

IN THE SOUTH AFRICAN INSTITUTE FOR DRUG FREE SPORT APPEAL BOARD

CASE NO.: SAIDS/2023/09/A01

In the matter between:

TEBOGO TSOTETSI

APPELLANT

and

THE SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT

RESPONDENT

DECISION OF THE APPEAL BOARD

Chairperson:

Ms Thabiso Kutumela

Appeal Board Members:

Adv Matsobane Gabriel Mello

Ms Mmadika Moloji

Appellant:

Tebogo Tsotetsi

Respondent:

South African Institute for Drug Free Sport

Date of Appeal:

Decided on the papers (5 December 2023
Appeal Committee had a zoom meeting to
discuss the Appeal)

INTRODUCTION

1. An appeal has been brought to this Appeal Board (“**Committee**”) in terms of Article 13 of the SAIDS Anti-Doping Rules (“**ADR**”). This is an appeal against the findings of a three-member panel of the South African Institute for Drug-Free Sport (“**SAIDS**”).
2. The Appellant is Tebogo Tsotetsi (“**Appellant / Athlete**”) who is a competing Athlete.
3. The Respondent is SAIDS established in terms of the South African Institute for Drug-Free Sport Act no. 14 of 1997, as amended, with the objective of acting as the independent National Anti-Doping Organisation for South Africa.

JURISDICTION

4. The Appeal Committee is established in terms of Article 13 of the ADR.
5. All members of the Committee have confirmed that there are no circumstances likely to affect their impartiality with respect to any of the parties.
6. In accordance with Article 20.5.1 of the World Anti-Doping Code (“**WADC**”), SAIDS has the necessary authority and responsibility to be independent in its operational decisions and activities from both sporting entities and governmental bodies.
7. All participants in South African sport that are subject to the authority of the World Anti-Doping Agency (“**WADA**”) are required to act in accordance with the ADR currently in force.
8. Articles 5.2.1 and 5.2.2 of the ADR read as follows:

“5.2.1 Subject to the limitations for Event Testing set out in Article 5.3, SAIDS shall have In-Competition and Out- of-Competition Testing authority over all Athletes specified in the Introduction to these Anti-Doping Rules

(Section “Scope of these Anti-Doping Rules”). Where SAIDS has the Testing authority, all associated Testing costs shall be borne by SAIDS.

5.2.2 *SAIDS may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place.”*

9. Except as otherwise provided in Articles 6.6 – 6.8 of the ADR and WADC Article 7.1, Results Management shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organisation (“**ADO**”) that initiated and directed the Sample collection (or, if no Sample collection is involved, the ADO which first provided notice to an Athlete or other Person of a potential anti-doping rule violation (“**ADRV**”) and then diligently pursues that ADRV). The ADO with responsibility for Results Management in this matter is SAIDS.
10. Each of the *Athletes* or *Persons* mentioned in the ‘*Introduction to the ADR*’ is deemed, as a condition of his or her participation or involvement in sport in South Africa, to have agreed to and be bound by the ADR, and to have submitted to the authority of SAIDS to enforce the ADR, including any consequences for the breach thereof, and to the jurisdiction of the hearing panels, specified in Article 8 and Article 13, to hear and determine cases brought under the ADR.
11. Decisions made under the ADR by SAIDS may be appealed as set forth in Articles 13.2 through 13.7, or as otherwise provided in the ADR, the WADC or International Standards. All decisions shall remain in effect while under appeal unless the appellate body orders otherwise.
12. In cases where Article 13.2.1 of the ADR is not applicable, the decision may be appealed to the SAIDS Appeals Board. The appeal process shall be carried out in accordance with International Standard for Results Management 2023 ISRM, as well as the SAIDS Operational Standard for Appeal Hearings for anti-doping cases under the jurisdiction of SAIDS.

