BEFORE THE ANTI-DOPING APPEAL TRIBUNAL OF SOUTH AFRICA HELD IN CAPE TOWN

Instituted in terms of section 17(2)(a) of Act No. 14 of 1997, as amended by Act No. 25 of 2006

Case No: SAIDS/2018/07/A03

IN THE MATTER BETWEEN:

RETSHIDISITSWE MLENGA **APPELLANT**

and

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 Thabiso Kutumela (Appeal Board Member)

(hereafter referred to as "the Appeal Panel")

Appearing for the Appellant:

Advocate J. Hoffman

Instructing Attorney: Gary Boruchowitz

Of Schindlers Attorneys

Appearing for the Respondent:

Attorney: Mrs Wafeekah Begg

Prosecutor for: The South African Institute for Drug-Free Sport.

INTRODUCTION

1. These proceedings are governed by the South African Institute for Drug Free Sport (SAIDS) Anti-Doping Rules 2016 ("the Anti-Doping Rules"). Federations and athletes are subject to the jurisdiction of SAIDS and are required to comply with these Anti-Doping Rules as a matter of law and contract.

2. The Athlete, Mr Retshidisitswe Mlenga, was charged with an Anti-Doping Rule Violation ("ADRV") in accordance with the 2016 SAIDS Anti-Doping Rules on 15 May 2018, after being tested on 15 March 2018 'in-competition' for the presence of any Prohibited Substances contained on the World Anti-Doping Prohibited List. Mr Mlenga tested positive for 3'OH –stanozolol-glucuronide a metabolite of Stanozolol which is a Non-Specified Prohibited Substance on the World Anti-Doping Prohibited List, found in his A sample (sample number 4176032).

3. As a result of the ADRV, Mr Mlenga was provisionally suspended as of 15 May 2018.

FACTS

4. On 22 May 2018 the Athlete exercised his right to have his B sample tested, the results of which confirmed the results of the ADRV issued on sample A.

5. The Appellant during June 2018 advised that he wanted to conduct a test on a supplement named "Curse" that he allegedly consumed during the competition. The supplement was tested at the laboratory at the University of the Free State by SAIDS and the results confirmed that there was no Stanozolol or any of its metabolites in the supplement.

6. A hearing was convened on 15 January 2019 which was re-convened on 14 February 2019. The findings of the Tribunal based on the evidence presented found the following:

    i. That SAIDS had proved not to have departed from the international standards for testing when the Athlete's samples were taken and tested.

    ii. That the Athlete failed to prove how the Prohibited Substance entered his body and failed to disprove that he had intention to ingest the Prohibited Substance and as a result was sanctioned to a period of four years ineligibility effective from the date of his provisional suspension being the 15th May 2018.

THE GROUNDS FOR APPEAL

7. The main ground of the Appeal brought by the Appellant is against the length of the sanction imposed upon him by the Tribunal and in relation thereto states that the Tribunal erred in arriving at this decision by not considering the following:

   7.1 That it failed to properly take into consideration that the Appellant was in all material respects a minor and a junior athlete at the time that he tested positive for the Prohibited Substance;

   7.2 That the Appellant did not have the maturity to understand the degree of risk he was taking by accepting what he believed to be medication from a coach whom he looked to for guidance and whom he could reasonably have been expected to take instruction from;

   7.3 That the Appellant was a first offender with no previous record of misconduct;

   7.4 That the Appellant was clearly under the influence of his coach Mr Reneilwe Aphane;

   7.5 That the Appellant is financially vulnerable and relies on athletics for a bursary and that the Appellant would be financially ruined by the length of the sanction and would not be able to procure future sponsorships;

   7.6 That in the context of the standard of strict liability, where it is unnecessary that intent, fault, negligence or knowing use be demonstrated by the Respondent, and when these elements have not been proved, that the appropriate penalty for ineligibility should not be 4 (four) years, which is the lengthiest sanction possible.

