Arbitration CAS 2000/A/281 H. / Fédération Internationale de Motocyclisme (FIM), award of 22 December 2000

Panel: Mr. Dirk-Reiner Martens (Germany), President; Prof. Richard McLaren (Canada); Mr. Jean-Philippe Rochat (Switzerland)

Motorcycling
Doping (ephedrine)
Strict liability

1. **As a general rule, in cases of strict liability offences it is sufficient that the federation is able to show that a forbidden substance was found in the urine of the athlete and that the positive test result of the sample was not affected by procedural defects in the laboratory. Under the FIM Rules it is not a requirement that the forbidden substance is contained in medication. The FIM Medical Code also expressly prohibits the use of chemical identical substances. This includes herbal or homeopathic substances. More generally, it can also be found in the jurisprudence of the CAS that it is sufficient that the active substance appears on the doping list. The name of the product is not relevant.**

2. **The established IOC testing procedures need to be applied strictly and do not leave room for the transfer of certain methods from one testing procedure to another on a case by case basis. If there was a need for the application of a correction factor in ephedrine cases this decision had to be taken by the competent authorities of the IOC. It cannot be the task of the CAS to amend on a case by case basis the rules established by the International Olympic Committee and applied by the IOC accredited doping laboratories.**

3. **In a case of strict liability it is irrelevant whether the athlete was aware that he was using a substance appearing on the doping list. The CAS considers that products and homeopathic substances that do not give the chemical name of the substances but the names of herbal substances need to be examined with great care by the athlete.**

The Appellant, H. is one of the leading Superbike riders in the world. He takes part in the Superbike World Championship organised under the auspices of the Respondent.

The Respondent, Fédération Internationale de Motocyclisme (FIM), is an international organisation which was created to control and develop the sporting and touring aspects of motorcycling and to assist motorcycle users in those fields. Among other competitions it organises the Superbike World

Championship. The FIM is incorporated under Swiss Law in accordance with Articles 60 *et seq.* of the Swiss Civil Code and is registered in the Swiss Trade Register. It has its seat in Mies (Canton de Vaud).

Sometime in the beginning of 2000 H. started to use the product "Thermogen" to support his efforts in losing weight. He obtained this product from his personal fitness trainer who advised him to take one pill every second day. H. used the product regularly until a training session in March in Valencia, Spain, after which H. stopped using the product on a regular basis but still took a pill from time to time.

According to its label, "Thermogen" is a dietary supplement which the label suggests can be used to support weight loss. "Thermogen" consists mainly of caffeine and the herbal substance MaHuang. The latter is an extract of a Chinese ephedra plant. The active substance in MaHuang is thus ephedrine.

On 2 April 2000, H. took part in a FIM racing event in Kyalami, South Africa. This was the first racing event of the 2000 Superbike world championship. Each Superbike event consists of two races. Following the result of each race individual points for the classification in the world championship are attributed to the competitors. H. finished second in the first race and obtained 20 points. He won the second race and obtained 25 points.

H. could not remember whether he took a "Thermogen" pill on the day of the race and if so whether it was before the first race or between the two races.

H. underwent a doping test after the second race. The doping control was carried out by the "International Doping Test Management" (IDTM). The urine sample was taken in two stages since H. was unable to give a sufficient amount of urine the first time. The first insufficient sample was stored in a sealed container until the second sample had been given. The two samples were then mixed and filled in the sample bottles of the Berlinger kit that had previously been selected by H. The following day the samples were sent to the IOC accredited doping laboratory in Kreischa, Germany where they arrived on 5 April 2000.

The A sample (No. A350311) which was tested on 10 April 2000 showed a concentration of 12.4 μg/ml of ephedrine. The result already took into account a standard tolerance of 0.3 μg/ml.

Upon H.'s request B-sample (No. B350311) was tested in the IOC accredited doping laboratory in Cologne, Germany. The test was conducted on 18 May 2000 in the presence of Prof. van Rossum and Mr. Vrijman on behalf of the Appellant. According to the report sent to the Appellant by fax on 19 May 2000, the test revealed a concentration of ephedrine of more than 10 μg/ml (about 13.4 μg/ml).

