IN THE MATTER BETWEEN:

CASE NO.: SAIDS/2017/01/21

SOUTH AFRICAN INSTITUTE FOR DRUG – FREE SPORT (SAIDS) **COMPLAINANT**

And

TUMISANE MADIBA **RESPONDENT**

RULING BY TRIBUNAL

THE PARTIES

The Complainant is South African Institute for Drug-Free Sport (SAIDS) a public entity established in terms of Act No. 14 of 1997, its objective is to promote participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance.

1. SAIDS has accepted the World Anti – Doping Agency (WADA) Code and it implements its anti-doping rules in accordance with the Code. The rules apply to South African Mixed Martial Arts (MMA), and to the Respondent by virtue of being a registered player under (MMA) and Extreme Fighting Championship (EFC).

2. The Respondent is Tumisane Madiba, a Mixed Martial Arts fighter.

INTRODUCTION

3. On 8 April 2017, the Respondent submitted "A" and "B" urine sample ("4012173") after an in-competition test in accordance with SAIDS Anti-Doping Rules and WADA code.

4. The aforementioned urine samples were forwarded to the Doping-Control Laboratory, Gent (Laboratory).

5. The Laboratory provided analytical report on Respondent's "A" sample which confirmed the presence of Carboxy – THC with concentration measuring 429 ng/ml, which is greater that the WADA's limit of 180ng/ml.

6. On 25th July 2017, SAIDS charged the Respondent with an anti – doping rule violation in terms of Article 2.1 of the SAIDS Anti – Doping Rules of 2016.

7. Set out below is the relevant facts and allegations based on the parties' written submissions, viva voce evidence adduced at the hearing, various correspondence and documents, legal arguments and Case law which the Panel considered in coming to its conclusion on the matter.

BACKGROUND FACTS

The doping test on 8th April 2017

8. On 8th April 2017, the Respondent participated in a fight which took place under the auspices of (MMA).

9. Immediately after the aforesaid event, the Respondent was informed by Doping Control Officer from SAIDS, Mr Sphesihle Zondo that he had been selected to undergo Mandatory Doping Control Test.

10. The Respondent went through the test by submitting to the Control Officer his Urine Sample "A" and "B" which was taken to Doping Control Laboratory Gent.

11. The Laboratory furnished an Analytical Report which confirmed the presence of Carboxy – THC with a concentration measuring 429 ng/ml in the Respondent's Urine Sample "A" [4012173].

12. As a result of the presence of prohibited substance in the Respondent's Urine Sample, SAIDS notified the Respondent on 25th May 2017 about the adverse analytical findings. It is common cause that the Respondent did not undertake the analysis of his "B" Urine Sample.

13. Pursuant to the Analytical report, and the charge levelled against the Respondent, the Respondent on 2nd June 2017, volunteered to take provisional suspension pending the finalization of the charges against him.

14. On 25 July 2017, the Respondent was formally charged with Anti-Doping rule violation.

PROCEEDING BEFORE THE PANEL

15. On 25 July 2017, the Respondent was formally charged for violating anti-doping rules in terms of Article 2.1.

16. The hearing was convened on Tuesday 12th September 2017, at 17H30 and at Holiday Inn Express, The Zone, 187 Oxford Road, Rosebank, Johannesburg.

17. The hearing Panel constituted of Sunny Nameng as the Chairperson, Professor Yoga Coopo and Professor Christa Janse Van Rensburg as panel members.

18. The case was prosecuted by Wafeeka Begg.

19. The Respondent was represented by Advocate Anthony Van Vuuren and Ms Estee Maman from MAMAN Attorneys.

20. The charge of anti-doping rule violation was read to the Respondent by the prosecutor.

21. The Respondent gave *viva voce* evidence including under cross-examination.

THE ISSUES FOR DETERMINATION BY THE PANEL

22. Whether the Respondent was not negligent in committing Anti – Doping Rule violation;

23. If so, what would be the appropriate sanction for illegibility and/or suspension.

THE RELEVANT RULES

24. The Panel in conducting the hearing was guided by the rules of SAIDS, on Anti – Doping Rules more in particular Article 2.1 of the 2016 Anti – Doping Rules, which deals with

    Anti – doping rule violations which applies to the Respondent by virtue of him participating Under the umbrella of both MMA and EFC which are governed by this Rules.

