

**SA INSTITUTE FOR DRUG-FREE SPORT (SAIDS)****ANTI-DOPING TRIBUNAL HEARING**

ATHLETE: MRS TEBOGO TSOTETSI

DATE: 20 JULY 2023

PLACE OF HEARING: VIRTUAL

DISCIPLINARY PANEL: MR LUC DU PLESSIS  
("THE PANEL") DR ANDY BRANFIELD  
PROF. YOGA COOPOO

PROSECUTOR: MR SHANE WAFER (SAIDS)

PARALEGAL: MS CHRISTINA SKHOSANA

COUNSEL FOR ATHLETE: MR PIETER PARSONS

OBSERVERS: MR NICK FLOWERS  
MR MATTHEW FREER

ANTI-DOPING RULE VIOLATION: 2.1 "Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample" and/or Article 2.2 "Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method"

In the matter between:

**SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT**

**COMPLAINANT**

and

**TEBOGO TSOTETSI**

**ATHLETE**

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**RULING**

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**A. INTRODUCTION**

1. SAIDS is an independent body established as a statutory body under Section 2 of the South African Institute for Drug-Free Sport Act 14 of 1997 as amended by Act no. 25 of 2006, with the objective of acting as the National Anti-Doping Organization (“NADO”) for South Africa.
2. SAIDS has formally accepted the World Anti-Doping Code (“WADC”) adopted and implemented by the World Anti-Doping Agency (“WADA”) and revised in 2021.
3. SAIDS has adopted the SAIDS Anti-Doping Rules (“ADR”) as published by SAIDS and revised in 2021 in accordance with its responsibilities under the WADC and are applicable to the present proceedings.
4. Any capitalised term not defined herein shall have the meaning given to it in the WADC or the ADR, where relevant.

**B. NOTIFICATION AND CHARGE**

5. On 11th April 2023, Tebogo Tsetetsi (the "Athlete") was notified of an Adverse Analytical Finding ("AAF") in respect of the Prohibited Substance Salbutamol detected in the Athlete's A-Sample (180910V) collected on 18th February 2023.
6. On the 8<sup>th</sup> of May 2023, SAIDS informed the Athlete that the Athlete was charged with a violation of **Article 2.1** and **2.2** of the ADR and set out the Proposed Suspension, which read as follows:

*"Salbutamol is a Specified Substance and its presence in your urine sample constitute an adverse analytical finding and is a prima facie breach of Article 2.1 "Presence of a Prohibited Substance or its Metabolites or Makers in an Athlete's Sample" and/or Article 2.2 "Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method" of the ADR".*

7. Following the notification of an AAF, the Athlete was invited by SAIDS to accept a Voluntary Provisional Suspension (a period of Ineligibility of 20 (twenty) months)) in terms of Article 7.4.4 of the ADR. The Athlete initially accepted a Voluntary Provisional Suspension, however she later withdrew her acceptance and chose to participate in the 2023 Comrades Marathon.

**C. PROCEDURAL ISSUES**

8. On 29th May 2023, SAIDS requested the Registrar to convene an Independent Doping Hearing Panel ("IDHP" or the "Panel").
9. On 30th May 2023 and pursuant to Article 8 of the ADR, the SAIDS Registrar appointed the IDHP to hold a virtual hearing on 20th July 2023, which was duly held with the Athlete and her representative.
10. It is accepted that as a result of the Athlete having already admitted the ADRV, the only matter for the Panel to consider is the potential Consequences and the merits of any

argument (or lack thereof) for a reduction of the otherwise applicable period of Ineligibility.

11. SAIDS delivered written submissions in support of the charges on the 17<sup>th</sup> of July 2023.
12. The charge against the Athlete was read into the record as per paragraph 6 above, SAIDS presented their arguments for the Proposed Consequences and the Panel proceeded to hear the Athlete's testimony and questions from the Panel and SAIDS.