By fax of Friday, 19 May 2000 the FIM informed the Appellant that a hearing by telephone in the matter would be conducted on Monday, 22 May 2000 in the afternoon before the "International Jury" (IJ) of the FIM.

On 23 May 2000 the IJ decided to refer the matter to the "International Disciplinary Court" (CDI) of the FIM. The hearing before the CDI was scheduled to take place at 10.30 a.m. on 2 June 2000, at Hockenheim, Germany. This was just 15 minutes before the start of the first race of the Superbike event at Hockenheim. The CDI decided to disqualify H. from the racing event in Kyalami, South Africa (both races) and to suspend him for a period of one month beginning on 5 June 2000.

H. appealed against this decision to the "International Tribunal of Appeal" (TIA) of the FIM on 15 June 2000. After the hearing, conducted in the French language, on 30 June 2000 the TIA decided to uphold H.'s disqualification. The suspension was reduced to three weeks beginning on 30 June 2000.

On 4 July 2000 Appellant filed a request for arbitration with the Court of Arbitration for Sport as an appeal against the decision of FIM's TIA of 30 June 2000.

Together with his statement of claim Appellant also filed a request for interim relief to stay the execution of the aforementioned TIA decision. By letter of 5 July 2000, Respondent requested that the stay of the execution should not be granted.

On 6 July 2000 the Deputy President of the Appeals Arbitration Division in a procedural order decided to:

> "*uphold[s] the application filed by H. on 4 July 2000, for a stay of the execution of the decision issued by the FIM International Tribunal of Appeal on 30 June 2000*."

According to the grounds of the interim order this decision was principally based on the fact that the reasons for TIA's decision were not available to either the Appellant or to the CAS at the time of the procedural order. The Deputy President of the Appeals Arbitration Division felt unable to determine whether this decision violated FIM rules or rules of law and to establish whether the appeal was likely to succeed on the merits. Taking into account the extent to which the requested order was useful to protect the Appellant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweighed those of the Respondent, the stay of execution was granted.

By letter dated 26 August 2000 Appellant filed his appeal brief together with 56 exhibits. Respondent's answer together with six exhibits was filed on 12 September 2000.

Appellant submits that his rights were infringed in various forms during the proceedings before the internal bodies of Respondent. Respondent allegedly violated Appellant's right to be heard and to a fair trial since it did not provide Appellant with all the necessary documentation prior to the hearing before the IJ and scheduled this hearing just 15 minutes before a race so as to deprive him, as a practical matter, of the possibility of attending the hearing.

On the merits of the case Appellant contends that Respondent was unable to establish the integrity of the urine collection process and the validity of the laboratory testing results. He points out that due to a language barrier Appellant was unable to understand the sample collection process.

According to Appellant after the second collection procedure his two samples were filled separately into the two bottles of the Berlinger kit instead of being mixed and then filled into the sample bottles. Initially the A-bottle contained only the urine of the first partial sample and the B-bottle the urine of only the second partial sample. Later Appellant was requested to pour some urine from the B-bottle into the A-bottle.

Appellant also states that he had no possibility of checking whether the bottles were properly closed. He alleges that the bottles were not properly sealed and packed for shipment to the IOC accredited doping laboratory. Appellant further allegedly observed differences in the amount of urine filled into the bottles during the doping control and the amount of urine that arrived in the laboratories.

Furthermore the Appellant contends that the testing of the B-sample was not conducted in accordance with the rules of the IOC. The laboratory in Cologne did not use enough samples of reference urine ("*aliquots*"). Thus the determination of the concentration of the B-sample was invalid.

In addition Appellant maintains that the test results are invalid because they did not take into account the specific gravity of the sample. Since, due to dehydration, the Appellant had difficulty providing the necessary amount of urine, the concentration of the ephedrine was higher than it would have been in a "normal" urine sample. This should have been taken into account by applying a correction factor. According to Appellant such a correction factor is for example applied in cases of positive results for norandrosterone if the specific gravity of the sample is higher than 1.020. As the specific gravity of H.'s samples was established as being 1.027 for the A-sample and 1.028 for the B-sample the correction factor would have pushed the concentration below the cut off level.

