

DECISION of the FEI TRIBUNAL

dated 19 January 2022

(FEI Case Number: 2019/BS33 CHANTILLY)

FEI Tribunal Hearing Panel:

MS. Constance Popineau (FRA), one-member panel.

FEI Tribunal Reference: C19-0006

Person Responsible/ID/NF: Mr Chris VAN DER MERWE/10092281/RSA

Horse/Passport: CHANTILLY/106AR98/RSA

Event/ID: CSI1*-W - Midrand (RSA), 2019_CI_1631_S_S_01

Date of Event: 08-12.05.2019

Prohibited Substance: Synephrine

Sample Collection: 5552496 (sample taken on 10.05.2019) and 5577402 (sample taken on 12.05.2019)

I. SUMMARY OF THE FACTS:

1. **Claim Brief:** By FEI Legal Department.

2. **Case file:** The Tribunal duly took into consideration all the Parties' written submissions and communications received up to date, as well as oral arguments presented during the hearing on 18 October 2021.

3. **Hearing:** 18 October 2021 at 5pm (Central European Time by videoconference (via Cisco WebEx).

4. **Present:**

The FEI Tribunal

- FEI Tribunal Panel, Ms Constance Popineau (FRA)
- Ms. Hilary Forde, FEI Tribunal Clerk

Athlete:

- Mr. Chris Van Der Merwe

Counsel for the Athlete:

- Represented by Ms. Lisa Lazarus (Morgan Sports Law)

For the FEI:

- Ms. Anna Thorstenson, Legal Counsel
- Ms. Ana Kricej, Junior Legal Counsel

National Federation:

- South African Equestrian Federation (SAEF): Ms. Janine Turner (Legal Department)

II. SUMMARY OF LEGAL AUTHORITY

1. **Articles of the Statutes/Regulations which are, *inter alia*, applicable:**

Statutes 24th edition, effective 19 November 2019 ("**Statutes**"), Arts. 1.5, 38 and 39.

General Regulations, 24th edition, 1 January 2020, Arts. 118, 143.1, 159, 164, 165 and 167 ("**GRs**").

Internal Regulations of the FEI Tribunal, 3rd Edition, 2 March 2018 ("IRs").

FEI Equine Anti-Doping and Controlled Medication Regulations ("EADCMRs"), 2nd edition, changes effective 1 January 2019.

FEI Equine Anti-Doping Rules ("EAD Rules"), 2nd edition, changes effective 1 January 2019.

Veterinary Regulations ("VRs"), 14th edition 2018, effective 1 January 2020, Art. 1055 and seq.

FEI Code of Conduct for the Welfare of the Horse.

2. Justification for sanction:

GRs Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

GRs Art. 118.3: "The Person Responsible shall be the Athlete who rides, vaults or drives the Horse during an Event, but the Owner and other Support Personnel including but not limited to grooms and veterinarians may be regarded as additional Persons Responsible if they are present at the Event or have made a relevant Decision about the Horse. In vaulting, the lunger shall be an additional Person Responsible."

EAD Rules Art. 2.1.1: "It is each *Person Responsible's* personal duty to ensure that no *Banned Substance* is present in the *Horse's* body. *Persons Responsible* are responsible for any *Banned Substance* found to be present in their *Horse's Samples*, even though their *Support Personnel* will be considered additionally responsible under Articles 2.2 – 2.8 below where the circumstances so warrant. It is not necessary that intent, fault, negligence or knowing *Use* be demonstrated in order to establish an *EAD Rule* violation under Article 2.1."

EAD Rules Art 2.2.1: "It is each Person Responsible's personal duty, along with members of their Support Personnel, to ensure that no Banned Substance enters into the Horse's body and that no Banned Method is Used. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the part of the Person

Responsible, or member of his Support Personnel (where applicable), be demonstrated in order to establish an EAD Rule violation for Use of a Banned Substance or a Banned Method. However, in accordance with the definition of Attempt, it is necessary to show intent in order to establish an EAD Rule violation for Attempted Use of a Banned Substance or a Banned Method”.

EAD Rules Art 2.2.2: “The success or failure of the Use or Attempted Use of a Banned Substance or a Banned Method is not material. It is sufficient that the Banned Substance or Banned Method was Used or Attempted to be Used for an EAD Rule violation to be committed”.

EAD Rules Art. 3.1: “Burdens and Standards of Proof. The FEI shall have the burden of establishing that an EAD Rule violation has occurred. The standard of proof shall be whether the FEI has established an EAD Rule violation to the comfortable satisfaction of the Hearing Panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these EAD Rules place the burden of proof upon the Persons Responsible and/or member of their Support Personnel to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except where a different standard of proof is specifically identified”.

III. THE DECISION:

5. Below is a summary of the relevant facts, allegations and arguments based on the Parties’ written submissions and documentary evidence submitted during these proceedings as well as the oral testimony given at the hearing held on the 18 October 2021. Although the FEI Tribunal (**“the Tribunal”**), has fully considered all the facts, allegations, legal arguments and evidence in the present case, the Tribunal will only refer to the submissions and evidence it considers necessary to explain its reasoning in this decision.

