Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2009/A/1915 WADA v. Polish Wrestling Federation, Kamil Blonski & Wojciech Zieziulewicz

ARBITRAL AWARD

rendered by the

Court of Arbitration for Sport

sitting in the following composition:

President: Christoph Vedder, Professor of law, Munich, Germany
Arbitrators: Dr. Hans Nater, Attorney-at-law, Zurich, Switzerland
Ms. Maria Zuchowicz, Attorney-at-law, Warsaw, Poland

in the arbitration between:

World Anti-Doping Agency (WADA), Lausanne, Switzerland
represented by Mr. Francois Kaiser, Attorney-at-law, Lausanne, Switzerland

Appellant

and

Polish Wrestling Federation (PWF), Warsaw, Poland
represented by Mr. Piotr Plachta, Attorney-at-law, Warsaw, Poland

First Respondent

and

Mr. Kamil Blonski, c/o PWF, Warsaw, Poland

Second Respondent

and

Mr. Wojciech Zieziulewicz, c/o PWF, Warsaw, Poland

Third Respondent

A. SUMMARY OF THE FACTS

I. The Parties

1. The World Anti-Doping Agency, the Appellant (hereinafter referred to as "WADA"), is the independent international organisation to promote, coordinate and monitor the fight against doping worldwide in all sports. In particular, it monitors the implementation of and compliance with the World Anti-Doping Code (hereinafter "the WADC"). It is a foundation under Swiss private law with its corporate seat in Lausanne, Switzerland and its headquarters in Montréal, Canada.

2. The Polish Wrestling Federation, First Respondent (hereinafter referred to as "PWF") is the national federation responsible for the sport of wrestling in Poland and affiliated with the Fédération Internationale des Luttes Associées ("FILA")

3. Messrs. Kamil Blonski and Wojciech Zieziulewicz, Second and Third Respondents (hereinafter referred to as the "Athletes"), are wrestlers representing the sports club MKZ UNIA Racibórz (Municipal Wrestling Club of Racibórz, the "club") which is affiliated with the PWF.

II. Factual Background

4. On 17 December 2008, both Mr. Blonski and Mr. Zieziulewicz were tested positive for two metabolites of Methyltestosterone, a prohibited substance on the Prohibited List, in an out-of-competition test. The analysis of the A samples of both athletes was carried out in the Department of Anti-Doping Research of the Institute of Sport in Warsaw, Poland, a WADA accredited laboratory, on 9 January 2009. The results of the A samples were confirmed by the analysis of the B samples of both wrestlers which was conducted in the same laboratory on 28 January 2009.

5. Both wrestlers were suspended by PWF on 17 December 2008.

6. By decision of 15 May 2009 which was notified to FILA by letter of 19 May 2009, the Board of PWF declared both Athletes ineligible to compete for a period of one year because the prohibited substances detected in the A and B samples were shown to be present in the nutritional supplement both wrestlers had received from their club. The Board of PWF invoked Art. 10.5.2 of the WADC and the relevant rule of FILA's Anti-Doping Regulations (hereinafter referred to as "ADR") dealing with *no significant fault or negligence.*

7. Upon request PWF notified WADA of the decision of PWF's Board on 20 May 2009 and, on 10 June 2009 WADA appealed the decision before the Disciplinary Arbitration Commission of the PWF (hereinafter referred to as "DAC"). The appeal was mainly based on the argument that in the case of both wrestlers the conditions for *no significant fault or negligence* regarding nutritional supplements had not been met.

8. In its decision dated 29 June 2009 the DAC confirmed the sanction of one year ineligibility of Messrs. Blonski and Zieziulewicz. The DAC concluded that the prohibited substance entered into the bodies of both athletes "*without their knowledge or negligence*" and the wrestlers "*did their best to exclude the possibility of occurring the prohibited substances in their bodies.*"

9. WADA was notified of this decision on 30 June 2009.

B. PROCEEDINGS BEFORE THE CAS

10. WADA filed a Statement of Appeal on 21 July 2009 followed by an Appeal Brief dated 31 July 2009 against the decision of 29 June 2009 adopted by the DAC of PWF concerning Second and Third Respondents. On 25 August 2009, PWF submitted its "Answer to the Statement of Appeal".

I. Composition of the Panel

11. By letter of 31 July 2009 all Respondents, PWF, Messrs. Blonski and Zieziulewicz, jointly nominated Ms. Maria Zuchowicz, attorney-at-law of Warsaw, Poland as arbitrator, whereas Dr. Hans Nater, attorney-at-law of Zurich, Switzerland already had been nominated by WADA in its Statement of Appeal. By letter dated 26 August 2009, the parties were advised that pursuant to Article R54 of the Code of Sports-related Arbitration ("the Code") the Deputy President of the CAS Appeals Arbitration Division appointed the Panel to decide the dispute as follows: Dr. Hans Nater and Ms. Maria Zuchowicz arbitrators and Mr. Christoph Vedder president of the Panel.

II. The Proceedings thus far

12. WADA filed its Statement of Appeal accompanied by the Appeal Brief on 21 July and 31 July 2009 to which PWF responded by its Answer to the Statement of Appeal on 25 August 2009. Upon request by WADA the Panel, by order of 22 September 2009, granted both parties the opportunity to file reply and response. WADA submitted its Reply on 6 October 2009 and PWF submitted its Second Answer on 23 October 2009. Further to that, PWF sent various bills and invoices evidencing PWF's expenses.

13. The Panel duly reviewed the facts and arguments submitted by WADA and PWF and came to the conclusion that it was sufficiently well informed and able to decide on a paper only base. WADA, by letter of 2 September 2009 already had agreed not to hold a hearing on the condition that it would be granted the opportunity to file a complementary brief in response to PWF's Answer. Therefore, by letter of 29 January 2010 the Panel informed the parties about its intention to decide without a hearing and consulted them according to Article R57 para. 2 of the Code. PWF, by letter of 3 February 2010 declared their agreement not to hold a hearing.

