1108 A: SPORT

IN THE DISCIPLINARY HEARING HELD IN JOHANNESBURG

In the matter between:

ATHLETICS SOUTH AFRICA (*"ASA"*) Complainant

and

MR LEONARD CHUENE First Respondent

MR KAKATA MAPONYANE Second Respondent

DR SIMON DLAMINI Third Respondent

Dates of hearing: 22, 23, 26 November 2010; 1, 2 and 3 December 2010; 8 and 10 December 2010; 13 and 14 December 2010

Appearances: For the complainant: Mr J Reddy, practising attorney
For the respondents: No appearance

Chairperson of the disciplinary inquiry: Adv Norman Arendse SC (Member of the Cape and Johannesburg Bars)

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FINDINGS OF THE CHAIRPERSON OF THE DISCIPLINARY INQUIRY

A. INTRODUCTION: THE CHARGES

1. The disciplinary proceedings involved three (3) members, office-bearers, and also directors of Athletics South Africa (*"ASA"*): Mr Chuene (hereafter *"Chuene"*) is described in the charge sheet as a Member and President of

ASA, and a Director of ASA; Mr Maponyane (hereafter *"Maponyane"*) is described as a member and Vice-President of ASA, and a Director of ASA; and, Dr Dlamini (hereafter *"Dlamini"*) is described as a Member and Director of ASA.

2. Accordingly, it is apt and appropriate to refer to one of the main objectives of ASA:

> *"... [A] basic cornerstone of the programme guiding the activities of ASA, ... is to uphold the following values, namely:-*
>
> *3.2.22.1 all the individual rights as enshrined in the South African Constitution;*
>
> 3.2.22.2 *to administer ASA as a business which is:*
>
> 3.2.22.2.1 *highly professional;*
>
> 3.2.22.2.2 *financially sound;*
>
> 3.2.22.2.3 *accountable to its Members,*
>
> 3.2.22.2.4 *user-friendly to the athletics family and the public at large, and*
>
> 3.2.22.2.5 *honesty and respect of the individual".*

(My emphasis).

3. The charges (dated **10 September 2010**) implicate some, if not all, of these objectives:

In relation to Chuene, the charge sheet alleges that he has been *"guilty of dishonesty, fraud and misconduct in performing his duties and functions at ASA. Mr Chuene has unjustifiably violated the provisions of the Constitution and the Companies Act, at times acting in concert with other Directors of ASA. He has failed and/or neglected to perform his duties in an effective and diligent manner, thereby causing and/or exposing ASA to financial loss and improper risks; and bringing SASCOC, ASA and the sport of athletics into disrepute"*;

In the case of Maponyane, similarly, the charge sheet alleges that he has *"been guilty of dishonesty, fraud and misconduct in performing his duties and functions at ASA ...; and bringing SASCOC, ASA and the sport of athletics into disrepute"*;

In the case of Dr Dlamini, the charge sheet similarly accuses him of *"dishonesty, fraud and misconduct in performing his duties and functions at ASA ...; and bringing SASCOC, ASA and the sport of athletics into disrepute"*.

4. The charge sheet in each case is quite detailed, and the individual charges details the alleged transgressions by reference to dates, names, incidents or instances, and the nature and extent of the alleged transgression or transgressions.

B. INTRODUCTION: THE SPORT OF ATHLETICS AND THE STATUS OF ASA IN RELATION TO SASCOC

5. The sport of track and field athletics is generally regarded as the centrepiece of the Olympic Games whenever and wherever it is held. Its importance as a sporting code globally, and nationally, can therefore never be overstated. In our country also, we have been blessed with some of the most remarkable athletes who have brought much joy, patriotism and honour to our country. In more recent times, we think of athletes of the calibre of Josiah Tungwane, Hezekiel Sepeng, and the long-jumper Khotso Mokoena. These athletes have exemplified the spirit of modern Olympism which was conceived as far back as June 1894. The first Olympic Games of modern times were celebrated in Athens, Greece, in 1896. Some of the fundamental principles of Olympism is that **all individuals** in the Olympic Movement must be inspired by the values of Olympism. It covers the five (5) continents, and reaches its peak when all the world's athletes are brought together at the world's greatest sports' festival, the Olympic Games. Olympism requires that the sport be organised, administered and managed by independent sports' organisations. Any form of discrimination

with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.

ASA is the sole organisation administering and controlling athletics in South Africa within the boundaries as defined in the Constitution of the Republic of South Africa, and ASA is the sole South African Member Federation affiliated to the IAAF, and as such, controls athletics in the Republic of South Africa.

6. ASA is also a Member of the South African Sports Confederation and Olympic Committee ("*SASCOC*") which is an entity governed by the National Sports and Recreation Amendment Act 18 of 2007, and which has jurisdiction over its members, officials and athletes in the Republic of South Africa and wherever they may be at the time while engaging in SASCOC, ASA or Team South Africa activities. As a member of SASCOC, ASA is subordinate to SASCOC and must comply with the Constitution of SASCOC as contained in its Articles of Association, as well as any directive issues by SASCOC.

SASCOC is a Member of the Olympic Movement having been recognised by the International Olympic Committee (IOC) as the controlling body for sports in the Republic of South Africa.

C. BACKGROUND

7. On **4 November 2009** (following the Collins Report[1] of **2 November 2009**), SASCOC took a decision to suspend[2] the entire Board of ASA. When the decision was taken it was also resolved to appoint an administrator to run the affairs of ASA. On **14 November 2009**, SASCOC's General Assembly, the supreme decision-making body of SASCOC, unanimously decided to suspend ASA from all activities of SASCOC and endorse the appointment of an administrator to conduct the affairs of ASA. Later, ASA's suspension was lifted.

Mr Remember Raymond Mali (*"Mr Mali"*) was appointed the administrator of ASA. To enable him to carry out his duties, he appointed an interim Board of ASA. The interim Board consisted of ten (10) members including Mr Mali.

8. The respondents challenged SASCOC's authority to suspend them and referred the matter to arbitration. SASCOC's stance was that because of

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[1] The Report was commissioned by the Board of SASCOC pursuant to the provisions of section 13(4) of the National Sport and Recreation Act 110 of 1998, as amended by Act 18 of 2007. The Committee was headed by Adv Michael Collins and also comprised Messrs. Metja Ledwaba, Colin Webster and Siven Samuel.

[2] The decision to suspend the respondents arose directly from the Report. However, the Committee did not recommend the suspension of Dr Simon Dlamini. As I am not charged with dealing with the issue of the suspension of the respondents, I make no pronouncement on the validity or legality of Dr Dlamini's suspension on **5 November**. What I do observe however, is that by his conduct, Dr Dlamini directly associated himself with Mr Chuene. Indeed, following the suspension of ASA, eight (8) ASA Board Members resigned except for the respondents. In subsequent court and arbitration challenges relating to the authority and jurisdiction of SASCOC to suspend ASA and its officials and office-bearers, Dr Dlamini was party to such challenges described by Justice Langa subsequently as *"misconceived"*.

the position it occupies in relation to the respondents and ASA, it has authority and is perfectly entitled to take the action it did.

9. On **18 May 2010**, the respondents filed their statement of claim to start the arbitration proceedings in terms of clause 25 of SASCOC's Constitution. The respondents were the applicants while SASCOC was the only respondent. In the relief they sought, they sought a declaration that the conduct of SASCOC in suspending them and appointing an interim Board was unlawful, alternatively the sought to review and have set aside the decision by SASCOC to suspend them and to appoint an interim Board to administer the affairs of ASA.

D. THE RELATIONSHIP BETWEEN SASCOC AND ASA, AND THE RESPONDENTS

10. SASCOC is an association incorporated in terms of section 21 of the Companies Act 61 of 1973. It derives its powers from its Memorandum and Articles of Association and its Constitution. It is comprised of various members, including ASA. In terms of its Constitution, SASCOC has jurisdiction in the Republic and over its members, officials and athletes through its membership. ASA is subordinate to SASCOC. In this capacity, the ASA Constitution must be consistent with the Constitution of SASCOC and must also comply with SASCOC's Constitution and any directive issued by the first respondent. Not only has SASCOC jurisdiction over ASA, but it has concurrent jurisdiction over *"any individual affiliated through their*

respective national Sports Federation to SASCOC". ASA is such a national Sports Federation. The powers of SASCOC are vested in its Board. The Board has not only the power to, *inter alia,* oversee, direct, control, administer and if necessary, manage the activities of SASCOC, but to, without restrictions, *inter alia*, suspend membership of any individual affiliated to SASCOC through ASA.