FACTUAL BACKGROUND

13. The Appellant is a competing athlete who was tested in-competition in terms of the ADR. The Appellant supplied a urine sample on 18 February 2023 at the Sasol Secunda Marathon (“**the Event**”).
14. The urine sample was submitted to the South African Doping Control Laboratory (“**SADoCoL**”). On 18 July 2022, SADoCoL reported an Adverse Analytical Finding (“**AAF**”) for the presence of Salbutamol (greater than the decision limit – the concentration level in the Sample was 1.68ug/mL) in the Appellant’s sample.
15. Salbutamol is a Beta-2 Agonist listed under Category S3 of the 2023 WADC International Standard Prohibited List. It is a Specified Substance which is prohibited In-and Out-of Competition.
16. On 19 April 2023, the Appellant admitted the ADRV and pleaded for leniency in her use of the Prohibited Substance, which she contended had been ingested via orally administered cough syrup purchased over the counter at a local pharmacy.
17. In summary, the Appellant initially advised SAIDS in a written response that:
 - 17.1 Around 10 February 2023, the Appellant’s daughter had a cold/flu and the Appellant contracted the same infection;
 - 17.2 On or about 13 February 2023, during her preparations for the Event, the Appellant began to use her daughter’s cough medicine “Alocphyllex” however, this did not work and thereafter she went to the Dis-Chem self-medication counter where the on-duty pharmacist recommended she uses “Pholtex Forte”; and
 - 17.3 The Appellant used the cough syrup in the week leading up to and on the morning of the Event.

18. At the initial hearing, SAIDS raised an issue in that the initial version of the Appellant was incorrect, and she had indicated using the wrong medication which did not in fact contain Salbutamol, only to later change her version and provide the actual medication that was used containing Salbutamol i.e., Durro-Tuss Linctus.
19. The Appellant was found guilty of a violation of Articles 2.1 and 2.2 of the ADR and the only determination that the Independent Doping Hearing Panel (“IDHP”) was required to make was the applicable consequences and the period of ineligibility to be imposed.
20. On 18 August 2023, the IDHP handed down a ruling imposing a twenty (20) month period of ineligibility on the Appellant, including disqualification of all results in terms of Articles 10.1 and 10.10 of the ADR.

DOCUMENTS REVIEWED BY THE COMMITTEE

21. The Committee reviewed the following documentation:
 - 21.1 Notice of Allegation dated 11 April 2023;
 - 21.2 the Doping Control Form;
 - 21.3 ADAMS Analytical finding Test Report confirming the Adverse Analytical Finding;
 - 21.4 Notice of Charge dated 8 May 2023;
 - 21.5 Correspondence from both Parties;
 - 21.6 Ruling dated 15 August 2023;
 - 21.7 Final decision letter dated 18 August 2023;

- 21.8 Transcript dated 20 July 2023;
- 21.9 Athlete Appeal Submission dated 4 September 2023;
- 21.10 SAIDS Reply to the Athlete Submission; and
- 21.11 Athlete Supplementary Statement.

THE APPELLANT'S SUBMISSIONS

22. The Appellant's ground of Appeal is confined to the sanction that was imposed by the IDHP. She submits that in terms of the ADR she can get a lighter sanction if she can establish that she lacked fault when the offence was committed.
23. The Appellant submits that the IDHP misdirected itself when they placed reliance on an email communication in which the Appellant admitted to being "very negligent" as these words were not meant in terms of strict legal interpretation.
24. The Appellant states that her level of blame was that of an ignorant athlete who was only running for enjoyment and not as a career athlete.
25. The Appellant submits that the IDHP further misdirected itself by finding that she is a seasoned athlete just because she participated in many races. She states that her length of participation does not mean that she received awareness on the ADR and accessibility of the Prohibited Substance List. She states that the consumption of the medication was based on ignorance of the prohibition of the substance and that she did not know about the list of prohibited substances.
26. The Appellant believed that only a career or seasonal athletes had to know about the list of prohibited substances. The Appellant states that no anti-doping training was provided to her as such training was provided to elite athletes.

27. The Appellant further submits that the IDHP erred in their analysis of a suitable sanction as they ignored Article 10.6.1.3 which made a case for an athlete who is a recreational runner. The Appellant is of the view that an athlete lacking knowledge fell within the category of a reprimand as a sanction.
28. The Appellant is of the view that she meets the requirements of Article 10.6.1.1 as she lacked the significant fault and was unaware of the prohibited list.
29. The Appellant further submits that the consumption of the medication was meant to assist with cough related symptoms and was not meant to enhance her ability during the race.

