

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

ANTI-DOPING HEARING PANEL

VIRTUAL HEARING

In the matter between:

SAIDS/2020/10

SAIDS

And

THAPELO PHORA

RULING

1. INTRODUCTION

- 1.1 The South African Institute for Drug Free Sports ("SAIDS") brought charges against Mr Thapelo Phora ("the athlete") for Adverse Analytical Findings.
- 1.2 The hearing was held on 15 June 2021 by means of virtual
- 1.3 The Athlete was represented by Mr Shane Wafer and Mr Matthew Kaiser and SAIDS was represented by Mr Lyrique Du Plessis.

2. COMPOSITION OF THE PANEL

- 2.1 The Hearing Panel was appointed by SAIDS a statutory body created in terms of section 2 of South African Institute for Drug-Free Sport Act 14 of 1997, as amended in 2005 when SAIDS accepted the World Anti-doping

code. The SAIDS Anti-doping Rules which were published by SAIDS are applicable to the present proceedings. ("**the Rules**")

- 2.2 The SAIDS Anti-doping Hearing Panel ("**the Panel**") has been Appointed in terms of Article 8.1 of the Rules. The Article states that:

"The Registrar shall appoint an independent Doping Hearing Panel consisting a minimum of, but not being limited to, three (3) members to hear and adjudicate cases. The Hearing Panel should consist of at least the following:

- a) A Legal practitioner who shall act as a chairman;*
- b) A medical practitioner and/or a person with analytical and /or forensic pharmacology or endocrinology; and*
- c) Either a second person from category (a) or (b) or an additional member who shall be, or has previously been, a sports administrator or an athlete".*

- 2.3 The appointment of the Hearing Panel complied with Article 8.1 in that the Hearing Panel comprised of the following members:

Mr. Mandla Tshabalala (A Legal Practitioner; Chairperson); Dr Jason Suter (Sports Physician) and Joe Carrim Prinsloo (Sports Administrator).

3. JURISDICTION

- 3.1 The Panel had to determine whether it has jurisdiction to adjudicate on this matter, and in doing so we were guided by the SAIDS Anti-Doping Rules 2019.
- 3.2 in terms of Article 1.3 of the Anti-Doping Rules, the Panel will have jurisdiction to adjudicate this matter and Article 1.3 states that:

"1.3.1 These Anti-Doping Rules shall apply to the following persons (including minors), in each case, whether or not such Person is a national of or resident in South Africa:

All Athletes and Athletes Support Personnel who are member or licence holders of any National Federation in South Africa, or of any member or affiliate organisation of any National Federation in South Africa(including any clubs, teams, associations or leagues); all Athlete and Athlete Support Personnel who participate in such capacity in Events, Competitions and other activities organised, convened, authorised or organised by any Federation in South Africa or by any member or Affiliate organisation of any National Federation in South Africa(including any clubs, teams, associations or leagues), wherever held;

any other Athlete or Athlete support Person or other who, by virtue of an accreditation, a licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of any National federation in South Africa (including any clubs, teams, associations or leagues), for purposes of anti-doping;

all Athlete and Athlete Support Personnel who participate in any capacity in any activity organised, held, convened, or authorised by the organiser of a National Event or of a national league that is not affiliated with a National Federation; and

all Athletes who do not fall within one of the foregoing provisions of this Article 1.3.1 but who wish to be eligible to participate in International Events or National Events (and such Athletes must be available for testing under these Anti-Doping Rules for at least six (6) months before they will be eligible for such Events).

1.3.2 These Anti-Doping Rules shall also apply to all other Persons over whom the Code gives SAIDS Jurisdiction, including all Athlete who are nationals of or resident in South Africa, and all Athletes who are present in South Africa, whether to compete or to train or otherwise.

1.3.3 Persons falling within the scope of Article 1.3.1 or 1.3.2 are deemed to have accepted and to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of SAIDS to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules, as a condition of their membership, accreditation and/or participation in their chosen sport".

- 3.3 The Athlete is a professional competing in athletics and therefore SAIDS Rules are applicable to him.

4. APPLICABLE RULES

- 4.1 SAIDS presented to the panel and the athlete that the rules to dispense with during the proceedings shall be the SAIDS 2019.

5. NOTIFICATION

- 5.1 On or about 1 May 2021, the Athlete was formally charged for Adverse Analytical Finding in respect of prohibited substances that was not specified with sample number 4456426.
- 5.2 On or about 21 May 2020, the Athlete was notified of the analytical report from the Laboratory which confirmed the presence of Stanozolol

and its metabolites 3'-OH-Stanozolol, 4B-OH Stanozolol, 16B-OH-Stanozolol in the Athlete's "A" sample with sample number: 4456379 and 4456426.

