



Arbitration CAS 2017/A/5066 World Anti-Doping Agency (WADA) v. Africa Zone VI Regional Anti-Doping Organization (RADO), Lesotho National Olympic Committee (LNOC) & Sello Mothebe, award of 13 September 2017

Panel: Mr Clifford Hendel (USA), Sole Arbitrator

Paralympic athletics (200 and 400 meters)

Doping (19-norandrosterone and metabolite 19-noretiocholanone)

Establishment of source of prohibited substance

In order to establish under the World Anti-Doping Code (WADC) the source of a prohibited substance CAS jurisprudence requires concrete evidence how the prohibited substance came to be present in the athlete’s body. It is therefore not sufficient for an athlete to merely submit unsubstantiated, conclusory assertions regarding the source of the prohibited substance. Furthermore, additional doubts are cast over the likelihood of the athlete’s explanation where the athlete had not disclosed the allegedly used substances in the Doping Control Form.

A. THE PARTIES

1. The World Anti-Doping Agency (“WADA” or “the Appellant”) is an independent international agency, set up to promote, coordinate and monitor the fight against drugs in sport. WADA is responsible for the World Anti-Doping Code, adopted by more than 600 sports organizations, including international sports federations, national anti-doping organizations, the International Olympic Committee, and the International Paralympic Committee. Its headquarters are located in Montreal, Quebec, Canada.
2. Africa Zone VI Regional Anti-Doping Organization (“RADO” or the “First Respondent”) is an independent regional organization created by WADA to mobilize and pool resources for anti-doping within the geographic area consisting of various countries in the southern cone of Africa. RADO includes Lesotho as one of its participating countries. It is located in Gaborone, Botswana.
3. The Lesotho National Olympic Committee (“LNOC” or the “Second Respondent”) is an organization destined to develop, promote and protect the Olympic movement in Lesotho. It is located in Maseru, Lesotho.
4. Mr. Sello Mothebe (“Mr. Mothebe” or the “Athlete”) is an international level para-athlete from Lesotho, who competes for the country in 200 and 400 metre races.

B. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' submissions on the merits of the appeal. Additional facts and allegations found in the Parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Award only references the submissions and evidence he considers necessary to explain his reasoning.
6. On 30 August 2016, Mr. Mothebe was subject to an out-of-competition doping control in Maseru, Lesotho.
7. The analysis of the A Sample revealed the presence of 19-norandrosterone ("19-NA"), classified as a banned substance under (S1.1.b) the WADA 2016 Prohibited List, and its metabolite 19-noretiocholanone, in a level which substantially exceeded the "*Decision limit of 2.5 ng/mL*" as well as the 10 ng/mL limit that constitutes an Adverse Analytical Finding under the relevant WADA Technical Document (TD2016NA).
8. On 5 October 2016, the RADO delegated to the LNOC the results management and the power to render a decision under the LNOC 2015 Anti-Doping Rules.
9. On 31 January and 2 February 2017, a hearing took place before the Lesotho – NADO Panel of the LNOC, where Mr. Mothebe acknowledged the anti-doping code violation but submitted that his use was not intentional and his sanction should accordingly be mitigated. According to the Lesotho – NADO Panel's decision, Mr. Mothebe stated at the hearing "*I plead guilty as charged even though it was not intentional to use such substances, as it was raining and I used flue (sic) medication*". In light of, *inter alia*, a finding of no intention to use prohibited substances, and noting also the athlete's admission of the violation, and the fact that this was a first-time infraction, by the decision of 7 February 2017 (the "Decision"), the Lesotho – NADO Panel sanctioned Mr. Mothebe with a two-year ineligibility period, (rather than the four-year period applicable where lack of intention is not established by the athlete), and concurrently suspending him from all sports activities from that date

C. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. The Appellant designated the Statement of Appeal as its Appeal Brief and filed it on 28 March 2017 before the Court of Arbitration for Sport (the "CAS"), with respect to the Decision in accordance with Article R51 of the Code of Sports-related Arbitration (the "Code").
11. On 6 April 2017, the CAS Court Office acknowledged receipt of WADA's Appeal Brief and, among other issues, invited the Respondents to submit their Answers within twenty days of receipt, containing a statement of defence, any defence of lack of jurisdiction and related exhibits, as well as the names of witnesses or experts whom they intend to call.
12. In this same communication, the Respondents were granted a deadline of five days to agree to the appointment of a sole arbitrator. In addition, the First Respondent was invited to

communicate a personal address for Mr. Mothebe, failing which the CAS would consider that Mr. Mothebe was duly notified by the First Respondent.