25. Article 2.1, 2.1.1 states that, it is each Athlete's personal duty to ensure that no prohibited substance enters his/her body. Athletes are responsible for any prohibited substance or its

metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's report be demonstrated in order to establish an anti – doping rule violation.

26. In terms of Article 2.1, 2.1.2, sufficient proof of an anti-doping rule violation under Article 2.1 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.

27. *WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List:*

27.1 A substance or method shall be considered for inclusion on the Prohibited List of WADA, in its sole discretion, determines that the substance or method meets any two of the following three criteria:

27.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method alone or in combination with other substances or methods, has the potential to enhance sport performance.

27.1.2 Medical or other scientific evidence, pharmacological effect or experience that the use of the substance or method represents an actual or potential health risk to the Athlete.

27.1.3 WADA's determination that the use of the substance or method violates the spirit of sport described in the introductions to the Code.

SUBMISSIONS BY THE PARTIES

Submissions by Counsel on behalf of Respondent were as follows:

28. The Counsel submits that the Respondent admitted the anti-doping rule violation and as a result of the Respondent respecting SAIDS rules requested to be placed on voluntary, temporary suspension pending finalization of the hearing against him.

29. The Respondent admitted to consumption of Cannabis by various means.

30. The Respondent was not facing a charge at the hearing of the 12th September 2017, which pertains to so called "habitual" or "recreational" use of Cannabis out of competition and away from MMA events in which the Respondent is participating.

31. The Respondent's conduct should therefore not be seen in light of the contents of paragraph 30 above and further, the question of sanction should also not be determined from the inappropriate premise.

32. Accordingly, the actual purpose of the hearing was for the sitting panel to determine the Respondent's negligence, if any, that resulted in the concentration of Cannabis Metabolites in the Respondent's system at a higher level than is permitted by World Anti-Doping Agency (WADA), arising from an in-competition test.

33. WADA permits Athletes to have urinary concentration of Carboxy – THC up to 180 ng/ml. WADA does not prescribe prosecution of athletes based on "habitual" or recreational" conduct alone and it would be inappropriate for the matter to be approached on the basis of absolute prohibition and a concomitant guilt due to "habitual" or "recreational" use.

34. The Respondent prays for a lesser sanction of more than six (6) months for ineligibility, which period includes the period of voluntary suspension.

35. The Counsel for the Respondent referred the Panel to the following cases: -

35.1 United States Anti – Doping Agency (USADA) v James Howell, 2016. The Athlete tested positive for Carboxy-THC and sanctioned for six (6) months which was later reduced to three (3) months.

35.2 USADA v Angelique Matsushima, 2017. The Athlete tested positive for Carboxy-THC and was sanctioned for six (6) months which was later reduced to three (3) months.

35.3 USADA v Kelvin Gastelum, 2017, the Athlete tested positive for Carboxy-THC and was sanctioned for six (6) months which was reduced to three (3) months and USADA v Riley Stohr, who was also sanctioned for six (6) months.

36. In light of the abovementioned cases, the consumption of prohibited substances took place out of competition and the Athletes were at fault for not ensuring that the prohibited

substances had cleared from their system.

37. The panel came to the conclusion that the Athlete's degree of fault was not significant to warrant punitive and unreasonable sanctions, consequently the sitting should grant a comparable sanction.

38. The panel should consider the evidence presented by the Respondent as true and accepted on the balance of probabilities. That the Respondent was a credible witness, sincere and candid, never contradicted himself even under cross-examination.

39. The panel members overlooked the contents of paragraphs 8.17 -8.19 where the Respondent disclosed use of Marijuana and Cannabis.

40. The Respondent's personal circumstances which he testified on should be taken into account, which include the Respondent's underprivileged upbringing, being a bread winner in his family and the common misconception that Cannabis was no longer illegal and was generally available for usage.

41. That he consumes Marijuana periodically as a result of his religious beliefs as a Rastafarian and the Respondent cannot be prejudiced for exercising his right to practice his own religion.

42. The Respondent used alternative methods of pain management being the use of Marijuana and Cannabis as are well documented to have analgesic and anti-inflammatory properties
to treat his toothache and the pain as a result of a grievously spider-bite.

43. The Respondent received Marijuana and Cannabis oil from acquaintances as he was unable to afford it and reject a proposition to the effect that he would have used Marijuana and Cannabis regardless of his financial and socio-economic circumstances.