11. In terms of clause 25 of SASCOC's Constitution its members' and individuals' dispute falling within SASCOC's jurisdiction must be referred to arbitration. The referral is qualified in that it relates to *"all disputes which are not covered by the Constitution of SASCOC".*

The issue referred to arbitration by the respondents was the determination as to whether SASCOC had the power to suspend them and to appoint the administrator (Mr Mali) who in turn constituted a Board to administer the affairs of ASA.

12. On **9** and **14 September 2010**, and again on **20 October 2010**, the respondents instituted legal proceedings in the South Gauteng High Court, Johannesburg, *inter alia*, seeking to interdict the disciplinary proceeding instituted by ASA pursuant to the Deloitte and Touche forensic report relating to the affairs of ASA pending their referral to arbitration as to whether SASCOC had the power to suspend them and to appoint the administrator.

support of requests for postponements is that a particular representative is not available. Although a person charged with a disciplinary offence does not have the right to have a preferred chosen representative if others are available, the body or institution or employer should not unreasonably refuse such requests.

21. In this particular matter, the record will show that every opportunity was given to the respondents to attend the hearing and to give reasons why they should not participate in the hearing or that the hearing should be postponed. On every occasion (even during the course of the hearing when invitations were extended to attend and participate), the invitation was declined by the attorneys acting on behalf of the respondents. At no stage was a formal application made that the hearing should not proceed on some or other basis, or that the hearing should be postponed pending the outcome of a Court application or a referral to arbitration. It is clear however from the correspondence handed to me by the prosecutor between himself and the attorneys acting for the respondents that the sole reason for the non-attendance of the respondents and/or their legal representative related to the fact that they collectively challenged the authority of SASCOC and/or ASA to suspend them, and to charge them with misconduct. I have already indicated above that these challenges to the authority of SASCOC and ASA proved to be misconceived, ill-conceived, and misdirected, and in this regard a Court application was

dismissed by the learned Mr Justice Tsoka, and subsequently in the arbitration conducted by the former Chief Justice, Mr P N Langa.

22. Accordingly, and in the circumstances of this particular matter, the complainant was perfectly entitled to insist that the hearing of the charges against the respondents proceed to finality.

23. I might add that notwithstanding the absence of the respondents and/or their legal representative, it will be borne out by the transcript of these proceedings, that none of the witnesses testifying in this hearing were given carte blanche to give evidence without such evidence being tested. To that extent, and on many occasions, I tested the evidence of the witnesses by reference to the oral evidence of the witnesses themselves, written documentation handed up by the prosecutor, and by reference to the forensic report. At times, this also placed me in an uncomfortable situation, but I felt duty-bound in the circumstances, and given the serious nature of the charges against the respondents, and given the serious consequences that may flow from a finding of guilty on any or all of the charges, that I should intervene in this fashion. Accordingly, it will be apparent from the number of days on which the hearing took place, that none of the witnesses testifying on behalf of the complainant had what will be called *"an easy ride"*.

24. I am satisfied therefore that the respondents were given every opportunity to attend the hearing, and to participate in it, but they, for reasons best

known to themselves, declined the invitation. This is most unfortunate, and is to be regretted.

F. THE CHAIRPERSON'S ALLEGED BIAS

25. Although not formally raised in or at the hearing, it is apparent from the correspondence entered into between the prosecutor and the attorneys acting for the respondents that the respondents were alleging that I would not keep an open mind throughout the proceedings, and that I would in fact be biased against them. Such an allegation was also made in proceedings brought by Mr Malehopo in the Labour Court also to interdict the hearing into allegations against him, in the Labour Court in Johannesburg. It is alleged that due to the fact that I have an association with the administrator, Mr Mali, when I represented Cricket South Africa as its Vice-President, and Mr Mali was its President, that I would be biased against the respondents due to that fact.

26. The point of a disciplinary hearing is to enable the presiding officer to weigh the evidence for and against the accused person and to make an informed and considered decision.[5] This pre-supposes that the presiding officer must have, and keep, an open mind throughout the proceedings. The rule against bias emanates from administrative law. This requires that officers presiding at a disciplinary hearing not only be impartial in fact, but also that there should be no grounds for even *"suspecting"* that their decisions might

[5] See Workplace Law (10th ed) John Grogon (Juta) at 242-244.

be influenced by extraneous factors, even if this is in fact not the case.[6] Decisions of administrative tribunals have been set aside merely on the ground that the person charged might reasonably suspect that the presiding officer was biased.[7]

Where an accused person has reason to doubt that a presiding officer is impartial, she or he may apply for the presiding officer's recusal. A presiding officer is duty-bound to consider an application for recusal, but necessarily to grant it. An unsubstantiated allegation of bias is not in itself sufficient to warrant recusal, however insulting the terms of the application may be. Accused persons who withdraw from proceedings after recusal applications are dismissed do so at their own peril; if the recusal application is subsequently found to have been unwarranted, the accused person or persons will be held to have waived their right to a hearing in their presence.

An accused person's right to be heard by an impartial disciplinary officer does not imply that such persons are entitled to have a hand in the choice of presiding officer. That right resides in the institution, body, entity or employer concerned.[8]

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[6] See generally Baxter Administrative Law (1984) 558-61; see also *Roussouw v SA Medical Research Council* (1997) 8 ILJ 660 (IC).
[7] See *Mönnig and Others v Council of Review and Others* 1989 (4) SA 866 (C).
[8] *Moodley v Knysna Municipality and Another* (2007) 28 ILJ 1715 (C).

27. It is well-established that the fundamental principles of justice are applicable to domestic (i.e. non-statutory) tribunals, and that it is an elastic concept which would depend upon the nature of the hearing, the complexity or otherwise of the matters in dispute before the particular tribunal.[9]

28. In the matter of *President of the Republic of South and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC), the Constitutional Court unanimously dismissed an application brought by Dr Louis Luyt for the recusal of four (4) members of the Court. In his application, Dr Luyt stated that he had a *"reasonable apprehension"* that every member of the Court would be biased against him, and that as a result he might not get a fair trial. He went on to make certain specific allegations against four (4) members of the Court.

In dealing with the application, the Constitutional Court referred to the *Mönnig* case, and said that the recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a Court of law should have a fair trial. That right to a fair trial is now entrenched in our Constitution. Section 34 of the Constitution applies in this regard. The Court held that a Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a

[9] See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646D-H; *National Horse Racing Authority v Naidoo* 1010 (3) SA 182 (NPD) 199 paras [8] – [11]. In the latter case, a Full Bench of the NPD declined to find that the Promotion of Administrative Justice Act 3 of 2000, applies to domestic tribunals. The question therefore remains open. However, in the *National Horse Racing Authority* case the Court said that it would not be inappropriate to introduce a further ingredient into the fundamental principles of justice and that is one of rationality.

reasonable apprehension that such Judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution.

In dealing with the test for bias, the Constitutional Court said:

> *"A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the parts of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes".* (At para [35]).

29. In applying the test for bias, the Constitutional Court stated as follows:

> *"From all the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one that "...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ..." [The]*

test is "what would an informed person, viewing the matter realistically and practically – having thought the matter through – conclude"".

The Court thus defined the test as follows:

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves..." [48].

30. Applying the law to the facts, it would appear both from the correspondence entered into between the respondents' attorneys and the prosecutor, and allegations made in various Court papers and in arbitration proceedings, that the only *"fact"* alleged is that I have an association with Mr Mali, the administrator appointed by SASCOC to administer ASA following the suspension of the respondents. If that indeed is the only or sole basis for

such an application, then an application for my recusal, if brought on that basis, would be dismissed. The fact of the matter is that I know both Mr Mali and Mr Chuene, the President of ASA. It is indeed the case that I know Mr Mali better than I know Mr Chuene, but the facts of this matter are that **first**, SASCOC suspended ASA as its Member; **second**, SASCC appointed Mr Mali as administrator, and appointed an interim Board to administer ASA; and, **thirdly**, thereafter, the administrator and the interim Board decided to charge the respondents with various forms of misconduct following a forensic audit of ASA's books. Not only is there no allegation or evidence that I was party to this, or that I had in any way discussed these matters with Mr Mali, but I can state without fear of contradiction that I had never been in contact with Mr Mali in any form whatsoever in relation to any of these matters. In fact, when Mr Mali appeared at the disciplinary hearing in **September 2010** when it was first convened, I saw him for the first time since late **2008**.

