

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

ANTI-DOPING HEARING PANEL

HELD AT SUPERSPORT PARK (CENTURION)

CASE NO: SAIDS/2022/19

In the matter of: Mr Bafana Dube

Date of Hearing: 21 March 2023

RULING

1. INTRODUCTION

- 1.1 The South African Institute for Drug Free Sports ("SAIDS") brought charges against the Athlete Mr. Bafana Dube ("the athlete") for committing an Adverse Analytical Findings.
- 1.2 The hearing was held on 21 March 2023 at Centurion and the athlete was legally represented by Mr Mphakati of Mphakati Incorporated Attorneys.

2. COMPOSITION OF THE PANEL AND JURISDICTION

- 2.1 The Hearing Panel was appointed by SAIDS a statutory body created by 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:

"8.1.1 Fair, impartial and operationally independent hearing panel."

8.1.1.1 SAIDS shall establish a Hearing Panel name the Independent Doping Hearing Panel (IDHP) which has jurisdiction to hear and determine whether an Athlete or other Person, subject to these Anti-Doping Rules, has committed and anti-doping rule violation and if applicable to impose relevant consequences

8.1.1.2 SAIDS shall ensure that the IDHP is free of conflict of interest and that its composition , terms of office, professional experience, operational independence and adequate financing comply with the requirements of international Standard for Result Management.

8.1.1.3 Board members, staff members, commission members, consultants and officials of SAIDS or its bodies, as well as any Person involved in the investigation and pre-adjudication of the matter, cannot be appointed as members and/or clerks (to the extent that such clerk is involved in the deliberation process and/or drafting of any decision) of the IDHP. In particular, no member shall have previously considered any TUE application, Result Management decision, or appeal in the same given case.

8.1.1.4 The pool of the IDHP members in South Africa shall be at a minimum of ten (10) members appointed by the Registrar.

8.1.1.5 Each members shall be appointed by taking into consideration their requisite anti-doping experience including their legal, sports, medical and/or scientific experience of not less than ten (10) years. Each member shall be appointed for a once renewable term of three (3) years.

8.1.1.5 The IDHP shall be in a position to conduct the hearing and decision-making process without interference from SAIDS or any third party.

2.3 The appointment of the Independent Doping Hearing Panel complied with Article 8.1 in that:

2.3.1 There was no conflict of interest raised by the Panel members;

2.3.2 The Hearing Panel members possess sufficient experience of not less than ten(10) respectively, of anti-doping matters;

2.3.3 The IDHP consisted of the following members: Mr. Mandla Tshabalala (A Legal Practitioner; Chairperson); Dr. Dimakatso Ramagole (A Medical Practitioner) and Ms Corinne Berg (Legal Practitioner), in compliance with article 8.1.1.5.

2.3.4 The IDHP have been appointed for a three (3) years term and they do not serve as Board members, staff members, commission members, consultants and officials of SAIDS or its bodies, or any person involved in the investigation and pre-adjudication of the matter.

2.3.5 The prosecutor for SAIDS was Mr Shane Wafer.

3. APPLICABLE RULES

3.1 The prosecutor presented to the panel and the athlete that the rules to dispense with during the proceedings shall be those of SAIDS anti-doping rules of 2021.

4. CHARGE

4.1 The charge favoured by SAIDS against the Athlete is contained in a letter dated 18 October 2022, which letter was addressed to the athlete. The charge preferred against the athlete reads as follows:

“Following the analysis of your explanation, SAIDS is satisfied that you have committed an ADRV pursuant to Article 2.1 and 2.2 . Consequently, you are hereby charged with committing the following ADRV's (Charged);

2.1.1 Presence of a prohibited substance or its metabolites or Makers in an Athlete Sample, pursuant to Article 2.1 of the ADR, by virtue of the presence of 5-methylhexan-2-amine(1.4 dimethylpentylamine) in your Sample; and

2.1.2 Use of prohibited Substance 5-methylhexan-2-amine(1,4-dimethylpentylamine), pursuant to Article 2.2. of the ADR.

4.2 The above charge emanate from an Adverse Analytical Finding from the South African Doping Control Laboratory – Bloemfontein, South Africa. The report of the finding was communicated and addressed to the Athlete on 18 October 2022.

5. PLEA

5.1 The Athlete initially pleaded not guilty to the charge. The Hearing took time to explain the principle of strict liability to the Athlete and Athlete's representative whom at the time had not prior understanding of the anti-doping rules. The Athlete did confirm in his response to SAIDS that the banned substance was found in his body, except that he did not know the banned substance entered his body. Subsequently the Athlete pleaded guilty to the charges

6. PLEA EXPLANATION

6.1 It was explained to the Athlete that the period of ineligibility for the violation of the Anti-Doping Rules where the substance is specified substance is a period of two years.

6.2 It was further explained to the Athlete that he has an opportunity to address the Panel on the circumstances that might lead to the reduction

of the period of ineligibility, to which the athlete took an opportunity to do same¹.

6.3 The Athlete submitted to the Panel that he has been a professional athlete for a period of 15 years and that he not previously been identified as a candidate to attend to anti-doping testing.

6.4 The Athlete further stated that he would have liked to exercise the opportunity for the B-Sample tested but he was unable to do so due to financial constraints and as a result he could not exercise such opportunity.