14. The order of procedure issued on 24 February 2010 states that by signature of the Order, the parties confirm their agreement that the Panel may decide this matter based on the parties' written submissions and was signed by WADA and PWF on 25 February and 2 March 2010, respectively.

15. The Panel deliberated the case by correspondence and a conference call was held on 9 March 2010.

III. Submissions of the Parties

16. Although the Athletes did not file any independent submissions nor sign the Order of Procedure, their signed statements dated 17 March 2009, declaring that they were not aware the supplements they took contained prohibited substances, were filed as exhibits to PWF's Answer brief. The Appellant and the First Respondent chiefly advocated the following arguments.

1. Appellant

17. In its Statement of Appeal and Appeal Brief, dated 21 July and 31 July 2009, respectively, and its Reply of 6 October 2009 WADA identifies the rules of FILA, the WADC and, as long as not in contradiction to the latter, the rules of the PWF as the law applicable to the case, the substantive rules of them is the version in effect at the time of the out-of-competition test, *i.e.* on 17 December 2008.

18. WADA confirms the admissibility of the appeal by stating that the Appeal Brief was sent to CAS on 31 July 2009 and, hence, the time limit according to Article R51 of the Code was respected.

19. With regard to the merits of the case WADA states that an anti-doping rule violation took place according to Article 2.1 of FILA's Anti-Doping Regulations ("ADR") and reiterates the fact that the violation had not been contested by Messrs Blonski and Zieziulewicz nor PWF.

20. WADA challenges the appealed decision of PWF's DAC but limited to the determination of a sanction of one year only. WADA submits that, according to Article 10.2 ADR the regular sanction of two years has to be imposed and that neither an elimination according to Article 10.5.1 ADR nor a reduction according to Article 10.5.2 ADR is justified.

21. WADA accepts, as the Board and the DAC of PWF did in their decisions that the prohibited substance found in the samples of the wrestlers originated from the nutritional supplement called "Jungle Warfare" which was given to the Athletes by one of their sponsors through the Club's personnel.

22. However, WADA disagrees that the conditions for an elimination of the sanction set forth in Article 10.5.1 ADR are met by Messrs. Blonski and Zieziulewicz. With reference to the CAS case law WADA submits that, in order to be entitled to an elimination of the sanction, an athlete must establish that he or she did not know or suspect and could not reasonably have known or suspected, even with utmost caution, that he or she had used or had been administered the prohibited substance. However, WADA states that it is uncontested that Article 10.5.1. ADR does not apply to the Second and Third Respondents.

23. Instead, WADA focuses on the conditions for a reduction of the sanction for *no significant fault or negligence* under Article 10.5.2 ADR. According to WADA's submission, the athlete, in order to benefit from a reduction, must establish that the circumstances of the case were truly exceptional, i.e. when it can be shown that the degree of fault or negligence, seen in the totality of the circumstances, was not significant in relation to the anti-doping rule violation.

24. WADA refers to the CAS case law concerning the use of nutritional supplements and deals with the arguments which had been submitted by the Athletes and accepted by the DAC in its decision under appeal, one after another: their search on the internet, the inquiry to the seller and distributor and the content of the product label.

25. According to WADA, by reference to CAS case law, an internet search is a minimum step athletes should take in order to make sure that the food supplement they intend to use does not contain prohibited substances. WADA, by quoting from various websites and links, submits that a brief search on the internet would have easily revealed that "Jungle Warfare" is a suspicious product, even when, as the Athletes do not speak English, one had looked at websites in Polish language, exclusively. WADA also refers to websites which were introduced into these proceedings by PWF in Polish language the wording and content of which should have alerted

and induced the Athletes to conduct further investigation. WADA, in particular, points to a quotation which, in the English translation, says that Jungle Warfare has "*the same effects as anabolic steroids*". By failing to carry out further inquiry the Athletes did not meet the standard of duty required for the use of food supplements.

26. With regard to the inquiry with the seller and the distributor of "Jungle Warfare" WADA makes reference to CAS case law to the effect that even a written certificate by the producer of a food supplement is not sufficient to provide a guarantee which is needed for a professional athlete whose livelihood and reputation depend upon the absence of prohibited substances. A mere phone consultation with the distributor of "Jungle Warfare", should it have taken place either by the Athletes themselves or, even less sufficiently, by Mr. Promis, an employee of the club, who told the Athletes that the product was clean, does not satisfy the requirements of Article 10.5.2 ADR. Even if a written confirmation had been obtained by the Athletes themselves this would not have been sufficient for Second and Third Respondent to fulfil their duty of care incumbent under Article 10.5.2.ADR, in particular against the background that the internet search should have shown to the Athletes that "Jungle Warfare" is a suspicious product.

27. With reference to CAS case law WADA thirdly submits that the mere confidence in the content of the product label cannot free the wrestlers from their responsibility of what substances enter their body. WADA points to the risk that food supplements can be contaminated with prohibited substances or contain substances not declared and that, concerning food supplements, various warnings have been issued by WADA and FILA, in particular through FILA's circular letter of 17 January 2007, in which it advised all national federations that food supplements may contain prohibited substances not listed in the contents of the products and to warn their wrestlers that "*In the event they want to carry on taking food supplements, the must have the selected product submitted to analysis prior to its absorption*". WADA emphasises that the prohibited substances found in the Athletes' bodies do not result from a contamination of a common food supplement purchased from a source with no connection with prohibited substances.

