THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORTS
DOPING DISCIPLINARY HEARING

Case Number: 2020/03

In the matter between:

THE SOUTH AFRICAN INSTITUTE
FOR DRUG-FREE SPORTS — COMPLAINANT

AND

MINOR ATHLETE — RESPONDENT

DISCIPLINARY PANEL:

Dr Andy Branfield
Mr Thulaganyo Gaoshubelwe
Adv Craig Cothill

PROSECUTOR:

Mrs Wafeekah Begg-Jassiem

AWARD

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1 On 13 May 2020 the South African Institute for Drug-Free Sports (**SAIDS**) charged the minor athlete (the **Athlete**) after a urine sample taken on 26 February 2020 was tested by the South African Doping Control Laboratory in Bloemfontein under sample number 4456535. This test established the presence of LGD-4033, RAD140 and Enobosarm (Ostarine) which are prohibited substances and not specified (the **prohibited substances**).

2 According to the charge sheet the presence of these prohibited substances constituted an adverse analytical finding in breach of Article 2.1 of the SAIDS Anti-Doping Rules (the **Rules**).

3 The Athlete admitted the presence of the prohibited substances in his system and waived his right to have his B sample analysed. He was provisionally suspended on 13 May 2020 in accordance with the mandatory provision under Article 7.9.1 of the Rules as the prohibited substances are unspecified.

PROCEDURAL ISSUES

4 SAIDS and the Athlete, who was represented by lawyers, agreed that this panel adjudicate this anti-doping matter in accordance with an *"Order of Procedure"* encompassing a charge sheet, which the Athlete responded to by means of a statement of defence, together with its annexures and affidavits from the Athlete and his father.

5 SAIDS responded by means of a *"reply to the Athlete's statement of defence"* together with its annexures.

6 This panel raised preliminary issues in a document we will refer to as an *"interim memorandum"*, and despite an agreement to the contrary the panel invited the parties to rather conduct this matter by availing themselves to oral evidence and argument in line with Article 8.1.4 of the Rules. Thereafter we received a response from the Athlete's legal representative that the Athlete would be available to speak to us on his mobile phone. Clearly this would not be acceptable.

7 Both parties responded to the concerns raised by the panel but declined the invitation to present evidence other than as found in the papers. We draw no adverse inferences from any failure to testify in person.

8 In exercising our mandate we carefully considered the initial *"annexure pack"* or *"hearing bundle"* consisting of 179 pages and the subsequent answers to the issues raised by the panel in our interim memorandum.

9 The Athlete does not rely on any departure from the international standards of testing, and we accept the correctness of a positive test for the presence of unspecified prohibited substances - forbidden in and out of competition - in the Athlete's system.

10 From the outset it is necessary to emphasise the following. An Athlete's age is of no real significant consequence in this matter according to the Rules which strive to implement the principles set out by the World Anti-Doping Association (**WADA**) in its Code (the **Code**). This is particularly relevant when applying the principle of strict liability in anti-doping matters.

JURISDICTION

11 The Athlete disputed the *"Jurisdiction of SAIDS to be present at the Inter High Ruimsig High School Meeting on the 26th February 2020".*

12 This argument is not sustainable for the reasons now considered.

13 Firstly, SAIDS and therefore this panel's jurisdiction to adjudicate this matter arises as a result of:

13.1 SAIDS being the body established under section 2 of the South African Institute for Drug Free Sport Act 14 of 1997;

13.2 SAIDS implementing the principles of the Code, through its Rules in order to appoint panels such as this one to adjudicate anti-doping violations in accordance with the principles of a fair hearing; and

13.3 both parties agreed, in writing, to the appointment of this panel to adjudicate this dispute. Having no reason to refuse the appointment, each panel member has accepted such appointment.

14 Secondly, although the presence of SAIDS at a seemingly low-key high school athletics event seems out of the ordinary, it has been sufficiently explained in the affidavit of the General Manager of SAIDS (**Galant**) read together with the annexures referred to in his affidavit being the *"mission order"*, the *"DCO report form"*, and the *"report on mission"* by the lead doping control officer (**Grobler**). The Athlete has taken no issue with this evidence, but even if this evidence were disputed, it would be difficult to fault SAIDS in the manner in which it went about its duties.