Appellant also argues that Respondent did not meet its burden of proof in establishing that the amount of ephedrine found constituted a doping offence within the meaning of Respondent's own regulations. Appellant points to the fact that Respondent's rules provide that the application of a substance must lead to an artificial increase in performance at events. Taking into account the amount of ephedrine found in the Appellant's urine no such proof has been established by Respondent nor can it be established since, according to Appellant, ephedrine has no performance-enhancing effect on motorcycle riders.

As the substance MaHuang contains only herbal components, Appellant claims that he cannot be sanctioned. Neither the IOC doping code nor the information leaflets of the FIM include any indication that the use of MaHuang can lead to a doping offence.

As regards the three-week suspension Appellant argues that this was not in accordance with Respondent's Disciplinary and Arbitration Code. This Code also provides for a warning which would have been sufficient in the circumstances of this case. Furthermore, a three-week suspension in addition to the disqualification violated the principle of proportionality which has to be applied to all doping sanctions.

Finally the Appellant argues that he could not be banned for both races held during the Kyalami event since there was no proof that he already had taken the banned substance before the first race.

In conclusion, the Appellant requests *inter alia* to be exonerated and found not guilty of having committed a doping offence.

The Respondent requests in particular that the submissions of the Appellant be dismissed and that the decision of the International Tribunal of Appeal (TIA) dated 30 June 2000 be upheld.

In response to Appellant's arguments Respondent submits that the uncontested facts clearly and without any doubt establish that the Appellant has committed a doping offence under the Rules of FIM. This was proven by the fact that Appellant was tested positive with ephedrine in a concentration above the cut off level of both the FIM Medical Code and the IOC Olympic Movement Anti-Doping Code.

According to Respondent, Appellant never contested that he had taken a product containing the substance ephedrine, that the urine samples collected in South Africa and tested in Germany were given by him and identical and that the analysis revealed a concentration of ephedrine above the cut off level.

Respondent claims that no procedural deficiencies occurred during the internal proceedings and argues that even if such deficiencies had occurred they would be cured as a result of the present proceedings. Respondent is of the opinion that the urine collection process and the analysis performed at both laboratories were in accordance with the applicable rules.

Finally Respondent maintains that doping is a strict liability offence under the FIM rules. The Olympic Movement Anti-Doping Code provides for a minimum sanction of one month for a first time doping offence involving ephedrine. Thus the Appellant has to be disqualified and suspended for one month.

The hearing was held on 11 October 2000 at the CAS office in Lausanne.

At the hearing the following witnesses were heard:

Mr. Davide Brivio (Manager Yamaha Superbike Racing Team, Italy) and Dr. D. de Boer (Technical Director of the IOC accredited doping control laboratory in Lisbon, Portugal) called by the Appellant and Dr. Philip Randall (International Doping Control Officer from South Africa), Mr. Sverker Backlund (Director of International Doping Test & Management [IDTM], Lindingö, Sweden) and Dr. Klaus Müller (Head of the IOC accredited doping laboratory in Kreischa, Germany) called by the Respondent.

With the consent of all the parties Dr. de Boer was examined in a telephone conference.

LAW

1. The appeal was submitted in time and in compliance with Art. R49 of the Code of Sports-related Arbitration, which provides that:

   "*In the absence of a time limit set in the statutes or regulations of the federation, association, sports body concerned or in a previous agreement, the time limit for appeals shall be 21 days from the communication of the decision which is appealed from.*"

2. The CAS has jurisdiction over this dispute on the basis of Art. 9 of the FIM Disciplinary and Arbitration Code (DAC) which provides:

   "*Final decisions handed down by the jurisdictional organs or the General Assembly of the FIM shall not be subject to appeal in the ordinary courts. Such decision must be referred to the Court of Arbitration for Sport which shall have exclusive authority to impose a definitive settlement in accordance with the Code of Arbitration applicable to Sport.*"

3. Appellant has exhausted all internal remedies (Article R47 of the Code of Sports-related Arbitration (the Code)). The decision of FIM's International Tribunal of Appeal (TIA) of June, 2000 is deemed to be final, Article 3.4.2 (2) DAC.