IV. FACTUAL AND PROCEDURAL BACKGROUND

6. Mr Chris Van Der Merwe (**FEI ID 10092281**), the Person Responsible (**the “PR”**), is an ‘professional’ rider participating in the discipline of Jumping and registered with the South African Equestrian Federation (**the “SAEF”**).
7. According to Article 118.3 of the FEI General Regulations (**the “GRs”**), *‘the Person Responsible (PR) shall be the Athlete who rides, vaults or drives the Horse during an Event’*, but the Owner and other Support Personnel including but not limited to grooms and

veterinarians may be regarded as additional Persons Responsible if they are present at the Event or have made a relevant Decision about the Horse.

8. The Fédération Equestre Internationale (**the “FEI”** together with the PR, **“the Parties”**), is the sole IOC recognised international federation for equestrian sport. The FEI is the governing body of the FEI equestrian disciplines (Dressage, Jumping, Eventing, Driving, Endurance, Vaulting, Reining, Para-Equestrian).
9. The EADCMRs applicable to these proceedings were adopted by the General Assembly in November 2018 and came into force on 1 January 2019. They apply to *‘each Person Responsible and their Support Personnel by virtue of their membership in, accreditation by, or participation in the FEI or National Federation, or in their activities, Competitions or Events’*.¹
10. The PR competed with the Horse, CHANTILLY (FEI ID 106AR98/RSA), (**the “Horse”**) at the CSI1*-W - Midrand (RSA), 2019_CI_1631_S_S_01 (**the “Event”**) on 08.05-12.05.2019.
11. As a member of the SAEF, which is a member of the FEI, the PR is therefore bound by the EADCMRs.
12. Urine and blood samples were taken from the Horse on 10 and 12 May 2019 for testing under the EADCMRs and the VRs. The samples were divided into an A Sample and a B Sample and sent to the FEI-approved Laboratory, LGC Newmarket Road Laboratory (**“LGC”**) in Cambridgeshire, UK, (**the “Laboratory”**) for analysis. The Horse's samples were given reference number 5552496 and 5577402 (collectively, **the “Sample”**).
13. The laboratory analysis of the A sample reported an Adverse Analytical Finding (**“AAF”**) for Synephrine in the urine sample, which is a “Banned Substance” under the FEI's Equine Prohibited List.
14. Synephrine is a stimulant that causes vasoconstriction, increases heart rate and is used as a weight loss aid in humans. Synephrine is a Banned Substance under the 2019 FEI Equine Prohibited Substances List. Synephrine remaining a Banned Substance is also designated as a “Specified Substance”.
15. The positive finding of Synephrine the Horse's sample therefore gave rise to an Equine Anti-Doping Rule violation under Article 2.1 of the EAD Rules wherein *“[t]he presence of a Banned Substance and/or its Metabolites or Markers in a Horse's Sample”* results in

¹ Introduction to the EADCMR at p 2.

an EAD Rule violation. In addition, Article 2.1.1 of the EAD Rules establishes that *'[i]t is each Person Responsible's personal duty to ensure that no Banned Substance is present in the Horse's body. Persons Responsible are responsible for any Banned Substance found to be present in their Horse's Samples'*.

16. Thus, on 17 June 2019, the FEI Legal Department officially notified the PR and the SAEF of a violation of Article 2.1 of the EAD Rules based on the Laboratory's AAF of Synephrine in the Horse's Sample collected at the Event (**the "Notification Letter"**)².
17. The Notification Letter included notice of an apparent Equine Anti-Doping Rule violation under Article 2.1 of the EAD Rules and that the PR would not be provisionally suspended in accordance with Article 7.4 of the EAD Rules since the substance found in the sample was a Specified Substance. However, in accordance with Article 7.4.1 EAD Rules, the Horse was provisionally suspended for two months from 17 June 2019 to 16 August 2019. Finally, the PR was informed of his right to request analysis of the B Sample, however the PR did not request for the B sample to be analysed, thus the right to request a B sample analysis was waived in accordance with Article 7.1.5 of the EAD Rules.
18. By way of background, after notification of the A Sample results on 17 June 2019, the PR requested a Preliminary Hearing³ (**"the Request"**) with the FEI Tribunal (**"the Tribunal"**), in order to present all explanations necessary for the Tribunal to assess whether the provisional suspension shall be lifted or maintained in accordance with Article 7.4.4 of the EAD Rules. The Preliminary Hearing Panel decided not to lift the Provisional Suspension of the Horse and it was maintained until 16 August 2019.
19. Moving forward, the FEI submitted the proceedings with regard to the merits of the case on 12 July 2021 wherein they requested for a hearing panel to be appointed by the Tribunal in order to adjudicate on the case. The FEI also submitted its Response with the relevant annexes.
20. On 27 July 2021, the Tribunal informed the Parties of the appointment of a one-person hearing panel to adjudicate this case. The Parties were asked to provide any objections to the constitution of the hearing panel by 30 July 2021. The PR was also provided with the opportunity to reply to the FEI's correspondence by 16 August 2021. Finally, the Parties were given a deadline until 19 August 2021 to indicate whether their request for an oral hearing to take place.