THE ISSUES FOR DETERMINATION BY THE APPEAL PANEL

8. The issue in essence that falls to be determined by the Appeal Panel in this matter is:

   a. Whether or not it can be established, based on the SAIDS Rules and relevant case law, that Mr Mlenga did in fact have the necessary intention (whether direct or indirect) as defined in the said Rules; and

   b. By virtue of that intention, whether the sanction imposed by the Tribunal in the circumstances should be upheld or reduced.

THE LEGAL FRAMEWORK

Article 2.1 of the SAIDS Rules provides as follows: -

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

9. *2.1.1 - 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 Athletes part be demonstrated in order to establish an anti-doping rule violation under Regulation 2.1.2 (Presence).*

10. *2.1.2 - Sufficient proof of an anti-doping rule violation under Regulation 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's 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.

11. *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 Athlete's Sample shall constitute an anti-doping rule violation.*

12. *2.2.1 – It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body and that no Prohibited Method is used. 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 for Use of a Prohibited Substance or a Prohibited Method.*

13. *2.2.2 - The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used or attempted to be Used for an anti-doping rule violation to be committed.*

Sanction

14. *In terms of Rule 10.2.1: The period of ineligibility to be imposed for a violation of Rule 2.1, 2.2 or 2.6 (Presence of Prohibited Substance or its Metabolites and Markers) which does not involve a Specified Substance shall be four years where;*

    10.2.1.1 The ADRV does not involve a Specified Substance unless the Player or other Person can establish that the ADRV was not intentional.

    10.2.1.2 The ADRV involves a Specified Substance and SAIDS can establish that the ADRV was intentional.

15. *If Rule 10.2.1 does not apply then the period of ineligibility shall be two (2) years. However the absence of intention must be proved.*

16. *Article 10.4: Only where the Athlete or other Person can establish in an individual case that he or she bears No fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated A further reduction in sanction is permissible in terms of Article 10.5.2 (where Article 10.5.1 is not*

applicable if a Athlete or other Person establishes that he / she bears No Significant Fault or Negligence. However this further reduction would be based on the Athlete's degree of fault.

17. *Definition of "**Intention"** - 10.2.3 – As used in Rule 10.2 and 10.3, the term "**intentional"** is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he/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.*

BURDEN OF PROOF

18. At the outset, in terms of Article 3.1 of the Rules SAIDS shall have the burden of establishing that an Anti-Doping Rule Violation has occurred to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation. This standard of proof in all cases is greater than a mere balance of probability but is less than proof beyond a reasonable doubt.

19. As a consequence of the provisions of Rule 3.1 the Appellant bears the onus of establishing, on a balance of probabilities, that the ADRV was not intentional, or that he acted with No Significant Fault or Negligence.

20. SAIDS, in the circumstances, is only required to prove the 'presence' of the Non-specified Prohibited Substance/s in the athlete's system[1]

SUBMISSIONS BY THE APPELLANT

21. The salient submissions set out by the Appellant are summarised as follows:

    21.1. The sanction imposed by the Tribunal is being appealed on two fronts, namely on the basis that the Appellant lacked the intention to cheat and the second on the basis that he lacked Significant Fault.

    21.2. It is encumbent upon an anti-doping panel to duly consider the mitigating factors in considering the extent of the sanction to be handed down and the Tribunal in the hearing of first instance skimmed over the mitigating circumstances of the Athlete providing no substantial reasons as to why the stated mitigating circumstances should be ignored. These included: 1) the personal circumstances of the Appellant; 2) substantial and compelling circumstances and 3) gravity of the offence, ie the blameworthiness of the offender in relation to the crime.

    21.3. In relation to the Appellant's circumstances one needs to consider that the Appellant was a first offender, a young and naïve amateur athlete from a financially vulnerable background that lacked the maturity of an experienced professional athlete in terms of understanding the degree of risk he was taking and the level of care he should have exercised in taking a

[1] As per section 2.1.2 and 2.1.3

substance from his coach, whom he looked up to and respected, instead of attending a medical facility when he felt ill.