6.5 He said he purchased his supplements over the counter and prior to purchasing supplements he checked the labels and found that there were no banned substances labelled.

6.6 He is of the age of 27 years old and that he commands the language of English without any difficulties.

6.7 The Athlete admitted that he cannot question the fact that the banned substances were found in his body, however alleged that he did not know how such banned substance entered his body and were found in his urine.

7. BURDEN OF PROOF

7.1 The SAIDS rules places a burden of proof on the prosecution 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 shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether SAIDS

¹ See Article 10.6 of the SAIDS Rules.

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 3.2.2 and 3.2.3 the standard of proof shall be by balance of probability”.

7.2 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”.

8. THE APPLICABLE PRINCIPLES

8.1 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 Athlete's personal duty to ensure that no Prohibited Substance enters their body. Athletes 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"

- 8.2 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) parts and analysis of the confirmation part of the split Samples confirms the presence of the prohibited substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split sample".

- 8.3 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 their bodies and that no prohibited method is used. 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."

- 8.4 The above provision is founded on the principle of strict liability that is applicable to anti-doping violations.
- 8.5 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.
- 8.6 The laboratory analysis report of the Athlete's urine sample A, 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.
- 8.7 To be able to address the committee and to be successful in reducing the period of ineligibility, the Athlete needed to address the hearing panel on Article 10 of the SAIDS anti-doping rules which deals with sanctions.
- 8.8 Specifically, 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 10.6 which deals with elimination or reduction of the period of ineligibility for specified Substance under the Specific Circumstances
- 8.9 Article 10.6.1.1 Specifically states that:

"where the anti-doping rule violation involves a specified substance (other than a substance of abuse) or specified method, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two (2)

years of ineligibility, depending on the Athlete's or other Person's degree of Fault.

8.10 The above provision places the onus on the Athlete to establish that he bears No fault and Negligence.

8.11 For the Athlete to be able to reduce the period of ineligibility, he must be able to establish No Significant Fault or Negligence by identifying the source of the prohibited substance.

9. NO FAULT AND NO SIGNIFICANT FAULT

9.1 For the panel to establish the degree of fault against the Athlete, they must consider the objective and subjective level of fault.

9.2 The objective elements describes what standard of care could have been expected from a reasonable person in the athlete's situation.²

9.3 The subjective elements describes what could have been expected from that particular athlete, in light of his personal circumstances.³

9.4 The objective levels requires that a reasonable person in the position of the Athlete would read the label of the product, cross-check all the ingredients on the label which list the ingredience, conduct an internet search of the product, ensure the product is reliably sourced, and consult experts in these matters and instruct them diligently before consuming the products.⁴

9.5 In order to determine the level of subjective fault, the following have derived from CAS jurisprudence and amongst them are an Athlete's

² CAS 2013/A/3327 Martin Cilic v International Tennis Federation and CAS 2013/A/3335 International Tennis Federation v Martin Cilic at par 71.

³ Id.

⁴ Ibid at par 74.

youth and/or inexperience, Language or environmental problems accounted by the athlete, the extent of anti-doping education received by the athlete, and any other personal circumstances.⁵

9.6 The length of sanction where the substance is specifies ranges form 0 – 24 months period of ineligibility. The Panel in the matter of Cilic recognised the following degrees of fault (i) Significant degree of considerable fault, (ii) normal degree of fault and (iii) Light degree of fault.⁶

10. RULING

10.1 SAIDS requested the Athlete's A and B Samples during an in-competition test on 13 August 2022.

10.2 The result of the A Sample came back having tested positive for a banned substance.

10.3 The Athlete did not request test for the B Sample and such opportunity was granted to the Athlete by SAIDS.

10.4 During the hearing, SAIDS has successfully satisfied its burden by producing evidence that the Athletes urine was tested by a WADA recognised Laboratory situated in Bloemfontein to the comfortable satisfaction of the Hearing Panel.

10.5 The Athlete has failed to satisfy his burden buy proving any deviation from the International Standard of testing and failed to prove that there any contamination of the banned substances he ingested.

10.6 The Athlete has, in his written reply to the charges, admitted that banned substances were found in his body, however he stated he does not know

⁵ Ibid at par 74.

⁶ Ibid at par 69

how such banned substances entered his body, this on its own is a violation of Article 2.1 and 2.2 of the SAID rules.

10.7 The Athlete failed to take reasonable standard of care as expected from a reasonable person in the Athlete's situation in that he failed to consult an experts in these matters and instruct them diligently before consuming the products he took.

10.8 He further failed to cross-check the label and conduct an internet search to ensure such with the prohibited list.

10.9 The Athlete is an experienced runner with age of maturity and he understand the English language well to be able to enable him to read the labels to his satisfaction that no banned substances were contained in the products he used.

10.10 Therefore the Athlete committed a significant degree of fault by failing to take reasonable step as expected from an Athlete in his position.

11. SANCTIONS

10.1 The Panel imposed the following sanctions against the Athlete:

10.1.1 A period of ineligibility shall be two (2) year in terms of Article 10.6.1.1

10.1.2 The Athlete shall serve the period of ineligibility from the date of the date of voluntary provisional suspension.

Date: 29 March 2023



Mr. Mandla Tshabalala

**For and on behalf of
Dr. Dimakatso Ramagole and Ms Corinne Berg**