

BEFORE THE ANTI-DOPING APPEAL TRIBUNAL OF SOUTH AFRICA

In the matter between: -

Case No.: AT 01/2011

WORLD ANTI-DOPING AGENCY (WADA)

(APPELLANT)

versus

VAUGHN VAN JAARVELD (the Athlete)

(FIRST RESPONDENT)

and

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

(SECOND RESPONDENT)

DECISION

1. This is an appeal by WADA against the sanction imposed by the Anti-Doping Disciplinary Committee of SAIDS upon the Athlete on 2 December 2010 for violating Article 2.1 of the 2010 Anti-Doping Rules of SAIDS.
2. On the 19th July 2011 WADA through their legal representatives indicated that they will not be present at the hearing but will rely on the submissions in their Appeal Brief which was again summarized in the aforementioned letter.
3. The Athlete was represented by Advocate Frans Rautenbach instructed by Irish Incorporated.
4. SAIDS was represented by Messrs Raymond Hack and Khalid Galant
5. Mr Mike Gajjar attended as an observer for Cricket South Africa.
6. The charge against the Athlete was that on the 16th October 2010 during an in competition test, a urine sample indicated the presence of substances which were metabolites of the stimulant Sibutramine which is classified as a Specified Stimulant and falls under Class S6(b) on the World Anti-Doping Code 2010 Prohibited List International Standard.
7. The Disciplinary Committee considered the evidence placed before it and concluded that the Athlete was guilty of contravening Article 2.1 of the Rules, having tested positive for a prohibited substance, namely Bis-norsibutramine and Hydro (cyclobutane) – bisnorsibutramine, metabolites of the Stimulant Sibutramine.
8. Insofar as the appropriate sanction is concerned the Disciplinary Committee was satisfied that the evidence established the criteria set out in Article 10.4 that qualified for the elimination or reduction of the two year period of ineligibility for Specified Substances under specified circumstances
9. The Disciplinary Committee was of the view that the degree of satisfaction of the criteria as set out in Article 10.4 of the 2009 Anti Doping Rule for the reduction or elimination of the two year period of ineligibility for a specified substance under specified circumstances was such that a severe reprimand of the Athlete would suffice.

10. It is against this sanction that WADA lodged a Statement of Appeal with the Court of Arbitration for Sport (CAS) on the 18 March 2011 in which WADA requested a stay of the CAS proceedings pending the outcome of this Appeal. On the 14th April 2011 this appeal was lodged with SAIDS.
11. At the commencement of this hearing Mr. Hack raised what appeared to be a point *in limine* relating to what appeared to be *lis pendens* in that the appeal lodged with CAS has not been withdrawn. It was raised more on the basis of giving the committee historical background whilst at the same time raising the issue as to whether or not the matter could proceed before us. Secondly Mr. Hack stated the appeal was out of time.
12. These points were never raised prior to the hearing nor by the Athlete at all. In any event, the forum in which to raise it would be at the CAS if the matter is proceeded with in that forum. As we understand the situation the appeal was lodged with CAS as SAIDS did not have an Appeal Tribunal and WADA requested CAS to stay the proceedings until SAIDS arranged for the Appeal to be heard by this Appeal Tribunal.
13. Accordingly both points *in limine* are dismissed.
14. The tribunal is indebted to the parties for the comprehensive submissions made and in particular to the case law which sets out the general principles to be applied in determining the appropriate sanction in this case.
15. Having considered the applicable Rules and the case law it appeared that the following are relevant to this case:
 - 15.1 In terms of Article 10.2 of the Rules the sanction for a first violation of Article 10.1 is 2 years ineligibility unless conditions for eliminating or reducing the period as contemplated in 10.4 and 10.5 are present or the conditions for increasing the period as provided for in 10.6 are met.
 - 15.2 Article 10.4 provides that where the Athlete can establish (a) how the Specified Substance entered his body and (b) that it was not intended to enhance his sport performance or mask the use of a performance-enhancing substance, the period of ineligibility may be replaced with a sanction ranging from a reprimand to a period of a maximum of 2 years ineligibility.
 - 15.3 Article 10.5.1 states that if a violation of 2.1 occurs and the Athlete establishes that he bears no fault or negligence and, how the Prohibited Substance entered his system, the period of ineligibility will be eliminated.
 - 15.4 Article 10.5.2 is similar to 10.5.1 but deals with "no significant Fault or Negligence", in which case the period of ineligibility will be reduced to half of the otherwise applicable period of ineligibility.
 - 15.5 Article 10.6 is not applicable in this case.
 - 15.6 The onus of establishing circumstances which warrant the imposition of a lesser period of ineligibility than prescribed rests on the Athlete on a balance of probabilities.
 - 15.7 That in considering an appropriate period of ineligibility in terms of Rule 10.4 the Tribunal has to take into account the facts relating to the specific matter it is dealing with and determine the degree of fault or negligence on the part of the athlete. In other words each case must be decided on its own merits.
16. Turning now to the facts of this case the following seems to be apparent from the evidence as summarized by the Disciplinary Committee.
 - (a) The Athlete consulted with Dr. Hudson.
 - (b) Dr. Hudson is not an expert on Sports Medicine