Moreover, in relation to the allegations against the respondents, Mr Mali himself has no direct knowledge of any of the allegations against the respondents, and when Mr Mali gave his evidence before the inquiry, such evidence related purely to his appointment as administrator, his terms of reference, and the fact that he had co-operated with the forensic auditors during the course of their investigation. A transcript of Mr Mali's evidence will show that his evidence had no bearing whatsoever on any of the

allegations made against any of the respondents. Accordingly, for this reason also, I would dismiss any recusal application, if brought.

G. INTRODUCTION TO THE CHARGES

31. At all material times relevant to the charges, Messrs Chuene, Maponyane and Dr Dlamini, were Members of ASA, served on its Executive Board and as such they were subject to the Constitution of ASA. The respondents were also Members of the Board of Directors of ASA.

32. When the individual charges against the respondents are taken cumulatively, they are charged, in effect, with dishonesty, fraud and misconduct in relation to the performance, or non-performance of their duties and functions at ASA.

33. There cannot be any doubt that a finding of guilty on one or more or all of these charges against the respondents would justify their exclusion from ASA on some or other basis, and certainly on a basis or on terms to be decided by the Board of ASA and SASCOC. The charges are grave, very serious, and are a sad indictment of the administration of athletics in our country during the tenure of the respondents in their respective capacities.

34. The charges, supported by the evidence adduced at the hearing (and in relation to the *"Semenya"* charges, the evidence before the Collins enquiry), refer to rampant abuse of ASA resources, an abuse of power and authority,

self-aggrandisement, greed and, quite frankly, corruption. The evidence demonstrates quite starkly that the respondents, individually and collectively, failed hopelessly to comply with their fiduciary duties to ASA as a section 21 company.[10] Instead of protecting ASA and its assets, ASA was (by such wanton and irresponsible conduct) exposed to unnecessary risk, and which, over time, resulted effectively in a stripping of the assets of ASA. The evidence shows, in effect, that from a positive bank balance of R500 000.00 in **2005**, by the end of the financial year in **2008**, ASA was in the red to the tune of in excess of R7 million. In this regard, the evidence shows that Mr Chuene played a central and pivotal role in breaking virtually every rule in the ASA rule book. He made decisions unilaterally without the consent of the Board and/or without consulting the Board; he gave orders and instructions to the operational staff of ASA when he should not have done so in his role as a non-Executive President; he put himself on the ASA payroll and effectively became a salaried employee without the knowledge and consent of the Board; he obtained for himself (at ASA expense) a range of corporate credit cards with which he generously spent ASA monies without the authority to do so and without accounting for it.

35. In a very recent media statement issued by the Minister of Sport and Recreation on **27 January 2011**, he said:

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[10] All office-bearers/officials and directors of ASA who served during the period to which these charges relate are implicated, and must take collective responsibility for the failures of ASA. Many of these directors resigned when ASA was suspended. Whether this was a demonstration of *"collective guilt"* or in solidarity with the respondents, one can only speculate. However, these former directors should not be allowed back into the sport without any enquiry.

"...We expect Federations to uphold principles of good corporate governance and transparency in the conduct of their business and administration. In this connection we agreed with SASCOC that our business is not to manage the Federations and we are not a crisis management team and we will not be reduced into one by self-seeking individuals that have no regard to national interest, honour and pride ..."

36. The evidence shows that the respondents neither acted in the national interest nor brought any honour or pride to our country as a result of their conduct or rather misconduct.

37. It is, of course, highly regrettable that the respondents failed and refused to attend the hearing, and to participate in it in order to defend themselves in relation to the charges. However, as I have indicated, the evidence given by the forensic auditors, in particular, was scrupulously, and fairly, assessed, and I am sure that at times, the forensic auditors thought that they were the accused! Indeed, this will be reflected in my findings below. Indeed, in some instances, I was not persuaded that the basis for the charge or charges were properly laid, and I will accordingly dismiss those charges against the respondents, or the respondent concerned. Overall however, I am satisfied that the bulk of the charges were proved on a balance of probabilities, and I will make the necessary findings in relation thereto.

H. THE EVIDENCE ADDUCED

38. Evidence was adduced in the form of witnesses testifying under oath; written documentary evidence handed in in the form of exhibits;[11] a working document and a Pastel Accounting Record detailing the findings in a forensic report;[12] as well as documentation handed in by various witnesses as they testified.[13]

I. THE CHARGES

39. For the sake of convenience (and this is also the way in which evidence was led by the prosecutor), I will deal with the charges collectively insofar as they relate to any or all of the respondents. For example, charge 1 against Mr Chuene and charge 7 against Mr Maponyane both relate to the Caster Semenya issue, and it is alleged that it involved fraudulent misrepresentation, dishonesty, dereliction of duty, abuse of position, and bringing ASA, SASCOC and the sport of athletics into disrepute.

CHARGE 1 (CHUENE) AND CHARGE 7 (MAPONYANE): THE MS CASTER SEMENYA ISSUE

40. Full details of these charges are reflected in the charges sheets at exhibits "DC1" and "DC2".

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[11] Exhibits "DC1" – "DC70".
[12] Exhibit "DT".
[13] In the case of the Semenya charge, and in the absence of Messrs Chuene and Maponyane in particular, I had regard to the transcript of the evidence led at the Collins enquiry. Both Mr Chuene and Maponyane testified in that enquiry.

41. From the evidence adduced, including the statements freely and voluntarily given by Mr Chuene before the Collins inquiry,[14] the facts are as follows:

- During **July 2009**, Ms Semenya competed in the Africa Junior Championships in the Republic of Mauritius. She won both the 800m and 1500m events. Her time in the 800m was considered world class. Dr Adams attended the event as the African medical delegate duly appointed by the Confederation of African Athletics.

- On **3 August 2009**, Nick Davies of the IAAF sent an email to various persons, including Dr Dollé (Director, Medical and Anti-Doping Department of the IAAF). The email quoted from a South African internet blog (established by Mr Arnaud Malherbe) which refers to Ms Semenya as "*an interesting revelation*" who "*was born as a hermaphrodite*" and who "*through a series of tests, has been classified as female*".

- On the same day, Dr Dollé sent an email to Dr Adams (who was not in South Africa at the time) wherein he drew Dr Adams' attention to the contents of the previous email and (1) asked whether Dr Adams was involved, through his Federation (presumably ASA), in the medical/gender verification investigations, (2) suggested that Dr Adams contact Dr Juan Manuel Alonso (IAAF) to confirm whether

[14] Having read the transcript of the evidence led at the Collins inquiry, I associate myself with its findings in relation to this issue. Accordingly, much of what is contained in this section is incorporated from the Collins Report.

the conclusion is in compliance with the IAAF Policy on Gender Verification or (3) whether further tests were envisaged in Berlin.

- Dr Adams forwarded the email on **4 August 2009** to Mr Malehopo, the general manager of ASA. In the email, Dr Adams indicated that he had spoken to Dr Dollé and that the questions had arisen due to the "*issues raise (sic) in the South African Press and the SA press to the IAAF*". Dr Adams concluded the email with a reminder that the matter was highly confidential.

- On **5 August 2009**, Dr Adams again emailed Mr Malehopo and stated that he had thought about the "*current confidential*" matter and that they make certain decisions. Those decisions were: (1) they obtain a "*gynae opinion and take it to Berlin*" or (2) they do nothing and Dr Adams will handle the issue if it "*come(s) up in Berlin*".

- Mr Malehopo telephoned Mr Chuene on the same day and informed him (Chuene) of the contents of the email from Dr Adams. Messrs Chuene and Malehopo then made a joint decision to send Ms Semenya for tests (presumably the "*gynae opinion*"). Mr Malehopo then emailed Dr Adams and suggested that Dr Adams goes ahead with "*the necessary tests that the IAAF might need*".

- At least one further email was exchanged between Dr Adams and Mr Malehopo on the same day relating to the identity of the

gynaecologist who would perform the tests. They also spoke telephonically to each other to make the necessary arrangements for the tests to be done and other related matters. Dr Adams requested Mr Malehopo to make arrangements for counselling of Ms Semenya before the tests take place.

- Also on **5 August 2009**, Mr Malehopo sent an email to Mr Seme, attaching thereto a *"whereabout information"* form emanating from the IAAF. These forms are apparently used by the IAAF in respect of those athletes considered to fall into the pool of top athletes in the world. Mr Seme was requested to complete the form on behalf of Ms Semenya.

