

## DOPING, ARE THERE ONLY A FEW GOOD APPLES IN THE BARREL?

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SUMMARY: 1. Introduction – 2. The History of Doping in Sports – 3. The Definition of Doping – 4. Strict Liability – 5. Standard of Proof – 6. The Varying Degrees of Doping – 7. The African Problem – 8. Sanctions – 9. Conclusion

### 1. Introduction

The use of performance enhancing drugs (doping) in sport is a world-wide phenomenon. Chuck Yesalis, opined that “*You’ve got to be a moron not to connect the dots. Doping is everywhere. There are only a few good apples in the barrel, and they’re not winning any medals.*”<sup>1</sup> With the number of doping incidents that have surfaced over the years worldwide, and the 2012 doping scandal involving Lance Armstrong, these words have to some extent proved to be true. After years of speculation, cycling ‘god’, Armstrong who had risen to the apex of the sports world and became an inspiration to cancer sufferers, was exposed as a cheat by United States Anti-Doping Agency (“USADA”).<sup>2</sup> Armstrong was once revered for his sportsmanship but he is now detested by many for his lies. He was stripped of his seven Tour de France titles and banned from sport for life. For years, Armstrong stubbornly and ferociously denied that he used performance enhancing drugs. It is now common knowledge that he lied.<sup>3</sup> Armstrong did not only lie, he attacked those who spoke out against his use of performance enhancing drugs and was prepared to sue these individuals. The individuals included the likes of Betsy and Frankie Andreu, Floyd Landis and Tyler Hamilton amongst others. Armstrong’s former teammates, including George Hincapie, Levi Leipheime and Michael Barry also confessed to doping during their careers as well as witnessing Armstrong using performance enhancing drugs.<sup>4</sup>

The controversy surrounding Armstrong has to some extent reinforced the perception that many elite athletes intentionally violate anti-doping regulations so as to gain an unfair advantage in sport. The Armstrong saga also – to some extent – lessened public sympathy for those athletes who unintentionally find themselves on the wrong side of the anti-doping regulations. These athletes are also regarded as cheats, despite a lack of the intention to cheat on their part. In some instances anti-doping rule violations occur as a result of a lack of knowledge and understanding of what doping actually is and a lack of understanding of the responsibilities placed on athletes by the regulations. This lack of knowledge is especially prevalent in the so-called ‘less developed’ countries, such as most of the countries in Africa.

This paper argues that doping has varying degrees, consequently that the ‘one size fits all’ approach is not the most appropriate way of tackling doping in sport. More specifically, this paper will look at, on the one hand those athletes who set out to intentionally cheat and actively take part in doping programs and (the likes of Armstrong have been successful for many years) and on the other hand, those athletes who unwittingly contravene the anti-doping regulations.

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<sup>1</sup> Cora Burnett (2013): *Deviance in sport: is it out of control?: Think Sport: A Journal on Sport & Recreation Volume 2 No.3 page 13.*

<sup>2</sup> In October 2012, the United States Anti-Doping Agency published the details of its findings against Lance Armstrong. see *United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

<sup>3</sup> *Ibid see United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

<sup>4</sup> *Ibid see United States Anti – Doping Agency v Lance Armstrong, Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility.*

## 2. *The history of doping in sports*

### 2.1. *The ancient times*

Doping in sport is rooted in ancient history.<sup>5</sup> Athletes have been searching for substances to improve their athletic performances from as far back as 776 BC, the days of the ancient Greek athletes.<sup>6</sup> These athletes are believed to have eaten the hearts, brains and the livers of animals in the belief that they would become more intelligent, swifter and stronger.<sup>7</sup> In 1904, mixtures of strychnine, heroin, cocaine and caffeine became very popular and were widely used by cyclists and lacrosse players in order to prevent fatigue and hunger.<sup>8</sup> By the 1920's, doping by athletes was so out of hand that it became abundantly clear for sporting authorities that boundaries needed to be set in place in order to prohibit doping.<sup>9</sup> As a result, in 1928 the International Amateur Athletics Federation (IAAF) attempted to set these boundaries and became the first international sport federation to prohibit doping.<sup>10</sup> In 1966 the *Union Cycliste Internationale* ("UCI") and *Fédération Internationale de Football Association* ("FIFA") followed suit. However the prohibitions put in place by the aforementioned Federations were in vain as no tests were performed on athletes.<sup>11</sup> The dreadful dangers and threats to athletes' lives and physical welfare caused by doping arose in 1960 when Danish cyclist Knut Jensen became the first known athlete to die as a result of doping.<sup>12</sup> It is recorded that Jensen's death increased the pressure on sporting authorities to introduce drug testing in sports.<sup>13</sup>