4. According to Article R58 of the Code, the Panel is required to decide the dispute according to the applicable regulations of FIM and Swiss law since Respondent has its seat in Switzerland and the parties did not choose any other applicable law.

5. Both parties provided the Panel with the 1999 edition of the FIM Medical Code which makes reference to the IOC Medical Code in the version which entered into force on 31 January 1998. This edition of the IOC Medical Code forms part of the FIM Medical Code as its appendices P and O. Article 09.8.2 para. 2 FIM Medical Code provides that the 1998 edition of the IOC Medical Code will be replaced by the 1999 edition of the IOC Medical Code from the time the latter is published by FIM. Neither Appellant nor Respondent provided any evidence whether or when and with which content this publication took place. Thus the Panel will apply the FIM Medical Code edition 1999 with the IOC Medical Code 1998 as provided by Appellant as his exhibits and circulated by Respondent during the hearing.

6. The Panel observes that new rules enacted by the IOC do not apply automatically, except when there is a provision to the contrary in the statutes or regulations of the sports authority concerned or an express undertaking by such authority (CAS 94/128 *UCI and CONI* in *Digest of CAS Awards 1986-1998*, Staempfli Editions, Berne 1998, p. 495, 508 [hereafter "CAS Digest"]).

7. Appellant raised various complaints about the procedure that had been followed by FIM before its internal instances. He particularly alleged a violation of his right to a fair trial and his right to be heard.

8. The Panel will not deal with these allegations in detail because at the beginning of the CAS hearing the Appellant withdrew his complaints as to alleged procedural defects in the FIM proceedings. However, the Panel does observe that the right to a fair hearing also includes the right to a certain amount of time for the preparation of a case. In this regard, the scheduling of a hearing on a doping case 15 minutes before a competition in which the athlete concerned is due to participate does seem to disregard that athlete's right to personally attend the hearing of his case.

9. According to Article R57 of the Code, the panel shall have full power to review the facts and the law. The panel will consequently hear the case *de novo* and is not limited to considerations of the evidence that was adduced before FIM either in the first instance or at the appellate stage. The panel can consider all new evidence produced before it. This implies that, even if a violation of the principle of due process occurred in prior proceedings it may be cured by a full appeal to the CAS (CAS 94/129 *USA Shooting & Q. v/ UIT,* CAS Digest, p. 187, 203).

10. The Panel is satisfied that the Appellant committed a doping offence under the relevant FIM Rules.

11. Appellant made a line of observations regarding the nature of a doping offence and its implications for the burden of proof. He also raised various defences against the validity of the result. Before turning to the facts and circumstances of the case before it, the Panel would like to recall the jurisprudence of the CAS with respect to doping offences.

12. At a minimum the Rules of each Federation must define the doping offence. The regulations need to be predictable, they must emanate from duly authorised bodies and must be adopted in a constitutionally proper manner (CAS 94/129 *USA Shooting & Q. v/ UIT,* CAS Digest, p. 187, 197).

13. Without any doubt the burden of proof that a doping offence has been committed lies with the federation. This follows from the general rule that the burden of proof is incumbent upon the person who is alleging the guilt of another (CAS 91/56, *S. v/ FEI*, CAS Digest, p. 93, 95). The presumption of innocence operates in favour of the athlete until the federation proves that a doping offence has been committed.

14. The standard of proof is high. It is higher than the standard in ordinary civil cases but it is less than that in criminal cases (CAS 99/A/234-235 *M. & M. v/FINA*, p. 14).