13. No response was submitted by the Respondents within the prescribed deadlines (or thereafter) regarding the aforementioned issue.
14. In the absence of answer from the Respondents within the granted time limit, the CAS Court Office informed the Parties on 30 May 2017 that Mr. Clifford J. Hendel, attorney-at-law in Madrid, Spain, had been appointed by the President of the CAS Appeals Arbitration Division as sole arbitrator to decide this case.
15. None of the Respondents has filed any Answer within the deadline of Article R55 of the Code.
16. On 8 June 2017, the CAS Court Office invited the Parties to indicate whether they prefer a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.
17. On that same date, WADA requested that the matter be decided on the basis of the Parties' written submissions, but reserved its right to reconsider its position in the event that any answer by the Respondents was filed.
18. The Respondents failed to respond on this issue by the established deadline (or thereafter).
19. On 28 June 2017, the Parties were invited to sign and return within five days from receipt the Order of Procedure.
20. On 3 July 2017, the Appellant returned its duly signed Order of Procedure. The Second Respondent signed the Order of Procedure on 7 July 2017, and returned it to the CAS.
21. The First and Third Respondents failed to return and sign the Order of Procedure within the granted time limit (or thereafter).
22. On 10 July 2017, the CAS Court Office requested the Appellant and the First and Second Respondent to provide the full address of Mr. Mothebe. In addition, the Second Respondent was invited to confirm again to the CAS Court Office that the previous CAS correspondences concerning the present proceedings were properly communicated to Mr. Mothebe.
23. On the same date, the Appellant responded with additional address information regarding Mr. Mothebe. The First and Second Respondents failed to respond on these issues by the established deadline (or thereafter).

D. THE APPELLANT'S SUBMISSIONS

24. In its Appeal Brief, the Appellant requests an award granting the following relief:

"1) The Appeal of WADA is admissible.

- 2) *The decision rendered by the Lesotho – NADO Panel of the LNOC on 7 February 2017 in the matter of Sello Mothebe is set aside.*
- 3) *Sello Mothebe is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Sello Mothebe 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 Sello Mothebe from and including 30 August 2016 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
- 5) *The arbitration costs shall be borne by the Respondents jointly and severally.*
- 6) *The Respondents be ordered to pay WADA a contribution to its legal and other costs in connection with these appeal proceedings”.*

25. In summary, the Appellant’s submissions in support of its appeal are as follows:

- Mr. Mothebe was tested positive for 19-NA, and admitted the anti-doping rule violation;
- 19-NA is a non-specified prohibited substance under S.1.1.b of the WADA 2016 Prohibited List;
- 19-NA was found at a concentration of 77.1 ng/mL, which is “greater than the Decision Limit of 2.5 ng/mL” and exceeds the 10 ng/mL limit that constitutes an Adverse Analytical Finding under the relevant WADA Technical Document (TD2016NA).
- Although Mr. Mothebe suggested at the Lesotho-NADO Panel hearing that the positive finding may have resulted from his use of flu medication or energy boosters/body stimulants provided by his coach, he did not provide any evidence that any of these products could have been the source of the concentration of 19-NA found in his sample nor did he disclose them on the applicable doping control form;
- Certain of the elements that were applied to reach the conclusion that Mr. Mothebe deserved a two year ineligibility period, i.e. that it was his “first time violation”, that he acted fairly in the proceedings and that he admitted the use of a prohibited substance, are irrelevant in the assessment of the intention of Mr. Mothebe and in the determination of the sanction;
- Therefore, Mr. Mothebe cannot profit from an elimination or reduction of the period of ineligibility based on Article 10.2.2 of the LNOC Anti-Doping Rules (“LNOC ADR”) and the Lesotho-NADO Panel of the LNOC should have sanctioned him with a minimum of four-year period of ineligibility according to Article 10.2.1 of the LNOC ADR, which applies in cases in which the “*anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional*”.

26. As noted, the Respondents have not filed any written submission in this procedure, although they have received a copy of the relevant submissions and correspondence and have had every opportunity to defend themselves.

E. JURISDICTION

27. Article R47 of the CAS Code states that “*an appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body*”.
28. As for entitled “*decisions subject to appeal*”, Article 13.1 of the LNOC ADR reads as follows:
- “Decisions made under these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or as otherwise provided in these Anti-Doping Rules, the Code or the International Standards”.*
29. In the LNOC ADR, CAS jurisdiction for appeals involving international-level athletes or international events is addressed at Article 13.2.1.
30. Article 13.2.3 of the LNOC ADR notably provides that “*In cases under Article 13.2.2 (this reference seems to be erroneous, since the reference should clearly be to Article 13.2.1), the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) LNOC and (if different) the National Anti-Doping Organization of the Person’s country of residence; (e) the International Olympic Committee or International Paralympics Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympics Games, including decisions affecting eligibility for the Olympic Games or Paralympics Games; and (f) WADA (...)*”.
31. In addition, Article 13.1.3 states that “*Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision within LNOC’s process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in LNOC’s process*”.
32. Those provisions clearly provide for the jurisdiction of the CAS against decisions rendered by the LNOC with regard to anti-doping issues.
33. The jurisdiction of the CAS has not been disputed by the Respondents, it has been expressly accepted by the Second Respondent by virtue of its signing of the Order of Procedure, and appears incontestable on the basis of the abovementioned applicable articles.