² FEI Response- Exhibit 1: Notification Letter dated 30 September 2019

³ FEI Response- Exhibit 3 and 4: Preliminary Decision (Operative and Reasoned Decision)

21. On 27 July 2021, the FEI informed the Tribunal that it did not have any objection to the constitution of the hearing panel.
22. On 12 October 2021, the Tribunal wrote to all Parties and confirmed that a hearing would take place on 18 October 2021 at 5pm (Swiss time). The Tribunal also reminded the Parties that it was the responsibility of each party to furnish the Tribunal with details regarding the participating of any additional attendees or relevant witness(es) by no later than 5pm on 14 October 2021. The Tribunal also confirmed that the hearing would proceed by videoconference (via Cisco WebEx).
23. On 13 October 2021, the Tribunal confirmed to the Parties that the SAEF indicated their attendance at the oral hearing on 18 October 2021. In respect of same the Tribunal wrote to all Parties and referred to Article 26.2 of the IRs wherein the Privacy of hearings is outlined; "Save for good cause shown by any party, all hearings before the Hearing Panel shall be conducted on a private and confidential basis, attended only by the parties to the proceedings and their representatives and witnesses, as well as the representatives of any third party/ies permitted under the applicable rules to attend in order to participate and/or observe the proceedings" and Article 26.2 of the IRs by means of which, "[the hearing Panel Chair] may also permit attendance by persons associated with another party or that party's National Federation if requested by that party for all or a portion of the hearing [...]" Thus, pursuant to the above, the Tribunal requested clarification on the following information in relation to this request by 5pm on 14 October 2021:
 - (i) The terms on which the SAEF wished to participate;
 - (ii) The motivated reasoning for such request to join these proceedings;
 - (iii) The expected type of participation in the oral hearing and if the SAEF had requested to present any submissions at the hearing;
 - (iv) The opinion of the other Parties in relation to this matter.
24. The Parties confirmed their agreement and supported the attendance of the SAEF in their capacity as a watching brief only and explained that such attendance was common practice in particular given the nature of the AAF however in the unlikely case that the SAEF planned to make submissions the FEI reserved their right to reply..
25. The hearing took place on 18 October 2021. The PR attended the hearing, with the support of his Legal Counsel and the SAEF.

V. SUBMISSIONS BY THE PARTIES WITH THE RESPECTIVE POSITIONS

In the following, a summary of the written and oral submissions made by the Parties concerning the merits of the case is provided. While the Tribunal has taken into consideration all submissions, only the ones relevant for the Decision are outlined below.

A. The Legal Submission by the PR:

26. The PR submitted several documents for the preliminary hearing, where he explained his situation⁴. In summary he submitted that:

- He was situated far away from certain equestrian shows, and therefore, it was not possible to deliver the food to these shows due to the weigh bridges on the respective route which meant that trucks would be overweight for crossing. He also confirmed that his feed was supplied by the biggest supplier in South Africa - Midfeeds;
- For the Event in question, the PR received the food and grass from Midfeeds, as well as teff and eragrostis for the 12 horses at the Event;
- The PR stated that he knew nothing about Synephrine, and that it was the first time he heard of such a substance when he received the notification from the FEI Legal Department on 17 June 2019;
- Since he found out about the AAF, he has studied and spoken to various people all over the world about this substance, and discovered that it was a plant base substance sourced to the grass they feed the horses as well as various weeds, brushes and trees;
- Subsequent to these findings he attended at Disa Stables, Kyalami Equestrian Park and Midfeeds on 20 June 2019 with a representative of South African Show Jumping, as a witness and they collected 26 samples of grass, weeds, trees etc. He confirmed that these samples were sent to the Food & Drug Assurance Laboratory in Pretoria for testing. In addition, he sent samples from his home base to the same laboratory which comprised of the food and every supplement the horse had received at the home stables, (which confirmed positive for Synephrine);
- The PR submitted that he was 100% convinced that these test results proved that Synephrine was present in the food given to the Horse and was done so

⁴ FEI Response- Exhibits 4 and 5: Statement of the PR and annexes

without any malicious intent on his part or with any knowledge that the food contained this substance;

- The PR also stated that he had spoken to the owner of Midfeeds in relation to conducting batch testing on Midfeeds grass in the future as it did not make financial sense for each individual to carry out testing on their own;
- The PR also confirmed that he had spoken to Dr Schalk de Kock (PhD in Biochemistry, the Head of the testing laboratory for Horse racing in South Africa) and according to him it was almost impossible to find any grass in South Africa that remained free of Synephrine. Dr Schalk de Kock also explained to the PR that he had spent a lot of time creating acceptable level of Synephrine charts for racehorses, as in his opinion every horse eating Teff in South Africa had the possibility to test positive for Synephrine.
- Lastly the PR stated that... *"For the future for every rider and horse in South Africa my intent to prove that Synephrine occurs naturally in our grass and that it was fed without the knowledge nor the intent to lead to any advantage to the horse."*

27. In addition, the SAEF was notified by the FEI about other positive findings resulting from this Teff Grass produced in South Africa⁵.

