

DISCIPLINARY HEARING

IN THE INDEPENDENT DOPING HEARING PANEL

established in terms of rule 8.1 of the Anti-Doping Rules made under
the South African Institute for Drug-Free Sport Act, 1997 (Act 14 of 1997)

HELD ON 25 MAY 2017

AT THE HOLIDAY INN EXPRESS JOHANNESBURG-ROSEBANK

In the matter of:

South African Institute for Drug-Free Sport Complainant

and

Demarte Pena Respondent

Before

Prof Steve Cornelius
Dr Rob Collins
Mr Leon Fleiser

Chairperson
Panel Member
Panel Member

RULING

1. The Complainant was represented by Ms Wafeekah Begg, who acted as the Prosecutor in this matter. She was assisted by Mr Farai Razano.
2. The Respondent was present in person and was represented by his attorney, Mr Anthonie van Vuuren. He was assisted by Ms Estee Maman.
3. Mr Calvin Howarth and Mr Graham Cartwell attended the hearing as observers on behalf of Extreme Fighting Championship Africa (EFC Africa).

4. At the outset, the Panel wishes to express its appreciation to the Prosecutor and the Respondent for their thorough preparation, well drafted submissions and honest approach which made it much easier for the Panel to focus on the issues that were actually relevant for this hearing.

Anti-doping rules violation

5. The following facts were common cause:

5.1 The Respondent is a mixed martial arts fighter who is contracted to EFC Africa to compete in certain extreme fighting events. He is a former EFC Africa featherweight champion, but relinquished that title to move into the bantamweight division where he also became the EFC Africa champion. The Respondent has successfully defended his title a record seven times and holds a proud record of 12 wins from 12 fights.

5.2 On 11 November 2016, the Respondent defended his EFC Africa bantamweight title against Irshaad Sayed and, as such, was subject to the rules of EFC Africa, the Professional Mixed Martial Arts Association, Martial Arts South Africa, the South African Sports Confederation and Olympic Committee and the South African Institute for Drug-Free Sport. At this event, the Respondent was requested to provide a urine sample for an in-competition test in accordance with South African Institute for Drug-Free Sport Anti-Doping Rules 2016 (the Rules).

5.3 The urine samples were submitted to the Doping Control Laboratory in Ghent (the Laboratory), which was, at the time, a laboratory accredited by the World Anti-Doping Authority (WADA).

5.4 An analysis of the A-sample returned an adverse analytical finding in that it revealed the presence of Testosterone and one of the diols, in the A-sample.

6. Testosterone and its diols are prohibited substances in terms of article 4.1 of the Rules read with the 2016 WADA List of Prohibited Substances and Methods (the WADA List) and are listed under category S1 Anabolic Agents and as such, do not constitute Specified Substances in terms of article 4.2.2 of the Rules.

7. Article 2 of the Rules provides inter alia:

“The following constitute anti-doping rule violations:

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

2.1.1 ...

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two (2) bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

8. The Complainant notified the Respondent of the adverse analytical finding in a letter dated 15 February 2017 and, since Testosterone and its diols are not specified substances in terms of article 4.2.2 of the Rules, the Respondent was provisionally suspended from participation in any sport as from the date of the notification. The Respondent did not dispute the adverse analytical finding and waived his right as contemplated in article 7.3.2 to have the B-sample tested.

Finding on anti-doping rules violation

9. The Panel finds that the Respondent is guilty of a violation of Article 2.1 of the Rules in that an analysis of the Respondent's urine sample taken during an EFC Africa event on 11 November 2016, returned an adverse analytical finding in that it revealed the presence of Testosterone and one of its diols, in his urine sample.

10. For reasons that will become apparent below, the Panel further finds that the anti-doping rule violation was not intentional, as contemplated in article 10.2.1.1 of the Rules.

Appropriate sanction

11. Article 10.2.1 of the rules provides *inter alia* that the period of eligibility shall be four years where the anti-doping rule violation does not involve a specified substance, unless the athlete can establish that the anti-doping rule violation was not intentional.

12. Article 10.2.2 of the Rules provide if article 10.2.1 does not apply, the period of ineligibility shall be two years. Article 10.5.1.2 provides for a reduction of the period of ineligibility where the prohibited substance involved came from a contaminated product and the Respondent can establish that there is no significant fault or negligence.

13. The Prosecutor correctly submitted that for the Panel to reduce the period of ineligibility in terms of article 10.5.1.2, the Respondent must establish:

- a How the prohibited substance came to be in his system.
- b That there was no intent or recklessness.
- c The degree of fault on the part of Respondent.

In this regard it is important to note that article 3.1 of the Rules provides that where the Rules place the burden of proof upon the athlete to establish specified facts or circumstances, the standard of proof shall be by balance of probability.