15. However, the above principles do not answer the question of what has to be proved. This will depend on the nature of the offence as established in the Rules. Federations enjoy discretion in establishing their internal rules. Therefore, they may require an intentional element for an offence to be committed or they may establish that an athlete has already committed a doping offence if a forbidden substance is found in his urine ("strict liability").

16. As a general rule, in cases of strict liability offences it is sufficient that the federation is able to show that a forbidden substance was found in the urine of the athlete and that the positive

test result of the sample was not affected by procedural defects in the laboratory. On the other hand an additional proof of negligence or wilful behaviour will not be necessary since the question of guilt will not be raised (for the concept of strict liability, see CAS 95/142 *L. v/ FINA*, CAS Digest, p. 225, 230).

17. The Panel leaves open the question of whether a positive test result constitutes only *prima facie* evidence that a doping offence has been committed, whether it constitutes a rebuttable presumption or whether it causes the complete reversal of the burden of proof.

18. The Panel notes that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard (CAS 94/129 *USA Shooting & Q. v/ UIT,* CAS Digest, p. 187, 194). If the federations were required to always establish the intentional nature of the act, the fight against doping would become practically impossible (CAS 95/141 *C. v/ FINA*, CAS Digest, p. 215, 220).

    On the other hand and taking into account the seriousness of the allegation and the severe consequences, the athlete needs to have the possibility of discharging himself (CAS 95/141 *C. v/ FINA*, CAS Digest, p. 215, 221). This is required in accordance with common principles of law and the human rights of the accused athlete even if the federation rules do not explicitly provide for it. The athlete may for example provide evidence that the presence of the forbidden substance is the result of an act of malicious intent by a third party or that the validity of the result of the analyses has been impaired by procedural defects (CAS 91/56 *S. v/ FEI*, CAS Digest, p. 93, 97; CAS 92/63 *G. v/ FEI*, CAS Digest, p. 115, 121; CAS 92/73 *N. v/ FEI*, CAS Digest, p. 153, 157). On the other hand even medical prescription by a doctor is no excuse (CAS 92/73 *N. v/ FEI*, CAS Digest, p. 153, 158).

19. Whatever the nature of the offence may be, the Panel is of the opinion that the special circumstances of each case must be taken into account when determining level of the sanction (CAS 95/141 *C v/ FINA*, CAS Digest, p 215, 222; CAS 92/73 *N. v/ FEI*, CAS Digest, p. 153, 159; CAS 96/165 *F. v/ FINA*, p. 58).

20. Article 09.8 FIM Medical Code defines doping as follows:

    "*Doping is the administration or use of substances in any form alien to the body, or of physiological substances in abnormal amount, which may lead to an artificial or unfair increase in performance in events*."

21. Article 09.8.1 FIM Medical Code prohibits the use of any substance appearing on the list of prohibited substances:

    "*All riders in events organised under FIM jurisdiction are forbidden to use any doping product, regardless of the product's commercial name, containing substances chemically identical to one of the substances, or related compounds, which are in the list of prohibited substances*."

22. Article 09.8.2 FIM Medical Code refers to the "List of Prohibited Substances and Prohibited Methods" of the IOC Medical Code in force as of 1 January 1998. The IOC list is thus incorporated into the FIM Medical Code as its Appendix O.

23. Chapter I of the IOC "List of Prohibited Substances and Prohibited Methods" mentions ephedrine as a prohibited substance in the class of stimulants. The provision establishes a cut off level of 5 μg/ml if ephedrine is the only substance detected and 10 μg/ml if ephedrine is found together with pseudo-ephedrine.

24. Finally Article 9.8.8 a) of the FIM Medical Code provides that:

"*Sanctions are imposed against the rider: whose test proves positive*."

25. The Panel rejects Appellant's allegations that the FIM anti-Doping Rules require an intentional behaviour by the athlete. The Panel is satisfied that the FIM Medical Rules establish doping as a strict liability offence.