28. The SAEF provided a statement to the FEI from the producer of the feed and Teff Grass, who explained that⁶:

"It was brought to their attention by certain customers (see below) that horses fed on hay from their feed supply had tested positive with a hay contamination called Synephrine. As we had not heard of this before they openly supported a full investigation and testing process which was in turn supported by our only supplier as they were all very concerned about this.

These samples were tested by FDA Lab in South Africa, some of the samples that were tested for substance Synephrine, were positive in both the Eragrostis and Teff purchased from the producer. The analysis of the hay and feed confirmed the presence of Synephrine in the majority of the samples.

The producer also confirms that the plant, which contains natural Synephrine, grows wildy in South Africa, and as such, is present in the various hay during the cutting and bailing process. The presence of this would be almost impossible to identify.

⁵ <https://inside.fei.org/system/files/Case%20Status%20Table%20Horses%20-%202004%2009%2019.pdf>
Cases 2019/BS28, BS29, BS30, BS31, BS33, BS36, BS43, BS44.

⁶ FEI Response Exhibit 6

The producer is a reputable, well-known supplier and one of the largest in South Africa, who feeds majority of the equestrian community in Johannesburg, South Africa. As a supplier they were unaware of such contamination, nor were the sole supplier (farmer) or the customers (the affected parties). The contamination of hay (both the Eragrostis & Teff) was unintentional on all parties behalf and there is no way the producer, the farmer or the customers could have known that such a hay (Eragrostis and Teft) was contaminated with Synephrine.”

29. The PR confirmed that Teff Grass is now known to be able to contain Synephrine which was also acknowledged in the FEI Warning regarding Synephrine issued by the FEI and distributed via email in the FEI Veterinarian Update on 13 May 2019⁷.

B. Written Response of the FEI:

30. The FEI submitted that in respect of the violation of the EADCMRs of the PR, Article 3.1 of the EAD Rules made it the FEI's burden to establish all the elements of the EAD Rule violation charged, to the comfortable satisfaction of the FEI Tribunal. Furthermore, the FEI stated that the elements of an Article 2.1 violation are straightforward, that 'It is not necessary that intent, fault, negligence or knowing Use be demonstrated in order to establish an EAD Rule violation under Article 2.1'.

31. Instead, the FEI noted that it was a 'strict liability' offence, established simply by proof that a Banned Substance was present in the Horse's Sample. As such, the results of the analysis of the A Sample taken from the Horse at the Event confirming the presence of Synephrine constituted sufficient proof of the violation of Article 2.1 of the EAD Rules.

32. In any event, the FEI also pointed out that the PR did not dispute the presence of Synephrine in the Horse's Sample. Accordingly, the FEI respectfully submitted that it discharged its burden of establishing that the PR had violated Article 2.1 of the EAD Rules.

- Presumption of Fault

33. The FEI submitted that as a result of the presumption of fault, Article 10.2 of the EAD Rules provided that a PR with no previous doping offences who violated Article 2.1 of the EAD Rules was subject to a period of Ineligibility of two years, unless he was able to rebut the presumption of fault. In order to do this, the rules specify that he must

⁷ FEI Response- Exhibits 7: FEI Warning regarding Synephrine.

establish to the satisfaction of the Tribunal (it being his burden of proof, on the balance of probability⁸):

- How the Prohibited Substances (here, Synephrine entered into the horse's system; and
- That he bears No Fault or Negligence for that occurrence, i.e., that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had administered to the horse (or the horse's system otherwise contained) a Banned Substance (in which case, the presumptive two-year period of Ineligibility is eliminated completely pursuant to Article 10.4 of the EAD Rules); or
- That he bears No Significant Fault or Negligence for that occurrence (in which case, the presumptive two-year period of ineligibility may be reduced by up to 50%, depending on his degree of fault, pursuant to Article 10.5 of the EAD Rules).

34. The FEI further explained that if the PR failed to discharge this burden, the presumption of intentional administration to enhance performance stands, and therefore the presumptive two-year ban under Article 10.2 is applied.

- **The 'threshold' requirement: proving how the Synephrine entered into the Horse's system**

35. In respect of the 'threshold' requirement and proving how Synephrine entered into the Horse's system, the FEI referred to the EAD Rules which stipulate, and the jurisprudence of the FEI Tribunal and the CAS were very clear: that it was a strict threshold requirement of any plea of No (or No Significant) Fault or Negligence that the PR proves how the substance entered into the Horse's system. They furthered that this requirement must be strictly applied because without such proof it would be impossible to assess the PR's degree of Fault or Negligence (or No Significant) Fault or Negligence for the presence of the Prohibited Substance in the Horse's system.

36. The FEI submitted in this context that the PR must provide clear and convincing evidence to prove how Synephrine entered the Horse's system. However, in these proceedings, the FEI acknowledged that during an extended period of 2019, the FEI notified a significant amount of Synephrine cases, where 11 of which were from South Africa, in line with these proceedings. The FEI noted that in those cases it was

⁸ Art 3.1 EADR

confirmed that Synephrine naturally occurred in Teff grass, which was fed to all the horses as their main source of nutrition⁹.

37. Consequently, the FEI was satisfied that the PR established how the Prohibited Substance Synephrine entered the body of the Horse and the “threshold requirement” was fulfilled in this case.