14. To this end, the Respondent denied that he had knowingly taken any banned substance. He explained that he was a professional mixed martial arts fighter who took great pride in his record as EFC Africa champion. He ascribed his success to the fact that he followed a healthy lifestyle, took good care of his body and trained very hard.

15. The Respondent explained that he had to work hard to keep his weight down so that he could compete in the bantamweight division. To this end, he also employed the services of Mr Rory Diesel, a sports nutritionist, who developed comprehensive meal plans for the Respondent. Because the respondent was not able to get sufficient nutrients from his meals to sustain his intense training, Mr Diesel also recommended that he should supplement his diet. For this purpose, the Respondent took a variety of vitamin, mineral and other supplements. These included *GH Freak* and *Test Freak* produced by Pharma Freak, *Libido & Performance Enhancer for Men* produced by SOLAL Healthy Aging Specialists, and *Testoforte for Stamina* produced by Biogen.

16. The Respondent further explained that he was sponsored by Biogen, a producer of various vitamin and supplements products. In terms of this relationship, Biogen would pay the Respondent a monthly retainer to promote the Biogen brand and provide the Respondent with a monthly allowance that he could spend on Biogen

products at any Dischem outlet. Biogen assured the Respondent that their products were safe to use and that they did not contain any substances listed in the WADA List.

17. The Respondent indicated that, since he was a professional athlete, he had come into the habit of always checking the labels of substances to ascertain the ingredients of those substances. He searched the Internet for any indications that any of the ingredients were on the WADA List, he consulted with fellow athletes to determine if they had any knowledge of the particular ingredients and he consulted his nutritionist to confirm that he was taking appropriate and safe supplements. He also noted the fact that both Biogen and Pharma Freak had existing sponsorship agreements with various professional athletes. That gave him confidence that their quality control measures were adequate to ensure that the supplements were not contaminated with substances on the WADA List.

18. The Respondent kept meticulous records and was able to provide the Panel with a breakdown of all the supplements he had taken since November 2015. In addition, the Respondent submitted his full meal plan, prepared by his nutritionist, for the period leading up to the title fight on 11 November 2016. This gave a detailed insight into the meals, energy drinks and supplements taken by the Respondent in the days leading up to the fight. Far from showing an athlete who is careless or reckless in what he consumes, the depth of information provided to the Panel by the Respondent speaks of an athlete who is meticulous in his preparation for a fight, seeks professional advice and takes great care in what he consumes during such preparation.

19. It is also significant that the Respondent testified that he knew that he would be subjected to an anti-doping test after each fight. He had undergone such tests on ten occasions in the past and these tests have not returned any adverse analytical findings. This was despite the fact that, at the time of some of these tests, the Respondent had used the same supplements that resulted in the ill-fated sample collected on 11 November 2016.

20. After the adverse analytical finding, the Respondent sought to have his supplements analysed to determine whether any of these supplements contained any substance that could account for the adverse analytical finding. With the intervention of the Complainant, the supplements were submitted to the Doping Control Laboratory in Bloemfontein for analysis. This revealed that the Biogen *Testoforte* sample which

was submitted for analysis, contained 4-Androstene-3, 17-dione. Similarly, one of the *Test Freak* samples submitted for analysis, also contained 4-Androstene-3, 17-dione. Significantly, though, a second sample of *Test Freak* submitted for analysis did not reveal the presence of any substance on the WADA List. The presence of 4-Androstene-3, 17-dione in the supplements is consistent with the analytical finding that the urine sample of the Respondent revealed the presence of Testosterone and one of its diols.

21. The Prosecutor sought to show that the Respondent could have done more to satisfy himself that the supplements he had taken was safe and contained no substances on the WADA list. To this end, she questioned the Respondent on the pharmacological action of some of the ingredients listed on the labels of the supplements he had taken. In particular, she focussed on Tribulus Terrestris, which is a herbal substance that is reputed to increase testosterone levels. The Panel did not find this line of questioning helpful. Firstly, there is no evidence to suggest that the Tribulus Terrestris is responsible for the adverse analytical finding. In fact the evidence suggests quite the opposite. The adverse analytical finding indicates an exogenous source of Testosterone, whereas Tribulis Terrestris is purported to cause an increase in endogenous testosterone. Secondly, while it should be expected of a professional athlete to be familiar with the WADA list and to be able to identify ingredients in a supplement which is on the WADA list, the Panel is of the view that it goes too far to expect of an athlete to also understand the exact pharmacological action or pharmacokinetics of every single ingredient listed on the label of a supplement. Such an approach would effectively expect of all athletes to become pharmacologists.