#### **D. ATHLETES' VERSION & SUBMISSIONS**

##### Prior to the Hearing

13. During her preparations for the Secunda Marathon (the "Event"), the Athlete began to use her daughters cough medicine (seemingly Alocphyllex) for her illness however this did not work and thereafter she went to the Dis-Chem self-medication counter who recommended she uses 'Pholtex Forte'.
14. The Athlete used a cough syrup in the week leading up to and on the morning of the Event.
15. The Athlete initially believed that the cough syrup she was using, namely 'Alocphyllex' and 'Pholtex Forte', both contained the Prohibited Substance Salbutamol (which was not that case);
16. The Athlete carried out Medication Checks using the SAIDS website however for the incorrect substances prior to her AAF.
17. The Athlete was requested to provide proof of her use of 'Alocphyllex' and 'Pholtex Forte'.
18. The Athlete returned on 21st April 2023, contending that:
  - The Athlete in fact used 'Durro-Tuss Linctus' and not 'Alocphyllex' and 'Pholtex Forte';

- The Athlete used the 'Durro-Tuss Linctus' on 17th and 18th February (the morning of the Event);
- The Athlete provided pictures of the 'Durro-Tuss Linctus' and a copy of her medical aid card and copies of the receipts of purchase for a number of various medications purchased on 17th February 2023, in her husband's name.
- On 25th April 2023, SAIDS requested further clarifications, including why the Athlete's use of various cough syrups did not line up with her indications on her Doping Control Form (DCF) and why the patient listed on the DisChem receipt was listed as her husband and not her.
- On 8th May 2023, the Athlete indicated to SAIDS that she admits being "*very negligent*" in her use of the medications and she seeks leniency in her sanctioning.

During the Hearing

19. The Athlete contended that she was not aware at the time that medication used to treat her cough and flu symptoms contained Salbutamol, which was a prohibited, specified substance.
20. She can't quite recall why she left off the 'Durro-Tuss Linctus' on the DCF but maintains she was stressed at the time of completion of the DCF and was cramping after the Event.
21. In terms of her reasoning behind the DisChem receipt which was listed as her husband and not her, she maintains it is protocol to list the primary medical aid member (her husband) and not necessarily the patient/beneficiary when it comes to non-prescription medicine. This is accepted as a plausible explanation.
22. She contends that she was a recreational athlete and had not received any professional support or sponsorship during her time as a runner and she ran purely for the thrill and for the camaraderie.

23. She deemed the voluntary suspension as very harsh and unfair and considering her recreational status as a runner, she claims she never intentionally went and bought a prohibited substance, it was merely one which was recommended for her, and hence she withdrew her acceptance of the voluntary suspension.
24. She claims she has never received anti-doping education and there was general uncertainty with her contemporaries about doping and the consequences. She believed doping was reserved for substances (and athletes) that had significant impact on their performance.
25. The Athletes main defence was that she did not take the prohibited substance intentionally and that as a result of her ignorance (in good faith) the cold or flu medicine had returned an anti-doping rule violation and although in her own words she was negligent, she wasn't significantly at fault.

**E. SAIDS'S SUBMISSIONS**

26. The Athlete has admitted the ADRV and thus shall be subject to the Consequences for an ADRV set out in the ADR.
27. SAIDS does not assert that the Athlete intentionally committed an ADRV. The issue at hand is negligence on the part of the Athlete.
28. SAIDS has not delved into the issue of intent nor have they attempted to impose a four-year sanction on the self-professed recreational athlete. The article that specifically protects the athlete in this regard is article 10.6.1.3, which states as follows:

*"10.6.1.3 Protected Persons or Recreational Athletes*

*Where the anti-doping rule violation not involving a Substance of Abuse is committed by a Protected Person or Recreational Athlete, and the Protected Person or Recreational Athlete 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 Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault."*

29. SAIDS asserts that even if the Athlete was considered to be recreational, she is still subjected to the exact same sanction framework. SAIDS has not asserted intention, so four years is not in question, SAIDS is requesting a sanction between two-years and a reprimand. SAIDS therefore maintains that the Athlete's recreational status is in fact irrelevant, and this is only an issue of negligence.

**E1. REGULATORY FRAMEWORK: CONSEQUENCES OF THE ANTI-DOPING RULE VIOLATION**

30. In terms of Article 10.2 of the ADR (underline for emphasis):

*"The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*

*10.2.1 The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:*

*10.2.1.1 The anti-doping rule violation does not involve a Specified Substance or a Specified Method, 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 involves a Specified Substance or a Specified Method and SAIDS can establish that the anti-doping rule violation was intentional.*

*10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years."*

31. Where the ADRV involves a Specified Substance and SAIDS can establish that the ADRV was intentional, the period of Ineligibility shall be four (4) years.
32. On this assessment of the facts SAIDS is willing to find that this suffices to establish, "very narrowly" that the ADRV has not been committed intentionally, therefore the base sanction will be set at two (2) years. The Panel agrees with this assessment.