44. It is submitted that the reasonableness of the Respondent's conduct must be viewed in the light of a reasonable person in the Respondent's position under these same circumstances and should not be viewed with the benefit of hindsight and from the perceived disconnect of a person who is not in a similar position.

45. The Respondent did not intend to use Cannabis for any performance enhancing capabilities and reject any proposition that an MMA athlete would gain any form of advantage or enhancement to his/her performance through consumption of Cannabis.

46. The Respondent acknowledged that, despite legal questions surrounding Cannabis, he was aware that Cannabis was prohibited by SAIDS in-competition as such the Respondent stopped using the product and replaced it with a significantly less effective permitted pain treatment medicine, which is Panado.

47. The Respondent submits that he is already taken steps to attend a drug awareness programme and is awaiting the Counselor form ICAS.

48. The Respondent is not different to the athletes who have been sanctioned in previous cases. To sanction the Respondent in an excessively harsh manner would not be line with the norm of how athletes are dealt with in these particular circumstances and the Respondent ought be given a fair sanction. The consequences of a severe sanction would be tantamount to a terminal sentence to his hopes and dreams.

SUBMISSIONS BY SAIDS PROSECUTOR

49. SAIDS submits that the Respondent is guilty of having violated anti -doping rule.

50. In the initial submissions by SAIDS, they prayed for a sanction of twelve (12) months Ineligibility, however, pursuant to the testimony of the Respondent and the Respondent's having to provide his submissions after his testimony, SAIDS was provided with an opportunity to supplement its submissions.

51. In its Supplementary Submissions, SAIDS prays for more sanction of eighteen (18) months.

52. SAIDS further submits that there is no argument provided by the Respondent as to why a reference to Case law of twelve (12) months sanction should not be considered.

53. There was no evidence given that the Respondent is a Rastafarian and he smokes Marijuana twice a week until he admitted under cross – examination.

54. The Respondent mentioned in his statement that Carboxy-THC could also have entered his system as a result of second hand inhalation smoke. At no point has the Respondent disclosed to SAIDS or EFC that he is a Rastafarian.

55. The Respondent had failed to disclose on the Doping Control Form (DCF), Carboxy-THC.

56. The Respondent's financial situation, his moving to Paarl, is not the reason to have tested positive for Carboxy-THC. No evidence was produced by the Athlete regarding his bank account for the month of March/April 2017, which would have showed that the Respondent indeed did not have the money.

57. The Respondent has at no stage stated that the Marijuana he smokes twice a week was given to him freely by acquaintances like the Cannabis oil given to him freely to treat his Spider-bite and toothache. The inference is that the Respondent is a Rastafarian.

58. SAIDS submits that had the Respondent mentioned in his two written statements provided by him that he smokes Marijuana for religious and custom purposes, they could have conceded. The Respondent could also not disclose under his evidence in chief that he is Rastafarian and/or smokes Marijuana for recreational purposes.

59. The Respondent relied on analgesic and anti-inflammatory properties Marijuana and Cannabis oil offers, however, the Respondent failed to provide the Panel with a medical journal and/or an expert in the field.

60. The Respondent failed to go to the government clinic which provides free medication.

61. It is more about what would a reasonable and elite athlete do under the circumstanced and not turn into using illegal substances whilst there are other means of resources.

62. The Respondent is not a medical expert on the effects of Marijuana on his performance, no proof that it diminished his performance.

63. The Respondent's body can endure more fights than the rest of the athletes because his body is not fully able to process his pain threshold due to the content of Carboxy – THC in his system.

64. The Respondent claims to be naive pertaining to prohibited substances and, yet he knows how long Carboxy-THC can last in the system and can manage the accumulation of the Metabolites to ensure that he does not test positive.

65. The Respondent is fully aware of anti-doping workshops, education offered by EFC and he has received such workshops and education.

66. If the Respondent is not a Marijuana user but smokes it for religious beliefs then ICAS will Not be able to help him to change his religion.

67. The Respondent had a financial set-back until he fights. He should have requested for a loan from either his Coach or Manager, which he did not. If, in fact the Respondent is naive, he would not have avoided taking alternative generic medicine in order to ensure that he does not fall foul of the SAIDS rules regarding prohibited substances.