28. In response to PWF which chiefly relies on the principle of proportionality WADA emphasizes that the CAS awards quoted by PWF were issued before the WADC entered into force on 1 January 2003. By introducing exceptional circumstances which allow a sanctioning authority to reduce the regular sanction in the WADC, the general proportionality principle was codified and restricted, however in line with the requirements of human rights. As of the coming into effect of the WADC the case law relied upon by PWF is no longer relevant. According to WADA, there is no longer room to apply the proportionality principle beyond Article 10.5.2 ADR. Instead, Article 10.5.2 ADR is to be applied as such following its various elements and according to the CAS case law related thereto, *i.e.* in cases after the entry into force of the WADC.

29. Contrary to PWF's submission which emphasized that the young and inexperienced Athletes were allowed to fully trust the club's staff personnel WADA, with reference to CAS jurisprudence, points out that it is the Athletes' personal responsibility to ensure that no forbidden substance enters their body. That duty of care was neglected when the Athletes blindly trusted their support personnel who in turn trusted the information given by the suppliers of "Jungle Warfare" with whom they entertained a commercial relation for years. According to WADA, no attempt was made to demonstrate that the wrestlers exercised some particular care.

30. With respect to PWF's excuse based on the Athletes' age and inexperience WADA, by reference to CAS case law, submits that the age of the Athletes is irrelevant in general and, in the particular case, that both Athletes were competing since 2004 on a national level and internationally since 2006 and that they underwent various doping controls previously.

31. WADA rejects PWF's submission that the wrestlers did not intend to enhance their performance. First and foremost, when applying Article 10.5.2 of the WADC and Article 10.5.2 of FILA's ADR for an anti-doping rule violation it is irrelevant whether an athlete intends to enhance his performance. Furthermore, the leaflet attached to "Jungle Warfare" announced that the product "*increases the strength*" and causes the "*growing production of testosterone*" which clearly means performance enhancement.

32. WADA rejects the argument submitted by PWF that the Athletes could have had confidence in the product information related to "Jungle Warfare" because Polish law provides that all ingredients of a nutritional supplement be made public on the label or package. WADA submits that the duty of care for athletes, pursuant to the WADC, is higher than for ordinary people under Polish law.

33. WADA concludes that the few steps undertaken by Messrs. Blonski and Zieziulewicz are not sufficient to show that the degree of their fault or negligence was such that it was not significant in relation to the anti-doping rule violation committed. By reference to CAS case law WADA is of the view that various factors, including a direct inquiry by the Athletes with the distributor, may be considered sufficient that *no significant fault or negligence* was present. Therefore, WADA comes to the conclusion that both wrestlers are not entitled to benefit from a reduction of the sanction for *no significant fault or negligence* and the regular sanction of two years provided for in Article 10.2 ADR shall apply.

34. WADA requests for relief that the Panel rule that:

"1. The Appeal of WADA is admissible.
2. The Decisions of the "Komisja Dyscyplinarno-Arbitrazowa" of the Polish Wrestling Federation rendered on June 29, 2009 in the matter of Messrs. Kamil Blonski and Wojciech Zieziulewicz is set aside.
3. Mr. Kamil Blonski is sanctioned with a two-year period of ineligibility starting on the date on which CAS Award will be enter into force. Any period of ineligibility (whether imposed or voluntarily accepted by Mr. Kamil Blonski) before the entry into force of the CAS Award shall be credited against the total period of ineligibility to be served.
4. All competitive results obtained by Mr. Kamil Blonski from December 17, 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.
5. Mr. Wojciech Zieziulewicz is sanctioned with a two-year period of ineligibility starting on the date on which CAS Award will be enter into force. Any period of ineligibility (whether imposed or voluntarily accepted by Mr. Wojciech Zieziulewicz) before the entry into force of the CAS Award shall be credited against the total period of ineligibility to be served.
6. All competitive results obtained by Mr. Wojciech Zieziulewicz from December 17, 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.
7. WADA is granted an award for costs."

2. First Respondent

35. In its Answer to the Statement of Appeal, dated 25 August 2009 and the Second Answer of 23 October 2009 PWF chiefly makes the following submissions:

36. As a matter of admissibility PWF submits that WADA did not respect the time limit for filing the Appeal Brief. The deadline of ten days for the Appeal Brief expired on 31 July 2009. However, according to PWF, one of its employees got the information from CAS that the Appeal Brief was not received on or before 31 July 2009, by phone. Therefore, PWF petitioned that WADA must prove receipt of the Appeal Brief by CAS on 31 July 2009. The issue of the admissibility of the appeal was not addressed in the Second Answer, however not waived.

37. PWF further submits that WADA's appeal is inconsistent with the ADR because FILA, which had had the right to appeal the decision of the Board of PWF and had had the authority to reverse this decision according to Article 13.2.4 ADR, accepted the decision by neither appealing nor reversing it and publishing the one-year sanction on its website.

38. It is generally emphasised by PWF that neither Mr. Blonski nor Mr. Zieziulewicz intended to enhance their performance. Instead, they took "Jungle Warfare" in order to gain weight and did not conceal the use of that product.

39. The presence of the prohibited substance of Methyltestosterone in the bodies of Messrs. Blonski and Zieziulewicz and, hence, the commission of an anti-doping rule violation is not contested.

40. PWF's main defence is to justify the imposition of a period of ineligibility of one year on Messrs. Blonski and Zieziulewicz by emphasizing that the Athletes took "Jungle Warfare" with *no significant fault or negligence* and, therefore, deserve a reduction under Article 10.5.2 ADR. According to PWF the Athletes showed "*normal*" but not significant fault or negligence. They trusted the information they received from people they trusted

41. As a matter of fact which is admitted by WADA it was shown by the Athletes, as a necessary prerequisite to apply Article 10.5.2 ADR, how the prohibited substance entered into their bodies. The analysis of "Jungle Warfare" which was conducted upon request of the Athletes revealed that the prohibited substance was contained in that product. The product was purchased by Mr. Promis, an employee of the club, for both wrestlers at the request of one of the members of the club's Board who is also a representative of the sponsor of the club and on recommendation of PROMAX, and passed to the Athletes for consumption. PROMAX is the seller of "Jungle Warfare" and had established the plans for the food supplementation of both Athletes. The club has been cooperating with PROMAX for many years during which the dietary supplements were used by the club members.