- 5.3 The charge as favoured by SAIDS emanates from violation of Article 2.1 of the SAIDS Anti-Doping Rules.

6. PLEA

- 6.1 The Athlete pleaded guilty to the charge.

7. EVIDENCE BY SAIDS

- 7.1 SAIDS presented evidence in a form of expert report from independent medical practitioners, Prof. van der Merwe and Dr van Eenoo.
- 7.2 SAIDS further stated that the Athlete has violated Article 2.1 of the SAIDS rules.
- 7.3 The test conducted to the Athlete was out of competition test after SAIDS received an intel tip-off about Athlete allegedly engaging in conduct of violating the anti-doping rules.
- 7.4 According to SAIDS, the scientific report of Prof. van der Merwe and Dr Eenoo coupled with the intel tip-off it received created a scenario of deliberate use of banned substance by the Athlete.
- 7.5 SAIDS referred the panel to page 201¹ a summary of the analysis of the supplement.
- 7.6 The table illustrates inconsistent outcomes of test conducted by the Laboratories on sealed and unsealed containers.

¹ A Bundle page 201, Table : Summary of the analysis of the supplements

7.7 The unsealed containers were provided by the Athletes when he requested his containers to be tested.

8. EVIDENCE BY THE ATHLETE

8.1 The Athlete gave a background as to how his career in athletics was natured and that there is a good opportunity for him to represent his country in the 2021 Tokyo Olympic Games.

8.2 He confirmed using the supplements as listed in the doping control form.

8.3 He said on the date on which the out of competition test was conducted on him, he took the supplements and went for a jog and as he was jogging he received a phone call from his girlfriend who informed him that the SAIDS people were at his house.

8.4 During the conducting of the test, he did not disclose that he usually mixes weight protein and L-Glutamine supplements.

8.5 During cross-examination he testified that he was previously tested four times and this test was the fifth test conducted on him.

8.6 He further said the supplement in question he uses during off-season around November-December period.

8.7 He further testified that he purchased his supplements at Dis-Chem over the counter and prior to purchasing the supplement, he would conduct a medical check on SAIDS website and he would thoroughly check the labels of the container of the supplements.

8.8 He said the supplement is for the purposes of recovery, but he often uses the supplement prior to training.

8.9 The Athlete called the second witness the girlfriend of the Athlete who confirmed that she is the Athlete's girlfriend.

- 8.10 She testified that the supplements that Athletes listed in his doping control form, are the supplements constantly used by the Athlete.
- 8.11 She further said the Athlete provide her with advice as to which supplements to use as and when she needed to uses or purchase supplements because the Athlete does his research before he purchases any supplement.

9. ANALYSIS OF EVIDENCE

- 9.1 SAIDS heavily relied on the evidence of the two expert witnesses in Prof. van der Merwe and Dr. Eenoo.
- 9.2 The expert's investigation was specifically focused on investigating the presence of prohibited substances, stanozolol and its metabolite, the presence of stanozolol in the supplement Biogen and L-Glutamine and the feasibility that the stanozolol and its metabolites observed in the urine sample could originate for the stanozolol in the supplement.
- 9.3 According to the expert two urine samples of the Athlete were collected on 12 March 2020 with the first sample number being 4456379 and the second sample being sample number 4456426.
- 9.4 Reason for the second urine sample is that the first urine sample was insufficient to conduct a test on, and the second urine sample was found to be sufficient for the test, and in both samples the same analytical results were reported.
- 9.5 The Athlete took his own containers to be tested for the presence of banned substance and laboratory result found the contained used by the Athlete contaminated with Stanozolol and so was another sealed container of a different batch.

- 9.6 Another test was conducted on containers and retention sample of the same batch of the contaminated product, did not reveal any contamination with Stanazolol.²
- 9.7 The expert also stated in his report that sample A and sample B confirmed the presence of Stanazolol.
- 9.8 According to the expert, the samples were tested by SAdoCoL and the one LGC Group on Fordham in the United Kingdom.
- 9.9 The expert further stated that the analysis were qualitative and not quantitative, and that "therefore reporting the presence of the relevant compound or not, and not providing an accurate, exact concentration thereof"³
- 9.10 Accordingly the expert concluded that "it is not possible to declare without any reasonable doubt that the presence of Stanazolol and its metabolites originated only from the Stanazolol detected in the supplement which the Athlete had used".⁴
- 9.11 In the opinion of Dr van Eenoo, the explanation of contamination by the Athlete cannot be excluded.
- 9.12 the results of the Laboratories and the containers which some confirmed contamination and the other tested absence of contamination brings about uncertainties.

10. BURDEN OF PROOF

² Page 204 Bundle A at par 4.3.2

³ Page 200 Bundle A at par 3.2.

