

**BEFORE THE ANTI-DOPING APPEAL TRIBUNAL OF SOUTH AFRICA**

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

Case No.: AT 01/2013

**In the matter between:-**

**WORLD ANTI-DOPING AGENCY (WADA)**

**(APPELLANT)**

**versus**

**Ms LEBOGANG PHALUALA (Athlete)**

**(FIRST RESPONDENT)**

**and**

**SOUTH AFRICAN INSTITUTE FOR  
DRUG-FREE SPORT (SAIDS)**

**(SECOND REPENDENT)**

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**DECISION**

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1. This is an Appeal by WADA against the Decision of the SAIDS Disciplinary Committee in respect of a hearing held on or about the 13<sup>th</sup> December 2011.
2. WADA was not present but requested that their Appeal Brief be taken into account. The Athlete was present as well as her legal representative Mr. Richard Mayer. SAIDS was represented by Adv. Nic Kock. Fahmy Galant & Liam Shirley were present as observers from SAIDS and Reyanah Rezant was the minute taker.
3. At the Disciplinary Hearing the Athlete pleaded guilty to a contravention of an anti-doping rule violation in terms of Article 2.1 of the Anti-Doping Rules (ADR) of SAIDS in that an in-competition test performed on a bodily sample provided by the Athlete at the Spar Ladies 10km race on 27 August 2011, revealed that the Athlete had tested positive for methylhexaneamine (dimethylpentylamine).

4. Methylhexaneamine (dimethylpentylamine) is a prohibited substance, which is classified under "S6 (b)" (*Specified Stimulants*) on the 2011 WADA Prohibited List.
5. The Athlete is a long distance runner, affiliated to the Gauteng Striders Athletics Club (the Club) which in turn is affiliated to Athletics South Africa (ASA), the national federation governing the sport of track and field athletics in South Africa.
6. The Committee found that the Athlete has established how the substance entered her body and was satisfied that the Athlete ingested the substance by taking one or more of the pills given to her in order to treat the symptoms of her illness and not to enhance her sporting performance.
7. The Committee imposed a sanction of 3 months ineligibility. It is against this sanction that WADA has appealed and requested the Appeal Board to impose a period of ineligibility of 2 years.

## DETERMINING THE SANCTION

### General

8. Pursuant to article 10.5 of SAIDS ADR, an athlete can establish that, in view of the exceptional circumstances of his/her individual case, the otherwise applicable period of ineligibility shall be eliminated (in case of no fault or negligence as per article 10.5.1) or reduced (in case of no significant fault or negligence as per article 10.5.2).
9. With respect to Specified Substances, article 10.4 of the SAIDS ADR further states:

*"Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:  
First violation: At a minimum, a reprimand and no period of ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. [...]"*

### Origin of the prohibited substance in the athlete's bodily specimen

10. In order to have the period of ineligibility eliminated or reduced under art. 10.4 or reduced under art. 10.5.2 of the SAIDS ADR, the Athlete must first establish how the prohibited substance entered her system.
11. In that respect, the standard of proof imposed upon the athlete pursuant to art 3.1 of the SAIDS ADR is the balance of probability.
12. We accept that the prohibited substance entered the Athlete's system as a result of her voluntary ingestion of the pills given to her by Mr. Livingstone Jabanga (Jabanga) the Chairman of the Club.

### Explanations of the Athlete

13. At the commencement of the Appeal Hearing Mr. Mayer requested to lead the evidence of the Athlete on one or two aspects.
14. The record of proceedings, the decision of the Committee and the further evidence of the Athlete provide more detail as to the circumstances in which the Athlete ingested the prohibited substance, as follows:
  - 14.1. The Athlete travelled to the Spar Race with Jabanga and her sister;
  - 14.2. The Athlete was suffering from a chest infection for the previous 2 weeks and was not feeling well on the day of the race.;
  - 14.3. The Athlete informed Jabanga that she was not feeling well but he handed her a few pills which he said were vitamins and that it would make her feel better;
  - 14.4. The Athlete trusted Jabanga not to give her any prohibited substances and she took the pills without further questions or verification;

- 14.5. The Athlete stated that Jabanga was a good man. He was like a father to her. He supported her with money and other help. She had no reason to disbelieve him.

#### Art 10.4 SAIDS ADR - Applicability

15. For art. 10.4 SAIDS ADR to apply, the Athlete must satisfy the Appeal Board that she did not take the pill(s) for the purpose of enhancing sport performance; indeed, she must do so to the higher burden of the comfortable satisfaction of the Appeal Board and provide corroborating evidence in addition to her own word.
16. We accept that the Athlete's sister provided the necessary corroboration.
17. We are comfortably satisfied that the pre-conditions of art. 10.4 SAIDS ADR are met and art. 10.4 SAIDS ADR is applicable.