42. At this stage PWF claims that, first, the fact that the Athletes had established how the prohibited substance entered into their bodies and that, second, the Athletes had taken the food supplement without intent to enhance their performance allow the reduction of the sanction.

43. By reference to two CAS awards in FILA-related cases which were pronounced in 2001, PWF advocates that under the proportionality principle the fact that the product label did not display that the product contained a prohibited substance and the lack of intention to enhance performance lead to a reduction of the sanction.

44. Contrary to WADA's submission PWF upholds the position that even after the entry into force of the WADC 2003 the proportionality principle applies independently of the WADC which only defines the range of a possible reduction of the sanction.

45. In this context PWF submits that the Athletes searched on the internet, questioned the distributor of "Jungle Warfare" and checked the product label.

46. PWF states that the print-outs from the internet attached to WADA's Appeal Brief were downloaded on 29 and 30 July 2009 and should therefore be rejected as evidence for the state of information available at the material time. According to PWF the relevant website had been updated following the analysis of "Jungle Warfare" in the course of this case. PWF further contends that the Polish versions of the product label and the information available on Polish websites did not contain any information about prohibited substances contained in "Jungle Warfare".

47. PWF repeatedly emphasises that both wrestlers were very young, *i.e.* 19 years old at the time of the doping control, and inexperienced. For this reason, according to PWF, they had been protected by more experienced sportsmen and the club personnel and their trust in these club mates and the sponsor of the club cannot be questioned. According to PWF CAS case law shows that young Athletes are allowed to rely on experienced people such as parents or coaches.

48. According to PWF's submissions Mr. Promis, responsible for the relations with PROMAX, informed PROMAX that both Athletes are subject to doping controls. Due to the long and undisturbed cooperation with PROMAX there was no reason to doubt that the products listed by PROMAX for the use of both Athletes, including "Jungle Warfare", were safe. PWF submits that there is no contradiction as to the way in which PROMAX was approached for the confirmation of the contents of "Jungle Warfare". According to PWF, Mr. Promis, after he had purchased the products, asked PROMAX to give assurance that the products were safe to be used by the wrestlers. This was confirmed by PROMAX. Then, after having received the supplements from Mr. Promis, both Athletes asked him explicitly to call PROMAX and FITNESS AUTHORITY, the general distributor of "Jungle Warfare" in Poland, to make sure that the products were safe. This was confirmed by PROMAX and FITNESS AUTHORITY orally and confirmed in writing in January and March 2009. PWF concludes from these facts that the athletes "*were misled by everyone who should have had the full information ... and there is no significant fault or negligence on their part.*"

49. Finally PWF raises the argument that, by virtue of Polish legislation on safety of food and health including implementing regulations, the marketing of food supplements on the Polish market is under strict control. According to Polish law the packaging of dietary supplements must contain full information on the constituents of the product. This allows the presumption that a substance which is bought in a package is the one described on the label and that, in particular, the requirements for the labelling of food supplements have been met. The confidence in Polish legislation entails that Messrs. Blonski and Zieziulewicz, as well as Mr. Promis could trust the product label and the reassurances offered by PROMAX and FITNESS AUTHORITY. According to PWF the lack of full and correct labelling of "Jungle Warfare" excuses the wrestlers.

50. At the end PWF summarizes that, in order to impose a proportionate sanction it must be taken into consideration that both wrestlers were very young and inexperienced, that they had never been accused of a doping offence before and that they did not intend to enhance their performance.

51. According to the letter from the PWF dated 28 May 2010, neither athlete has competed since the commencement of the sanction on 17 December 2008. The PWF further informs that both

Athletes did not obtain any prizes, results, medals, awards or points from the day of their suspension and that Mr. Zieziulewicz has since resigned from professional wrestling.

52. PWF submits the following prayers for relief:

Firstly, to

- *"deem the appeal withdrawn if it cannot be proven beyond a shadow of a doubt, with a sending receipt, that the Appeal Brief was sent on 31 July 2009 to the physical address of the CAS."*

Secondly, *"in case the CAS does not deem the Appeal withdrawn"* PWF asks for:

"1. The dismissal of the Appeal in its entirety,
2. The dismissal of any other motions filed by the Appellant,
3. The upholding of the decision questioned by the PWF and the upholding of the 12-month suspension penalty imposed on Kamil Blonski and Wojciech Zieziulewicz, with time already served deducted from the full suspension period,
4. The admission into evidence the statements of Kamil Blonski and Wojciech Zieziulewicz, Marcin Krzysztoszek, Darius Promis, Michal Wasilewski, Arkadius Bala - and all the relevant facts in the statements contained in their claims,
5. If the CAS finds it expedient to clarify all circumstances, the acceptance of the evidence based on the statements of the Respondents, Kamil Blonski and Wojciech Zieziulewicz, and from witness testimonies given by Darius Promis, Marcin Krzysztoszek, Michal Wasilewski, Arkadius Bala for the circumstances which are necessary to clarify the case, including the confirmation of the facts contained in the declarations of these person's statements.
6. The awarding of all litigation costs of the proceedings before the CAS to the PWF at the expense of WADA, including translation fees, costs of legal support and representation, costs of witnesses fares in amounts to be presented during the final stage of proceedings."

In its Second Answer PWF requests the Panel to

"1. deny the appeal in its entirety and deny all of the Appellant's motions, and
2. maintain in force the decision appealed from of the KDA of the Polish Wrestling Federation and maintain the sanction of suspension of Kamil Blonski and Wojciech Zieziulewicz for the period of 12 (twelve) months, and to apply toward the sanction that portion of the sanction that has already been served, that is since 17 December 2008."