- **Fault/Negligence for the rule violation**

38. In relation to the degree of “Fault” and “Negligence” by the PR for the rule violation, the FEI noted that the starting point of any evaluation is the “*personal duty*” of the PR following from Article 2.1.1 of the EAD Rules, i.e., his personal duty to ensure that “*no Banned Substance is present in the Horse’s body*”.

39. Furthermore, the FEI noted that it was necessary to look at the definitions of *Fault*, as defined in Appendix 1 of the EADCMRs.

“Fault is any breach of duty or any lack of care appropriate to a particular situation ...the degree of risk that should have been perceived by the Person Responsible and the level of care and investigation exercised by the Person Responsible and/or member of the Support Personnel in relation to what should have been the perceived level of risk... In assessing the Person Responsible’s degree of Fault, the circumstances considered must be specific and relevant to explain the Person Responsible’s departure from the expected standard of behaviour.” (Emphasis added)

“No fault - The Person Responsible establishing that he or she 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 administered to the Horse, or the Horse’s system otherwise contained, a Banned or Controlled Medication Substance.”

40. In 2019, the FEI submitted that there was a wave of Synephrine cases not only from South Africa but also from Mexico and Spain, (published cases are listed on the FEI website)¹⁰.

41. The FEI noted that the common factor for those cases was that the source of Synephrine arose as a naturally occurring substance in Teff grass. Additionally, the PRs in those cases had not heard of the Synephrine before and the main producers in those countries were not aware that Teff grass could cause positive findings of Synephrine in a horse. Furthermore, the FEI noted that no suitable alternative existed

⁹ FEI Response: Exhibits 6-7.

¹⁰ [Equine Anti-Doping Decisions | FEI](#)

for Teff grass since it was in fact used as the main nutrition for horses, in several warm countries.

42. Considering the circumstance of the cases, the FEI submitted that the PRs in all those cases were at no fault and negligence for the rule violations. The FEI was of the opinion that they could not have reasonably known or suspected that the use of Teff grass as the main source of nutrition to the horses, would result in positive findings for Synephrine.

43. As a consequence, the FEI proposed a Settlement Agreement to the PRs based on the following terms:

"The PRs and the additional PRs admit the violation of Article 2.1 of the EAD Rules (The presence of a Banned Substance and/or its Metabolites or Markers in a Horse's Sample); and

The PRs and the additional PRs established on a balance of probabilities how the Synephrine entered the Horse's system; and

The PRs and the additional PRs bear no fault or negligence for the Rule Violation and therefore they shall not serve any period of ineligibility and the otherwise applicable period of Ineligibility (i.e., two years) shall be eliminated; and

In accordance with Article 10.8.3 of the EAD Rules, this violation of the EAD Rules shall not be considered a prior violation for the purpose of Article 8 (Multiple Violations) of the EAD Rules.

In accordance with EAD Rules Articles 9.1 and 10.1.2 the results achieved by the PRs and the additional PRs, and the Horses at the Events are disqualified, with all resulting consequences, including forfeiture of any related medals, points and prizes;

The PRs and the additional PRs shall not incur any fines;

No other Sanctions (other than the Disqualification of the Horse's results at the Event in accordance with Articles, 9, 10.1.2 and 11 of the EAD Rules) will apply in this case.

The PRs and the additional PRs acknowledge that the Provisional Suspension imposed on the Horse and therefore accepts that this remained in place for 2 months.

Each party will bear its own legal and other costs incurred in connection with these proceedings."

44. The FEI also proposed to the PR in these proceedings to enter into such a Settlement Agreement, however the PR wished to present the case before the Tribunal as the PR

would not agree to all the proposed terms of such an agreement. The PR contested firstly, the Provisional Suspension of the Horse, (decided in the Preliminary Decision) and secondly, the automatic disqualification of the competition results.

45. Despite these objections by the PR, the FEI submitted that the same terms as proposed in the agreement outlined at paragraph 43 should also be applied to this case, in order to protect the welfare of the horse and ensure that a level playing field existed in equestrian sport.

- **Disqualification of results**

46. In respect of the Disqualification of Results, the FEI referred to Article 9.1 of the EAD Rules provided that an EAD Rule violation *'in connection with a Test in a given Competition automatically leads to the Disqualification of the result of the PR and Horse combination obtained in that Competition with all resulting Consequences, including forfeiture of any related medals, points and prizes'*.

47. This rule will be applied even if the period of Ineligibility is reduced or eliminated under Article 10, e.g., on the basis of No (or No Significant) Fault or Negligence. *"Even if a Sanction is reduced or eliminated under Article 10 below, such reduction or elimination shall under no circumstances reverse the automatic Disqualification of Individual Results mandated by this Article 9."*

48. Further, since this was a case involving a Prohibited Substance occurring during or in connection with an Event, the FEI requested that in order to safeguard the level playing field, the FEI may disqualify all of the PR's individual results obtained in that Event, with any and all of Horses with which the PR competed, with all consequences, including forfeiture of all medals, points and prizes, in accordance with Article 10.1.2 EAD Rules. The FEI explained that they always applied the disqualification of the whole Event, unless the PR could establish, with a negative test, that the horse did not compete with a prohibited substance, during the remaining Competitions of the Event. Hence, the FEI considered this was an *automatic disqualification* of the results from the day of sample collection at the Event, and that this rule was applied in all cases and the FEI stated that they have no jurisdiction to deviate from this rule.