⁴ Supra at page 207

- 10.1 The SAIDS rules places a burden of proof on SAIDS to prove to the comfortable satisfaction of the hearing panel, that the athlete violated an anti-doping rule. In terms of Article 3.1 of the SAIDS anti-doping rules:

“SAIDS has the burden of establishing that an anti-doping 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 that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt. Where the Anti-Doping rule places 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 balance of probability, except as provided in Article 10.4 and 10.6 where the athlete must satisfy a higher burden of proof”.

- 10.2 Article 3.2 outlines the methods of establishing facts and presumption, and Article 3.2.2 specifically states that:

“WADA accredited laboratories and other laboratories approved by WADA, are presumed to have concluded sample analysis and custodial procedure 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, the SAIDS

shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".

- 10.3 The Sample A and B of the Athlete was tested by a WADA accredited Laboratory.

11. THE LAW

- 11.1 The charge against the athlete constitutes a breach of Article 2.1 of the South African Institute for Drug-Free Sport, which rule states that "The presence of a prohibited substance or its Metabolites or Makers in the Player's sample." Article 2.1.1 specifically states that:

"It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Makers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1"

- 11.2 Now the question is how does SAIDS prove the presence of the banned substance in the body of the Athlete, and the answer to the question is found in Article 2.1.2 which states that:

"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 metabolite 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 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 analysis of the second bottle conforms the presence of the prohibited substance or its Metabolites or Markers found in the first bottle".

- 11.3 Article 2.2 which is headed "Use or attempted Use by an Athlete of a Prohibited Substance or a prohibited Method". In particular Article 2.2.1 states that:

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. 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 for Use of a Prohibited Substance or prohibited Method."

- 11.4 The above provision is founded on strict liability that is applicable to anti-doping violations.
- 11.5 Athletes are required to adhere to a standard set by the anti-doping rules on the basis that they could be held accountable for what enters their systems and the rules do not in any way accept ignorance of the anti-doping provisions or prohibited list.
- 11.6 The laboratory analysis report on the Athlete's urine samples A and B shows presence of a prohibited substance. Sufficient proof of an anti-doping rule violation has therefore been established in accordance with Article 2.1.2.

12. SANCTIONS

- 12.1 Having found to have tested positive to a banned substance and having pleaded guilty as charged, the only obligation left to the panel is to pose an appropriate sanction deserving by the Athlete.
- 12.2 The Athlete has a duty to convince the panel to impose a sanction which the Athlete deems appropriate.
- 12.3 Rule 10 of the SAIDS anti-doping rules provides various possible sanctions the panel has to consider.

13. POSSIBLE REDUCTION OF A PERIOD OF INELIGIBILITY

- 13.1 If the athlete wants to be successful in his quest for elimination or reduction of period of ineligibility, the athlete must address the Panel on Article 10.4 which deals with elimination or reduction of the period of ineligibility for specified Substance under the Specific Circumstances
- 13.2 Article 10.4 Specifically states that:
- "If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated".*
- 13.3 The above provision places the onus on the Athlete to establish that he bears No Fault and Negligence.
- 13.4 The other provision which an Athlete may argue and to reduce the period of ineligibility based on No Significant Fault or Negligence is Article 10.5.1 which states that:
- "Reduction of Sanctions for specified substances or contaminated products for violation of Article 2.1, 2.2 and 2.6".*
- 13.5 For the Athlete to be able to reduce the period of ineligibility, he must be able to establish no Significant Fault or Negligence and identify the source of the substance (in this case, an allegedly contaminated supplement).
- 13.6 If the Athlete is successful in establishing that the substance came from a contaminated product, the period of ineligibility shall be at a minimum reprimand or no period of ineligibility, and a maximum, two (2) years of ineligibility, depending on the Athlete's or other person's degree of fault.⁵

⁵ Article 10.5.1.1 and 10.5.1.2 respectively.

13.7 However, SAID's argument on the Sanctions leaned primarily on Article 10.2 and specifically Article 10.2.1 which states that:

"the period of ineligibility shall be four (4) years".

13.8 The above provision contains two qualifications which warrants a 4 years period of ineligibility, and these are found in Article 10.2.1.1 and 10.2.1.2.

13.9 The above qualifications states that:

"10.2.1.1 The anti-doping rule violation does not involve the specified substance unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional

10.2.1.2 The anti-doping rule violation involved is specified substance and SAIDS can establish that the anti-doping violation was intentional".

13.10 If the above provisions are being successfully argued by the Athlete and it is found that they are not applicable, the period of ineligibility shall be reduced to two (2) years.⁶

13.10 Intention requires that the Athlete or other person engaged in conduct which he or she knew constitute 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 disregard that risk.⁷

13.11 In *casu*, we are dealing with unspecified substance, one should take into account that the Athlete was not able to identify the substance he took.