22. The Prosecutor also questioned the Respondent with regard to the warnings printed on the labels of the supplements and posted on webpages where the supplements are advertised. The Panel also did not find this helpful. These warning cautioned against the use of the products concerned if the prospective user suffered from a range of medical conditions, such as hormone disorders, diabetes, liver or kidney disease and others. The Respondent replied that none of these listed conditions applied to him and therefore he did not see the need to consult a health care practitioner as recommended in the warnings.

23. The Prosecutor also justifiably questioned why the Respondent apparently did not declare the use of these supplements on his doping control form. The Respondent replied that the urine sample was taken shortly after a very gruelling fight which had gone the full distance of five rounds. He was tired and in some measure of pain and his state of mind was not as clear as it would have been if the test had been taken before the fight. Secondly, the Respondent indicated that he listed some supplements generically because of limited space on the doping control form. So for instance, he specified "multivitamins" without giving the details of each vitamin supplement. Similarly, he listed "testo booster" to refer to the Biogen Testoforte and Pharma Freak Test Freak. He also listed "Tribulus", which refers to Tribulus Terrestris, an ingredient in both these supplements. The Panel is satisfied that the Respondent has adequately explained the apparent omission on his doping control form.

24. In terms of Appendix 1 to the Rules, "No Significant Fault or Negligence" means:

The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the anti-doping rule violation.

The criteria for "No Fault or Negligence" is that the athlete

did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance.

25. Based on the totality of the evidence before the Panel, the Panel concludes that the Respondent has established how the prohibited substance came to be in his system. He submitted meticulous records which revealed that he had taken supplements which was later shown, through chemical analysis, to contain the exact substance that would account for the specific adverse analytical finding returned in his case. The athlete also established that he had not wilfully taken any substance on the WADA list. This was not disputed by the Prosecutor. The Respondent conducted his own research into the safety of the supplements used, he discussed it with fellow athletes and even sought expert advice from a sports nutritionist. He relied on reputable companies that are known for the quality of their products and involvement in sport. The Respondent had used the supplements in the past and has passed various anti-doping tests. Lastly, the Respondent provided detailed information with regards to his diet, use of supplements and training regimen in the weeks leading up

to the fight where the ill-fated urine sample was collected. The Panel concludes that, based on the depth of evidence provided by the Respondent, the Respondent had shown the utmost care and that there is little more that he could have done to ensure that the supplements he used was safe, with the result that the Panel finds no significant fault or negligence on the part of the Respondent.

Disqualification of results

26. Mr van Vuuren argued on behalf of the Respondent that, if the Panel should find that there was no significant fault or negligence in respect of an anti-doping rule violation, article 9 of the Rules, which provides for disqualification of results, should not apply. Article 9 provides:

An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

Mr van Vuuren based his arguments on the Comments in Appendix 3 to the Rules in respect of article 9, which reads:

Article 9: For Team Sports, any awards received by individual players will be disqualified. However, Disqualification of the team will be as provided in Article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one (1) or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.

In particular, he relied on the use of the expression “committed an anti-doping rule violation” in this comment and submitted that this expression denotes that there must be some measure of significant fault or negligence.

27. The Panel finds this argument unpersuasive. The comment deals with the application of article 9 in the context of teams sports and is therefore not applicable in the present matter which involves an athlete participating as an individual. Furthermore, article 9 is very clear that an “anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition”.

28. According to the *Concise Oxford Dictionary* “automatic” means “(of a penalty or legal sanction) necessary and inevitable, as a result of a fixed rule or particular set of circumstances” and “automatically” has a corresponding meaning. As a result, the

disqualification of the result in the competition concerned, with all the resulting consequences in terms of article 9, is a necessary and inevitable consequence of the anti-doping rule violation. The Panel has no discretion to decide otherwise.

Finding on appropriate sanction

29. The panel finds that in terms of article 10.5.1.2 of the Rules, the Respondent has established in respect of the anti-doping rule violation which does not involve a specified substance, that there is no significant fault or negligence.

30. In determining the appropriate sanction, the panel also takes into account the fact that the Respondent has, by the time of this hearing, been under provisional suspension for a period of more than three months, as well as the fact that the results of the fight on 11 November 2016 is disqualified, with the consequence that the Respondent will forfeit his EFC Africa bantamweight title and the prize money he received.

31. Accordingly, the Panel rules that the appropriate sanction in this case is a reprimand and no further period of ineligibility.

Ruling of Panel

32.1 It is the ruling of the Panel that the Respondent is guilty of a violation of Article 2.1 of the Rules, but that the violation was not intentional.

32.2 It is the further ruling of the Panel that the Respondent established that there was no significant fault or negligence and that the Respondent therefor receives a reprimand with no further period of ineligibility.



Prof Steve Cornelius
Chairperson



Dr Rob Collins
Panel Member



Mr Leon Fleiser
Panel Member

Johannesburg
25 May 2017