49. In addition, the FEI noted that since the PR had not established that the Horse was free from a prohibited substance on any of the other days at the Event, all the other results from the whole Event must be disqualified.

50. Lastly, the FEI noted that it is important to take into consideration that in all cases of Synephrine thus far, the results from the whole Event have been disqualified. They furthered that should the Tribunal choose to decide differently in this case, the FEI

believed that an unfairness would be created threatening the level playing field, which in turn provided a disadvantage for the PRs who entered into the previous Settlement Agreements with the FEI for Synephrine. Therefore, in addition to the above, the FEI submitted that such automatic disqualification was necessary for this case also.

- **Fine and Costs**

51. In respect of the issue of fines and costs the FEI referred to Article 10.2 of the EAD Rules which provides that for a violation of an article 2.1, a PR shall be fined up to fifteen thousand (15'000) CHF with the appropriate legal costs to be imposed. However, the FEI submitted that considering the circumstances, the FEI did not request for any fine nor any costs to be imposed in this case. The FEI noted that should this be approved by the Tribunal the PR shall therefore not incur any fine and each party will bear its own legal and other costs incurred in connection with these proceedings.

- **Conclusion**

52. In summary and taking into account the particulars outlined at paragraphs 30 to 51 of the written response of the FEI, the FEI respectfully requested that the FEI Tribunal issue a decision:

- i. upholding the charge that the PR violated Article 2.1 of the EAD Rules;
- ii. confirming that the PR bears no fault or negligence for the Rule Violation and shall therefore not serve any period of ineligibility and the otherwise applicable period of Ineligibility (i.e., two years) shall be eliminated;
- iii. disqualifying the result of the PR and Horse combination obtained in the Event, and the consequent forfeiture of all medals, points, prize money, etc. won, pursuant to Articles 9 and 10.1.2 of the EAD Rules;
- iv. No other Sanctions (other than the Disqualification of the Horse's results at the Event in accordance with Articles, 9, 10.1.2 and 11 of the EAD Rules) shall apply for the case;
- v. In accordance with Article 10.8.3 of the EAD Rules, this violation of the EAD Rules shall not be considered a prior violation for the purpose of Article 8 (Multiple Violations) of the EAD Rules.
- vi. The FEI also wished to reserve the right to request an oral hearing or submit further evidence on the merits, in order to respond to any new arguments and/or evidence set out in the PR's reply, if any;

- vii. Subject to the foregoing, the FEI believed (at that stage) that the FEI Tribunal would be sufficiently well-informed of the facts of the case to issue a decision based on written submissions alone. Nonetheless, an oral hearing was requested by the PR.

VI. SUMMARY OF THE HEARING - 18 OCTOBER 2021

FEI: OPENING SUBMISSIONS

53. At the Hearing dated 18 October 2021, the FEI commenced their opening arguments emphasising that this hearing was mainly about the disqualification of results of the Event as the PR was offered to enter into Settlement Agreement in line with a similar wave of cases of Synephrine positives in 2019 wherein they bore no fault and negligence and would not serve any ineligibility period however the results achieved at the Event would be disqualified. However, the PR rejected the Settlement Agreement proposal on the basis that he would not accept disqualification of his results achieved at the Event.
54. The FEI noted that the PR's main arguments in respect of these proceedings were that Synephrine did not have any performance enhancing effects and furthermore that the literal wording of Article 9 of the EAD Rules relating to "Automatic Disqualification of individual results" ran contrary to the intention of the rule. The PR submitted that this rule should only be applied in circumstances where the prohibited substance had a performance enhancing effect. The FEI also noted that the PR considered the circumstances of this case to be so exceptional that the disqualification of the results achieved at the Event was unfair and disproportionate.
55. The FEI submitted that in respect of the first argument raised that Synephrine did not have any performance enhancing effects, the FEI reminded the Tribunal of the inclusion requirements for a substance to be placed on the on the Equine Prohibited Substance List ("**the EPSL**")¹¹ in accordance with Article 1057(3)¹² of the VRs which stated that "Banned Substances are substances that have been deemed by the FEI List Group to have: a) no legitimate use in the competition Horse; and/or b) have a high potential for abuse. Therefore, the FEI noted that "effect" on performance is not the only requirement for entering the EPSL.
56. Furthermore, the FEI also noted that the PR submitted that Article 9 of the World Anti-Doping Code ("**the WADA Code**")¹³ was only intended for an automatic disqualification

¹¹ [Clean Sport for Horses - FEI Prohibited Substances List | FEI](#)

¹² [27.3_ANNEX_GA19_VETERINARY REGULATIONS.pdf \(fei.org\)](#)

¹³ [wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf \(wada-ama.org\)](#)

of individual results achieved for an Anti-Doping Rule Violation (“**ADRV**”) for performance enhancing substances. However the FEI noted that this was not the intention of the WADA Code and highlighted that in accordance with the World Anti-Doping Agency Prohibited List (“**The WADA List**”) for a substance to be added to the WADA List it had to meet 2 out of the 3 following criteria: 1) the potential to enhance or enhances sport performance; 2) represents an actual or potential health risk to the Athlete; 3) violates the spirit of sport (this definition is outlined in the WADA Code). Thus, the FEI argued that both the WADA Code and EPSL are similar in their view here, of what was considered a Prohibited Substance and more importantly that it was not solely based on the enhancement of performance.