- Mr Malehopo made arrangements (for counselling) with Ms Lane (then an ASA Board Member) on **6 August 2009**. He also arranged, as requested by Dr Adams, for transport to the clinic where the tests were to be done for Ms Semenya and her coach, Mr Seme.

The tests took place on **Friday, 7 August 2009**.

- Ms Lane met with Ms Semenya and Mr Seme on the afternoon of **7 August 2009**. The nature of the discussions that took place is disputed between Ms Lane, Dr Adams and Ms Semenya. This event is dealt with in more detail later herein.

- A South African medical doctor conducted the tests on **7 August.**

- On **8 August 2009**, Ms Semenya departed to Germany. Dr Adams also travelled to Germany on the same day, but on another flight.

- On **14 August 2009**, Dr Adams received a telephone call from the clinic where the tests were performed. He was informed that provisional results were available but that those results could not be released to him without the consent of Ms Semenya. Dr Adams met with Ms Semenya and obtained her written consent to obtain the provisional results. The consent was sent to the clinic and the results were communicated telephonically to Dr Adams.

- Dr Adams requested a meeting with Mr Chuene on the same day (**14 August**) to discuss the results with him. The exact sequence of events and how the request was conveyed is subject to dispute.

- Dr Adams and Mr Chuene met on **14 August** at Mr Chuene's hotel in Berlin.

- At the meeting Dr Adams informed Mr Chuene of the nature of the test results. The contents and nature of the discussion is highly disputed and will be dealt with fully later herein. Likewise, the decision made by Mr Chuene at that meeting is also disputed.

- On the morning of **15 August 2009**, Mr Maponyane (acting on the instructions of Mr Chuene) met Ms Semenya in his hotel room and informed her that she would not run at the world championships as a result of the tests performed in South Africa. This meeting is considered crucial to a determination of what was decided at the preceding meeting between Dr Adams and Mr Chuene.

- Later on the same day, a meeting took place between Messrs Chuene, Maponyane, Drs Adams, Dollé and Alonso. The nature of the discussions at this meeting is controversial.

- On **16 August 2009**, Ms Semenya took part in the first heat of the 800m. A protest followed from the Kenyan Athletics Federations.

- Ms Semenya was subjected to gender verification tests in Berlin on either **17** or **18 August 2009**. The relevant interviewees were uncertain as to the exact date on which these tests took place. Nothing turns on the exact date. Dr Adams deliberately delayed the commencement time of the tests in order to preclude the completion of all the tests required.

- The IAAF (in breach of its own rules) announced on 18 August 2009 that tests had been conducted on Ms Semenya.

- Ms Semenya won the 800m final on 19 August 2009.

- Prior to returning to South Africa as well as after the team's return to South Africa, Mr Chuene deliberately denied any knowledge of tests conducted on Ms Semenya.

A discussion on specific issues arising from the Semenya issue

The South African Tests

The catalyst for the events that took place from **3 August 2009** to date is a *"blog"* published on Media 24. Mr Chuene correctly alleged that the author of this *"blog"* is Arnaud Malherbe. The contents of the *"blog"* were attached to the email sent by Nick Davies to various persons on **3 August 2009**. The contents of the *"blog"* are reproduced *verbatim* hereunder, for the sake of completeness:

> *"Caster Semenya is an interesting revelation. Interesting because the 18 year old was born as a hermaphrodite and, through a series of tests, has been classified as female. A revelation, because, at only 18 years old, she has become the fourth fastest South African women ever over 800m with her personal best time of 2:00.58. She has also broken Zola Budd's South Africa Junior record in this event, that has stood since 1984! Clearly, she has a great future ahead of her. In Berlin, her main aim will be to get under that magical two minute barrier. She is up against a host of women that can run much faster than 2 minutes over 800m, so she is unlikely to make the final.*

If she can get under two minutes, she should be very happy, because the experience gained will stand her in good stead over the next few years and she might be a very realistic medal prospect in London in 2012." (sic)

Not only did none of the witnesses have any knowledge of the "*series of tests*" referred to in the *"blog"*, but Mr Malherbe himself disavowed any knowledge of such tests.

There were serious disputes about the tests that followed in South Africa, with specific reference to whether these tests were conducted under the auspices of the IAAF or ASA. The version of ASA (through Messrs Chuene, Maponyane and Malehopo) was that the tests were *"IAAF tests"* as ASA does not and cannot conduct gender verification tests. Dr Adams, on the other hand, stated that the tests can be conducted by ASA and were, in fact, conducted on behalf of ASA.

Various pointers exist to help determine this issue:

- Dr Dollé, in his email to Dr Adams on **3 August**, asked whether he (Dr Adams) was involved, through his Federation (ASA), in the medical/gender verification investigations. This question would not have been posed if ASA could not conduct such investigations.

- In the same email Dr Dollé requested Dr Adams to contact Dr Alonso to inform him whether the *"conclusion"* is in compliance with IAAF policy on gender verification.

- Dr Adams, in his email to Mr Malehopo on **5 August**, stated that "*we make the following decisions*". (Emphasis added)

- Mr Malehopo called Mr Chuene in Berlin and a joint decision was made by them to do the tests.

- Dr Adams never informed Mr Malehopo that the IAAF insisted on any tests.

- The IAAF Policy on Gender Verification states that the process may be handled at the level of (1) national federation; (2) the medical delegate of an event; (3) the IAAF Medical committee.

Before reaching a final conclusion on this aspect, it is necessary to deal with the tension that exists in relation to Dr Adams' capacity (at material times). ASA, through Messrs Chuene, Maponyane and Malehopo, insisted that Dr Adams acted in his capacity as member of the IAAF medical commission both in relation to the tests conducted in South Africa as well as the meeting with Dr Dollé and Dr Alonso in Berlin. Dr Adams disagreed with this contention.

Dr Adams' view was that, upon his return from the Africa Junior Championships in Mauritius, he was in preparation to join the South African Athletics team in Berlin. He had some time previously been appointed as team doctor and his name appeared, as team doctor, on the official delegation list for Berlin. He produced that list at the time of his interview before the Collins inquiry, together with other letters, emails, accreditations documents and the Team Manual, all of which supported his contentions.

The IAAF Competition Rules 2009, in any event, make provision for the appointment of a medical delegate for each event. The same goes for the doping control delegate.[15] Dr Alonso was the medical delegate for the Berlin event and Dr Dollé was the doping control delegate. No provision exists in the IAAF Competition Rules for team doctors (even if they are ordinarily part of the IAAF medical commission) to assume any IAAF related duties during an event.

ASA's Board apparently approved the South Africa delegation. It therefore approved the appointment of Dr Adams as team doctor some time prior to **August 2009**. It cannot be accepted that Dr Adams could exchange hats at will and act as ASA team doctor when it suited him and IAAF Medical Committee member at other times. It rather appears that it suited ASA to contend that Dr Adams acted as a representative of the IAAF at the relevant time in order to shift any possible blame away from ASA. It should also be

[15] Rule 110 of the IAAF Competition Rules.

born in mind that Dr Adams is the Chief Medical Officer of ASA and has been since 1995.

I thus accept that Dr Adams acted, at all material times, in his capacity as ASA team doctor.

Thus, when Dr Adams told Mr Malehopo that "*we*" make decisions, he was referring to ASA. That indeed happened when Messrs Chuene and Malehopo made just such a decision. The South African tests were thus conducted on behalf of ASA.

It is strange, given the context of events, that Mr Malehopo deemed it fit to send the IAAF *"whereabouts information form"* to Mr Seme almost an hour before he emailed Dr Adams suggesting that the necessary tests be done. That form is utilised for the IAAF pooled athletes. The pool of such athletes is very small and, according to Dr Adams, consists of the top 20 athletes in the world. The forms are utilised for the purposes of *"out of competition drug tests"*. Ms Semenya, at the relevant time, was not considered part of that pool.

Ms Semenya informed the Collins inquiry that she did complete the form at the request of Mr Seme. He (Mr Seme) informed her that the form was for the purpose of doping controls.

It is difficult to conceive of any other reason for Mr Malehopo to have sent this form to Mr Seme to complete on behalf of Ms Semenya other than to *"colour"* the impending tests as drug tests.

Another very strange dispute arose in respect of the South African tests. It is common cause that Dr Adams requested Mr Malehopo to arrange for counselling for Ms Semenya prior to the tests taking place. Mr Malehopo obtained the services of Ms Lane for that express purpose. Ms Lane, however, informed the Collins inquiry that she could not counsel Ms Semenya because at the time that she interviewed Ms Semenya, she (Ms Semenya) was unaware of the nature of the tests to be done. Because Dr Adams had not obtained *"informed consent"* from Ms Semenya, Ms Lane said she could not counsel her as that would have constituted a breach of Ms Semenya's right to confidentiality.