⁶ Article 10.2.2.

⁷ Intention is defined in Article 10.2.3 of the SAIDS Rules.

- 13.12 According to Article 10.2.1.1 it is the duty of the Athlete to prove that his conduct was not intentional.
- 13.13 SAIDS failed to establish that the Athlete intentionally took a banned substance to enhance his performance.
- 13.14 During the closing argument SAIDS relied on Article 10.2.1 and it argued that the Athlete intentionally took the substance knowing and accepted the risk that comes with of being subjected to testing.
- 13.15 The above provision places the onus on the Athlete to identify the substance which entered his body and that such substance was not used to enhance his performance, taking into account Article 2.1 which places strict liability on what enters the Athlete's body strictly on the Athlete.
- 13.16 Firstly the Athlete must identify the Prohibited Substance and secondly the Athlete must prove that the very same Prohibited Substance was not intended for performance enhancement. As it was stated in the **Dimatar Kutrovsky v ITF**⁸ that:
- "and athlete does not need to prove an intent to enhance his sport performance, since he cannot be said to this intent if he is not aware that the product he is taking contains specified substance."*
- 13.17 This simply means that if an Athlete fails to specify the substance, there is no reason to further enquire whether it was used for performance enhancement as the provision of Article 10.4 specifically says "such" as a follow up to a specified substance.

⁸ CAS 2012/A/2804 Dimatar Kutrovsky v ITF, par 9.12

13.18 Article 10.5.1 addresses the elimination or reduction of period of ineligibility based on exceptional circumstances and Article 10.5.1 states that:

"If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of ineligibility shall be eliminated. When a Prohibited Substance or its Markers or its Metabolites is detected in an Athlete's Sample in violation of the Code Article 2.1 (Presence of Prohibited Substance), there shall also establish how the Prohibited Substance entered their system in order to have the period of ineligibility eliminated. In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation only for the limited purpose of determining the period of ineligibility for multiple violations under Article 10.7."

13.19 for the committee to consider elimination or reduction of period of ineligibility, Article 10.5 sets two conditions which the Athlete must meet and the conditions are the following:

13.19.1 that the Athlete must establish how the Prohibited Substance entered his system; and

13.19.2 That the Athlete must establish that he bears No Fault or Negligence.

13.20 The Athlete is required to prove that he bears no fault or negligent. The anti-doping rules required an Athlete to exercise a standard of care and to know exactly what enters his body.

13.21 it was held in **Kowalczyk v FIS**⁹ that:

⁹ CAS 2005/A/918 at par 12.5.2

"the duty of care resting upon any 22 year old athlete engaged in world class competition requires, at the very least, that she provide her treating physician a copy of the 2005 Prohibited List and that she enquire with the doctor whether any of the medication and treatments which he/she prescribes contain substances contained on the list."

13.22 In *casu*, the Athlete could not identify the banned substances found in his body however he suspected that the banned substance came as a result of contamination.

13.23 Based on the reports of the two experts of SAIDS, whom both could not exclude the possibility of contamination, the fact that the containers as tested by the two accredited Laboratories whose result were contradictory in that some batches detected contamination and some containers did not detect containers, and on the balance of probabilities, therefore It is the finding of the committee that the Athlete was successful in proving his case to the comfortable satisfaction of the panel.

14. RULING

14.1 The Athlete was successful in his argument to the comfortable satisfaction of the Panel that the substance the tested positive was contaminated.

15. SANCTIONS

15.1 The Panel imposed the following sanctions against the Athlete:

15.1.1 The Athlete has served provisional suspension from 21 May 2020 to 05 February 2021 and during the period 05 February 2021 to 19 February 2021, SAIDS erroneously lifted suspension. From 19 February 2021 to 12 May 2021 the Athlete was on provisional suspension again.

15.1.2 It is the contention of the Athlete that the error committed by SAIDS in lifting the provisional suspension should be included as period of provisional suspension and it was not the error of the Athlete but that SAIDS and therefore, according to the Athlete he has served a period of 11 months and half.

15.1.3 In the contrary SAIDS contends that the Athlete has served a period of 8 months and a half.

15.1.4 It is therefore the finding of the panel that the Athlete has served a provisional suspension for a period of 8 months and a half and that the Athlete is credited for the provisional suspension already served in terms of Article 10.10.3

15.1.5 The Athlete is therefore sanction with a period of ineligibility for a period of 8 months from the date of provisional suspension.

Date: 18 June 2021

A handwritten signature in black ink, appearing to be 'M. Tshabalala', is written over a horizontal line.

Mr. Mandla Tshabalala

**For and on behalf of
Dr Jason Suter and Mr Joe Carrim**