15 Thirdly, the presence of SAIDS at this high school athletics meeting does not contravene section 8A of the South African Schools Act 84 of 1996 (the **Schools Act**). Although section 8A of the Schools Act mandates a procedure when testing for recreational drugs, those procedures are not of application in the realms of an anti-doping dispute, but in any event the evidence from the Athlete, under oath in his affidavit deposed to on 27 July 2020, read together with what Galant and Grobler have said suggests that SAIDS has

substantially complied with section 8A read together with section 9 of the Schools Act.

16 Lastly, the undisputed evidence points towards:

16.1 the officials of the high school athletics event having knowledge of and consenting to the testing undertaken by SAIDS;

16.2 to the extent that it is relevant, the testing was not limited to this Athlete; and

16.3 the event being sanctioned by Athletics South Africa, in which event the legitimacy of the presence of SAIDS is beyond dispute.

17 Accordingly, the Athlete's jurisdictional defence fails.

18 Other than the *in limine* defence of jurisdiction the Athlete raised **firstly** the infringement of his rights as a minor, **secondly** the defence of contamination, and **thirdly** a defence which we will refer to as *"victimisation",* to substantiate his plea of not guilty. Lastly, the Athlete argued that if found guilty the period of ineligibility should be less than four years.

19 In considering these defences the following principles apply:

19.1 SAIDS has established a rule violation of Article 2.1 of the Rules as the Athlete has conceded the presence of the prohibited substances. That being the case, the panel is prompted to consider the sanctions under Article 10.2 (ineligibility for presence of a prohibited substance), and in particular Article 10.2.1, obliging the panel to impose a 4 year ineligibility period for the presence of the unspecified

prohibited substances, unless the Athlete can establish that the rule violation was not intentional (Article 10.2.1.1);

19.2 this presumption of intent is onerous to overcome because, for example, Article 2 of the Rules places the responsibility on the Athlete to know what constitutes an anti-doping rule violation and what substances are classified as prohibited. This is the foundation on which the strict liability principle is based. It applies to all athletes, including this minor Athlete who bears the onus to *"comfortably satisfy"* this panel that the rule violation was not intentional;

19.3 when considering intent, Article 10.2.3 of the Rules distinguishes between two forms of intent. The first being the intention to cheat (direct intention). The second being knowledge of a significant risk that the Athlete's conduct might result in an anti-doping rule violation and manifestly disregarding that risk (indirect intention); and

19.4 if intent is established the issues surrounding fault are then considered.

20 Taking into account the above-mentioned principles we now turn to deal with the defences raised by the Athlete.

FIRST DEFENCE: INFRINGEMENT OF THE RIGHTS OF THE ATHLETE AS A MINOR

21 In his papers the Athlete makes a very broad statement that his rights as a minor have been violated. In our view there is no evidence to suggest that the SAIDS officials have infringed any of the various rights attaching to

persons who are considered minor. This is borne out by the Athlete's affidavit deposed to by him on 27 July 2020, the contents of which do not support a violation of any rights.

22 The allegation in this affidavit that the Athlete was threatened with a sanction if he failed to provide a urine sample is correct, because an athlete's failure or refusal to provide a urine sample comes with its own set of sanctions under Article 2.3 of the Rules.

23 Likewise, the argument advanced by the Athlete that his parents ought to have consented to him completing the doping control form holds no water.

24 SAIDS have presented evidence that the athletics event is a sanctioned Athletics South Africa event, which the Athlete participated in with the consent of his parents, and incidental to such an event are doping tests (refer to Article 16 of the Rules). The Athlete's parents by implication consented to their son completing the doping control form.[1] The same can be said regarding the school officials, who gave consent for SAIDS to be present and test at the meeting.

25 Given the primary purpose and mandate under which SAIDS operates (to prevent doping) it can hardly be said that the presence of its officials at this high school event to take urine samples jeopardises or infringes on the rights of minors. It seems to us that a South African Constitutional imperative would

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[1] CAS 2016/A/4758 Aline de Sousa Facciolla Ferreira v IWF at para 40

be to protect minors from the adverse consequences of doping. This is the mandate given to SAIDS and is exactly what its officials were attempting to do on the day in question.

26 Considering the totality of the evidence supplied in the Athlete's affidavit together with the Galant and Grobler affidavits, there can be no serious suggestion that the Athlete's rights had been violated.