**E2. NO FAULT**

33. Article 10.5 of the ADR provides that, if an 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.
34. SAIDS records that the Athlete, in her statements has admitted to being “*very negligent*” in her use of the Prohibited Substance. It is, therefore, common cause that it is not possible to ever raise an argument for the applicability of No Fault or Negligence.
35. Although SAIDS is willing to accept the that the Athlete in this case “*very narrowly*” escapes the provisions of intentional conduct (indirect intention), but given the fact that the Athlete was competing at a major national marathon she ought to have been more considerate for her duties as it may relate to competing in sport and major sports events that include the observation of anti-doping policies and rules.
36. The Athlete is a seasoned marathon racer having completed 14 Comrades and 12 Two Oceans Marathons.
37. Being a seasoned runner the Panel accepts that this ADRV still represents an element of fault on behalf of the Athlete which needs to be assessed as there needs to be at least some expected standard of behaviour or care that the Athlete should have exercised.

**E3. NO SIGNIFICANT FAULT OR NEGLIGENCE**

38. In order for the Athlete to be eligible for any reduction in the applicable period of Ineligibility, outside of instances of No Fault or Negligence, they must comply with the provisions of Article 10.6.1.1 which states as follows:

*“10.6.1.1 Specified Substances or Specified Methods*

*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."*

39. In order to receive the benefit of this Article, the Athlete must establish that she had No Significant Fault or Negligence in her use of the medication containing Salbutamol.

40. The definition of No Significant Fault or Negligence is set out in the ADR as follows:

*"The Athlete or other Person's establishing that any Fault or negligence, when viewed in 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"*.

#### **G. MAINS ISSUES**

41. Given the submissions made by the parties the following is the main issue (*point in limine*) which arose during the proceedings and which the Panel needs to consider:

- If the Panel is satisfied that the Athlete had No Significant Fault or Negligence in her use of the medication containing Salbutamol, then the IDHP is to determine how much Fault the Athlete had and where on the Cilic scale/guidelines (set out below) her applicable Consequences shall lie.

#### **H. REDUCTION OF SANCTION**

42. In determining whether the Athlete has acted with No Significant Fault or Negligence, the Panel should also take into account the definition of Fault (own emphasis added):

*"Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's*

*degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2."*

43. In addition to the above when determining the degree of fault, this Panel applied the three categories of Fault as considered, in a different context, and under different rules, in the matter of *Cilic v ITF* (CAS 2013/A/2237) (the "**Cilic Guidelines**").
44. In terms of the Cilic Guidelines<sup>1</sup> there are three degrees of Fault which can be applied to the possible sanction range of 0 – 24 months:
- (a) **significant** degree of or considerable fault, with a sanction range from 16 to 24 months, and a "standard" significant fault leading to a suspension of 20 months;
  - (b) **normal** degree of fault, with a sanction range from 8 to 16 months, and a "standard" normal degree of fault leading to a suspension of 12 months; and
  - (c) **light** degree of fault, with a sanction range from 0 to 8 months, and a "standard" light degree of fault leading to a suspension of 4 months.
45. The distinction in the three degrees of fault: significant, normal, and light, it is suggested to take "*the objective and the subjective level of fault*" into consideration. The objective element relates to "*what standard of care could have been expected from a reasonable person in the athlete's situation*" while the subjective element describes "*what could have been expected from that particular athlete, in the light of his particular capacities*".

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<sup>1</sup> Subsequent CAS panels since *Cilic*, for example in *Robert Lea v. United States Anti-Doping Agency (USADA)* ("Lea") have made slight adjustments to the Cilic categories to allow for the new 2021 wording of Article 10 of the WADC and ADR, such that the adjusted guidelines are as follows: (a) **considerable** degree of or considerable fault, with a sanction range from 16 to 24 months, and a "standard" significant fault leading to a suspension of 20 months; (b) **moderate** degree of fault, with a sanction range from 8 to 16 months, and a "standard" normal degree of fault leading to a suspension of 12 months; (c) **light** degree of fault, with a sanction range from 0 to 8 months, and a "standard" light degree of fault leading to a suspension of 4 months.