57. In addition, when it was raised at the hearing, the FEI confirmed that a suggestion was made to FEI List Group (“**the List Group**”) in 2019 to change the status of Synephrine wherein the List Group reviewed this proposal and decided that Synephrine would retain its categorisation as a Banned Substance and a Specified Substance in light of which the FEI had nothing further to comment on this proposal.

58. The FEI then referred to the EADCMRs and in particular Article 9 and 10.1 and wished to provide further clarity on these provisions, aside from the content already outlined in their written submissions. Firstly, in respect of Article 9.1 of the EAD Rules, wherein it states that “A violation of these EAD Rules in connection with a test in a given Competition automatically leads to the Disqualification of the result of the Person Responsible and Horse combination obtained in that Competition with all resulting Consequences, including forfeiture of any related medals, points and prizes. Where applicable, consequences to teams are detailed in Article 11 below. Even if a Sanction is reduced or eliminated under Article 10 below, such reduction or elimination shall under no circumstances reverse the automatic Disqualification of Individual Results mandated by this Article 9”.

The FEI noted that these rules are based on Article 9 of the WADA Code, the same article which stated 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 with all resulting Consequences, including forfeiture of any medals, points and prizes”. Thus, the FEI submitted that in both the WADA Code and EAD Rules the Horse was automatically disqualified without any exceptions.

59. In respect of Article 10.1, and the “Disqualification of Results in the Event during which an EAD Rule Violation Occurs”, the FEI noted that the following rules relating to the Disqualification of results will apply: “10.1.1: “At the Olympic Games, Paralympic Games, FEI World Equestrian Games, FEI Championships for Seniors, and Regional

Games: An EAD Rule violation occurring during or in connection with an Event shall lead to Disqualification of all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all Consequences (and the resulting consequences to teams as provided in Article 11), including forfeiture of all medals, points and prizes, except as provided in Article 10.1.4”.

60. Similarly, the FEI noted that Article 10.1 of the WADA Code regarding “Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs” stated that;

“An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete’s individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete’s anti-doping rule violation and whether the Athlete tested negative in the other Competitions.

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete’s individual results in the other Competitions shall not be Disqualified, unless the Athlete’s results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete’s anti-doping rule violation”.

61. Accordingly, the FEI noted that the EADCMRs mirrored the WADA Code in this respect and as such the Tribunal had always disqualified the other results of the full Event unless the PR tested negative in another competition. Furthermore, the FEI confirmed this was always the case when applying Article 10.1 in relation to disqualifying other results and that only in cases where negative AAF’s are returned that results achieved at the competition are maintained. Therefore, the FEI submitted that as the Horse tested positive on the first day of the competition and no negative tests were provided for the rest of the event, the PR had failed to prove that the Horse was unaffected by the ingested Synephrine and therefore the results of all the Event must be disqualified.

62. In respect of the PR’s request for the Tribunal to apply the rule regarding automatic disqualification, the FEI referred to previous caselaw on this matter and submitted that in response to whether or not the Tribunal had discretion to apply the automatic disqualification the answer was a clear no. The FEI noted that the PR did not provide

any caselaw where the rules regarding automatic disqualification were not applied.

63. The FEI however submitted CAS caselaw on this area which they argued reaffirmed and concluded the same thing – that no room existed for any form of discretion in relation to the rule regarding mandatory automatic disqualification of the individual results in connection with an ADRV. The FEI referred to the case of CAS 2017/A/4927 Misha Aloyan v. International Olympic Committee (IOC), award of 16 June 2017 and in particular paragraph 75 which stated that “the “Automatic Disqualification of Individual Results” appears to be nothing else than an objective consequence of an objective fact, i.e. that the finding of an ADRV, and an effect of a retroactive assessment of a condition of ineligibility: no athlete using a prohibited substance (unless authorized on the basis of a valid TUE) can compete; if an athlete is later found having competed while a prohibited substance was in his/her body, his/her individual results are disqualified. The disqualification is not a sanction, but only the reinstatement of an objective condition, which explains why its application” is “automatic”. The FEI noted that this CAS case was very similar to these proceedings as it required the Tribunal to examine:

- 1) Whether there WAS any kind of situation that would not trigger the automatic disqualification of the results;
- 2) Whether the athlete’s situation was one that could avoid triggering the automatic disqualification of results.

64. The FEI further submitted that in the CAS case of 2017/A/4927 as detailed in para 63 the Panel did not even examine whether the athlete’s situation was one that could avoid triggering an automatic disqualification of results as there was no room for any form of discretion to action such a measure. Thus, the FEI submitted that in respect of this case their recommendations were correct for a number of reasons. Firstly, the FEI noted that the wording was clear and unambiguous in that “automatic” means the operation of the literal wording of the rule without any exceptions.