27 There are two further reasons that fortify this opinion:

27.1 firstly, if there has been a transgression of the Athlete's rights as a minor, that fact will not automatically exclude the evidence of the urine sample because this panel is not constrained by the strict rules of evidence in civil or criminal matters;[2]

27.2 secondly, if there was a transgression of the Athlete's rights, that transgression does not explain the presence of the unspecified prohibited substances in his urine sample, and it is difficult to conceive of circumstances in which these alleged (but vague) procedural flaws or even denial of fundamental rights, could justify ignoring the presence of the prohibited substances.[3]

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[2] Dexgroup (Pty) Ltd v Trustco Group Intl (Pty) Ltd 2013 (6) SA 520 (SCA)

[3] CAS 2016/A/4758 Aline de Sousa Facciolla Ferreira v IWF at para 37

28 Accordingly, the Athlete has not overcome the presumption of at least indirect intent on this defence.

29 We now turn to the contamination defence.

SECOND DEFENCE: CONTAMINATION OF SUPPLEMENTS

30 It must be remembered that this Athlete, who is a minor is not obliged to establish how the prohibited substances entered his system. However, it would nevertheless have assisted this Athlete to establish the source of the contamination.

31 Taking into account the assertions by the Athlete that the supplements he was taking could have been contaminated, a reference to the definition of *"contaminated product"* according to the Rules is useful:

> *"A product that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable Internet Search."*

32 As stated, although we are not obliged to expect from the Athlete to establish the manner in which the prohibited substances entered his system, it is nonetheless extremely rare for any athlete to:

"establish lack of intention to commit an ADRV (or to cheat) without proof of how the prohibited substance came to be present in his or her system…".[4]

33 The main gist of the Athlete's defence on this score is to rely on the evidence of his father who purchased supplements at Dischem after speaking to unknown representatives.

34 There is no reason to disbelieve this evidence, and we will (perhaps too generously) accept the Athlete's explanation when completing the doping control form and indicating he takes no supplements, when in fact this was not the case. Ultimately, nothing turns on this point because whether or not the Athlete was taking supplements does not explain away the presence of the prohibited substances in his urine sample.

35 At best, the evidence tendered by the Athlete on the issue of contamination is speculative. The explanations certainly do not overcome the burden of proof carried by the Athlete (comfortable satisfaction) to explain the absence of intent and falls very short of what is required from any athlete in the circumstances of the strict liability framework.

36 Taking the definition of *"contaminated product"* into account, the Athlete has made available no evidence to comfortably satisfy this panel that the products used by him were contaminated, and to find otherwise - that the

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[4] Aline case referred to above at para 43 and CAS 2017 / A / 5112 Arsan Arashov v International Tennis Federation at para 109

tendered evidence overcomes the presumption of intent - would permit other athletes to:

"shirk their responsibilities under the anti-doping Rules by not questioning or investigating substances entering their body [and] would result in the erosion of the established strict regulatory standards and increased circumvention of anti-doping rules".[5]

37 Additionally, the Athlete has tendered no evidence to displace the WADA accredited laboratory results of his urine sample.

38 Accordingly, the contamination defence must fail, and the Athlete has failed to overcome the presumption of at least indirect intent.

THIRD DEFENCE: VICTIMISATION

39 The Athlete suggests that he has been victimised by the *"foul play"* of another athlete, but the Galant affidavit sufficiently explains the basis for the presence of SAIDS at the high school athletics meeting. SAIDS acted upon information it received from an anonymous tip off which ultimately proved to be correct.

40 Assuming the correctness of this (entirely unsubstantiated) defence, that fact does not explain the existence of the prohibited substances in the Athlete's urine sample.

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[5] CAS 2008/A/1488*P v International Tennis Federation*, at para 2

41 Accordingly, we find that the Athlete has failed to overcome the presumption of at least indirect intent. However, that is not the end of the matter, and we will return to the issue of intention later in this award under the heading of *"REPORTING OBLIGATIONS"*.

RULE VIOLATION

42 The Athlete is guilty of violating Article 2.1 of the Rules (presence of an unspecified prohibited substance), and has failed to overcome the presumption of indirect intent under Article 10.2.1 read with Article 10.2.3 of the Rules. As to indirect intention:

42.1 it is well established that any athlete cannot escape the consequences of a rule violation by simply relying on the advice of another (in this case the Athlete's father); and

42.2 whilst there is some evidence that the Athlete's father questioned unknown representatives of Dischem, that evidence does not go far enough to overcome a presumption of indirect intention. This certainly does not amount to a serious effort to have the supplements tested. It does however point towards at least some knowledge of the risk associated with indirect intention.