68. The panel should not consider leniency to an athlete who intentionally dopes that is aware of anti-doping rules and regulations.

69. The substance found in the Respondent's urine sample is a prohibited substance in-competition only, falling within category 5.8 on the WADA prohibited list.

70. SAIDS has established violation of anti-doping rule and in considering appropriate sanction, the panel should apply Article 10.2.1.2 and the period of ineligibility shall be two (2) years.

71. When one refers to the definition of fault, factors to be taken into consideration in assessing the degree of fault, include whether the athlete was a minor, experience, degree of risk and level of care by the athlete. In assessing degree of fault, the circumstances considered must be specific and relevant to explain the departure from the expected standard of behavior.

72. The Respondent is not a minor, he is an elite athlete and has been fighting in MMA since 2005. By virtue of being contracted to EFC, he is aware of anti-doping rules and regulations, and the purpose it serves.

73. In terms of the definition of no fault or negligence, the athlete who establishes that he/she did not know or suspect and could not reasonably have known or suspected even with the

exercise of utmost caution, that he/she had used or administered the prohibited substance must establish how the prohibited substance entered his/her system.

74. The reasons why Marijuana and Cannabis meet the criteria of the WADA prohibited list for performance enhancement, health risks and violation of the spirit of the sport is because Cannabis cause muscle relaxation and reduce pain during post work recovery. It Decreases anxiety and tension, resulting in better sport performance under pressure.

75. It can increase focus and risk-taking behavior, allowing athlete to forget bad falls or previous trauma in sport and push themselves past those fears in-competition.

76. The smoking of Marijuana raises the heart rate which can increase the risk of heart attack.

77. Due to the illegal use of Marijuana in most countries, the use of it does not exhibit the Ethics and moral judgment that upholds the spirit of sport.

78. SAIDS referred the panel in its submission to the following cases, NADO FLANDERS 2017
Disciplinary Commission 2017/002T whereby the athlete tested positive for the prohibited substance.

79. The athlete admitted having smoked joints. The commission concluded that the athlete was a long-term Cannabis use and that the use was non-intentional.

80. The further cases SAIDS referred to include CAS 2008/A/1565 WADA v CISM & FEDERICO TURRINI, P v INTERNATIONAL TENNIS FEDERATION.

EVIDENCE OF THE RESPONDENT

81. The Respondent testified *viva voce* as follows: -

82. He testified before the Panel that he had acquainted himself with the rules of SAIDS and he had not tested before the testing of 8th April 2017. He adheres to the principle of anti-doping in Sports.

83. He testified that his preparation for the fight of the 8th April 2017 against Irshaad Sayed,

was the worst camp ever, everything went wrong because of injuries, illnesses and worrying about family.

84. He has financial constraints as almost his family depend on him financially. He relocated to Cape Town in order to make more money.

85. He had bad toothache and at clinic they said is abscess. He had a spider bite close to the date of the fight which caused swollen leg.

86. He only consulted with the Dental Surgeon on 12th and 21st April 2017, for the treatment of abscess as he didn't have the money to consult with the Doctor on the dates prior.

87. He presented pictures of the swollen leg and confirmed that the pictures were taken by his Coach Mr John McGrath on 22 March 2017.

88. He was able to visit the Doctor on 22nd March 2017, regarding Spider-bite as he had obtained financial assistance from one of his Sponsors, Lapace.

89. The Spider-bite caused extreme swelling on his leg and caused water retention. He could not train, he could barely walk and couldn't prepare optimally for the fight.

90. The amount he received from the Sponsor could only cover for consultation. The toothache and Spider-bite became unbearable during the camp which was almost three weeks before the fight.

91. He testified that he didn't have medical aid or other type of health insurance that could facilitate doctor's visits or treatment and as such he was forced to address the pain on an alternative fashion.

92. He used Marijuana and Cannabis oil as a pain management tool and not as performance enhancement.

93. He specifically testified that he never felt that he gained any performance enhancement after consuming both Marijuana and Cannabis.

94. In the doping Control Form he testified that the medication he consumed during the past seven days prior to the date of testing was Panado and he also took pure Hemp Seeds and

pure Hemp protein Supplements.

95. He had not disclosed that he took Marijuana and Cannabis oil as he had taken them about eight or nine days before the in-competition testing and had replaced them with Panado with the assumption that it would clear from his system at the time of the in-competition testing.

