that burden.

155. The next question is that "has the athlete shown any remorse? The answer is no, maybe is because he believed he had a good case as he stated in his testimony.

156. In light of all the above circumstances, the panel is unable to consider any sanction which is below the prescribed maximum sanction.

FINDINGS

157. Given the evidence adduced by all the parties, *viva voce* evidence, documentary evidence, oral and written submissions, the Panel has established the following: -

157.1 SAIDS has proved not to have departed from International Standards for Testing when the athlete was tested and samples analysed.

157.2 The athlete has failed to proof on how the prohibited substance entered into his body and he did not violate anti-doping rules.

157.3 The athlete has failed to show any remorse for having violated anti-doping rules, in fact the athlete persisted with his case despite being fully aware that he didn't have evidence to proof his innocence and instead resorted to clutching at straws.

SANCTION

158. The athlete is sanctioned for a period of four (4) years of ineligibility, effective from the date of provisional suspension being 15 May 2018 to 14 May 2022.

159. During the period of ineligibility, the athlete will not take part and/or participate in any organized and authorized sport, be at local, national and international level.

DATED AT MELROSE NORTH, JOHANNESBURG ON THE 1ST JULY 2019

Chairperson

Sunny Nameng

(also signed for and on behalf of Dr D Ramagole and T Gaoshubelwe)