#### Art 10.4 SAIDS ADR – The degree of fault.

18. The range of possible sanctions under art. 10.4 SAIDS ADR is very wide. Depending on the degree of fault on the part of an Athlete, it can vary from a reprimand to a two year period of ineligibility.
19. In the exercise of our discretion we have considered the evidence, the documents submitted, the decision of the Disciplinary Committee, the relevant case law and the submission made to us by the parties.
20. In arriving at an appropriate sanction one must balance the interests of all of the stakeholders – the Athlete, her competitors, the sports community, sponsors and the public at large – in such a way that the sanction is neither too harsh nor too lenient. Each case must be decided on its own merits.
21. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body (art. 2.1.1 SAIDS ADR).
22. In this case, the Athlete failed to take any precautionary measures prior to taking the pill(s). Without limitation, she did not consult a medical doctor or perform any internet checks.

23. The Athlete's omissions must be considered as particularly serious on the basis of the following:

23.1. The Athlete claims that she relied on the assurances of Jabanga as she trusted him and because his wife is a medical doctor;

23.2. She is an elite athlete having competed in international events like the African Championships and the World Games;

23.3. She is 30 years old and passed Grade 12;

23.4. She has access to a qualified sports medicine practitioner but did not utilize his services to ascertain whether the pills given to her by Jabanga contained prohibited substances or not;

23.5. She has been tested on numerous occasions;

23.6. She receives anti-doping education on an annual basis;

24. Athletes have been held to be at significant fault for relying on the assurances of a general practitioner rather than a doctor specialised in sports medicine (CAS 2008/A/1565 WADA v. CISM &Turrini). In this case, the Panel found that:

*"[.....] the Athlete cannot rely on advice from his personal physician in these matters, especially when the doctor is no expert on sports medicine."*

25. If relying on specific advice from a doctor is not sufficient to cause the standard two-year sanction to be reduced, this is the case *a fortiori* where an athlete relies on the instructions of a non-medically qualified sports administrator.

26. To hold that the Athlete's fault is not significant in these circumstances runs counter to an established body of case law on art. 10.4.

27. The Appeal Board agrees with the submission by WADA that if an athlete merely had to submit that he placed great trust in a coach or administrator in order to obtain a reduced sanction a reduction under art 10.4 or 10.5.2 could be engineered to apply in almost every doping matter.

Art 10.5.3 SAIDS ADR – Applicability

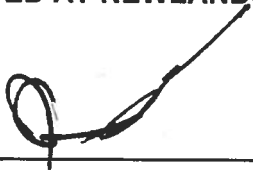
28. Art 10.5.3 SAIDS ADR provides for the suspension of a period of ineligibility where the Athlete has provided Substantial Assistance to an Anti-Doping Organization which results in the Anti-Doping Organization discovering or establishing an anti-doping violation by another person.
29. The extent to which the otherwise applicable period of ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete and the significance of the Substantial Assistance provided by the Athlete.
30. No more than three-quarters of the otherwise applicable period of ineligibility may be suspended.
31. From the outset the Athlete implicated Jabanga as the source of the Prohibited Substance. Jabanga is an important figure in athletics. He is the Chairperson of the Club and is also a board member of the Central Gauteng Athletics Board.
32. Jabanga is also an athletics coach at the Club and has an excellent record in the coaching of young athletes.
33. As a consequence of the evidence given by the Athlete, Jabanga was charged with and convicted of a contravention of art.2.8 SAIDS ADR on 11<sup>th</sup> July 2012. On the 20<sup>th</sup> November 2012 Jabanga received a sanction of 5 years' ineligibility.
34. The Athlete was a witness at the hearing of Jabanga and her evidence was accepted by the Panel and Jabanga's denial rejected.
35. Having regard to the following factors we are of the view that a suspension of a portion of the period of ineligibility we intend imposing is justified:
- 35.1. The status of Jabanga;
  - 35.2. The Athlete 'blew the whistle' on Jabanga at an early stage;
  - 35.3. The Athlete testified against Jabanga;
  - 35.4. Jabanga was found Guilty and Sanctioned.

## DECISION

Having regard to all of the above we have decided as follows:

1. The Appeal of WADA is admissible.
2. The sanction imposed by the SAIDS Anti-Doping Disciplinary Committee on 13th December 2011 is set aside.
3. The Athlete is sanctioned with a two-year period of ineligibility starting on the 28<sup>th</sup> September 2011.
4. A period of one year is suspended in accordance with art. 10.5.3 SAIDS ADR.
5. No order is made as to costs

**DATED AT NEWLANDS ON THIS 10th DAY OF JANUARY 2013.**



**ALEX ABERCROMBIE**

**Dr E Nematswerani**

**Prof. Y Coopoo**