SAIDS SUBMISSIONS

30. SAIDS argues that on a plain reading of the Appellant's submissions, the Appeal is nothing more than an aggrieved athlete that is unhappy with the finding of the IDHP, having regard to the consequences imposed.
31. SAIDS further argues that it is incomprehensible that an Appellant would be allowed to backtrack on the use of the words "I was very negligent" which in plain language has no legal meaning save as to highlight the Appellant admitting her fault in not carrying out all the required checks prior to using medication, clearly containing a prohibited substance.
32. SAIDS argued before the IDHP, that the Appellant ought not to be considered a recreational athlete given her vast experience in running and having participated in many of the country's biggest marathons, finishing in the top percentiles, with race times far exceeding those of an occasional "weekend warrior".
33. SAIDS submits that on the Appellant's own version, she was very negligent and therefore ought not to be allowed to claim the application of no significant fault or negligence (i.e. her sanction should be two (2) years).

34. SAIDS further submits that the Appellant did not observe the objective **Cilic**¹/**Lea**² criteria before using the medication, which would ordinarily afford the Appellant the opportunity to be eligible for a reduction in the applicable period of ineligibility. SAIDS takes this position for the following reasons:
- 34.1 The Appellant was in a situation which, objectively, presented a high risk of committing an ADRV;
 - 34.2 She took medication of her own volition and casually via the recommendation of a DisChem pharmacist, who has no sports specific medical training and no knowledge of anti-doping;
 - 34.3 She also used the medication on the eve and the day of a competition;
 - 34.4 Despite this, the Appellant did not 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, which, in this case would have instantly alerted the Appellant to the fact that the medication was prohibited;
 - 34.5 The Appellant failed to consult a doctor. Given the heightened duties of Appellant's with respect to medication, such conduct is, from an objective standpoint, significantly negligent;
 - 34.6 The Appellant did not observe the most important objective Cilic criteria. She did not cross-check the ingredients on the label with the Prohibited List, which would have been a very easy step to take. She also did not consult appropriate experts in this matter, despite allegedly suffering from some sort of ailment or sickness;
 - 34.7 The Appellant did not make use of the SAIDS Medication Check; and

¹ CAS 2013/A/2237

² Robert Lea v. United States Anti-Doping Agency CAS 2016/A/4371

34.8 The Appellant should bear a considerable degree of Fault because she has been running in the country's biggest marathons for almost a decade.

THE REGULATORY FRAMEWORK

35. The Appellant was charged with a violation of Articles 2.1 and 2.2 of the ADR for the presence and use of a prohibited substance. The Appellant admitted the ADRV.

36. Article 10.2 of the ADR reads as follows:

"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."

37. 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 an 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."

THE COMMITTEE'S FINDINGS

38. In order for an 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.
39. In order to receive the benefit of Article 10.6.1.1, the Appellant 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."

41. The Committee agrees with the finding of the IDHP in that the Appellant could find application of the No Significant Fault or Negligence provisions in her use of the medication containing Salbutamol. The question that needed to be answered by the IDHP was how much Fault the Appellant had, and where on the **Cilic** scale her applicable consequences lay.
42. At paragraphs 43 – 49 the IDHP went on to assess the categories of Fault and paragraph 43 – 49 of the IDHP ruling reads as follows:

*"[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 Guidelines³ 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”.*

[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:*

³ “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 – 8 months, and a “standard” light degree of fault leading to a suspension of 4 months.”

- 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 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."

43. This Committee agrees with the IDHP in that the Appellant *"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."*⁴

⁴ Paragraph 52 of the IDHP ruling.

44. The Committee finds that the Appellant fell short of all the objective factors set out in **Cilic** and therefore, no reasonable IDHP would ever have been able to assess the Appellant's conduct outside of the top-tier considerable category (between 16 – 24 months).
45. The Committee finds that the issue of the Appellant being a recreational or seasoned athlete has no bearing on an assessment of her objective fault. Any argument to be made about the Appellant not being “elite” and or having no anti-doping education would only ever be relevant to the subjective factors which are used to move an Athlete's conduct up and down within a category. The Committee finds that this was already done by the IDHP as the period of ineligibility was moved down from 24 months to 20 months.

ORDER

46. The Appeal is dismissed.
47. The decision of the IDHP is upheld.
48. Each party to pay its own costs with regard to this Appeal.

DATED at JOHANNESBURG on this the 12th day of DECEMBER 2023.



MS THABISO KUTUMELA (CHAIRPERSON)