Consequently, in 1966, the UCI and FIFA introduced doping tests in their respective World Championships.<sup>14</sup> The doping tests however, seemingly did not prevent athletes from their quest to improve their athletic performances by using performance enhancing drugs. In 1967, the tragic death of another cyclist, Tommy Simpson, whose alleged motto was "*if it takes ten to kill you, take nine and win*" heightened the urgency of anti-doping work and triggered renewed efforts by sporting agencies to take action against doping.<sup>15</sup> As a result, the International Olympic Committee (IOC) instituted its Medical Commission and set up its first list of prohibited substances.<sup>16</sup>

### 2.2. *The birth of the IOC*

The IOC was established with three guiding principles, namely; the protection of the health of athletes, respect for medical and sports ethics, and equality for all competing athletes.<sup>17</sup> As mentioned above, the IOC established a Medical Commission and set up the first list of prohibited substances in response to the rise of doping by athletes. The IOC's first doping tests were introduced at the Olympic Winter Games in Grenoble and at the Olympic Games in Mexico in 1968, where Hans-Gunnar Liijenwall who tested positive for doping was stripped of his bronze medal and became the first athlete to be disqualified as a result of doping.<sup>18</sup> By the 1970's, most International Sporting Federations had introduced drug testing. Athletes however attempted to outsmart the Federations by using steroids, as there was no way of detecting the steroids through the then available testing processes.<sup>19</sup> In 1975, a test considered to be reliable in detecting steroids was developed.<sup>20</sup> The development of the test resulted in the IOC including steroids to its list of prohibited substances. In the 1970s and 1980s, anti-doping work was apparently complicated by suspicions of state-sponsored doping

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<sup>5</sup>This analysis of the history of doping in sport is necessarily brief. For an in depth discussion of the history of doping in sport, see further D Rosen, *Dope: A history of Performance Enhancement in Sport from the Nineteenth Century to Today* (2008).

<sup>6</sup>*Historical Timeline – Sports and Drugs - ProCon.org* (accessed 10 July 2013).

<sup>7</sup>*Ibid Historical Timeline – Sports and Drugs - ProCon.org*.

<sup>8</sup>*Ibid Historical Timeline – Sports and Drugs - ProCon.org*.

<sup>9</sup>*Ibid Historical Timeline – Sports and Drugs – ProCon.org*.

<sup>10</sup> <http://www.wada-ama.org> (accessed 3 January 2014).

<sup>11</sup> *Ibid* <http://www.wada-ama.org>.

<sup>12</sup> *Ibid Historical Timeline – Sports and Drugs – ProCon.org*.

<sup>13</sup> *Ibid Historical Timeline – Sports and Drugs – ProCon.org*.

<sup>14</sup> *Ibid* <http://www.wada-ama.org>.

<sup>15</sup> *Ibid Historical Timeline – Sports and Drugs – ProCon.org*.

<sup>16</sup> *Ibid* <http://www.wada-ama.org>.

<sup>17</sup> *Ibid* <http://www.wada-ama.org>.

<sup>18</sup> *Ibid Historical Timeline – Sports and Drugs – ProCon.org*.

<sup>19</sup> <http://www.wada-ama.org>.

<sup>20</sup> <http://www.wada-ama.org>.

practices in some countries.<sup>21</sup> Although the fight against stimulants and steroids was producing some results, the main front in the anti-doping war rapidly started to shift towards blood doping.<sup>22</sup> Blood doping was banned by the IOC in 1986.