21.4. Accordingly, the Athlete's version has been consistent throughout the proceedings, both before and during the Tribunal hearing. The Appellant denies knowingly taking any Prohibited Substance and according to his statement, on the day of the ASA Senior Championships at TUKS he was not feeling well and took vitamin C , Calcium, Zinc, Iron and Magnesium Vital boost. In addition he took amino acids whenever he runs. He indicated that he obtains the amino acids from his coach and the other vitamins from his training partner.

21.5. The Athlete could not provide an answer as to the source of the Prohibited Substance as well as denying knowing what it is. The Appellant premises the amino acids that he obtained from his coach as the source of the Prohibited Substance. He wanted to feel better so he took these supplements on the advice of his coach, it was in no way to enhance his performance.

21.6. The Appellant's counsel indicate that the Appellant may not have reached the age of majority when he possibly utilised a Prohibited Substance as the Appellant turned 18 on 27 February 2018 and was tested on 15 March 2018. He was young and naïve and could not reasonably have known or suspected, even with the exercise of utmost caution, that what was being administered to him by his coach whom he looked up to, could possibly have been a prohibited substance and which would lead him to violating the anti-doping rules.

21.7. The Appellant could not be held to the same standard as an older, more mature and experienced professional athlete and could not have fully understood the degree of risk he was taking by accepting the advice and instruction of his coach instead of attending a medical facility or seeing the onsite doctor.

21.8. The influence of coach Aphane on the Appellant cannot be discounted. Aphane himself tested positive for a banned substance and at the Tribunal hearing SAIDS alluded to this very fact.

21.9. The Appellant's counsel submitted that there are differing views as to whether the source of the Prohibited Substance must be established in order to disprove intention. Reference is made to one set of decisions indicating that an athlete must prove how a non-specified substance entered their body to establish the lack of intention; whereas another set of decision have said that it is not vital to prove this. The case of *Arijan Ademi v UEFA* and *Mauricio Fiol Villanueva v FINA* were cited favouring the proposition that the establishment of the source of the prohibited substance is not a *sine qua non* of proof of the absence of intent.

21.10. It is submitted that the establishment of source is specifically required when a Athlete needs to prove No Fault, or Negligence or No Significant Fault, but this is not so with regard to the proof of intention.

21.11. The Appellant maintains that he did not knowingly ingest the Prohibited Substance with an intention to cheat or enhance his performance and given that the Respondent did not prove

otherwise must suggest that the Appellant's offence cannot be viewed in the same way as when an athlete clearly and intentionally goes out to cheat

21.12. The sanction imposed by the Tribunal was arbitrary and its discretion was not exercised judicially. In the circumstances the appropriate sanction is an ineligibility period of two years retrospective from the date of suspension.

SUBMISSIONS BY THE RESPONDENT

22. While the Rules of Strict Liability are clear, the decision of the Tribunal Panel should be upheld.

23. There is no dispute regarding the ADRV, however the Appellant alleges that the Tribunal panel erred in finding that the ADRV was intentional.

24. The burden of proof lies on the Athlete to prove that he did not have the requisite intention to enhance his performance or 'cheat', and the Athlete is required to prove the source of the Prohibited Substance on a balance of probabilities. This burden lies solely on the athlete and it is not for SAIDS to disprove same.

25. In order to establish the origin of a prohibited substance, the Athlete must provide actual (emphasis provided) evidence as opposed to mere speculation.[2] Raising an unverified hypothesis is not sufficient. In fact the athlete must adduce concrete evidence to demonstrate that a particular supplement or medication or other product that the athlete took contained the substance in question[3]

26. It is clear from the Athlete's own evidence that he does not know the source of the Prohibited Substance found in his A and B samples. While he attempted to indicate that it may have been a supplement he was taking identified as "Curse", on testing this was not found to be the source.