Dr Adams informed this Committee that the purpose of counselling is to inform the person to be tested of what is about to happen and to *"soften the blow"*. It is only after counselling has taken place that informed consent can be obtained. Dr Adams further informed this Committee that he specifically requested Ms Lane to explain to Ms Semenya what gender verification is. He also informed Ms Lane that Mr Malehopo would send her the relevant correspondence. Dr Adams stated that Ms Lane called him later in the day and informed him that counselling had indeed taken place. That contention was at odds with what Ms Lane had told the Collins inquiry.

The issue was finally settled by Ms Semenya herself. She informed the Collins inquiry that Ms Lane explained gender tests to her. She further stated that although she initially believed that she was going for doping tests, matters became clear when Ms Lane explained to her that she was actually going for gender verification tests.

The Berlin Meetings

Two meetings of note took place in Berlin. The first took place on **14 August 2009** between Dr Adams and Mr Chuene (*"the first meeting"*). The second meeting took place on **15 August 2009** between Messrs Chuene, Maponyane and Drs Adams, Dollé and Alonso (*"the second meeting"*). There is considerable tension between the versions relating to these meetings.

The Chuene and Maponyane version

Mr Chuene informed this Committee that he was told by Mr Maponyane that Dr Adams had informed him (prior to the first meeting) that Ms Semenya had to be withdrawn from the Berlin event due to the fact that she had been tested in South Africa and the test results were *"not good"*. Dr Adams allegedly said that Ms Semenya should feign an injury.

Mr Chuene further stated that Mr Maponyane and Dr Adams met him at his hotel on **14 August** (the first meeting). Dr Adams informed him that he had

spoken telephonically to the clinic in Pretoria and that Mr Semenya had to be withdrawn from the Berlin event. Dr Adams apparently told him that the tests results were not good, but they were also not conclusive. Mr Chuene stated that he requested to see the test results for himself. Dr Adams did not have the results in writing with him. According to Mr Chuene he then looked at the IAAF Policy on gender verification and established that the correct procedures had not been followed as no other athlete or Federation had complained about Ms Semenya. He (Mr Chuene) refused to withdraw Ms Semenya from the Berlin event.

Mr Maponyane was then tasked to speak to Ms Semenya.

Mr Chuene's version to the Collins inquiry of the second meeting was rather terse. He stated that he and Mr Maponyane met with the full IAAF medical delegation, consisting of Drs Adams, Dollé and Alonso (*"the IAAF team"*). They gave Messrs Chuene and Maponyane two options: (1) Ms Semenya could run but should not finish – she had to feign injury; or (2) she could run and the matter would be sorted out afterwards. Mr Chuene stated that he chose the second option.

Mr Chuene accused the IAAF team of wanting him to do their *"dirty job"*. They (the IAAF) had previously withdrawn athletes and since Dr Alonso was the medical delegate, he had the authority to withdraw Ms Semenya if he so wished. He said that the IAAF knew that it was their competition and they could withdraw her if they wanted to.

According to Mr Chuene the IAAF team did not proffer any explanation of tender verification issues and they simply offered him two choices.

Mr Maponyane's version of the second meeting largely echoed that of Mr Chuene save for some important issues. According to him, the IAAF team was asked for advice. The said team did not make any suggestions or recommendations. They only offered two options: (1) Ms Semenya could be withdrawn; or (2) she could run and when the results of the gender verification tests from both South Africa and those to be conducted in Berlin were available, they would advise ASA accordingly. He said that the IAAF team never attempted to persuade him and Mr Chuene to choose one option over the other.

Mr Maponyane then went on to state that the IAAF team stated that Ms Semenya had an unfair advantage over other athletes but they failed to explain this to Messrs Chuene and Maponyane.

He further made reference to the fact that he had asked the IAAF team whether they were now going to create a *"third gender"* apart from that of male and female. When Mr Maponyane was requested by this Committee why he had made such a comment and in which context he made the same, he was unable to explain what the context of the discussion was with the IAAF team that prompted him to make such a comment. His explanation was to the effect that he made the comment *"out of the blue"* and without any particular cause or comments from the IAAF team.

Both Messrs Chuene and Maponyane were at pains to inform this Committee that Dr Adams was told in advance by them that he was to attend the second meeting in his capacity as IAAF representative and not as ASA team doctor.

The Adams' version

Dr Adams stated that he met Mr Chuene with Ms Mlangeni on **14 August** in Mr Chuene's hotel to discuss the test results from South Africa (the first meeting). (Ms Mlangeni agreed that she was at the meeting but stated that she left the meeting shortly after it commenced to attend to an issue pertaining to the entry of an athlete. Mr Maponyane, however, informed us that he had attended to the same issue at the stadium at an earlier stage. It therefore appears as if Ms Mlangeni did attend the first meeting.)

Dr Adams informed Mr Chuene that the results were not good and that he had very strong evidence to recommend that Ms Semenya be withdrawn from the Berlin event. Mr Chuene never asked to see the test results and if he did, Dr Adams would have responded that such permission would have been the prerogative of Ms Semenya.

He stated that such withdrawal would offer an opportunity to take the process forward in South Africa and to consult properly with all parties concerned, which would include Ms Semenya and her parents. He further stated to Mr Chuene that he did not want any tests to be performed in

Germany on Ms Semenya as those tests would be carried out by foreign doctors and that ASA would have no control over what happened with those results. In addition, the tests could prove very traumatic for Ms Semenya.

According to Dr Adams, Mr Chuene accepted his recommendation and agreed that Ms Semenya would be withdrawn from the Berlin event. Mr Maponyane was tasked to speak to Ms Semenya and inform her of the decision.

According to Dr Adams he was in the company of Mr Maponyane the next day (**15 August**) when Mr Maponyane received a call from Mr Chuene. The call lasted almost an hour. Mr Maponyane then handed the phone to Dr Adams. Mr Chuene informed Dr Adams that he had consulted with *"high-powered"* politicians in South Africa and that he had changed his mind about withdrawing Ms Semenya. Mr Chuene requested him to set up a meeting with the IAAF medical team.

Dr Adams suggested that Mr Chuene discuss the matter with the President of the IAAF, but Mr Chuene said that such a meeting would be his last option. He stated that he (Mr Chuene) first wanted to politicize the whole thing and cause confusion within the IAAF medical team. The second meeting was arranged.

Dr Adams further stated that he was instructed by Mr Chuene not to speak at the second meeting as he (Mr Chuene) would do the talking. Dr Adams

was of the view that he was attending the second meeting as ASA team doctor.

The second meeting then took place. At this meeting Mr Chuene informed the IAAF medical team that withdrawing Ms Semenya from the Berlin event was not acceptable to top-level South African politicians who are also in government and that if the IAAF[16] insisted on her withdrawal, they would face the wrath of the South African Government because it would not hesitate to take the IAAF to the highest court in the world. He further warned them that the Oscar Pistorius case would be a Sunday school picnic compared to what will happen if Ms Semenya did not run.

Dr Alonso apparently reminded Mr Chuene of the IAAF Competition Rules and that in the absence of any tests conducted in South Africa, the athlete would get the benefit of the doubt. Mr Chuene insisted that no tests had been performed in South Africa. Dr Adams stated that he could not rectify that statement as he had been ordered by Mr Chuene not to speak at the meeting.

Dr Alonso further stated that:

- if Ms Semenya competed at the World Championships, then she fell under the jurisdiction of the IAAF and would be subjected to IAAF gender verification tests in Berlin. If any unfair advantage was

[16] Dr Dollé and Dr Alonso confirmed this version in writing in response to written questions put to them.

detected, she would be stripped of any medal she might win; alternatively

- Ms Semenya could be withdrawn from the Berlin event. If that option was exercised then the IAAF was comfortable with ASA handling gender verification tests in South Africa and a report on the tests could be sent to the IAAF.

Mr Chuene chose the option for Ms Semenya to compete. Dr Adams, after the said meeting, voiced his reservations about the choice.

The Meeting between Mr Maponyane and Ms Semenya

It is common cause that Mr Maponyane met with Ms Semenya after the first meeting but before the second meeting. It was decided that he should speak to her as they knew each other well. The discussion itself is also common cause.

Mr Maponyane informed Ms Semenya that she could not run at the Berlin event as a result of the tests performed in South Africa. She broke down and cried.