The number of athletes who failed doping tests increased over the years. As a result of increased incidents of doping, the IOC became more stringent in dealing with athletes caught doping. Accordingly, in 1988, Ben Johnson a Canadian sprinter was stripped of his gold medal after he too tested positive for doping.<sup>23</sup> Johnson was not only stripped of his gold medal but he was also later banned from sports for life. Johnson claimed that his herbal drink was spiked, but the officials declined his explanations. Johnson did later admit to doping through using steroids.<sup>24</sup> Even years after Johnson's ban, he feels he was unfairly picked out for vilification at a time of widespread drug use in athletics.<sup>25</sup>

### 2.3. *The rise of WADA*

After Johnson's ban from sport for life, one would have expected athletes to stop doping, but they continued. In 1998 a large number of prohibited medical substances were found by police in a raid during the *Tour de France*.<sup>26</sup> The scandal led to a major review of the role of public authorities in anti-doping affairs.<sup>27</sup> The *Tour de France* scandal highlighted the need for an independent international agency, which would put in place unified standards for anti-doping work and coordinate the efforts of sports organizations and public authorities.<sup>28</sup> The IOC took the initiative and convened the First World Conference on Doping in Sport in Lausanne in February 1999. Following the proposal of the Conference, the World Anti-Doping Agency (WADA) was established on 10 November 1999.<sup>29</sup> WADA was established as an independent doping control body to fulfill the functions of education and testing worldwide. WADA's mission is to promote and coordinate at international level the fight against doping in sport in all forms.

Even years after the establishment of WADA, some athletes have not stopped doping. In recent times, doping has however become more sophisticated and increasingly more difficult to detect. What might have been impossible back then, using genetically engineered artificial hormones such as EPO to stimulate the production of red blood cells, is not only possible today but is said to be a popular method for athletes to improve their endurance results.<sup>30</sup> Revelations of Armstrong's doping program and that of his team is proof of how sophisticated doping programmes have become in recent times. Richard Poplak remarked that Armstrong's doping programme "*was not schoolboy cribbing. It was a sophisticated conspiracy that involved secret payments in the millions, the intimidation of witnesses, and cat and mouse tactics with testing agencies.*"<sup>31</sup> Hopes that athletes would err on the side of caution after Armstrong's bust have also proved ill founded. In June 2013, Armstrong's long-time rival, Jan Ullrich, also confessed to doping. Sprinters Tyson Gay of the United States, Asafa Powell and Sheroine Simpson of Jamaica all tested positive of prohibited substances before the athletics Worlds Championship in August 2013.<sup>32</sup> Doping practises can be attributed to what Eric Chwang terms the 'prisoners' dilemma'. In Eric Chwang's terms, "*elite athletes are trapped in something like the 'prisoners dilemma' when it comes to the use of performance –enhancing drugs: they realise they would be better off if they did not use them, but the strategic dynamics of the sporting contest*

<sup>21</sup> <http://wada.wada-ama.org>.

<sup>22</sup> "Blood doping" refers to any illicit method of boosting an athlete's red blood-cell supply in advance of competition. The red blood cells carry oxygen through the bloodstream. Increasing the number of the blood cells allows an athlete's blood to deliver oxygen to muscles more efficiently, reducing fatigue and giving the athlete an edge.

<sup>23</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html>

<sup>24</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html>

<sup>25</sup> <http://www.telegraph.co.uk/sport/othersports/athletics/10329995/Ben-Johnson-I-was-nailed-on-a-cross-for-taking-steroids-at-Seoul-Olympics-25-years-later-Im-still-being-punished.html> (accessed on 3 January 2014)

<sup>26</sup> J Anderson "Morden sports law: A textbook" (2010) at page 116.

<sup>27</sup> *Ibid* 25 at page 116.

<sup>28</sup> *Ibid* 25 at page 116.

<sup>29</sup> <http://www.wada-ama.org>.

<sup>30</sup> *Ibid* D Rosen, *Dope: A history of Performance Enhancement in Sport from the Nineteenth Century to Today*, preface ix.

<sup>31</sup> Rickard Poplak is an author and journalist, who was born in Johannesburg, South Africa. He published a book on Lance Armstrong in 2010 titled, *Braking Bad: Chasing Lance Armstrong and the Cancer of Corruption*.

<sup>32</sup> J Savulescu, B Froddy and M Clayton (2004) "Why we should allow performance drugs in sport", *British Journal of Sports, Medicine, British Medical Journal Volume 38 no 6*.

mean they cannot help but use them".<sup>33</sup> In my view if the sophisticated methods of doping available today had been available in the past, athletes would have unquestionably put them to use.