46. The objective element should be foremost in determining into which of the three relevant categories of Fault a particular case falls.
47. The subjective element can then be used to move a particular athlete up or down within that category.
48. The Cilic panel set out criteria for assessing the objective element (Stage 1) stating that, "*In theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented*". For example, the athlete could always:
- read the label of the product used (or otherwise ascertain the ingredients);
  - cross-check all the ingredients on the label with the list of prohibited substances;
  - make an internet search of the product;
  - make use of medication check tools;
  - ensure the product is reliably sourced; and
  - consult appropriate experts in these matters and diligently instruct them before consuming the product.
49. The subjective element (Stage 2) describes what could have been expected from that particular athlete, in light of their personal capacities.
- an athlete's youth and/or inexperience;
  - language or environmental problems encountered by the athlete;
  - the extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete); and
  - any other "personal impairments" such as those suffered by: (i) an athlete who has taken a certain product over a long period of time without incident; (ii) an athlete who has previously checked the product's ingredients; (iii) an athlete who is

suffering from a high degree of stress; (iv) an athlete whose level of awareness has been reduced by a careless but understandable mistake.

50. The Panel accepts that in this assessment, negligence is the failure to exercise reasonable care in line with what could have been expected from the Athlete in her particular circumstances. Although the Athlete admitted to being “*very negligent*” in her correspondence to SAIDS, her testimony seems to suggest that she was only ignorant and this ADRV could be chalked down to a bona fide mistake.
51. This distinction between negligence and ignorance rests on the notion of internal access. In cases of genuine ignorance, a person lacks internal access to the relevant facts. In cases of negligence, in contrast, a person has internal access to the relevant facts but fails to bring them into their conscious mind at the appropriate time.<sup>2</sup>
52. Unfortunately, ignorance is not a defence and given her access and objectively speaking, crucially she failed to perform any checks prior to ingesting the medication, such as reading the label of the product used, enquiring as to the nature of the medication and cross-checking its ingredients with the Prohibited List. She also did not consult appropriate experts in this matter, despite clearly suffering from some sort of ailment or sickness.
53. The Panel notes that the new WADC provided a framework for reduced obligations and sanctions for ‘recreational athletes’, allowing discretion and flexibility in sanctioning under the Anti-Doping Code and International Standard Framework Development and Implementation Guide for Stakeholders: *51. New Category of Athletes “Recreational Athletes” Permitted More Flexibility in the imposition of Consequences.*
54. Despite the fact that the Athlete was a recreational athlete and had very little or no anti-doping education, in determining “No Significant Fault or Negligence” the Panel agrees the following in aggravation:

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<sup>2</sup> Alexandra Trofimov (2022) Negligence is not ignorance, Jurisprudence, 13:2, 240-257, DOI: [10.1080/20403313.2022.2027693](https://doi.org/10.1080/20403313.2022.2027693)

- She was not uneducated or illiterate;
  - Being a registered ASA license holder she would have agreed to abide by the ASA Rules and IAAF Regulations.
55. SAIDS and the Panel agree that even though there is a greater obligation on the high-level, elite athlete who has received anti-doping education on numerous occasions to undertake a more thorough due diligence however this does not absolve the so-called inexperienced athlete at the other end of the spectrum from taking any steps whatsoever.<sup>3</sup>
56. Despite the fact that the Athlete received no formal anti-doping education, this fact alone is not dispositive and cannot serve as a standalone ground for a reduction of sanction under No Significant Fault or Negligence.
57. SAIDS is correct that ignorance is not a defence, and despite her status as recreational or otherwise, the degree of fault meets the requirements for No Significant Fault or Negligence but still in the category of considerable fault.

## I. FINDING

58. In assessing Athlete's degree of fault based on the objective and subjective factors and considering the totality of the specific and relevant circumstances together with the flexibility and discretion applied to recreational athletes, the Panel finds that the Athlete falls in the standard or mid-part of the "considerable" degree of fault category.
59. The Panel finds that a period of ineligibility of **20 months** is to be imposed on the Athlete.
60. The Athlete's results of 18th February 2023 at the Event (4th place), as well as the results obtained in any other competition the Athlete participated in from 18th February 2023, including the 2023 Comrades Marathon, be immediately disqualified, along with

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<sup>3</sup> See: Joshua Taylor v. World Rugby CAS 2018/A/5583, § 94.

the return of any medals or prize money awarded, in accordance with Article 10.1 and 10.10 of the SAIDS ADR.

61. The Athlete's period of Ineligibility will run from the date of this ruling by the Panel, 15 August 2023 expiring on the 15 April 2025 (midnight).

Dated: 15 August 2023

**For and on behalf of the Panel:**

*Luc du Plessis*

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MR LUC DU PLESSIS

DR ANDY BRANFIELD

PROF. YOGA COOPOO