Discussion

It required careful analysis of the information presented to determine which version was accurate, and fairly recounted these events. The most telling

factor was the meeting between Mr Maponyane and Ms Semenya. It is inconceivable that Mr Maponyane, bearing in mind his close relationship with Ms Semenya, would cause her such unspeakable grief and agony by informing her that the event was over as far as she was concerned, if Mr Chuene had not made a firm decision at the first meeting to follow the recommendation of Dr Adams and withdraw her from the event.

I agree with the Collins inquiry that, on the probabilities, Dr Adams' version is to be preferred.

It will be noted that there are inconsistencies between the versions of Messrs Chuene and Maponyane in respect of the second meeting. The questions allegedly posed by Mr Maponyane fits the factual matrix of the Adams version whereas it does not fit into the Chuene version. In addition, the options allegedly proffered by the IAAF medical team, according to Mr Maponyane, fit the Adams version whereas they are at odds with the Chuene version.

The IAAF written responses in relation to the second meeting accord with Dr Adams' version of it.

The Chuene/ASA Denials

It is common knowledge that Mr Chuene persistently denied that any gender verification tests were performed in South Africa.[17]

[17] The Collins Committee describes Mr Chuene's answers in this regard as *"deliberately obtuse ..."*.

Mr Chuene variously answered that he:

- told the media he had lied to protect *"the child"*;
- had lied to the country to protect Ms Semenya;
- never told the media he had lied;
- did not lie because he did not know about the tests;
- did not lie because he had not seen the actual written test results.

He eventually admitted that the matter ought to have been handled differently. He made a printed copy of a press statement available to the Collins inquiry. In that document ASA admitted that matters could have been handled differently. ASA then continued to deal with what it considered to be *"the most critical part of this issue: What went wrong?"* It is most instructive that ASA (in the document) did not point a finger at itself or Mr Chuene. They lay all the blame at the door of the IAAF. In effect, ASA exculpated itself and Mr Chuene despite conceding that matters could have been dealt with differently.

Copies of eTV programmes (3rd Degree and 3rd Degree Plus) were made available for viewing purposes. The footage included the press conference

at O R Tambo airport (upon return of the team) and subsequent press conferences by ASA. Mr Chuene's behaviour, especially in light of the true facts as they emerged in the Collins inquiry, brought the sport and ASA into disrepute.

Ms Lane (a former Board Member) informed the Collins inquiry that she sent sms messages to Mr Chuene in Berlin urging him to respond to queries by saying he cannot confirm or deny any tests, but not to lie. Mr Chuene clearly chose to ignore the advice. Dr Adams showed various sms messages on his cellular phone from Mr Malehopo, calling on him to attend urgent meetings at ASA to discuss what the press should be told. Dr Adams declined to attend those meetings. He further stated that he was requested on two occasions to attend press conferences with Mr Chuene as his presence would lend credibility to Mr Chuene's (false) assertions. Dr Adams declined to attend.

A summary of the established facts

- The author of the *"blog"* (Arnaud Malherbe) relied upon false, unsubstantiated, and incorrect information which triggered the events set out above.

- The tests conducted in South Africa were conducted under the auspices of ASA.

- Mr Chuene had knowledge of the aforesaid tests, having authorised them, by **5 August 2009**.

- Dr Adams recommended to Mr Chuene to withdraw Ms Semenya from the Berlin event on **14 August 2009**.

- Mr Chuene agreed to withdraw Ms Semenya on **14 August 2009**.

- Between **14** and **15 August 2009**, Mr Chuene spoke to (unknown and unidentified) individuals in South Africa and relied upon their advice/wishes to reverse his decision to withdraw Ms Semenya.

- Ms Semenya was informed on **15 August 2009** that she would be withdrawn from the Berlin event.

- On **15 August 2009**, Messrs Chuene and Maponyane met with Drs Adams, Dollé and Alonso.

- Dr Adams attended the aforesaid meeting as ASA team doctor.

- Mr Chuene insisted that Ms Semenya take part in the 800m for women against the wishes and advice from Dr Adams and despite having been made aware of the consequences of his decision by Dr Alonso.

- Ms Semenya underwent partial gender verification tests in Berlin on or about **17 August 2009** due to the decision made by Mr Chuene.

- The IAAF announced publicly at a press conference (in breach of its own rules) that Ms Semenya had been subjected to gender verification tests.

- Mr Chuene lied (initially to the IAAF at the second Berlin meeting about the ASA tests), to the media and the public about the tests and his and ASA's knowledge of the tests.

The Semenya saga: the aftermath

42. There can also not be any doubt that what had set off a train of events (and unintended consequences) resulting in much negative publicity for Ms Semenya, ASA, and for the country, was the Malherbe blog. The blog itself contained inaccurate, unsubstantiated, false, and misleading information. Subsequently, when Mr Malherbe testified, he could not substantiate the damaging statements made in the blog, and indicated that he deeply regretted having written the blog, and that he had subsequently removed it from the News 24 website following an objection by one of the readers. This appears not to have been the case upon enquiry. It would also appear that it was at odds with firsthand information given to him by a Mr Van der Walt, an athletics coach who had had a meeting with Mr Malherbe almost immediately prior to the publication of the blog. In this regard, I would recommend to the ASA Board that disciplinary steps be instituted against Mr Malherbe as soon as possible. This is what fairness demands: fairness requires that even-handed action be taken against individuals or parties in a

similar or the same position, and not only against one single individual.[18] Fortunately, some ASA officials/office-bearers resigned before any action could be taken against them. They should not be allowed back into athletics without some form of inquiry.

43. Based on the evidence both oral and written, there can be little doubt that the conduct of Mr Chuene in particular was unacceptable in that it brought ASA and athletics in this country into disrepute, and that the dignity of Ms Semenya was violated as a result. Although the evidence indicates that Mr Maponyane played a lesser role in the saga, there is no doubt that he appeared to be an active acolyte of Mr Chuene, and failed to take issue with Mr Chuene in relation to his decision that she participate at the Championships in Berlin. In his evidence before the Collins inquiry, he constantly tried to cover up for Mr Chuene.

44. Accordingly, both Mr Chuene (in relation to charge 1) and Mr Maponyane (in relation to charge 7) are found guilty of fraudulent misrepresentation, dishonesty, dereliction of duty, and abuse of their respective positions, and bringing ASA and SASCOC into disrepute in relation to what occurred in the period between 5 August 2009, and 19 August 2009 in relation to Ms Semenya.

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[18] Arguably, Mr Malherbe (and others who were privy to the blog and who were named during the hearing but whom I prefer not to name at this stage) also brought ASA and athletics into disrepute by publishing the blog containing such scurrilous information.

CHARGES 2, 3, 11, 12 AND 13: MR CHUENE, MR MAPONYANE AND DR DLAMINI [STAFF LOANS]

45. I deal with these charges as they relate to the grant of staff loans either to Mr Chuene as President and as Director of ASA, and his instruction to the Finance Department of ASA to open a trade debtors' account and to re-allocate all his staff loan transactions to that account; and that Mr Chuene would have acted in contravention of the ASA Constitution, the Companies Act and ASA's Staff Manual when he permitted or was party to granting loans to Mr Malehopo and other members of staff of ASA at times when they were already indebted to ASA in respect of loans previously granted to them by ASA which loans had not yet been repaid; the granting of loans to himself and others (including Mr Malehopo and other members of ASA staff at a time when ASA was not in a financial position to do so; and the contravention of the relevant provisions of the Companies Act which places a duty on a director to ensure that ASA's annual financial statements made disclosure of the loans granted to himself and Mr Malehopo.

In his capacity as Vice-President, Mr Maponyane approved and was party to the approval of granting loans to Mr Chuene, Mr Malehopo, the General Manager and other members of staff at a time when ASA was not in a financial position to do so and this was in contravention of the provisions of section 226 of the Companies Act, and the failure on the part of Mr

Maponyane to ensure that ASA's annual financial statements made disclosure of the loans granted to Mr Chuene and Mr Malehopo.

In his capacity as a Member of the ASA Executive Board as well as a Member of the Board of Directors[18], Dr Dlamini also approved of the granting of loans to Mr Chuene and Mr Malehopo and other members of ASA staff at a time when ASA was not in a financial position to do so, and he also failed in his duty to ensure that ASA's annual financial statements made disclosure of the loans granted to Mr Chuene and Mr Malehopo.