27. The reasons WADA includes substances on the Prohibited list, other than the main criteria being performance enhancement, is that the substance poses an actual or potential health risk to the Athlete and/or that the use of the substance or method violates the spirit of the sport.[4]

28. The Appellant put his health at risk by taking a "quick fix" route in order to make himself feel better and his actions grossly violated the spirit of the sport of athletics. The Appellant, regardless of his age is an elite athlete and competes in international competitions possessing an IAAF code and thus would have received anti-doping education and is familiar with the concept of "strict liability". The Appellant was not a minor at the time of being tested.

29. It was therefore encumbent upon him to exercise the 'utmost caution' by ensuring that no harmful substances enters his body, especially given the level at which the Appellant competed . He therefore

[2] WADA v Damar Robinson CAS 2014/A/3820
[3] CAS 2014/A/3615 WADA v Daiders & FIM
[4] Article 4.3 of the WADA Code 2015

did nothing to eliminate the risk which he should have foreseen and instead relied solely on his coach and friend to assist him when he was feeling sick on the day of the competition.

30. The Appellant failed to interpret the meaning of "strict liability" correctly in terms of the Rules.

31. Further, with regard to the consideration of mitigating factors when sanctioning an athlete, it is submitted that the SAIDS and WADA Rules are very different to Civil procedure and jurisprudence and that the Appellant's counsel was misguided by relying on *Mxolisi and Another v S* as being applicable in the arena of strict liability.

32. In terms of the definition of "intention" in Regulation 10.2.3 the Athlete must prove that he did not engage in conduct that he knew would or could result in an ADRV, or that he did not engage in conduct which he knew that there was a significant risk that it would result in an ADRV and manifestly disregarded that risk. Therefore in assessing an Athlete's degree of fault the Panel must assess the degree of risk that should have been perceived by the Athlete and the level of care and investigation that should have been exercised by the Athlete in relation to what the perceived level of risk should have been.

33. When considering "fault or negligence" or "no significant fault or negligence" as an indication of intention, Article 2.1 allows the panel to have regard to the peculiar circumstances of an Athlete – in terms of examining the Athlete's experience, whether he/she is a minor and the level of care and investigation the Athlete should have taken or done in order to determine the risk. In assessing the Athlete's degree of fault, the standard of care required from the Athlete needs to be considered.

34. The level of care required is the duty of 'utmost caution' in ensuring that no Prohibited Substance enters his/her system, the Appellant should have at the very least enquired from his team doctor (who was listed on the Doping Control Form) .

35. The duty of care is considered when assessing whether an athlete's fault or negligence is to be regarded as "significant." WADA imposes this onerous 'duty' to avoid a prohibited substance entering an athlete's body." This duty requires athletes to "leave no reasonable stone unturned,"

36. The duty of "utmost caution" requires athletes to know what constitutes a doping offence and what substances and methods are included on the WADA Prohibited List, follow health care and nutrition guidelines set by governing bodies, review a product's packaging, refrain from ingesting any products without consulting a "competent medical professional," refrain from ingesting products from "unreliable sources," and avoid places with an "increased risk of contamination."[5]

37. The Appellant should have questioned either his friend or his coach or at least consulted a medical professional as to his illness and/or the reason therefore, whom the athlete did have access to. He therefore acted negligently and with significant fault and totally disregarded the risk that he should have perceived. The Appellant's reliance on his coach is not sufficient to discharge the onus.

[5] Czarnota, P. 2012 The World Anti-Doping Code, the athlete's duty of 'utmost caution' and the elimination of cheating. Marquette Sports Law Review Article 9 Vol 23 Issue 1.

38. The Respondent relied on the case of *P v ITF*[6] *and IAAF v AFI and Ashwini*[7], where the tribunal held that while it is understandable for an athlete to trust his/her medical professional (or in this instance his coach), reliance on others and on one's own ignorance does not satisfy the duty of care. Further, to allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body, would result in the erosion of the established strict regulatory standard and increased circumvention of the anti-doping rules.

39. Any departure from the Rules will have the impact of disadvantaging such other athletes, including minors who were found to have Prohibited Substances in their system and who received four years ineligibility sanctions by the Tribunal and which were upheld on Appeal.