The word "use" in Article 09.8.1 FIM Medical Code does not imply that an element of "intent" is required. "Use" has to be seen as a description of an objective process undergone by the athlete. A wilful element is not required. The case in hand needs to be clearly distinguished from the case CAS 94/129 *USA Shooting & Q. v/ UIT,* CAS Digest, p. 187, where the applicable rules provided that doping meant "… the use (…) with the aim of attaining an increase in performance." The panel interpreted the words "with the aim of attaining an increase in performance" as requiring a guilty intent (*ibid.* p. 194). Words like this cannot be found in the FIM Rules.

26. In the eyes of the Panel the words "which may lead" in Article 09.8. FIM Medical Code refer only to the objective effects of the substance. The Panel is of the opinion that according to the clear wording, Respondent needs to establish only that the substance found in the athlete's urine has the potential of enhancing performance.

27. Under the FIM Rules it is not a requirement that the forbidden substance is contained in medication. Article 09.8.1 FIM Medical Code also expressly prohibits the use of chemical identical substances. This includes herbal or homeopathic substances. More generally, it can also be found in the jurisprudence of the CAS that it is sufficient that the active substance appears on the doping list. The name of the product is not relevant (see CAS 95/122 *NWBA v/* IPC, CAS Digest, p. 173 and CAS 92/73 *N. v/ FEI*, CAS Digest, p. 153).

28. The doping test carried out on Appellant's urine sample in the IOC accredited doping laboratories in Kreischa and Cologne, Germany revealed the presence of ephedrine and pseudo-ephedrine in the urine of the Appellant. The concentration of ephedrine in both the A and the B samples was above the cut off level established by the IOC Medical Code 1998.

The Appellant expressly admitted that he took the product "Thermogen" which contains the substance MaHuang, a herbal substance from the Chinese ephedra plant. MaHuang contains ephedrine and pseudo-ephedrine.

29. Finally the Panel is satisfied that ephedrine has a potential performance-enhancing effect even for motorcycle riders. The two witnesses Dr. de Boer and Dr. Müller testified that ephedrine has a stimulating effect on humans. Primarily it has a positive effect on the lungs by easing

respiration. Secondly it has also an effect on the human brain by reducing the signals of bodily tiredness. The Panel is of the opinion that these two effects potentially allow a motorcycle rider to increase his performance during a competition. That is all that is required under Article 09.8.1 of the FIM Medical Code.

30. The Appellant raises various defences against the validity of the test results. The Panel recalling the relevant provisions of the FIM Medical Code and the jurisprudence of the CAS on procedural defects as mentioned above rejects those allegations for the following reasons.

31. Firstly, Appellant raises various doubts about the correctness of the sample collection procedure. He claims that he was unable to understand the test collection procedure in South Africa since his command of the English language was insufficient. Furthermore he alleges that the containers were not properly sealed and packed for shipment.

32. Article 09.8.6 FIM Medical Code establishes a detailed procedure that has to be followed for every doping control. As a general rule (see Article 09.8.6 a) FIM Medical Code) the athlete must be able to understand the procedure, he must have a free choice of clean containers for the samples and those containers need to be properly sealed after they have been filled with the sample. However, Article 09.8.6 b) FIM Medical Code expressly provides that deviations from the prescribed procedure do not invalidate the result unless they cause serious doubts as to the reliability of the findings.

33. Appellant failed to show procedural defects that would have a possible impact on the test result.

The detailed testimony of Dr. Randall showed that the procedure as prescribed by the FIM rules was followed carefully. There is no evidence that the Appellant was unable to understand the collection procedure. He had been tested previously and Dr. Randall explained that although the Appellant had difficulty with the English language he was able to follow all the instructions given to him. There is also no evidence that the samples were not sealed properly and checked by the Appellant. Finally it appears from the testimony of Dr. Randall that the samples collected during the racing event in Kyalami were packed and shipped according to good practice and in line with the applicable rules and regulations.

It appears from the memoranda provided by the parties that the chain of custody was proper. The testimonies of Dr. Randall and Dr. Müller showed that the volume of the sample was probably above 75 ml and was in any event sufficient to carry out a proper test of an A and a B sample. Counsel for Appellant attended the examination of the B sample and did not raise any doubts about the amount of the urine. There is no evidence that any urine was lost in transport. On the contrary, Dr. Müller testified that there was no sign of leakage when the Berlinger kit was opened upon arrival. Dr. Müller and Mr. Backlund also confirmed the reliability of the Berlinger kit used in the case in hand.