46. The evidence of the forensic auditors establishes that Mr Chuene obtained loans in the sum of R183 451.72 in the period between 2006 to 2009 from ASA without any compliance with the provisions of section 226 of the Companies Act, and in contravention of ASA procedures. This evidence was corroborated by the evidence of former Board Members. In this regard, Mr Chuene was aided and abetted by Mr Maponyane and Dr Dlamini, fellow directors of ASA although they were aware of these loans but failed to prevent it, alternatively to disclose it in their capacity as directors of the company.

47. The evidence also established that Mr Chuene used his ASA credit card to cover personal expenses, some of which were then allocated to staff loans

[18] At the time, the ASA Board comprised: Godfrey Hammers, Snowy Mathews, Chris Brits, Lorraine Laine, Zigi Mathanga, Thomas Manoko, Hendrick Mokganyetsi, Lili Mothetha, Leonard Chuene, Mr Maponyane, Dr Dlamini. Save for the latter three, all the others resigned when ASA was suspended in November 2009.

or reflected as trade debtors. These expenses were incurred by Mr Chuene without any prior ASA Board approval.

48. Although Mr Chuene was not employed by ASA as an employee, he nevertheless received staff loans. Not only was this not permitted by ASA policy and the Staff Manual, but the procedures in relation to loans exceeding one third (1/3rd) of one's gross salary, and the fact that loans were required to be settled within four (4) months and within the same financial year, these procedures were never followed. Indeed, at the time of the hearing, Mr Chuene still owed ASA approximately R80 000.00 in respect of unpaid loans.[19]

49. In relation to the staff loans, Mr Chuene, the evidence establishes, gave an instruction to the finance department to reflect his loans under trade debtors in order to deceive users of the ASA financial statements as to the true state of affairs. In this regard, the forensic auditors furnished full and particularised details of the amounts of the loans that Mr Chuene allocated to trade debtors. A former employee in the finance department also confirmed the instruction given to her by Mr Chuene for his loans to be re-allocated to trade debtors. There can be little doubt that Mr Chuene deliberately and intentionally issued the instruction to an ASA employee by abusing his authority as President in order to deceive third parties into believing that he in fact had not made any loans from ASA. There can also

[19] Exhibit "DT" pages 105-106, 109-111, and 124.

not be any doubt that Mr Chuene could never qualify as a *"trade debtor"* of ASA since he could never in the ordinary course as President render a service to ASA, and charge ASA for it. In this regard, the ASA auditor confirmed that Mr Chuene's loans were recorded as trade debtors and that was incorrect and should not have been reflected as such in the annual financial statements.

50. Mr Chuene, Mr Maponyane, and Dr Dlamini were also party to permitting to the granting of loans to Mr Malehopo and other ASA employees in contravention of the ASA Constitution, the Companies Act and the ASA Staff Manual. These loan transactions are detailed.[20]

51. Related to this charge, is the fact that Mr Chuene, Dr Dlamini and Mr Maponyane were aware at the time when loans were granted to Mr Chuene and other ASA staff members that ASA was not in a financial position to grant such loans. The details appear from the record.[21] In this regard also, the deteriorating financial position of ASA shows a profit in 2005 of R403 763.00, a loss in 2006 of R436 360.00, a further loss in 2007 of R930 479.00, to a loss in 2008 of R4 064 004.00. Notwithstanding this knowledge, Mr Maponyane and Dr Dlamini nevertheless were party to the granting of such loans in such deteriorating circumstances.

[20] Exhibit "DT", pages 100, 103, 110-111, and Exhibit "DC12".
[21] "DT", pages 92, 103, 132, 139, and 147.

52. Loans are required to be disclosed in terms of section 295 of the Companies Act. Mr Chuene, Mr Maponyane and Dr Dlamini failed to do so.[22] The evidence reveals that the annual financial statements for the period **2006** to **2008** did not contain the disclosure of any of these loans.

53. Accordingly, and taken cumulatively, the respondents are guilty on charges 2 and 3, and Mr Chuene, in addition, also on charges 11, 12 and 13.

CHARGE 10 (CHUENE), CHARGE 1 (MAPONYANE), AND CHARGE 1 (DLAMINI) [KEEPING OF ASA BOARD MINUTES]

54. In this regard, the respondents are charged with contravening the provisions of the ASA Constitution and the Companies Act by failing in their duty to ensure that minutes of all meetings of the Board of Directors and of the Executive were kept and entered into a minute book.

In this regard, the evidence does not establish the basis for a finding of guilty. Indeed, during the course of the hearing, minutes of meetings were discovered and/or disclosed as they were requested either by me as Chairperson of the hearing or when referred to by witnesses. I got the impression that further diligent search may well uncover all the relevant minutes of meetings of the Board. In any event, there was no evidence that any of the respondents were in any way responsible for the destruction of Board minutes.

[22] Exhibit "DT", pages 113-115; Exhibit "DC2".

Accordingly, the respondents are found not guilty on these charges.

CHARGES 4 (CHUENE) AND CHARGE 7 (DR DLAMINI) [SETTLEMENT BY ASA OF THE MOKGOATJANA CLAIM]

55. These charges relate to items of irregular expenditure, dereliction of duty and abuse of position of authority relating to the settlement payment made by Mr Chuene to his previous personal assistant, Mrs Thabile Mokgoatjana.

56. The evidence established that there was an intimate relationship between Mr Chuene and a female ASA employee and that a payment was made to Ms Mokgoatjana to ensure that she would remain silent about her knowledge about such intimate relationship.

57. The forensic report[23] deals extensively with this alleged affair, sms messages found on Ms Mokgoatjana's cellular phone, the agreement to settle the dispute between Mr Chuene and Ms Mokgoatjana, and the irregular payment of approximately R90 000.00.

58. The nature of the settlement and the costs incurred were never disclosed to the ASA Board. Moreover, these costs were incurred during a period when ASA's financial status had deteriorated quite markedly.

59. Dr Dlamini, according to the evidence, was fully aware of the circumstances surrounding this issue. In this regard, Dr Dlamini in fact wrote to Mr

[23] Exhibit "DT" at pages 94-99, and exhibits "DT1" and "DT2", annexures 25-33.

Chuene on **3 July 2007** wherein he makes reference to the misappropriation of funds.[24]

60. Mr Chuene and Dr Dlamini, in breach of their constitutional and statutory obligations, failed to bring these allegations to the attention of the Board although Dr Dlamini had submitted a letter of complaint against Mr Chuene, but subsequently retracted the letter.[25]

61. Accordingly, I find both Mr Chuene and Dr Dlamini guilty on this charge.

CHARGE 5 (CHUENE) [SALE OF MERCEDES BENZ TO CHUENE FOR R1.00]

62. This charge relates to a Mercedes Benz motor vehicle which was sold to Mr Chuene for R1.00 following the authorisation of such sale by resolution of a special Executive Board Meeting held on **11 September 2004**. Notwithstanding the sale, the evidence shows that Mr Chuene failed to transfer the vehicle into his name and thereby ensured that ASA continued to maintain the vehicle and pay the insurance premiums in relation thereto. Mr Chuene indeed still claims ownership of the vehicle.[26]

63. There is no doubt that Mr Chuene's conduct in this regard was wrongful and unlawful and the he continued to cause ASA financial loss by inducing it to maintain the vehicle and to pay the insurance premiums in relation thereto.

[24] Exhibit "DC14"; exhibit "DT2", annexure 82; exhibit "DC26".
[25] Exhibit "DT2", annexure 82; exhibit "DT2", annexure 83.
[26] Exhibit "DT2", annexure 53 dated 1 February 2010.

64. Accordingly, Mr Chuene is guilty on this charge.

CHARGE 6 (MESSRS CHUENE AND MAPONYANE, AND DR DLAMINI) [EMPLOYMENT OF BANELE SINDANI AS CONSULTANT]

65. This charge involves the employment of Mr Banele Sindani as CEO/Strategic Consultant of ASA.

66. Mr Sindani was initially employed by ASA as CEO and thereafter was engaged as an independent contractor in the position of a Strategic Consultant.

67. The record shows Dr Dlamini calling for the appointment of Mr Sindani as CEO with immediate effect.[27] However, at an Executive Board Meeting held on **4 August 2007**, it was resolved that the position of a CEO should not be discussed, but rather that the position of a Strategic Planner/Adviser was required. Notwithstanding that the Board emphasised that the financial situation of the Federation should be taken into account, that a framework for the Strategic Planner should be outlined, and that the Strategic Adviser not be confronted with operational matters,[28] Sindani was nevertheless appointed to this position. Notwithstanding the resolution of the Board, Mr Chuene initially appointed Mr Sindani as CEO. This is confirmed in the evidence at exhibit "DC16".