#### 2.4. The WADA Code

Following the establishment of WADA, various rules and regulations have been developed to combat doping. These rules and regulations are constantly under review and are occasionally changed as a result of new technologies, methods and drugs that enter the doping marketplace.<sup>34</sup> The stated aim of these rules and regulations is to uphold and preserve the ethics of sport, safeguard the physical health and mental integrity of sportspersons, offer protection to the innocent competitor from cheats and to penalise those that transgress the regulations.<sup>35</sup> As mentioned above, WADA was established as an independent doping control body to fulfill the functions of education and testing worldwide. Consequently, the fight against doping is organised internationally under WADA. WADA is governed by a board which includes representatives from the major stakeholders in international sport, such as the IOC, International Federations and Governments.<sup>36</sup> After extensive consultations with the relevant stakeholders, the World Anti-Doping Agency Code (Code) was adopted in 2005 as the core document which provides the framework for harmonized anti-doping policies, rules and regulations. The Code oversees the promotion, coordination and monitoring of doping in sports on an international level. The signatories to the Code, such as the IOC and other International Sport Federations, have undertaken to implement the Code and to adopt the regulations for their specific sports.<sup>37</sup>

Various countries across the world have established their own rules and regulations in accordance with the WADA Code and in order to regulate doping.<sup>38</sup> In South Africa, for example, the South African Institute of Drug-Free Sport Act 14 of 1997 ("the Act") was enacted to regulate doping. The purpose of the Act is to "*promote the participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance, thereby rendering impermissible doping practices which are contrary to the principles of fair play and medical ethics, in the interest of the health and well-being of sportspersons.*" The South African Institution for Drug-free Sports (SAIDS), an independent statutory body was established in accordance to the Act. The purpose of SAIDS is to promote drug free sports by overseeing testing and educations of matter relating to drugs and doping in sport in South Africa. SAIDS is required to conduct effective, documented, national drug testing programmes, that are independent, reliable, and secure and that conform to the highest international standard. SAIDS carries out a number of doping tests on elite athletes each year. These tests are carried out at events which include provincial, national or international events.<sup>39</sup>

In order to facilitate the doping tests conducted on athletes, WADA also makes provision for Anti-doping laboratories which are dedicated to the analysis of sports doping control tests. Laboratories that wish to perform the analysis of doping controls for sports under the Code must achieve and maintain accreditation from WADA.<sup>40</sup> The International Standard for Laboratories and its related technical documents specify the criteria that must be met for accreditation and re-accreditation, as well as standards that must be met for the production of valid test results and evidentiary data.<sup>41</sup> There are currently 32 laboratories around the world accredited to conduct human doping control sample analyses. There is however only one accredited Doping Control Laboratory in Africa.<sup>42</sup> This Doping Control Laboratory is set up in South Africa, Bloemfontein.

### 3. The definition of doping

Doping simply put – is cheating. The Code however broadly defines doping as the occurrence of at least one of the eight anti – doping violations set out in article 2 of the Wada Code.<sup>43</sup> The eight anti-doping violations

<sup>33</sup> *Ibid* Savulescu, J, Froddy, B and Clayton M (2004). "Why we should allow performance drugs in sport", *British Journal of Sports Medicine, British Medical Journal Volume 38 no. 6.*

<sup>34</sup> Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 185.

<sup>35</sup> *Ibid* 34 at page 185.

<sup>36</sup> *Ibid* 34 at page 186.

<sup>37</sup> *Ibid* 34 at page 186

<sup>38</sup> These countries include countries such as France and South Africa.

<sup>39</sup> *Ibid* 34 at 187

<sup>40</sup> <http://www.wada-ama.org>

<sup>41</sup> <http://www.wada-ama.org>

<sup>42</sup> <http://www.wada-ama.org/en/Science-Medicine/Anti-Doping-Laboratories>.

<sup>43</sup> article 1 of the Wada Code.

in the Code are the following; the presence of a prohibited substance or its metabolites or markers in an athlete's bodily sample<sup>44</sup>; the use or attempted use of a prohibited substance or a prohibited method<sup>45</sup>; refusing, or failing, without compelling justification, to submit to sample collection or otherwise evading sample collection;<sup>46</sup> violating applicable requirements regarding an athlete's availability for out-of-competition testing including failure to provide required information on the whereabouts of an athlete;<sup>47</sup> tampering or attempting to tamper with any part of a doping control test;<sup>48</sup> possessing prohibited substances or methods;<sup>49</sup> trafficking in any prohibited substance or prohibited method;<sup>50</sup> or administering or attempting to administer a prohibited substance or prohibited method to any athlete or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.<sup>51</sup> These substances or methods are prohibited either because they potentially enhance performance thereby rendering competition unfair, they are potential health hazards or their possession and supply may be illegal. Clearly, some of the doping offences listed above such as administering prohibited methods, assisting, encouraging, aiding, abetting, covering up (mainly through the use of masking agents) require the active involvement of the athlete in committing the offence. Some however require knowledge that the substance is prohibited. Although unfortunate, ignorance can easily lead to a transgression of the anti-doping regulations and punishment.