The testimony of Dr. Randall was different from that of Mr. Brivio only with respect to details on how the two samples were mixed and filled into the containers. The Panel considers

this point as a minor detail which had no influence on the validity of the test results, 09.8.6.b) FIM Medical Code.

34. Secondly Appellant is of the opinion that a different calculation method with respect to the concentration needs to be applied and that the specific gravity of the sample should be taken into account. In his view, as in nandrolone cases, a correction factor has to be applied in the case in hand. Both Dr. de Boer and Dr. Müller confirmed that the IOC standard does not mention the application of a correction factor for cases involving ephedrine. However, Dr. de Boer was in favour of a correction factor in ephedrine cases despite the absence of a rule to this effect while Dr. Müller strongly rejected this idea.

The Panel holds that the established IOC testing procedures need to be applied strictly and do not leave room for the transfer of certain methods from one testing procedure to another on a case by case basis. If there was a need for the application of a correction factor in ephedrine cases this decision had to be taken by the competent authorities of the IOC. It cannot be the task of the CAS to amend on a case by case basis the rules established by the International Olympic Committee and applied by the IOC accredited doping laboratories.

35. Contrary to the allegations of the Appellant the result of the B sample does not give rise to concerns about the validity of the testing procedure. According to Dr. Müller's witness statement it is perfectly normal that the testing of the two samples reveal a slightly different concentration. This can be linked to different testing methods applied to the A and the B sample by two different laboratories. The Panel is satisfied that both IOC accredited laboratories applied the necessary measures and a state of the art procedure.

36. Finally, the Panel again rejects the claim that the Appellant cannot be found to have committed a doping offence since he was not aware that he was using a forbidden substance. In a case of strict liability it is irrelevant whether the athlete was aware that he was using a substance appearing on the doping list. The Panel notes that it is not public knowledge that MaHuang contains ephedrine. On the other hand the Panel is of the opinion that products and homeopathic substances that do not give the chemical name of the substances but the names of herbal substances need to be examined with great care by the athlete. It is clearly not sufficient for the Appellant to ask his fitness trainer about the substances contained in "Thermogen". A fitness trainer will normally not be sufficiently qualified to give advice in pharmacological matters.

37. Article 09.8.8.a) of the FIM Medical Code provides that an athlete who has committed a doping offence, is subject to sanctions. Article 09.8.8.b) FIM Medical Code provides that:

"*The authorities responsible for imposing penalties are referred to the current International Olympic regulations (See Appendix "P").*"

38. This provision is not entirely clear. The interpretation and comparison with the French text reveals that the form and the extent of the sanctions should be taken from the IOC Medical Code 1998 as attached as Appendix P. This is also evidenced by Article 09.8.2 FIM Medical Code which also contains a provision allowing for the amendment of Appendix P. Since there

is no evidence that Appendix P was subsequently changed by FIM, the Panel will apply the provisions of the IOC Medical Code as printed in the 1999 edition of the FIM Medical Code. The reference to the IOC provisions is also valid since they form an integral part of the FIM Medical Code as an appendix.

39. Chapter IX, Article III of the IOC Medical Code 1998 (see Appendix P to the FIM Medical Code) provides, in cases of a first time offence, for disqualification and suspension of up to three months in a case where ephedrine is found during an event.

40. The Panel rejects the Appellant's submission that the applicable sanctions are those provided by the FIM Disciplinary and Arbitration Code. Although Article 2 of the FIM Disciplinary and Arbitration Code provides a greater variety of sanctions the Panel has to apply Article 2.2 FIM Disciplinary and Arbitration Code. This provision obliges the Panel to apply Appendix P of the FIM Medical Code in doping cases. Its provisions take precedence as *lex specialis* to the FIM Disciplinary and Arbitration Code since they provide specific sanctions for doping offences.