43 We view the unexplained presence of the unspecified prohibited substances in a 15-year-old schoolboy participating in an inter-high athletic event as a significant violation.

44 Thus, this panel is obliged in accordance with Article 10.2.1 of the Rules to award a 4 year period of ineligibility.

45 We now turn to the issue of fault.

FAULT

46 In awarding our sanction the panel is afforded a measure of discretion under Article 10.5.2 of the Rules because if the Athlete establishes an absence of fault or significant fault or negligence, the applicable period of ineligibility may be reduced based of the athlete's degree of fault, but the reduced period of ineligibility may not be less than one half of the period of ineligibility otherwise applicable. As with Article 10.2.1.1, it is for the Athlete to comfortably satisfy the panel that he bears no fault or no significant fault or negligence, but in line with WADA principles the application of this rule applies in only exceptional circumstances.

47 The wording of this Article suggests that it is to be applied in a manner tailored to the facts of a given case, and should be determined after viewing *"the totality of the circumstances and taking into account the criteria for no fault or negligence was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the prohibited substance entered his system".* [6]

48 It is also obvious that in applying the leniency afforded by Article 10.5.2 the presence of fault is not an issue, it is simply the Athlete's degree of fault to

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[6] Appendix 1 of the Rules

be determined by taking into account certain factors in deciding if there should be a reduction in the period of ineligibility. As with intent, the onus to establish the absence of any degree of fault lies with the Athlete. Again, this is a cornerstone of strict liability we are obliged to apply.

49 In considering the application of the degree of fault in the realms of a doping violation, we have relied on the seminal decision of Marin Cilic v ITF.[7] The sanction in Cilic is irrelevant (despite the Athlete's reliance thereon) because those facts do not concern an unspecified prohibited substance, but this case does provide a useful guideline concerning the degrees of fault and how this panel ought to go about dealing with this issue:

49.1 there are three degrees or categories of fault being: i) significant (or considerable), ii) normal and iii) light;

49.2 in order to determine a degree or category of fault the panel ought to consider both the objective level of fault (referring to the standard of care to be expected from a reasonable person in the athlete's situation) and a subjective level of fault (referring to what can be expected from that particular athlete in light of his particular personal capacities);

49.3 generally, the objective elements should be *"foremost in determining which of the three relevant categories a particular case falls"* under,

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[7] CAS 2014/A/3335 Marin Cilic v ITF from para 69 onwards

and the subjective element can be used to move a particular athlete *"up or down within that category"*.

50 As was done in Cilic we now apply these principles to this matter:

Objective element of the level of fault

51 The prohibited unspecified substances the Athlete has acknowledged was in his system are forbidden at all times. They are also performance enhancing. Under these circumstances this Athlete is required to *"be particularly diligent and, thus, the full scale of [the] duty of care"* applies.[8]

52 This duty has not been met at all, but in particular, for the principal reason that there is insufficient evidence that the 5 different supplements the Athlete has admitted ingesting were contaminated.

53 In any event, assuming that these products were contaminated, and contamination was relevant, the panel is not comfortably satisfied that:

53.1 enough was done to ascertain the contents of these products. In fact, there has been no evidence that the labels were read;

53.2 the ingredients of these products were crosschecked with the list of prohibited substances;

53.3 an Internet search of any of the products was made; and

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[8] Cilic at para 75 a

53.4 appropriate experts were employed to diligently advise on the ingestion of these products.

54 Although there was a certain degree of care and caution taken when enquiring from representatives of Dischem (by no means are they experts) about the nature of the products, that enquiry falls far short of the diligent duty expected from an athlete confronted with the presence of no less than 3 performance enhancing unspecified prohibited substances which are forbidden to be in his system at all.

The subjective element for the level of fault

55 The most obvious subjective element in this matter is the Athlete's youth, inexperience and lack of education. Although no evidence was tendered about this, we will accept that the Athlete's age probably infers that he has little education concerning anti-doping matters. Apart from the relationship the Athlete has with his father, this is also the only subjective element available on the evidence.