#### 4. *Strict Liability*

In contrast to the commonly applied principle of presumption of innocence, i.e. an accused is innocent until proven guilty, when an athlete is accused of violating the doping provisions, they are instantly vilified as guilty until they can prove their innocence. Consequently, doping regulations apply the principle of strict liability. The strict liability principle holds that for example, an athlete is strictly liable for the prohibited substances which are found in and revealed by, the testing of their bodily specimen and that an anti-doping violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance.<sup>52</sup> It is unnecessary that fault (intent or negligence) be demonstrated in order to establish guilt. Ignorance, unfortunately, is not a valid defense on the part of the athlete. The thrust of this principle is said to be that "*athletes must take responsibility, in the context of anti-doping, for what they ingest and use*".<sup>53</sup> The application of the principle is acceptable on two grounds. Firstly, the strict liability approach is said to operate to the benefit of all 'clean' athletes that is 'when an athlete wins a gold medal with a prohibited substance in his or her system that is unfair to the other athletes in that competition regardless of whether the gold medalist was at fault in any way.'<sup>54</sup> Only a 'clean' athlete should be allowed to benefit from his or her competitive results.<sup>55</sup> Secondly, the strict liability approach, it is argued, is counterbalanced by the fact that an athlete has the opportunity to avoid or reduce the applicable sanction if they can demonstrate how the substance in question was not taken with the intention to enhance performance or was ingested negligently or through no fault or no significant fault of that athlete<sup>56</sup>.

The burden of proof often lies with the accusing party – generally the sport's governing body. Proof of a doping offence is adequate for the disqualification of an athlete.<sup>57</sup> After the establishment of a doping offence, the burden of proof shifts from the sport's governing body to the athlete accused of having committed a doping offence. Proving innocence in a doping case by an athlete is a strenuous task. It is very common, for athletes to claim that they have no explanation for testing positive. Athletes will typically, claim that their positive tests are influenced by things such as food additives, manipulation of samples,

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<sup>44</sup> article 2.1 of the Wada Code.

<sup>45</sup> article 2.2 of the Wada Code.

<sup>46</sup> article 2.3 of the Wada Code.

<sup>47</sup> article 2.4 of the Wada Code.

<sup>48</sup> article 2.5 of the Wada Code.

<sup>49</sup> article 2.6 of the Wada Code.

<sup>50</sup> article 2.7 of the Wada Code.

<sup>51</sup> article 2.8 of the Wada Code.

<sup>52</sup> article 2.1.1 of the Wada Code.

<sup>53</sup> article 21.1.3 of the Wad Code.

<sup>54</sup> *Ibid.* See also J Anderson (2010) *Modern Sports Law: a textbook* at page 123.

<sup>55</sup> Article 9 of the WADA Code.

<sup>56</sup> Article 10 of the WADA Code.

<sup>57</sup> *Ibid.* Se Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 189.

mistakes in analysis, coaches and doctors amongst other such excuses. Most of these alleged facts are often difficult to prove and will in most probability require the athlete to be backed up by a strong legal team, in order to receive a reduced sanction or to be cleared of the doping charges preferred against them.

An athlete can be discharged of doping charges by proving that the testing process was flawed and failed to comply with a number of international sampling processes and anti – doping procedures. As mentioned above, proving this may require the athlete to be assisted by strong legal team, such as in the case of Mamabolo, the winner of the 2012 Comrades Marathon. Mamabolo tested positive for *methylhexanamine* and was provisionally stripped of the title and denied access to the winner's prize money for almost a year.<sup>58</sup> After a marathon hearing however, Mamabolo was cleared of all doping charges preferred against him and was confirmed as the 2012 Comrades Marathon winner. In Mamabolo's case the committee that presided over his case found that SAIDS had failed to comply with a number of international sampling processes and anti – doping procedures.<sup>59</sup>