96. He testified that his perception was that domestic use and private use of Marijuana was acceptable by the Constitution according to what he read and what everybody was saying, especially after the Western Cape High Court judgment on the legal use of Marijuana.

97. He only realized that he was ill – informed after he received legal advise on the judgment of the Western High Court regarding the use of Marijuana.

98. He was exposed to people smoking Cannabis and it would be inevitable to be exposed to second hand smoke as a result of living conditions.

99. He admitted that he does not have any specific scientific knowledge or education regarding the pharmacological actions of Cannabis or THC and how it is metabolised in the system, or how it is eventually excreted from the system or the specific pathways involved.

100. He is prepared to take part in a drug awareness and management programme. He contacted SANCA, ARC and Mighty Wings, but was told that he does not qualify for what they would consider addiction and they are more focused on addiction rehabilitation than drug awareness and management.

101. After the adverse analytical finding, he took voluntary suspension as he respect the findings of SAIDS and he didn't want to compete and risk being seen as a cheater. At that time, there was a bout he had to participate in at Sun City on 8th July 2017, against Gareth Buirski. When he got pulled out of the bout of 8 July 2017, effectively he lost all the money that could have come through.

RESPONDENT'S EVIDENCE UNDER CROSS - EXAMINATION

102. During cross – examination, the Respondent testified as follows: - that, in terms of (EFC) Contract, the athlete needs to inform Graeme Cartmel of any injuries.

103. He felt, he could not disclose the injuries to EFC as he would have been pulled out of the bout as he needed the money and could not afford not to fight.

104. He confirmed that he receives communication from EFC with regard to anti – doping education, workshops, communication via email and WhatsApp for the past couple months and of late.

105. His understanding of anti – doping rules is to catch cheaters out. To make sure athletes are not cheating and they are not using steroids.

106. He used Cannabis oil to manage the pain from both toothache and the Spider- bite.

107. He was given the advice to use Cannabis oil by friends in Cape Town who called themselves Raggies.

108. After receiving the advise from friends he never verified the information with a Sports physician, medical doctor, SAIDS or EFC as he read in the media that Cannabis had been legalised.

109. He smokes Marijuana from time to time for recreational purposes and for his belief.

110. He didn't pay for Cannabis oil, it was given to him by a friend and never questioned the contents because he wanted to fight and was looking for a quick fix.

111. On why he had to explain in 10-page letter instead of 2-page letter as he knew that he was smoking Marijuana twice a week and taking Cannabis oils. He testified that it's because he wanted to give the factors as to why the Cannabis was in his system.

112. He admitted that living a healthy life-style does not include smoking Marijuana.

113. He was already smoking Marijuana prior to the Western Cape High Court Judgment.

114. When the Respondent was specifically asked about the contents of his letter of 3rd July 2017, more in particular paragraph 8.14 at page 24 of the bundle which states, "I also could not seek medical assistance for number of reasons – first, I was financially not in a position to pay for an operation to remedy the toothache and, secondly, I was not personally willing

to seek treatment by medicines which would place me at risk of the SAIDS rules and regulations pertaining to "anti-doping". The Respondent admitted the contents.

115. He admitted to be correct that he took advice from lay people like his Coach on consumption of supplements like hemp protein powders. He would not take medicines from doctors because of the risk of SAIDS rules and regulations. He was under the assumption that the High Court having legalized Marijuana, it would be permissible even under SAIDS, as SAIDS operate under the South African Constitution.

116. He had a spider-bite during the 19th or 20th March 2017 and consulted the doctor on 22 March 2017.

117. He testified that he stopped taking Cannabis eight or nine days before the fight and started taking Panado because he thought the Cannabis would clear.

118. The reason why he wanted the Cannabis to clear is because he knew it was illegal to take it, in-competition.

UNDISPUTED FACTS

119. The following facts appear to be common cause or at least are not in dispute: -

(a) The Respondent underwent a mandatory in-competition test on 8th April 2017.

(b) The Respondent's Urine Sample "A" and "B" collection was conducted by an authorized doping Officer.

(c) The Respondent's Urine Sample "A" [4012173] tested positive for prohibited substance.

(d) The Laboratory that analysed the Respondent's Sample is a WADA accredited laboratory.