40. With regard to the establishment of the origin or source of the Prohibited Substance the Respondent cited recent CAS jurisprudence[8], indicating that it was required that the athlete establish the source of the Prohibited Substance on a balance of probabilities, and it was not for the anti-doping organisation to prove an alternative source to that contended by the athlete. Further that evidence that a particular scenario is possible is not enough to establish the origin of the Prohibited Substance, the athlete must do so with concrete evidence not mere speculation.

41. It is further not sufficient for an athlete to deny deliberate ingestion of a Prohibited Substance and assert that there is an innocent or unintentional explanation for the presence of the Prohibited Substance in his/her system. Further in the case of *Villanueva v FINA*[9] also dealing with the substance Stanozolol, the panel held that it is difficult to establish lack of intent if origin is not proven. The Respondent therefore submitted that the Appellant was required to establish the origin of the Prohibited Substance in order to negate intention.

42. The Respondent indicated that based on the facts and evidence there was no basis for the Appeal panel to consider a reduction in the sanction.

DECISION

Preface:

43. It is important to note at the outset, that an important component of the decision reached by the Appeal Panel, is the evidence before it and the veracity thereof, considered in the light of the circumstances taken in totality, the facts and the relevant case law provided by the Parties.

44. The main issue before the Appeal Panel is whether the Appellant acted with the necessary intention in accepting and taking the Prohibited Substance which was found to be present in both his A and B

[6] CAS 2008/A/1488 paragraph 2
[7] 2012/A/2763
[8] *In the form of Jose Paolo Guerrero v FIFA* CAS 2018/A/5546
[9] CAS 2016/A/4534

samples and in establishing whether or not he acted with the necessary intention – whether establishment of the source of the Prohibited Substance is required.

Regarding Intent:

45. In terms of the principle of "strict liability"[10]on Athletes, is to ensure that no Prohibited Substance enters his/her body. However, when Prohibited Substances are found to be present in their samples Athletes are therefore to be held strictly responsible therefor unless they are able to discharge an onus of proof to indicate an absence of such intent, which only affects the period of ineligibility, which would otherwise be a period of four years.

46. In terms of the standard of proof for Non-Specified substances:

    a. The onus is on SAIDS to prove the presence of the Prohibited Substance in order to prove the anti-doping rule violation (the ADRV), which in the current circumstances has been established;

    b. Consequently then the onus shifts to the Athlete, Mr Mlenga, to establish the absence of intent as contemplated in the SAIDS Rules in order to achieve a reduction in the applicable sanction - the standard of proof being on a balance of probabilities.

47. In attempting to dispute intent -

    a. The Athlete must prove that he did not engage in conduct that he knew constituted an ADRV or knew that there was a significant risk that his conduct might constitute or result in an ADRV and manifestly disregarded that risk in order to gain an unfair advantage or to "cheat"; and

    b. Furthermore, in order to establish the absence of intent, the Appeal Panel is of the view in light of the recent case law as well as the practical effect, that it is necessary for the Athlete to establish how the Prohibited Substance came to be in his system ("Proof of Source").

    c. In the Gordon Gilbert case referred to at the hearing[11] specifically states that while the source of the Prohibited Substance is not explicitly mandated in terms of the definition of 'intention' in terms of Article 10.2.3, as compared to Article 10.5 where establishment of the source is expressly required – it is acknowledged by the arbitrator that it could be *de facto* difficult for the athlete to establish the lack of intent to commit an ADRV demonstrated by the presence of a prohibited substance in his sample[12]. Further that proof of source would be an important, even critical first step, in any exculpation of intent because intent or its lack are more easily demonstrated with respect to the identified route of ingestion.

[10] Sufficient proof of an anti-doping violation under Article 2.1 is established by the 'presence' of the Prohibited Substance or its Metabolites or Markers in the athlete's system.
[11] WADA v SAIDS & Gordon Gilbert CAS 2017/A/5369
[12] Ibid at para 146

48. It is clear from the Appellant's conduct and based on his affidavit, that he needed a 'quick fix' so that he could feel well enough to compete in the competition for which he was selected. The Appellant pleaded not guilty to the charge, but did not dispute that the Prohibited Substance was found in his A sample and later confirmed in his B sample.