41. Chapter IX Article III of the IOC Medical Code 1998 provides for disqualification if the infraction occurred during an event. Disqualification is a natural consequence of a doping offence committed during an event and a requirement of sporting fairness against the other competitors (CAS 95/141 *C. v/ FINA*, CAS Digest, p. 215, 220; CAS 98/214 *B. v/ FIJ*, p. 16).

42. The Panel observes that a Superbike race event is composed of two separate races. Although there is only one training session and the starting positions for both races are allocated in accordance with the results of the single training session, the result of each race is counted separately towards the final result of the World championship. Thus the Panel is of the opinion that each race forms a single competition.

43. Respondent has failed to prove that Appellant applied the prohibited substances before he took part in the first race. The positive urine sample was not collected until after the second racing event in Kyalami.

The evidence of this sample thus only covers the second race. The Appellant claims that he did not apply "Thermogen" on a regular basis at the time of the race and could not remember whether he had taken the product on the day of the race and if so when this occurred. Respondent did not provide any additional evidence that Appellant also participated in the first competition of the day with a forbidden substance in his body.

Thus the Panel can only disqualify the Appellant for the second race after which his urine sample was tested positive. The Respondent has failed to prove that a doping offence had been committed also for the first race.

44. Chapter IX, Article III (b) of the IOC Medical Code 1998 provides for a first time offence in addition to the disqualification:

"*in cases of a positive result for ephedrine (…) a maximum suspension of three months*."

45. The Panel notes that the CAS has, in several cases, established that a penalty must reflect and not be disproportionate to the guilt of the athlete (CAS 95/141 *C. v/ FINA*, CAS Digest, p 215, 222; CAS 92/73 *N. v/ FEI*, CAS Digest, p. 153, 159; CAS 96/165 *F. v/ FINA*, p. 58). The Panel has taken all the relevant circumstances of this case into account in establishing the extent of the sanction.

46. In favour of the Appellant the Panel has to consider that there is no evidence that the Appellant acted intentionally. Furthermore it is not easy to recognise the substance MaHuang as a herbal sister of ephedrine. The Panel also notes that the concentration of ephedrine in Appellant's urine sample tested was only slightly over the limit. Finally the Appellant presented himself as an honest man during the hearing and showed great regret for what he had done.

47. On the other hand, Appellant also admitted that he made a terrible mistake and acted carelessly. Indeed, he could have easily consulted a doctor or pharmacist about the content of "Thermogen" instead of trusting the advice of his fitness trainer. This is all the more true since "Thermogen" also contains a considerable amount of caffeine. His behaviour shows a certain degree of negligence which makes it necessary to raise the sanction above the minimum.

48. Taking all the aforementioned circumstances into account and bearing in mind the absence of any kind of doping antecedent concerning the Appellant, the Panel considers a suspension of three weeks as adequate and appropriate.

49. In view of the aforementioned, the Panel decided to annul the decision of the FIM International Tribunal of Appeal, to disqualify the Appellant from only the second race in Kyalami and to suspend him for three weeks beginning from the date of the final decision.

As the decision of TIA has been annulled, the suspension imposed by its decision and stayed by the CAS order of 6 July 2000 cannot be taken into account. The stay had been granted until the final decision of the CAS. Thus the suspension starts from 12 October 2000 and runs for three weeks.

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by H. on 4 July 2000 is partially upheld.

2. The decision rendered by the FIM International Tribunal of Appeal on 30 June 2000 is annulled.

3. The CAS renders the following decision:

   a) H. is disqualified from the second race of the FIM World Championship event held in Kyalami on 2 April 2000 and has to return all trophies, prizes and any other entitlements won;

   b) The disqualification of H. in connection with the first race of the FIM World Championship event held in Kyalami on 2 April 2000 is invalid; H. is entitled to the trophies, prizes, points and any other entitlements on the basis of the result achieved;

   c) H. is suspended from any competition under the governance of FIM for a period of three weeks beginning 12 October 2000, exclusive of the suspension already served (7 days).