- (c) Dr Hudson had checked an outdated WADA prohibited list and Sibutramine was not listed thereon.
 - (d) Dr Hudson prescribed 5 different types of medication on the 11th July 2010 one of which was Ciplatrim which contained metabolites of the stimulant sibutramine.
17. It is therefore apparent from the record that the athlete has established how the Specified Substance entered his body.
 18. The questions to be answered in determining an appropriate period of ineligibility are the following:
 - (a) was the specified Substance taken by the athlete to enhance his sports performance?
 - (b) has the athlete established no fault or negligence.
 - (c) has the athlete established no significant fault or negligence.
 19. Having regard to the fact that the Athlete took Ciplatrim for weight loss and having regard to the other medication prescribed at the time, it may well be that the Athlete has not established that he did not take the medication to enhance his sports performance.
 20. On the facts of this case it cannot be said that the Athlete has established no fault or negligence.
 21. Consequently this Tribunal is not convinced that the Athlete qualifies to be dealt with under Article 10.4. It seems to us that Article 10.5.2 should find application but here it is not clear whether or not there needs to be an absence of an intention to enhance the Athletes' performance.
 22. From a perusal of the decision of the Disciplinary Committee it seems that neither the prosecutor nor the Committee canvassed the aspect relating to performance enhancement at all.
 23. It is not clear from the Decision whether any oral evidence was led and tested. It appears as if this was not done so that it is difficult to understand on what basis the committee found that the athlete discharged the onus which he bore.
 24. A further disturbing factor is the affidavit by Dr Shuab Manjra. The Tribunal is of the view that this hearsay affidavit should not have been admitted as evidence but that Dr Hudson should have been called as a witness or alternatively an affidavit by Dr Hudson if he was unable to attend the hearing. In any event the practice of officials of SAIDS contacting witnesses and submitting an affidavit in a Disciplinary hearing is frowned upon by the Tribunal.
 25. Despite what is stated above we are bound by the concession by WADA in paragraph 29 of its Appeal Brief and the first Bullet Point in a letter of the 19 July 2011 namely that WADA accepts that the various conditions of Article 10.4 are met and the said article therefore applied.
 26. What remains is for us to consider an appropriate sanction. In this regard we are of the view that the following factors must be taken into account and we should try to strike a balance so as not to overemphasize the one over the other.
 - (a) The nature and seriousness of the offence.
 - (b) The personal circumstances of the athlete.
 - (c) The community at large and in particular the Sports Community.
 - (d) The interests of the competitor(s).

27. Having considered these factors we must be mindful of the objectives of a sanction, namely, to punish the offender, to deter others from committing similar offences, rehabilitation of the offender and retribution.
28. There is no doubt that the offence is a serious one. This is borne out by the mandatory sanction of ineligibility for 2 years. The sports community and indeed the community at large regards offenders with outrage and disgust and competitors feel cheated to say the least.
29. Insofar as the personal circumstances of the Athlete is concerned, the following can be gleaned from the Decision:
- (a) he is a National Level Cricketer
 - (b) he waived his right to the analysis of the B-sample thereby effectively pleading Guilty.
 - (c) he consulted a medical doctor who prescribed medication for weight loss.
 - (d) he informed his coach about the medication he was on.
 - (e) He disclosed the medication on the Doping Control Form.
 - (f) He was suspended for one month
30. We are of the view that given the degree of negligence on the part of the Athlete in not making sure that the medication prescribed did not contain a Specified Substance, the sanction of a severe reprimand was not appropriate taking into account what is stated above.
31. In our view a period of 4 months ineligibility (less the period of one months' suspension already served) is an appropriate sanction and accordingly the appeal succeeds and paragraph 30(b) of the decision and recommendation of the Committee is set aside and replaced with the following
- (b) The Athlete has satisfied the requirements for a reduction of the period of ineligibility in terms of Article 10.4 and is declared ineligible for participation for a period of 3 months as from date hereof.***

Dated at Johannesburg this 23rd September 2011

Mr. Alex Abercrombie (Chairperson)

Dr. Sello Motaung

Prof. Denver Hendricks