C. THE LEGAL ANALYSIS

I. Jurisdiction of the CAS

53. The Panel has jurisdiction to hear the case according to Article R47 para. 1 of the Code. WADA appeals from a *"decision of a federation"*, *i.e.* the decision of PWF's DAC, dated 29 June 2009, and this appeal is provided for by the statutes or regulations of that federation. As a precondition for PWF's affiliation with FILA the statutes and regulations of PWF must include or make reference to the relevant provisions of FILA.

54. According to Article 13.2.4 in conjunction with Article 13.2.2 ADR, in the case of national level athletes WADA can appeal from a doping-related decision in the sense of Article 13.1 and 13.2 ADR to the national level reviewing board which is, according to the rules of PWF, the DAC of PWF. This opportunity has been used by WADA when it appealed the decision of PWF's Board to the DAC on 10 June 2009. According to Article 13. 2. 4 second sentence ADR, the decision of DAC as the national level reviewing board can be appealed by WADA to CAS.

55. By appealing the decision of PWF's Board to DAC WADA has exhausted the internal remedies available under FILA's and PWF's rules as required by Article R47 of the Code. Furthermore, PWF signed the Order of Procedure without raising any issue as to jurisdiction. Based on an analysis of the provisions referred to above, the Panel is satisfied that it has jurisdiction to hear this matter.

II. Applicable Law

56. In accordance with Article R58 of the Code the "*applicable regulations*" apply. These are the statutes and regulations of FILA which must be incorporated by PWF according to Article 5.1 of FILA's Constitution. As a signatory of the WADC, FILA has incorporated the latter into their Constitution and ADR, in particular. Through this channel only, the WADC may apply. The rules of PWF are applicable to the extent that they do not conflict with the rules of FILA. This leads to the conclusion that Second and Third Respondent are bound by the rules of FILA and PWF.

57. The present ADR of FILA, however, pursuant to their Article 18.7 do not apply retroactively to matters pending before 1 January 2009. According to Article 18.5 ADR the ADR "*shall be interpreted in a manner that is consistent with the applicable provisions of the (WADC).*" Therefore the more detailed transitional provision of Article 25.2 WADC 2009 can be applied. By virtue of that rule, concerning an

> "*anti-doping rule violation case brought after* [1st January 2009] *based on an anti-doping rule violation which occurred prior to* [1st January 2009], *the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstance of the case.*"

Hence, the substantive ADR of FILA as in force on 17 December 2008, *i.e.* as updated on 28 February 2008 ("ADR 2008") apply to the case before the Panel while procedural matters are to be decided according to the present ADR provisions.

III. Admissibility of the Appeal

58. The appeal has been filed in a timely manner and is therefore admissible. According to Article 13. 5. ADR 2008 and the applicable PWF rules the time limit to file an appeal to CAS is 21 days "*of the sending of the decision*". Article R49 of the Code subsidiarily provides for the same time limit of 21 days from the receipt of the decision appealed against. The decision of PWF's DAC, adopted on 29 June 2009, was notified to WADA on 30 June 2009. Undisputedly, the time limit to appeal was respected when WADA filed the appeal by sending the Statement of Appeal on 21 July 2009.

59. Then, according to Article 51 of the Code, the Appeal Brief shall be filed within 10 days following the expiry of the time limit for the appeal. The general rule on the calculation of time limits included in Article R32 of the Code provides that time limits run from the day after the relevant event and are respected "*if the communications by the parties are sent before midnight on the last day on which such time limits expires.*" Undisputedly, in the case before the Panel this time limit began on 22 July 2009 and expired on 31 July 2009.

60. The Panel is satisfied by the documentation before it that WADA has sent the Appeal Brief before midnight on 31 July 2009. The cover letter shows that the Appeal Brief was communicated to CAS by fax on 31 July 2009 at 17h12 and was sent to CAS by ordinary mail on the same day. This is evidenced by the copy of the envelope which was stamped on "31.07.09" by the Lausanne post office.

61. Independent of whether or not FILA appealed the decision of the DAC, WADA, according to Article 13.2.4 ADR 2008 has its own right to appeal in order to secure the adherence to the WADC by national or international federations.

IV. THE MERITS OF THE DISPUTE

1. Anti-Doping Rule Violation

62. As both the Board and the DAC of PWF had determined in their decisions Messrs. Blonski and Zieziulewicz committed an anti-doping rule violation under Article 2.1 ADR 2008 in the form of the presence of a prohibited substance. The analysis of the A samples as well as the B samples conducted in a WADA accredited laboratory showed the presence of Methyltestosterone which is listed in the Prohibited List. These findings have never been challenged by the Athletes or PWF. The Panel determines that Messrs. Blonski and Zieziulewicz committed an anti-doping rule violation according to Article 2.1 ADR 2008. The decision of the DAC is appealed by WADA exclusively with regard to the length of the sanction imposed on both Athletes.

2. The Sanction

63. For a first anti-doping rule violation in the form of the presence of a prohibited substance, according to Article 10.2 ADR 2008 the regular sanction is a two-year period of ineligibility. However, the regular sanction can be reduced up to 1 year if the wrestlers, in their particular case, had established that they bear *no significant fault or negligence* according to Article 10.5.2 ADR 2008.

64. The first condition for a reduction set forth in the second paragraph of Article 10.5.2 ADR 2008 is that the Athletes must establish how the prohibited substance entered their bodies. This requirement has been met by Messrs. Blonski and Zieziulewicz. The analysis of "Jungle Warfare" which was executed on behalf of both Athletes identified this product as the origin of Methyltestosterone found in their samples. This result was communicated to PWF by letters of the Athletes dated 17 March 2009.