49. While SAIDS has discharged its onus in terms of establishing the presence of the Prohibited Substance in the Athlete's system, on analyzing the evidence before the Appeal Panel all that is really before the Appeal Panel in essence is a mere protestation of innocence by the Athlete without sufficient proof to substantiate the pleaded lack of intention.

Source

50. Bearing in mind the onus of 'strict liability' on the Appellant, it is up to the Appellant to demonstrate to the Appeal Panel that he did not have the intention to cheat or that he did not manifestly disregard a significant risk he ought to have perceived, exercising the utmost caution.

51. In proving the absence of intent, it is encumbent upon the Athlete to prove on a balance of probabilities what the most probable source of the Prohibited Substance was.[13] In terms of establishing the source the Athlete must provide **actual** (*emphasis provided*) evidence as opposed to mere speculation as to the source.[14]

52. In the hearing of first instance, the Tribunal found that the Appellant had not in fact established the source of the Prohibited Substance. The Appellant did not, either at the Tribunal hearing nor at the Appeal hearing, provide concrete proof the source of the ingestion. He seeks to rely on the fact that his coach gave him amino acids and that his friend and fellow team mate gave him vitamins to assist him to feel better, which amino acids were not disclosed on the Appellant's doping control form.

53. The Tribunal panel questioned the veracity of the Athlete's version in terms of establishing the source of the Prohibited Substance and found that in the circumstances the Athlete did not discharge the onus on him to prove on a balance of probabilities what the source of the prohibited substance was - which is critical in proving that he lacked intention to 'cheat' or enhance his performance and which the Appeal Panel agrees with.

54. Due to the fact that he trusted his coach he took the alleged amino acids without question or further investigation as to what he actually was taking was only amino acids and nothing else. Neithern did he go and see any medical professional as to the reason for his illness and legitimately obtain what he could take to help him feel better.

55. Therefore on the Appellant's version alone, without being given the opportunity to question the Appellant's friend from whom he alleges he obtained vitamins, or Mr Aphane the Appellant's coach, the source of the Prohibited Substance cannot be substantively verified.

56. In fact, irrespective of where or from whom he obtained the Prohibited Substance, it is highly improbable that the source was either the vitamins the Appellant alleges he obtained from his friend or the amino acids he obtained from his coach. The inference to be drawn therefore by the Appeal

[13] WADA v Gharbi and WADA v Alvarez
[14] WADA v Damar Robinson CAS 2014/A/3820

Panel is that the Appellant is not being entirely truthful as to his version as to how the Prohibited Substance came to be present in his system.

No Fault or Negligence

57. The question as to whether the Appellant had 'No fault or negligence' and the significance thereof, is only considered where it is found that an athlete did not have the direct or indirect intention to enhance his performance, or to 'cheat'. It is considered to determine whether a reduction in the period of ineligibility required to be imposed in terms of the Anti-Doping Rules is justifiable.

58. On the facts before the Appeal Panel, and in light of the fact that the evidence is not conclusive - in giving the Appellant the benefit of the doubt and assuming he lacked the requisite direct intention to 'cheat' or enhance his performance – in order for the Appeal Panel to consider a reduction in the sanction imposed by the Tribunal one must examine the level / significance of fault or negligence of the Athlete in the totality of the circumstances.[15]

59. The standard of care required of Athletes, even minors, who are required to be active in ensuring that the medication, supplements or other products ingested by them do not contain prohibited substances, is the duty of 'utmost caution'.

60. In terms of the definition of 'No Fault or Negligence'[16], the Athlete or other person establishing that he or she did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution that he or she had used or been administered the Prohibited Substance, in terms hereof the Athlete must also establish how the Prohibited Substance entered his or her system.