F. ADMISSIBILITY

34. Article 13.7 of the LNOC ADR provides “*the filing deadline for an appeal filed by WADA shall be the later of: (a) Twenty-one days after the last day on which any other party entitled to appeal in the case could have appealed; or (b) Twenty-one days after WADA’s receipt of the complete file relating to the decision*”.
35. According to WADA, certain documents from the case file related to the appealed Decision were received on 7 March 2017. This was not contested by the Respondents. The Appeal was hence filed within the deadline set by Article 13.7 of the LNOC ADR. The Appeal complied with all other requirements of Article R47 of the CAS Code including the payment of the CAS Court Office fee.
36. It follows that the Appeal is admissible.

G. APPLICABLE LAW

37. According to Article R58 of the CAS Code, “*the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation [...] which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. [...]*”.
38. In the case under scrutiny, the applicable regulations are those of the LNOC ADR.
39. The most relevant provisions of the LNOC ADR are summarized below:

“ARTICLE 2 DEFINITIONS OF DOPING - ANTI-DOPING RULE VIOLATIONS

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample.

2.1.1 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 or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete’s B Sample is analyzed and the analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete’s A Sample.

[...]

3.1 Burdens and Standards of Proof

LNOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether LNOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

[...]

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Articles 2.1 [Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample], Article 2.2 [Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method] or Article 2.6 [Possession of a Prohibited Substance or a Prohibited Method] shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

[...]

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk [...]."

H. MERITS

1. The occurrence of an anti-doping rule violation (ADRV)

40. In the case at hand, the Athlete's A Sample revealed the presence of 19-NA, as well as its metabolite 19-noretiocholanone, in a level which exceeded the "Decision limit of 2.5 ng/mL" as well as the 10 ng/mL limit that constitutes an Adverse Analytical Finding under the relevant WADA Technical Document (TD2016NA).

41. According to the WADA 2016 Prohibited List, 19-NA is included as a substance prohibited in class S.1.1.b.
42. Pursuant to Article 2.1 of the LNOC ADR, the presence of this substance in an athlete's body constitutes an anti-doping rule violation sanctioned as per Article 10 of the LNOC ADR.
43. In addition, Mr. Mothebe admitted the anti-doping rule violation and, thus, breached the LNOC ADR.
44. In reliance on Mr. Mothebe's assertion that the source of the concentration of 19-NA found in his sample probably resulted from two different types of products: (i) flu medications or (ii) energy boosters recommended by his coach, the Lesotho – NADO Panel concluded that the violation was not intentional, and apparently on this basis, imposed as a sanction a period of ineligibility of two years rather than the four years applicable under Article 10.2.1.1 of the LNOC ADR *"unless the Athlete [...] can establish that the anti-doping rule violation was not intentional"*.
45. However, CAS jurisprudence requires concrete evidence on how the prohibited substance came to be present in Mr. Mothebe's body. The unsubstantiated, conclusory assertions provided by Mr. Mothebe in this regard during the proceedings before the Lesotho-NADO Panel, i.e. the proposition that 19-NA must have been present in the flu medications or body stimulants he consumed, cannot be considered as concrete evidence revealing that the prohibited substance was actually contained in those products (SDRCC DT 16-0242 Re Taylor Findlay; CAS 2016/A/4377; CAS 2016/A/4626; CAS 2014/A/3820; CAS 2009/A/1926 & 1930).
46. The fact that Mr. Mothebe did not disclose he was taking these products on the Doping Control Form casts an additional shadow over the likelihood of his affirmation.
47. Therefore, the Sole Arbitrator cannot conclude that Mr. Mothebe has met his burden of establishing by the balance of probability (Article 3.1 of the LNOC ADR) that the violation in this case was not intentional (Article 10.2.1.1 of the LNOC ADR).

2. The sanction

48. The Appellant recalls that according to Article 10.2.1 of the LNOC ADR, the period of ineligibility is four years where the ADRV does not involve a specified substance, unless the athlete can establish that the ADRV was not intentional.
49. The Appellant argues thus that the Athlete should be sanctioned with a four-year ineligibility period.
50. As to the sanction starting date, pursuant to Article 10.11 of the LNOC ADR, *"the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility, or if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed"*.
51. The Sole Arbitrator therefore concludes that a four-year ineligibility period, starting on 7 February 2017, instead of the two-year originally imposed on the Athlete by the Lesotho-

NADO Panel of the LNOC, shall be imposed, because the Athlete has failed to establish that the violation was not intentional.

52. All competitive results obtained by the Athlete from and including 30 August 2016 until 7 February 2017, are disqualified.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency against the decision of the Lesotho – NADO Panel of the LNOC dated 7 February 2017 is upheld.
 2. The decision rendered on 7 February 2017 by the Lesotho – NADO Panel of the LNOC is amended as follows:
 3. Mr. Sello Mothebe is sanctioned with a four-year (4) period of ineligibility starting from 7 February 2017. All competitive results obtained by Mr. Sello Mothebe from and including 30 August 2016 until 7 February 2017 are disqualified with all resulting consequences (including forfeiture of medals, points and prizes).
- (...)
6. All other or further motions or prayers for relief are dismissed.