65. PWF submits that both wrestlers took "Jungle Warfare" without the intent to enhance their performance. This is not persuasive because they intended to gain weight and the leaflet to "Jungle Warfare" promised an "*increase of strength*". However, first and foremost the lack of such an intention is completely irrelevant when applying Article 10.5.2 of the WADC and

Article 10.5.2 of FILA's ADR for the anti-doping rule violation, as such, and, therefore, in relation to the negligence in committing the doping offence, as well.

66. A reduction of the sanction based on Articles 10.5.3. or 10.5.4 ADR 2008 cannot be taken into consideration because the athletes neither provided substantial assistance nor admitted the violation in time.

67. It remains for the Panel to examine whether or not the athletes bore *no significant fault or negligence* in the sense of Article 10.5.2 ADR 2008 when they committed the anti-doping rule violation.

68. The proportionality principle which had been applied by CAS panels as a general legal principle in its earlier jurisprudence has been codified in Article 10.5 of the WADC 2003 which allows a sanctioning authority to consider *exceptional circumstances* of the case in order to lower the sanction instead of imposing a fixed sanction. Through the WADC 2003 the principle of proportionality was codified and thereby adjusted to the needs of the anti-doping law. As stated in the Comment to Article 10.5.2. WADC 2003 the codification is in line with the requirements of the general proportionality principle and human rights (see *Kaufmann-Kohler/Rigozzi/Malinverni*, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, para. 178 *et sequ.*). CAS has stated at various occasions that the WADC "*enables the Panel to satisfy the general principle of proportionality*" (CAS 2006/A/1025 *Puerta v. ITF*, para. 11.7.8). The Panel therefore concludes that there is no room to apply the proportionality principle beyond the application of Article 10.5.2 WADC 2003 and Article 10.5.2 ADR 2008 which implements the relevant provision of the WADC.

69. Article 10.5.2 ADR 2008 does not further specify what is meant by *no significant fault or negligence*. The definition of the term in the part "Definitions" of the ADR is of little help for the understanding of the term:

"No Fault or Negligence. The Wrestler's establishing that his or her 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."

As "utmost caution" is required for no fault or negligence the standard of duty for *no significant fault or negligence* is less than utmost care.

70. According to Article 18.5 ADR 2008

"These Anti-Doping Regulations have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with the applicable provisions of the Code."

Therefore Article 10.5.2 and other applicable provisions of the WADC must be taken into consideration for the interpretation of Article 10.5.2 ADR 2008. According to Article 24.2 WADC 2003

"The comments annotating various provisions of the Code are included to assist in the understanding and interpretation of the Code."

Hence, the Panel may include the Comments attached to Article 10.5.2 WADC when interpreting Article 10.5.2 ADR 2008.

71. As a general rule, according to the Comment to Article 10.5. has an impact

"only in cases where the circumstances are truly exceptional and not in the vast majority of cases."

Amongst the non-exhaustive examples which are not sufficient to show that *no fault or negligence* was borne, the Comment, with respect to food supplements, mentions the following:

" (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination"

Such a situation, however, as the Comment further explains, can lead to a reduction of the sanction for *no significant fault or negligence*:

"However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking the nutritional supplements.)"

72. According to the submissions of Appellant and First Respondent and the information available in the file, "Jungle Warfare" is not a common multiple vitamin which may have been contaminated. The case before the Panel is clearly not covered by the illustration given by the Comment. Although the Comment lists examples non-exhaustively, the situation described above sets the standard for what may result in a reduced sanction based on the absence of significant fault or negligence in respect of food supplements: a contamination of a common multiple vitamin obtained from a non-suspicious source may exclude significant fault or negligence.

73. The Panel recalls the cornerstone of the anti-doping law which is the personal responsibility of the athlete for what he or she ingests. According to Article 2.1.1 ADR 2008

"It is each wrestler's ... personal duty to ensure that no prohibited substance enters his or her body. Wrestlers are responsible for any prohibited substance or its metabolites found to be present in their samples...."

74. As it is generally known, nutritional supplements are often contaminated with or contain prohibited substances which are not declared on the label or package. The high standard of responsibility has been specified by warnings issued by the sport organizations. By circular letter of 17 January 2007 addressed to all national federations, signed by FILA's President and Secretary General, FILA issued the following:

"In several cases, the results of the doping tests were positive and an inquiry was made to investigate on the reasons for the sudden increase in positive results. It resulted from this inquiry that nearly the totality of food supplements contains forbidden substances not listed in the contents of the product.

Consequently, we invite you to be vigilant and to inform your wrestlers that, in the event they want to carry on taking food supplements, they must have the selected product submitted to an analysis prior to its absorption.

This recommendation being clear, we inform you that in the event a wrestler is found positive further to the taking of a food supplement containing one or several forbidden substances not mentioned in the contents of the product, there will be no attenuating circumstances. On the contrary, this will be considered as a voluntary use of this or these products with full knowledge.

We thank you for the attention you will give to the foregoing and for making sure that this information is relayed to your wrestlers and that these guidelines are complied with."

75. In order to demonstrate that the wrestlers did exercise their duty of care PWF submits that (i) they searched the internet, (ii) read the label and leaflet of "Jungle Warfare" and (iii) contacted, via Mr. Promis, the seller and distributor of that product who provided assurances that "Jungle Warfare" was "*permissible for athletes to use*".

76. In order to meet the necessary standard of the duty of care, a minimum requirement may be whether the athlete carried out internet research. The athletes submitted before the bodies of PWF that they had checked the internet and did not find any information about prohibited substances in the product. It is further submitted by PWF that both Athletes do not speak English and, therefore were dependent on websites in Polish language. PWF submitted a certified English translation from a website of the producer of "Jungle Warfare", the American company ALR Industries, published in Polish language. A reading of this website in its entirety must have alerted the Athletes:

"*We all know how well anabolic steroids and prohormones influence the growth of muscle mass. However, using them causes a lot of side effects such as ... and finally the risk of disqualification in any sports competitions. Is it possible to achieve the results comparable to these affects of the above-mentioned substances, but without any side effects related to them?*

Now it is possible, thanks to Jungle Warfare!