ANALYSIS OF EVIDENCE

120. In light of the above evidence and submissions made, and the Panel wish to first analyse

and summarise the evidence, as set out below: -

120.1 The Respondent placed before the Panel an oral evidence about his personal financial circumstances, which evidence maybe true or false. It was incumbent on the Respondent to ensure that he adheres to the principle "he who alleges must prove".

120.2 Firstly, it is important to deal with the oral evidence of the Respondent regarding his personal financial circumstances, although such evidence relates more towards mitigating factors as far as the sanction is concerned.

120.3 The two important questions one has to ask is: -

120.3.1 Whether the personal circumstances of the Respondent led him to violate anti-doping rule and;

120.3.2 Should the Panel consider the Respondent's personal circumstances when it passes its sanction.

121. If the question in (120.3.1) above is in the affirmative, then the Panel would be required to consider the relevance of such evidence on the basis of the charges against the Respondent and evidence which led the Respondent to have violated the anti-doping rule.

122. The Respondent in his evidence-in-chief and cross – examination stated that, he took the prohibited substance in order to alleviate a pain as he could not afford conventional medicine. However, the Respondent under cross-examination went further and stated that he also take Marijuana for recreational and for his beliefs, twice a week. Secondly, he was not personally willing to seek treatment by medicine which would place him at risk of SAIDS rules.

123. The Respondent failed to take the Panel into his confidence more so that he has presented himself as a person who struggles financially on how he affords to purchase Marijuana which he smokes for recreational and for his beliefs although he was able to demonstrate on how he acquired Cannabis oil which he used to alleviate the pain.

124. As a result hereof, the Respondent has failed to prove on how his personal circumstances

led him to violate anti-doping rule violation.

125. With regard to question (120.3.2) above, it is always significant for any presiding officer and/or a panel empowered to hand over a judgment or sanction to consider the personal circumstances of the accused person (in this instance, Respondent).

126. The Respondent provided oral evidence about his personal circumstances. It must be noted that, the Respondent never provided documentary proof and/or witnesses to demonstrate and collaborate his testimony.

127. What the Respondent needed to realise is that any person who is accused of anti-doping violation can, before the panel, say anything about his/her personal circumstances like the Respondent did. However, what is of importance is for that person to ensure that, he takes the hearing panel into his confidence. The onus is on that person and such onus cannot be discharged by just telling the presiding officer and/or the panel.

128. It was up to the Respondent to provide documentary proof and/or call witnesses, maybe a family member, his Coach or someone who knows his personal circumstances to testify on his behalf.

129. It is still puzzling that the Respondent failed to call any witnesses to collaborate his testimony on his personal circumstances, more so that the Respondent relied heavily on such testimony.

130. To consider and accept the evidence of the Respondent in this regard would open flood gates of "yes I have financial problems, I come from a poor background, I had to break the law because I cannot afford".

131. The Respondent submitted that he stopped taking Marijuana and Cannabis oil days before the fight because he believed that by the time he fights the prohibited substance would have cleared from his body or system.

132. The Respondent admitted that he is not a scientist or expert in medical field and his assumption was misplaced and incorrect.

133. It is quite clear from the Respondent's evidence that he was already fully aware prior to

him taking part on the fight of the 8th April 2017, that the Marijuana and Cannabis oil were prohibited substances, hence he alleged to have stopped taking them days before the fight.

134. The legal advise the Respondent received towards the preparation of the hearing of 12th September 2017, that his assumption was incorrect is neither here nor there, it simply happened after the fact. The Respondent already knew the consequences.

135. The Respondent submission is that he took both Marijuana and Cannabis oil out of competition. However, for some reason unknown to the Panel, or even SAIDS, he fails to justify how Carbonyx - THC level was way too high even after he had stopped taking it eight or nine days before.

136. It must be noted that the Respondent on his letter to SAIDS, dated 3rd July 2017, at paragraph 11.2, page 26 of the bundle, he specifically stated the following: the advises of a suitable medical or physiological expert who can, if necessary, assists me in furtherance of my submissions that the amounts of THC Metabolite in my system was a result of build-up due to historical consumption of Cannabis, and also that it was not a substance consumed for purposes of enhancement of my performance.

137. The Respondent had already alluded that he is not an expert and secondly at paragraph 11.2 of his letter mentioned above, he already knew at least in July 2017, that the expert is needed though he said if necessary, however, the Respondent fails to call an expert witness, simply because he could say to the Panel that he did not have financial means to do so *alternatively* as per the contents of his letter of 3rd July 2017, "was not necessary".