56 On the very relevant point of youth, Cilic refers to CAS 2011/A/2493 CAS v Minor. Whilst this case deals with the rule violation by a minor for the presence of a specified substance in competition only resulting in a lesser sanction of ineligibility, this case is similar to the facts this panel is currently dealing with because as at paragraph 49 the following is stated:

> *"As the athlete was still of compulsory school age at the time of the anti-doping tests, he was not only a minor, but still sufficiently young to have a submissive relationship with the adult, in this case with his*

trainer, in whom his own parents had all confidence… Given also that he was not yet old enough to commence professional training…

57 We accept that this quotation is an almost replica of the facts the Athlete finds himself in because there seems to be a *"submissive relationship"* between the school going Athlete and his father. However, an athlete cannot fault another even in these circumstances because that would lead to the erosion of the strict liability principle as referred to above.

58 It is also worth repeating that, according to Cilic, the subjective elements are less important than the objective elements when dealing with an unspecified prohibited substance completely forbidden from being found in the system of an athlete at any time.

59 Even on the most generous of interpretation the Athlete has provided no evidence to justify a reduction of the period of ineligibility under Article 10.5.2 of the Rules read with the Cilic guidelines.

60 We are of the opinion that the Athlete has not overcome the presumption of fault to any degree. We are of the view that the fault is significant and the 4 year period of ineligibility ought not to be reduced.

61 In view of the COVID-19 pandemic and the delays associated therewith the Athlete's period of ineligibility will commence from the date of sample collection (refer to Article 10.11.1 of the Rules), being 26 February 2020.

62 Before making our award, we now return to the particularly distressful facts of this matter.

REPORTING OBLIGATIONS

63 The combination of the 3 unspecified prohibited substances in a 15-year-old school going boy is alarming. It is most improbable that these 3 related but compatible banned substances appear naturally or by contamination in the urine sample of any athlete. The probabilities are overwhelmingly in favour of these 3 prohibited substances being ingested in a stacked form. This suggests a level of sophistication that is, in our view, far beyond the capabilities of a 15-year-old school boy.

64 Ironically, a defence raised by the Athlete that his rights as a minor are being infringed may now be relevant because, as we have stated the level of sophistication required to ingest the combination of these 3 prohibited unspecified substances is most probably outside the capabilities of the Athlete.

65 Although we have found that direct intention is absent, the most probable explanation for presence of these unspecified substances points us in the direction of the Athlete being assisted by an adult.

66 In a South African context it would be irresponsible for this panel to ignore the rights of children as emphasised in section 9 of the Children's Act 38 of 2005 (the **Children's Act**), emphasising that "*In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.*"

67 Although publication of this award is limited by Article 14.3.6 of the Rules as public reporting does not apply to a minor athlete, there is a proviso in that:

"Any optional Public Reporting in a case involving a Minor shall be proportionate to the facts and circumstances of the case."

68 We interpret Article 14.3.6 to provide for an optional reporting of this matter proportionate to the facts and circumstances of the case, and find that the facts of this case justify a measure of reporting. A literal interpretation of Article 14.3.6 of the Rules, that this award remain completely confidential would, in the circumstances of this case not be in the interests of this Athlete.

69 Also, relying on the provisions of the Children's Act, that the rights of a child are paramount we recommend that, with due regard to the privacy of the Athlete as a minor, this matter be referred for further investigation.

70 Although our mandate does not encompass an award of this nature, we are nonetheless compelled to advise SAIDS, with due regard to the Athlete's privacy as a minor, to report this matter to the following persons and/or institutions for further investigation:

70.1 the headmaster of the high school attended by the Athlete;

70.2 the Minister of Basic Education;

70.3 the South African Police Services; and

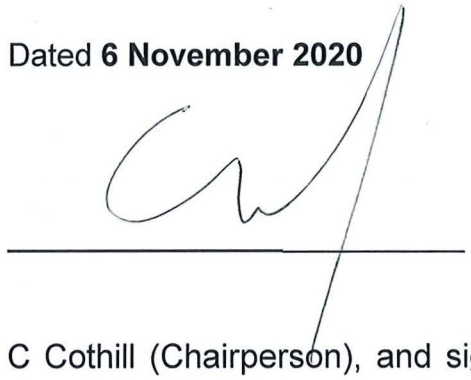
70.4 the South African Child Welfare Services.

SANCTION

71 The Athlete is guilty of a violation of Article 2.1 of the Rules.

72 The Athlete's period of ineligibility is 4 years commencing from 26 February 2020 and ending at midnight on 25 February 2024 during which period the Athlete is prohibited from participation in any sport in accordance with the Rules and in particular Article 10.12.1.

Dated **6 November 2020**



C Cothill (Chairperson), and signing on behalf of Dr Andy Branfield and Mr Thulaganyo Gaoshubelwe