Androgenes (anabolic steroids, prohormones) bring about the anabolism in muscle cells in a very interesting way....

However, along with the scientific progress, it appeared that the same effects may be obtained without hormones and the side effects indispensably related to them. For some years, the research has been done we have been working on certain herbs .... I can hear the voices "Herbal? Vegetable? It cannot work." I can tell these people only one thing "Opium and cocaine are also of vegetable origin, but nobody doubts their power...."

The manufacturer of "Jungle Warfare" promised the same effect as steroids and prohormones exercise on the growth of muscle mass. This must have caused at least a certain suspicion taking into consideration that it is common knowledge that in the community of wrestlers and body-builders to whom the publicity of ALR is addressed, prohibited substances are used.

77. The leaflet attached to "Jungle Warfare", in a certified translation submitted by PWF, is even more of a kind to cause severe suspicions.

"What kind of a product is it? It increases the strength and the muscle mass by means of the growing production of testosterone."

Following this introductory statement the leaflet describes the way of action and effects of anabolic steroids and hormones and continues by stating that "*the same effect*" is made by "Jungle Warfare" on a herbal basis which is identified as an Indian vegetable.

78. The leaflet clearly announces that the production of testosterone will be increased by "Jungle Warfare". For the Panel, the mentioning of the term "*testosterone*" alone is sufficient to create severe doubts as to the permissibility of "Jungle Warfare" for athletes.

79. Against the background of the content of the manufacturer's website and the leaflet of the product, further investigation should have been mandatory before the consumption of "Jungle Warfare" by the Athletes. A check of the announcements in the internet and the product label, its package or leaflet was not sufficient. The Panel agrees that the website and leaflet do not indicate prohibited substances openly. However, it is common knowledge that food supplements often contain undeclared substances or are contaminated with prohibited substances as FILA's circular letter of 17 January 2007 clearly warned. Therefore, it is part of the Athletes' responsibility, pursuant to Article 2.1.1 ADR 2008 not to trust publicity on the website or the content of the label or leaflet.

80. PWF refers to the CAS award in the *Knauss* case (CAS 2005/A/847 *Knauss v. FIS*, Award of 20 July 2005, para. 7.3.6). In this decision the CAS Panel at that time stated that the athlete could have had the nutritional supplement tested before he ingested it, but concluded that the failure to do so can give rise to ordinary fault or negligence and does not fall into the category of significant fault or negligence. However, the facts of the *Knauss* case distinguish significantly from the case before this Panel, *inter alia* in that Mr. Knauss personally and directly inquired with the distributor of the food supplement. Without that precaution, according to the Panel in *Knauss*, the conduct of the athlete would constitute significant fault or negligence.

81. In the case before the Panel neither Mr. Blonski nor Mr. Zieziulewicz conducted an inquiry with the seller of "Jungle Warfare", PROMAX, or the distributor for Poland, Fitness Authority, personally and directly. According to PWF and supported by the "Official Statement" of Mr. Promis, undated, he ordered "Jungle Warfare" together with other products for both Athletes especially and contacted PROMAX again

"in order to make sure that the purchased supplements had necessary certificates and met all conditions to be applied safely by sportsmen, which was explicitly confirmed."

Then Mr. Promis gave the supplements including "Jungle Warfare" to Messrs. Blonski and Zieziulewicz

"ensuring them that, on the basis of obtained information the said supplements can be applied by them without facing the consequences of using banned substances."

82. Even under the assumption that Mr. Promis asked PROMAX upon the request of the athletes, as submitted by PWF, and that Mr. Promis' statement is true, the athletes received the information only indirectly and orally. Only by letter of 17 March 2009 PROMAX stated in writing that the products delivered in November 2008, according to their current knowledge at that time, "*were*

permissible to be used by professional athletes". Fitness Authority declared that "Jungle Warfare" did not contain substances other than mentioned on the label by fax on 22 January 2009 only.

83. According to PWF's submission and the statement of Mr. Promis the latter received money that was designated to buy nutritional supplements especially for Messrs. Blonski and Zieziulewicz, from a member of the board of the club who was a representative of a company that sponsored the club. Mr. Promis ordered a variety of products from PROMAX company with which the club had been cooperating in the delivery of food supplements. PROMAX even established the plans for the taking of the supplements by the Athletes. Mr. Promis was the club employee responsible for the contact with PROMAX.

84. The Panel concludes from these facts that the Athletes were completely directed by the club staff, a sponsor and PROMAX. However, by simply trusting the club personnel in what nutritional supplements they were given and the oral information provided by Mr. Promis that the products were clean and taken into account the commercial interests of the club, the sponsor and PROMAX, both athletes did not exercise the duty of care which is required in order to bear *no significant fault or negligence* only. The Panel accepts as a possibility that the athletes were misled by the club personnel and the seller and distributor of the supplements which were in close economic relation with the club and Mr. Promis, in particular. Even if the athletes were victims of the club personnel's behaviour and general practise they are not relieved from their personal responsibility to make sure that no prohibited substance enters their bodies.

85. The age and alleged inexperience of the Athletes do not lead the Panel to assess that the wrestlers did not bear significant fault or negligence. At the time of the doping control both athletes were 19 years old which, today, is not extraordinarily young in sports. They are of age and therefore fully responsible under civil law. They cannot transfer their responsibility to coaches etc. The CAS award relied upon by PWF related to 15 years old tennis player (CAS 2006/A/1032 *Karantcheva v. ITF*, paras. 137 *et sequ.*). In that award the Panel stated that even regarding a 15 years old athlete, the same criteria as for an adult apply. In another case a CAS Panel held a 16 years old athlete fully responsible with respect to food supplements (CAS 2003/A/447 *Stylianou v. FINA*, para 10.8). The fact that the athletes trusted Mr. Promis does not relieve them of their responsibility for what they ingest.