### 5. *The Standard of Proof*

According to the Code, the standard of proof required of the sports body or anti-doping agency, is “whether the [sports body or anti-doping agency] has established an anti-doping rule violation to the *comfortable satisfaction*’ of the panel bearing in mind the seriousness of the allegation which is made.<sup>60</sup> This standard of proof is greater than a mere balance of probabilities, which is the ordinary civil standard of proof, but less than proof of beyond a reasonable doubt, which is the criminal standard of proof.<sup>61</sup>

### 6. *The varying degrees of doping*

As mentioned above, doping has various degrees. The ‘one size fits all’ approach is therefore not the most appropriate way of tackling doping in sport. On the one hand there are those athletes who set out to intentionally cheat and actively take part in doping programs and on the other hand, there are those athletes who unwittingly contravene the anti-doping regulations.

The Code itself does not distinguish between outright cheats who intentionally set out to violate anti-doping rules and unwitting offenders. As a result of this one size fits all approach all athletes found on the wrong side of anti-doping rules, even the unwitting offenders end up being labeled cheats when they actually do not set out to cheat. There are those athletes who intentionally set out to violate the doping regulations and actively take part in doping programs, such as Lance Armstrong, in order to gain money (massive financial incentives are available for winners in the world of sport) fame and power. Within the same category of dopers are those athletes who dope in desperate attempts to save their sporting careers such as Nate Jackson.<sup>62</sup> Just approaching the age of 30, Jackson was not ready to ‘taste the death of his football dreams’, so he chose to save his career the only way he knew how: doping.<sup>63</sup>

Another example of a suspected ‘intentional cheater’ is Wilson Erupe Loyanai, a well -known Kenyan athlete, caused international stir when he won the Seoul International Marathon in a course record of 2:05:37 hours. Not only did he beat his more favoured compatriots, but he bettered his personal best time and set a course record in the process. That feat placed him among the top 100 marathoners of all time. An out-of-competition test done on him by officials from WADA revealed that he was using EPO. Loyanai was then banned in January 2013 for two years from sports. He is one of the 17 Kenyan athletes currently serving out bans for doping, a vice that seems to be taking root in Kenya even though the Kenyan officials concerned are reported to be downplaying the doping scandal. Kenyan athletes are currently on top of the world; they win almost all the important middle and long distance races with ‘ease’. This has obviously attracted attention and resulted in suspicion from friends and foes. It is believed that the athletes are powered by a potent drug. These Kenyan athletes have been on the spot since allegations surfaced that there could be extensive doping amongst them. Investigations are however currently underway. Mathew Kisorio, is another example. He is amongst the 17 Kenyan athletes who tested positive for doping. He tested positive for a

<sup>58</sup> <http://www.sport24.co.za/OtherSport/Athletics/Mamabolo-failed-by-process> (accessed 2 May 2013)

<sup>59</sup> <http://www.sport24.co.za/OtherSport/Athletics/Mamabolo-failed-by-process> (accessed 2 May 2013)

<sup>60</sup> Article 3.1 of the Wada Code.

<sup>61</sup> Jack Anderson (2010) *Morden sport Law: a textbook* at page128.

prohibited steroid after completing the 10,000 meter race in the 2012 Kenya Athletic Championships. He later admitted to using blood-boosting drugs saying the practice was fairly common in Kenya as it was encouraged by foreign athletics agents and doctors.

In Zimbabwe, the Zimbabwe national football team midfielder Devon Taitamba Chafa was suspended by FIFA, from playing in all matches for six months after he was found using prohibited drugs in a World Cup preliminary match between Zimbabwe and Egypt in Harare in June 2013.<sup>64</sup>

On the opposite end of the spectrum, are those athletes who are innocently caught on the wrong side of doping regulations; innocently because they are unwitting offenders. These athletes do not set out to contravene the anti-doping regulations, such as the South African National Rugby Team (“Springbok”) duo of Chiliboy Ralepelle and Bjorn Basson. Ralepelle and Basson were charged and provisionally suspended after they tested positive for methylhexanamine (“MHA”). In their case it was confirmed that the MHA was contained in supplements provided to them by the Springboks medical team in a warm-up before a game. Although Chiliboy and Basson, unknowingly took the substance they were condemned for returning positive drug tests, and both found guilty of doping. They did however successfully argue for a reduced sanction as they managed to show how the MHA entered their bodies and that they did not ingest it for cheating purposes.