61. In the article entitled "The World Anti-Doping Code[17]" in explaining the athlete's duty of 'utmost caution' it states that the World Anti-Doping Code imposes an onerous duty on athletes to avoid any prohibited substance entering his or her body. This duty requires athletes to leave no reasonable stone unturned, meaning that it requires athletes to know what constitutes a doping offence and what substances and/or methods are included on the WADA Prohibited List as well as review a product's packaging, refrain from ingesting any products without consulting a competent medical professional, and refrain from ingesting products from an 'unreliable source'.[18]

[15] Only if an athlete can establish in an individual case that he/she bears no fault or negligence then the otherwise applicable period of ineligibility can be reduced or eliminated.
[16] SAIDS Anti-Doping Rules 2016
[17] Czarnota P (2012) The World Anti-Doping Code, the athlete's duty of utmost caution. Marquette Sports Law Review Art 9 Vol 23 issue 1.
[18] Factors to be taken into consideration in assessing an athlete or other Person's degree of fault include: i) the Athlete or other Person's experience, whether the Athlete is or was a minor at the time, or other special considerations, such as the level of care and investigation exercised in relation the degree of risk that should have been perceived by the athlete and ii) the degree of risk that should have been perceived by the Athlete.

62. In exercising such 'utmost caution', it is trite that in order to establish the absence of 'Fault' on behalf of the athlete he needed to demonstrate that he could not reasonably have known or suspected even with the exercise of the utmost caution that he had used or been administered the Prohibited Substance. Therefore, one is required to consider the degree of risk that should have been perceived by the athlete and the level of care and investigation exercised in relation to what should have been the perceived risk. This would go to the significance of assessing such fault or negligence.

63. The Appellant's fault or negligence when viewed in the totality of the circumstances and taking into account the criteria of no fault or negligence[19], is to be regarded as significant in relation to the ADRV, in that by limiting himself to trusting the advice of his coach and/or his friend who are not medical doctors / professionals to make him feel better, the Appellant did not make good faith efforts "to leave no reasonable stone unturned" to ensure that no Prohibited Substance entered his system and has thus significantly disregarded his duty of utmost caution. He did not even attempt to consult his team doctor or any other medical professional regarding obtaining advice as to what he was considering taking, whether it was to enhance his performance or not.

64. The jurisprudence highlighted by the Respondent, in the matter of *SAIDS v Raydall Walters*[20], where on Mr Walters own admission, he was significantly at fault by taking a supplement from one of his team mates. It was found that the Athlete had not exercised the 'utmost caution' in first checking that the supplement did not contain any Prohibited Substance and was found to have clearly violated the Rules of strict liability and had engaged in conduct which he knew could constitute an anti-doping rule violation or alternatively knew that there was a significant risk that his conduct might result in an anti-doping rule violation and manifestly disregarded that risk.

65. In light of the facts and evidence before the Appeal Panel, the Appeal Panel is of the view that the Appellant's conduct was reckless in terms of failing to see a doctor that was at his disposal, instead of relying solely on his friend or his coach. He also did no research of his own, on the internet or otherwise, to establish the effect of what he was considering taking and had taken and which he alleges had been given to him by his coach who had also done so on previous occasions, despite the trust he had in his coach – given the duty that was imposed upon him as the Athlete.

66. It is emphasised that for there to be a finding of 'no fault or negligence', the athlete is required to establish that he did not know or suspect, and could reasonably not have known or suspected, even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance or Prohibited Method. No fault in effect means that the athlete has fully complied with the duty of care - that being the duty of utmost caution. Therefore, based on the objective test alone, the Appeal Panel cannot make such a finding, taking the totality of the facts and evidence in the circumstances into account.

[19] Ibid
[20] SAIDS/2016/56

67. The Court of Arbitration for Sport (CAS) decision in the matter of Federico Turrini[21], where the athlete – a professional swimmer- relied on his doctor to warn him if any medication he was taking did not contain anything on the Prohibited List. CAS held that an athlete, in order to fulfil his or her duty according to Article 2.1 of the WADA Code, has to be active to ensure that a medication that he or she uses does not contain any compound that is on the Prohibited List and found that the athlete had not done anything to ensure this. As a result the athlete did not establish that he bore no significant fault or negligence and therefore found no basis to reduce his sanction.