86. Furthermore, the Athletes were not inexperienced. They had competed nationally since 2004 and on an international level since 2006 and had undergone doping controls previously.

87. In practising the sport of wrestling Messrs. Blonski and Zieziulewicz are bound by the provisions of FILA including its ADR and the high duty of care requested therein. This is a severe professional duty of care which is not incumbent on normal citizens and goes far beyond the standards of duty applicable to normal people. This standard of duty has not been met when the Athletes simply trusted that the contents of "Jungle Warfare" were fully declared according to the requirements of Polish legislation on the marketing of food, in general, and nutritional supplements, in particular. Their confidence that "Jungle Warfare" was marketed in conformity with Polish legislation does not exclude significant fault or negligence on their side.

88. In conclusion, as a matter of fact the Panel derives from the submissions of Appellant and First Respondent and the information available in the file that both Mr. Blonski and Mr. Zieziulewicz fully and blindly trusted Mr. Promis, their entourage in the club with respect to which food

supplement they were given and the assurance that they could take the products without any risk. They may have searched the internet personally and read the leaflet before taking "Jungle Warfare" the result of which must have alerted them, but they did not personally carry out any thorough inquiry with the seller, the distributor or the manufacturer and did not receive a written clearance before the consumption of "Jungle Warfare".

89. According to established CAS jurisprudence, athletes do not escape liability when they simply trust their club's staff or other supporting personnel (CAS 2007/A/1370 and 1376 *FIFA, WADA v. CBF, STJD, Dodo* para. 141 *et sequ.*). The Panel also refers to the award in the *Torri Edwards* case:

"It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance" (CAS OG 04/003, para 38).

As the WADC 2003 in its Article 2.11 and the ADR 2008 (see para. 77) expressly provide and CAS panels have frequently stated

"it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance ... found to be present in their bodily Specimens."

90. As clearly stated in FILA's circular letter of 17 January 2007 (reproduced in para. 78) it was well known before the tests Messrs. Blonski and Zieziulewicz underwent in December 2008 that nutritional supplements often contain prohibited substances not declared on the label or are contaminated. In such a situation, the wrestlers bore significant fault or negligence when they took "Jungle Warfare" without a further thorough investigation conducted by themselves or even having tested "Jungle Warfare" prior to the consumption as recommended in FILA's circular letter.

91. Taking into consideration the totality of the circumstances of the particular case before it the Panel concludes that Mr. Blonski and Mr. Zieziulewicz did not establish that they bore *no significant fault or negligence* in committing the anti-doping rule violation and, hence, the regular sanction of two years has to be imposed.

92. The Panel does not consider the applicable substantive provisions of the present ADR 2009 *lex mitior* in relation to the ADR 2008.

V. CONCLUSIONS

93. In the light of the foregoing the Panel concludes:

94. Messrs. Blonski and Zieziulewicz committed an anti-doping rule violation in the form of the presence of the prohibited substance of Methyltestosterone according to Article 2.1 ADR 2008 which triggers the regular sanction of the period of ineligibility of two years according to Article 10.2 ADR 2008.

95. Taking into account all the facts and submissions it is not established that Mr. Blonski and Mr. Zieziulewicz met the standard of care in order to avoid the risk of ingesting nutritional supplements which contain prohibited substances. A reduction of the sanction for *no significant fault or negligence* according to Article 10.5.2 ADR 2008 cannot be granted.

96. Therefore, pursuant to Article 10.2 ADR 2008, both Mr. Blonski and Mr. Zieziulewicz have to be declared ineligible to compete for a period of two years beginning with the issuing of this Award. However, according to Article 10.8 ADR 2008, the period of provisional suspension both Athletes served since 17 December 2008 up until the date of the award, *i.e.*, a period of one year, seven months and 26 days, shall be credited against the total period of two years. Furthermore, all competitive results obtained by Mr. Blonski and Mr. Zieziulewicz from 17 December 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

V. COSTS

97. Pursuant to Article R65.1 of the Code, disciplinary disputes of an international nature are free, except for the Court Office fee to be paid by the Appellant and retained by the CAS.

98. Article R65.3 of the Code stipulates that the Panel shall decide which party shall bear the costs and legal expenses of the parties or on what proportion the parties shall share them taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties. Having taken into account the outcome of the proceedings and the clear non-compliance of PWF with the standards set by FILA in its circular letter of 17 March 2007 the Panel is of the view that PWF shall pay to WADA a contribution of 3.000 CHF to their legal expenses.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of WADA is declared admissible and upheld.

2. The decision of the Disciplinary Arbitration Commission of the PWF adopted on 29 June 2009 is set aside.

3. Mr. Kamil Blonski and Mr. Wojciech Zieziulewicz are sanctioned with a two-year period of ineligibility starting on the date of this Award. The period of provisional suspension served by Mr. Kamil Blonski and Mr. Wojciech Zieziulewicz since 17 December 2008, *i.e.* one year, seven months and 26 days, shall be credited against the total period of two years.

4. All competitive results obtained by Mr. Kamil Blonski and Mr. Wojciech Zieziulewicz from 17 December 2008 through the commencement of the applicable period of ineligibility shall be disqualified with all resulting consequences, including forfeiture of any medals, points and prizes.

5. This Award is pronounced without costs except for the non-reimbursable Court Office Fee of CHF 500,- already paid and to be retained by the CAS. The parties bear their own legal and other costs. PWF is ordered to contribute CHF 3.000,- to the costs incurred by WADA.

6. All other prayers for relief are dismissed.

Lausanne, 12 August 2010

Christoph Vedder
President of the Panel