138. Once again, according to the Respondent, the financial situation of the Respondent was critical in calling or not calling an expert witness. However, despite the importance of his evidence on his financial position, he fails to call witnesses or provide documentary proof regarding his financial situation. This in fact, is evidence for it to be proved satisfactory, it didn't require the Respondent to be in a healthy financial situation to call a person close to him who knows his financial position.

139. The Respondent suffered from a severe toothache, weeks before the fight of the 8th April 2017, as a result he resorted to alternative means in order to alleviate the pain as he could not afford to consult the doctor.

140. What is of interest, the Respondent fails to demonstrate to the hearing panel the steps he took in trying to secure finances for him to be able to consult a doctor. He never informs anyone including his Coach except for his friends who allegedly provided him with Cannabis oil.

141. He was able to advise the Coach about the Spider – bite where after the Coach was able to accompany him to the doctor.

142. The Respondent made it clear that he is a habitual smoker of Marijuana and does that almost twice a week, whether in-competition or not, is immaterial as far as the evidence regarding his financial position is concerned., which ever way he is able to afford it except when he is sick.

143. He further made it clear that he was not willing to seek medical treatment because it would have placed him at risk of SAIDS rules and regulations pertaining to anti-doping rules.

144. The Respondent by failing to call any witnesses made him the only witness who could provide evidence about the charges against him which in the Panel's view did not do him a favour.

145. His evidence was expected to be clear and satisfactory in every material respect. The Panel is obliged to accept the evidence if it is satisfied that it is truthful.

146. The Respondent also need to remember that adverse analytical findings as per the laboratory report is a *prima facie* proof of anti – doping rule violation, which then compels the Respondent to ensure that such *prima facie* evidence is dispelled.

147. In fact, the Respondent's evidence cries out for corroboration if one has to make an adverse finding by the Respondent for not calling any witnesses.

148. The Respondent had a toothache during March 2017, which is weeks before the fight of the 8th April 2017, as at that period of March at least, and long before he tested positive, the Respondent knew about anti-doping rules, hence in his letter to SAIDS dated 3rd July 2017, and at paragraph 8.14, page 24 of the bundle stated that, he could not seek treatment by medicines which would place him at risk of SAIDS rules and regulations

pertaining to anti-doping.

149. The Respondent stated that he was mislead by the decision of the Western Cape High Court, it simply means that the Respondent at some point in his life and before he tested positive in-competition, knew that smoking Marijuana in South Africa was prohibited. However, as a professional athlete he expected the same prohibited substance not to be under the prohibited list of WADA code and SAIDS

RELEVANT CASE LAW

150. The panel in coming to its conclusion considered all the cases both the SAIDS and the Respondent relied upon and submitted by both parties to the panel.

151. NADO FLANDERS 2017 DISCIPLINARY COMMISSION 2017002T this is one of the cases SAIDS referred the panel to which the panel find it relevant in these proceedings.

152. The facts of the case were briefly as follows: -

152.1 The Dutch football player was charged with anti-doping rule violation after having tested positive for the prohibited substances, Cannabis with a concentration higher than the WADA's required threshold.

152.2 The athlete admitted he had smoked joints and accepted the use of Cannabis was non-intentional and he bears no significant fault or negligence.

152.3 The Commission concluded that the athlete was a long-term user of Cannabis as a result was non-intentional. The Commission imposed 1000 Euros fine and a one-year ineligibility period.

153. SAIDS v KEENON – BLIGNAUT, the athlete was a professional football player who had smoked Marijuana the night before his game and where he was tested after the game, was found to have 766 ng/ml of Carboxy-THC in his system. The athlete's strongest mitigating factor was the fact that he had fully co-operated, and was not a habitual user of the drugs. He admitted fault and was sanctioned for four (4) months.

154. In the cases of ANGELIQUE MATSUSHIMA and RILEY THOR *supra*, both athletes were

tested positive for prohibited substances whereby Carboxy – THC level was higher than the required 180 ng/ml.

155. In both cases, the hearing panel accepted the athlete's explanation that the intake of prohibited substances occurred out of competition which resulted in a reduced sanction.