Sanction

68. As stated, the departure point for any matter of this nature is the strict liability / personal responsibility placed on each Athlete to ensure that no Prohibited Substance or any of its Metabolites or Markers enters his/her body, which duty requires athletes to leave no reasonable stone unturned in terms of ingesting products without consulting a competent medical professional, or refrain from ingesting products from 'unreliable sources'. The Appellant, in the circumstances, did not fulfil this responsibility and neither did he, act with the utmost caution to avoid any prohibited substance from entering his body or at least avoid the risk of same. In fact based on the totality of his conduct, he manifestly disregarded the risk in not making enquiries from or seeing a medical doctor when he was sick and 'in-competition'.

69. The period of ineligibility to be imposed for a violation of Article 2.1.2 (Presence of Prohibited Substance or its Metabolites and Markers) which does not involve a Specified Substance is four years irrespective of whether this is a first violation or not. In fact at the time that he was tested the Appellant was already regarded as a major and not a minor as submitted.

70. While the period of ineligibility can be reduced in certain circumstances as indicated above, in the context of this Appeal hearing and considering the evidence in totality there is no basis for such a reduction in terms of the application of the Rules.

71. Any further reduction in the sanction would be unfair and arbitrary in relation to the other athletes whom on appeal their sanctions of four years on the same or similar facts were upheld. Therefore in dealing with the Appellant's counsel's submissions that the mitigating factors were not properly considered, the Appeal Panel finds that in fact mitigating factors have been considered by the Appeal Panel but the ambit of the Appeal's Panel mandate is strictly prescribed by the Rules and the WADA Code.

72. The Appeal Panel, on the balance of probabilities, is not convinced that the Appellant had no intention in ingesting the Prohibited Substance. Alternatively, he should reasonably have foreseen the risk of taking an unknown substance either from his coach or friend – especially since neither the Appellant's friend nor coach was called to give evidence and having had anti-doping education given the level at which he was competing should have sought assistance if he in any way felt unduly pressured into taking any substance which he was not comfortable taking.

[21] CAS 2008/A/1565

Conclusion

73. In the circumstances therefore, there is no reasonable basis on which the Appeal Panel can differ from the decision of the Tribunal panel in regard to the sanction imposed.

74. The Appeal Panel is of the view that the Appellant has not been fully forthcoming in regard to stating the whole truth of what he ingested and the source thereof.

75. In summary the reasons why the sanction of 4 (four) years should remain are the following:

    i. The Prohibited Substance is a Non-Specified substance and is prohibited both in and out of competition
    ii. SAIDS is not required to prove anything more than 'presence' and no substantive factors have been advanced by the Appellant to suggest that there is a basis for reducing the period of ineligibility.
    iii. The Appellant failed to prove, on a balance of probabilities, that the ADRV was not intentional
    iv. Reducing the period of the sanction would be arbitrarily unfair to other athletes, who were minors at the time of testing, who were also from disadvantaged backgrounds and who also stood to lose their scholarships to various universities as well as their sponsorships.
    v. It is only when the Anti-Doping Rules are strictly applied that Athletes will begin to take what they ingest seriously and strive to perform at their best without the assistance of chemically prohibited substances and ensure the integrity of sport.

ORDER

In the current premise, it is hereby ordered that:

1. The Appeal is dismissed;

2. The period of ineligibility shall be four years and the decision of the Tribunal is upheld;

3. In addition, that the Appellant receives a credit for the period of provisional suspension as well as the period of ineligibility already served with effect from the date of his provisional suspension

4. Each party to pay its own costs in regard to the Appeal.

Dated at Durban on this 23rd day of January 2020.

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MS. MARISSA DAMONS

Obo of the Appeal Board Panel