[27] Exhibit "DC14".
[28] "DC15", page 3 dated 4 August 2007.

68. Following his appointment, ASA paid to Mr Sindani the sum of R1 762 682.79. From the evidence, it is manifestly the case that this amount was grossly inappropriate, excessive, and unjustifiable. There is no record of any substantial work being performed by Mr Sindani, and the decision to employ him was taken in contravention of the resolution of the Board relating to the consideration of ASA's financial status. Indeed, ASA was clearly not in a financial position to pay Mr Sindani and that is why it did so by accessing a loan through a bond facility exposing ASA property to major risk.

69. The forensic auditors together with former Board Members gave evidence concerning the Sindani appointment.[29]

70. All the witnesses confirmed that Mr Sindani was rarely at the ASA offices, and that he added very little, if any value to ASA.

71. In the circumstances and on the totality of the evidence, I find Messrs Chuene and Maponyane, and Dr Dlamini guilty on this charge.

CHARGE 7 (MR CHUENE) [FAILURE TO ACCOUNT TO ASA FOR *PER DIEM* PAYMENTS]

72. This charge relates to the failure of Mr Chuene to submit a reconciliation and provide supporting documentation for the sum of US $20 000.00 given

[29] Exhibit "DT", pages 140-159, and exhibit "DT", annexures "73" – "84".

to him for the purpose of promoting his chances of election onto the IAAF Council.

73. The oral evidence of two (2) witnesses confirmed that a sum of US $20 000.00 was given to Mr Chuene's assistant on **17 August 2007**, and was given to her to give to Mr Chuene. In a written statement handed in, Chuene's assistant confirmed that the funds were indeed given to him.

74. The forensic evidence demonstrates the receipt by Chuene's assistant of the money, and the receipt of it by him.[30]

75. The minutes of an ASA finance meeting held on **16 March 2008** confirm that it was resolved that Chuene must communicate with Mr Sindani to produce the said reconciliation.[31] However, the reconciliation and/or supporting documentation were never produced.

76. Accordingly, Mr Chuene is guilty of this charge.

CHARGE 8 (MR CHUENE) [CREDIT CARD ABUSE]

77. This charge relates to the excessive use of the ASA credit cared by Mr Chuene when ASA's financial position had deteriorated, and was deteriorating fast, and his failure to submit proper reconciliations and

[30] Exhibit "DT", pages 154-159, "DT" annexures 81-84; exhibit "DC17".
[31] Exhibit "DC13", page 2 item 63.

supporting documentation for the expenditure in terms of ASA's procedures.

78. The evidence in this regard was thorough, and was extensive.[32]

79. The forensic witnesses in particular emphasised the lack of reconciliation and the failure to allocate between business and private expenses.[33]

80. I find Mr Chuene guilty on this charge.

CHARGE 9 (CHUENE) [*PER DIEMS* RECEIVED FROM ASA AND IAAF FOR THE SAME EVENTS]

81. This relates to the *per diems* received by Mr Chuene both from ASA and the IAAF for the same events.

82. The evidence confirms that Mr Chuene received a total amount of R464 439.95 regarding *per diem* payments for the period 2007 – 2009. During the same period he received the sum of R264 463.95 from ASA, and R199 975.95 from the IAAF for the same events.

83. Although the evidence of the forensic auditors reflects that they did not find a formal policy prohibiting the acceptance of duplicate *per diem* payments, Chuene was under a duty, as a director of ASA, to act in the best interests of ASA, and when he accepted these duplicate *per diem* payments, he was

[32] Exhibit "DT", pages 130-144; exhibit "DT2" annexures 58-61, annexure 63 and annexure 115.
[33] Exhibit "DC12", pages 20-27.

not acting in the best interests of ASA. It was clear at the time that the financial status of ASA was bleak, and moreover, there was no evidence that Mr Chuene paid any taxes on the *per diems* received from the IAAF.[34]

84. ASA witnesses confirmed that it was against ASA policy for Mr Chuene to accept *per diem* payments from both IAAF and ASA. Letters in this regard were produced as evidence.[35] Indeed, in one of the exhibits, Mr Sindani who was then the CEO, highlighted the requirement of strict financial controls following earlier allegations of financial irregularities and fraud. He states that ASA's auditors required policies to be in place from **1 July 2002** dealing with *per diems*. In the same letter he included a *per diem* policy.

85. In the circumstances, I find Mr Chuene guilty as charged.

CHARGE 14 (CHUENE) AND CHARGE 4 (MR MAPONYANE AND DR DLAMINI [PAYMENT OF PERFORMANCE BONUSES TO CHUENE AND ASA STAFF]

86. This charge relates to the respondents acting contrary to the interests of ASA and in breach of their fiduciary duties and the ASA Staff Manual in that they were party to the approval of the payment of performance bonuses to Mr Chuene and ASA staff members in the absence of any performance assessments, and at a time when ASA was not in a financial position to pay such bonuses.

[34] Exhibit "DC12" and exhibit "DT2", annexure 12.
[35] Exhibits "DC64", "DC65" and "DC66".

87. The forensic auditors led much evidence in this regard and made electronic data dealing with such payments available.[36]

88. The payment of a bonus of R150 000.00 is reflected at exhibit "DT1" pages 121-129.

89. It would appear that only the ASA Finance Committee approved of a bonus of R150 000.00 to Mr Chuene in **November 2007**, and not the full Board as required. Former Board Members also testified in this regard. The ASA Finance Committee has no decision-making powers. It makes recommendations to the ASA Board.

90. Dr Dlamini was part of the ASA Finance Committee which authorised the payment. Indeed, Dr Dlamini appeared to be the chief motivator for such payment and even went to the extent of chastising the former General Manager of ASA when she questioned the bonus. In fact, Dr Dlamini lodged a complaint against the former General Manager which resulted in her having to tender an apology to the Board in respect of the matter.

91. Accordingly, Mr Chuene and Dr Dlamini are guilty as charged.

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[36] Exhibit "DT", pages 25-26.

CHARGE 15 (CHUENE) AND CHARGE 5 (MR MAPONYANE AND DR DLAMINI) [GENERAL SALARY AND HONORARIUM INCREASE TO ALL ASA STAFF AND ASA BOARD MEMBERS IN 2009]

92. This charge deals with a breach of their fiduciary duty on the part of the respondents to act in the best interests of ASA and to avoid any conflict of interest in approving or being party to the approval during 2009 of a general salary increase of 10% for all employees of ASA, and an increase in the honorarium pay to Board Members for their attendance at meetings of ASA from R947.00 to R5 000.00 per meeting, and an increase in the monthly salary of Mr Chuene as Non-Executive President from R19 067.40 to R35 000.00 at a time when ASA's financial position was deteriorating, and it could clearly not afford the said increases.

93. The forensic auditors testified that the relevant minute of an ASA Board Meeting on 13 March 2009 revealed that it was clear that despite the fact that the Board was informed that ASA was in a deficit, and that proposals were required to rectify and change the financial position, the Board nevertheless resolved to implement the increases.[38] In this regard, the respondents are guilty as charged.

[38] Exhibit "DT" pages 149-151, and exhibit "DC12".

CHARGE 16 (CHUENE) [BREACH OF SECTION 424 OF COMPANIES ACT]

94. In my view, this charge relates to charges on which Mr Chuene was already found guilty in that it relates to his reckless and/or fraudulent conduct in contravention of the provisions of section 424 of the Companies Act. This is therefore a duplication of other charges aforementioned.

J. CONCLUSION

95. In conclusion, the respondents either on their own, or acting in concert with Mr Chuene, have been found guilty of a number of serious charges, and have also been found not guilty in respect of others. The charges in relation to which the respondents have been found guilty are very serious charges. However, at this stage I am not required to pronounce on the sanction, and accordingly these findings are submitted to the ASA Board and SASCOC for further action, if any. The ASA Board and the SASCOC Board may either act on it or refer it back to the disciplinary inquiry for the appropriate sanction. In either case, the respondents must first be notified of the outcome, the reasons therefor, and be granted an opportunity to make either written and/or oral submissions in relation to any likely sanction, if any.

DATED at CAPE TOWN and JOHANNESBURG on this 7th day of FEBRUARY 2011.

ADV N M ARENDSE SC
CHAMBERS
CAPE TOWN AND JOHANNESBURG