156. In the cases of JAMES HOWELL AND KELVIN GASTELUM *supra*, both athletes tested positive for prohibited substances with Carboxy-THC over 180 ng/ml.

157. The athletes' sanctions for ineligibility was reduced depending on their degree of fault. Both the athletes were sanctioned for six (6) months which was later reduced to three (3) months.

DEGREE OF FAULT

158. The use of Marijuana and Cannabis is illegal in South Africa, however, it is commonly used. The Respondent does smoke Marijuana for recreational and religious purposes. He was aware of anti-doping rules in sports and he understand them.

159. The use of Marijuana is inconsistent with the spirit of sport and the Respondent conceded under cross -examination that smoking of Marijuana is not a healthy life style.

160. The Respondent was eager to participate in the fight by all means, hence he could not avoid positive test results. Consequent to the above, there is a degree of fault on the part of the Respondent which would attract a sanction.

161. Furthermore, the Respondent used Marijuana and Cannabis oil to alleviate a pain, which in Essence, he concedes that in a contact sport like Martial Arts, Marijuana will help the body to endure the pain better.

CIRCUMSTANCES REGARDING REDUCED SANCTION

162. The circumstances do exist to reduce the sanction to a period of ineligibility as issued herein below.

163. The Respondent cooperated with SAIDS and took a voluntary suspension despite having an oncoming fight on July 2017. He did not deny and/or contests the results.

164. The Respondent is the first transgressor of anti-doping rules and he has been in the sport since 2005.

166. He only participates in Martial Arts and earns his living from the sport and he has no other source of income.

167. In terms of the standards set by SAIDS in its cases and internationally in respect of similar cases, the period of ineligibility ranges from two (2) months to four (4) months and occasionally to nine (9) months

168. The Respondent has shown remorse by agreeing to undergo drug rehabilitation and counselling classes.

169. The period of ineligibility may have negative impact upon his career.

170. In the case of IRB v IRAKI CHVINVIVADZE, 2nd June 2009, the tribunal stated that in assessing whether there is a corroborating evidence, the overall context of the events relating to the athlete should be considered, including the clean record of the athlete. So far there is no evidence which suggest that the Respondent has no clean record in – competition

CONCLUSION

171. The Panel will be misdirecting itself by accepting the evidence of the Respondent as completely satisfactory and reliable in light of the short comings in the Respondent's evidence, and further that there were no objective facts which corroborates the Respondent's version with regard to the actual alleged circumstances.

172. Similarly, the principles of common-sense and the principles laid down in the case of IRB v IRAKI CHVINVIVADZE, *supra*, have not escaped the attention of the panel.

173. Although there is no rule of thumb, test or formula to apply when it comes to a

consideration of the credibility of the single witness, the Panel had to weigh the Respondent's evidence, consider its merits and demerits thereof, and having done so, decide whether it is trustworthy and whether despite the fact that there are short - comings, or defects or contradictions in the testimony, it is satisfied that the truth has been told.

174. The emphasis is that even though the exercise of caution maybe considered, that cannot be allowed to displace the exercise of common – sense.

175. In weighing up all the elements which points towards the quilt of the Respondent against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, the Panel was forced to come to the below conclusion.

176. Consequently, the Panel is of the opinion that the Respondent has failed to prove that his personal circumstances made him to violate the anti-doping rules and further that the evidence has not assisted the Panel to come to a different conclusion to the one below.

177. Similarly, the *viva voce* evidence of the Respondent cannot be ignored in its totality as a result of the absence of objective facts which would have corroborated same.

FINDINGS

178. The Respondent is found guilty for having violated article 2.1 of SAIDS anti – doping rules of 2016 by having adverse analytical finding in respect of prohibited substance in his urine sample [4012173].

SANCTION

179. The Respondent is sanctioned for a period of twelve (12) months ineligibility, effective from the date of voluntary suspension being 2nd June 2017 to 2nd June 2018.

180. During this period of ineligibility, the Respondent will not take part and/or participate in any unauthorized sport be at local, national and international level.

181. No order as to the costs.

DATED AT MELROSE NORTH, JOHANNESBURG ON THIS THE 4th DAY OF DEC. 2017

CHAIRPERSON
SUNNY NAMENG

PANEL MEMBER
PROFESSOR YOGA COOPOO

PANEL MEMBER
PROFESSOR CHRISTA JANSE VAN RENSBURG