Forming part of the ‘unwitting offenders’ category and arguably most of the African athletes prosecuted for doping, are those athletes who are uneducated and unaware about doping and what it actually is. These athletes are also regarded as cheats despite a lack of the intention to cheat on their part. An example of an unwitting offenders is Hezekiel Sepeng<sup>65</sup> who was South Africa’s first black Olympic medalist to win a silver medal in the 800-meter race at the 1996 Olympics in Atlanta, Georgia, but with one positive test result in 2005, he went from being a hero to being strongly criticized. He was banned from competition in 2005 after he failed a test for a banned substance. He argued that the testing laboratory made a mistake. Officials however disagreed and banned him from competition for two years. The ban ended his athletic career. Today, Sepeng works with the South African athletics federation, and operates an organization that helps needy children. He has opined that many poor athletes in Africa eat foods that could cause them to fail some tests for banned substances. He says that anti-doping officials should create a strong campaign to help such athletes understand the doping dangers caused by some of the foods they grew up eating.

## 7. The African Problem

In Africa, only a few doping incidents, in comparison to the rest of the world, are reported. These few doping cases can arguably be attributed to the fact that there is only one Doping laboratory serving 55 African countries. As a result of the lack of laboratories in Africa, a great number of athletes are therefore never exposed to doping tests. Doping is a worldwide phenomenon and it is certainly happening amongst African athletes as we have seen in South Africa, Kenya and Zimbabwe. Even though doping appears to be less prevalent in African countries compared to other parts of the world, because of the few doping cases which have surfaced, doping is still a concern in Africa.

The lack of resources and the lack of education on doping are common issues which affect the ‘less developed’ countries, such as most of the countries in Africa. Although a number of African athletes are never exposed to doping tests, the few African athletes that are tested and who return positive tests are likely to be less informed about doping and what it actually is. These athletes have been labelled as cheats when they are in some instances unwitting users of prohibited substances as a result of being un-informed about what doping is. Mamabolo the winner of the 2012 Comrades Marathon commented on the education of athletes on doping and said the following, “*Black people – I’m sorry to say it – do not have computers where we can log in. We wake up, eat pap, and train. But we have the right to be informed and it’s important to us.*”<sup>66</sup>

In what appears to be an effort to educate and test African athletes, Kenyan officials and its government has been partnering with the officials of the world’s athletics governing body, the IAAF, to set up another testing centre in Nairobi. Kenya conducts almost 700 tests on athletes every year but the samples from these tests are analysed in South Africa since it is the only country on the continent with a WADA

<sup>64</sup> <http://news.xinhuanet.com/english/sports/201310/15/c> (accessed 4 January 2014).

<sup>65</sup> <http://learningenglish.voanews.com/content/sports-doping-conference-wada-accidental-doping-hezekiel-sepeng/1811290.html>.

<sup>66</sup> <http://www.iol.co.za/sport/athletics/ludwick-runners-not-educated-about-doping> (accessed 3 January 2014).

accredited laboratory. Athletics Kenya President Isaiah Kiplagat, remarked that it makes a lot of sense that being the nation with most athletes, Kenya should have a centre that will also serve neighbouring countries such as, Ethiopia and Uganda.<sup>67</sup>

It is also important for authorities to realise that they too need to support athletes by providing them with access to information on anti-doping in sport. The authorities should also advise athletes about their rights and obligations in relation to the doping test processes. The responsibility is, to some extent, a shared one between the authorities and those involved in sport. The ultimate responsibility, however, lies with athletes and it is they who have the most to lose if they transgress the doping regulations – however innocently. In South Africa for example, a lot has been done by SAIDS in education about doping. It must be made clear and emphasized that it is however each and every athlete's duty to ensure that no performance enhancing drug enters their bodies.

All athletes, as well as their doctors, should be well informed of the WADA Code's List of Prohibited Substances which is updated from time to time and they should keep a record of what they eat. Athletes should also be very wary of herbal remedies, health products, nutritional supplements, energy tonics and slimming agents<sup>68</sup> These products are not regulated and their purity is not guaranteed. It is therefore difficult to accurately determine all their ingredients and these are not always properly depicted on the packaging. These products should be regarded as high risk products as they may contain prohibited substances or they may be converted into prohibited substances in the body. While the ultimate responsibility lies with the athlete, sports clubs and regulating bodies are also recommended not to encourage the use or be actively involved in promoting particular supplements. If the promoted substance contains a prohibited substance, like the Chiliboy and Basson case, the sport club too may be sanctioned.

International sports federations have made some exceptions in order to accommodate athletes with medical conditions requiring the use of prohibited substances in treating their medical conditions. These athletes may apply for a therapeutic use exemption (TUE)<sup>69</sup> Under the Code, WADA is assigned to harmonise the international standards and criteria that surround the granting of TUE and also reserves the right to review at any time the granting of TUE to athletes. The underlying idea of the process is to accommodate athletes who would, without using the prohibited substance, otherwise experience serious health problems. A classic example of this process is where an athlete suffering from asthma uses medication containing a prohibited substance. Some of them take certain medications for their health, but do not get TUEs due to ignorance.

## 8. *Sanctions*

Massive financial incentives are available for winners in the world of sport. It is therefore essential that where winners are revealed as cheats the consequences sufficiently serious to act as a counterweight to the incentives of cheating. If that is the case that might also be a valuable message to prospective drug cheats. Sanctions are decided according to the rules and regulations of the various sports federations. Sanctions are usually set at the level of the International Sports Federation, and followed by the National Sports federations. All sports federations should have doping policies, and the sanctions related to offences should be included in these policies. Such policies and details should be available to all parties, involved including coaches, athletes, administrators and relevant others. Sanctions for a positive test may also include suspensions up to a maximum four years.

If an athlete cannot prove his innocence, by showing that the testing process was flawed and failed to comply with a number of international sampling processes, such as in the case of Mamabolo, a sanction will be imposed. In cases where the athlete lacks the intention to cheat, such as the Ralepelle and Basson case, the sanction can be the minimum possible (a warning) but the athlete will still be guilty of doping. In cases where the athlete intended to cheat, such as in the case of Armstrong the sanction imposed can be a life ban. Normally the sanction for a doping offence in sport is not a criminal punishment in line with criminal law, it is a disciplinary sanction, except in countries such as Belgium, Greece, Italy and Sweden, which have by legislation made doping a criminal offence.

<sup>67</sup> *Ibid* 66

<sup>68</sup> *Ibid*. See Cloete R (ed). (2005). *Introduction to Sports Law in South Africa* at page 186.

<sup>69</sup> Article 4.4 of the Code

In September 2013, a WADA committee approved changes to the Wada Code. The new World Anti-Doping Code will take effect in January 2015, more than a year before the 2016 Olympics in Rio de Janeiro, Brazil. Anti-doping officials say they hope the new rules will help make that event the cleanest Olympics ever. The changes include a four-year suspension from competition for athletes who knowingly take banned substances to improve their performance. Coaches and trainers who help athletes break the rules will also be punished. The Code also punishes athletes who refuse to cooperate in doping investigations. However, those who cooperate may be punished less than those who do not.

#### 9. *Conclusion*

Doping is not a new phenomenon. It is rooted in ancient history. It has however evolved over the years. The market for doping substances has grown and the doping methods dedicated to “beating the system” with “designer drugs”, undetectable substances and masking agents have become more sophisticated. Certain rules and regulations are in place however to assist with the fight against doping. The rewards on offer for those athletes who win medals these today are enormous and with success comes fame, wealth and power. Most athletes are willing to risk losing their sporting careers, if they are caught, in order to secure these rewards on offer. Lance Armstrong is an example of such an athlete. Other athletes are not ready to ‘taste the death of their sporting dreams’, so they choose to save their careers, by doping. The Code, unfortunately does not distinguish between outright cheats and “unwitting offenders” innocently caught on the wrong side of the anti-doping regulations. Unwitting offenders include many African athletes who are uneducated about what doping actually is. As a result of this one size fits all approach of the WADA Code explained above all athletes’ found on the wrong side of anti-doping rules end up being labelled cheats to their detriment when some are clearly not. African sport (and sport around the world) is losing great talent as a result of the lack of education about doping when a little more education by the authorities and vigilance by the athletes could curb the rampant problem of doping. With the abovementioned varying degrees of doping, the one size fits all approach should apply to doping, but sadly for the unwitting offender, it does. Although there are only a few good apples in the barrel, they are not winning any medals.