65. The FEI also referred to other jurisprudence of the Swiss Federal Tribunal in particular the decision of 23 August 2007, ATF 134 III 193, consid. 4.6.3.2.2, wherein the Panel considered the legality and nature of the rule of “Automatic Disqualification of Individual Results” which underlined that the purpose of the rule was to avoid endless discussions regarding the potential enhancing effects of the Prohibited Substance detected. In that regulatory context, the FEI submitted that no discretion could be left to the disciplinary body (or the CAS Panel) to evaluate on a case-by-case basis, for instance, whether an actual competitive advantage was gained by the athlete as a result of the use of a Prohibited Substance even if inadvertently ingested,.

66. Accordingly, the FEI confirmed that as the rules now stood, the results achieved in the given competition shall always be disqualified and no room existed for the application of the principle of proportionality when applying the rule regarding automatic disqualification of results since automatic disqualification was just the objective consequence of an objective fact.
67. In addition, the FEI referred to the CAS case 2019/A/6637 Njisane Phillip v. Panam Sports Organisation (“PASO”) wherein the Panel relied on CAS 2017/A/4927, paragraph 71 which stated that: “Article 9 of the IOC ADR leaves no room for any form of discretion to verify whether a finding of an anti-doping rule violation should not trigger the 'Automatic Disqualification of Individual Results’”. Accordingly, the FEI was satisfied that no room for any form of discretion to verify whether a finding of an ADRV should not trigger the 'Automatic Disqualification of Individual Results’”.
68. In summary, the FEI concluded that it was crystal clear that there was no discretion for a disciplinary body to deviate from Rules as set out at Article 9 of both the EAD Rules and the WADA Code and furthermore that the results achieved in a given competition shall always be disqualified. Finally, the FEI noted that the PR failed to convince the FEI that any circumstances existed in this case to enable the other results of the Event to be maintained.

COUNSEL FOR THE PR: OPENING SUBMISSIONS

69. The PR commenced his opening arguments and stated his appreciation of the FEI for declaring this was a no fault or negligence case, that the PR shall not serve any period of ineligibility and that no fines or costs were to be imposed. Hence, the PR acknowledged that we might be wondering why this hearing was taking place and if holding such a hearing was a waste of Tribunal resources. However, the PR stated that such a hearing was necessary as this was an “atypical case” which was why he wished to explain to the Tribunal the unique circumstances of this case and that such circumstances warranted for his results achieved in the Event to be maintained.
70. Firstly, the PR noted that this case was clearly at odds with the very purpose of the disqualification rules, and in that regard referred to paragraph 5.23 of the FEI Response¹⁴ wherein it stated that:

“Further, since this is a case involving Prohibited Substance occurring during or in connection with an Event, in order to safeguard the level playing field, the FEI

¹⁴FEI Response 2019/BS44 CAMPBELL dated 12 July 2021.

may disqualify all of the PR's individual results obtained in that Event, with any and all Horses with which the PR competed, with all consequences, including forfeiture of all medals, points and prizes, in accordance with Article 10.1.2 EAD Rules. The FEI always applies the disqualification of the whole Event, unless the PR can establish, with a negative test, that the horse did not compete with a prohibited substance, during the remaining Competitions of the Event".

71. However, the PR argued that applying the above rule in this case had the opposite effect and served to destabilise the level playing field. The PR deemed that the playing field is only kept fair and balanced if all of these results are maintained and the reason for that is that the evidence showed that all of the horses participating in said Event had Synephrine in their system. Furthermore, the PR submitted that in addition to the scientific components of the evidence already presented which the Tribunal could review in their own time, Synephrine was present in all of the horse feed in South Africa (i.e., low sugar feed). The PR confirmed that's the only feed he could give his Horse in order to maintain his health and welfare needs.
72. The PR then referred to the FEI's acknowledgement of the Synephrine problem that occurred in 2019 (Synephrine being present in hay of other countries as well as South Africa) and that as a result the National Horse Laboratory in South Africa stopped testing for Synephrine. Consequently, horses could compete in national events regardless of whether Synephrine was present in their systems. However, in contrast, the FEI was testing for Synephrine, which provided an unlevel playing field due to rules allowing for Provisional Suspensions to be imposed by the FEI for AAF's of Synephrine in horses of top competitors. Consequently, these competitors were withheld from the national competitions and as such the PR considered that unequal treatment existed between the FEI and the National Authority in South Africa, and this was difficult to accept.
73. Furthermore, the PR submitted that any of the Horses that were unable to give urine samples at the Event, had blood samples taken, and these blood samples did not return AAFs for Synephrine which further destabilised the level playing field. The PR noted this practice caused an issue whereby competitors would hold water from the horses to prevent urine samples being taken which created further welfare issues for these horses.
74. In response to the FEI's argument that the List Group considered the removal of Synephrine from the EPSL, the PR discussed this matter and confirmed that a whole body of evidence was submitted to the List Group at that time by SAEF. The PR believed that this evidence was compelling enough to warrant the removal of

Synephrine from the EPSL and he did not know why the EPSL Group rejected their recommendation.

The PR further explained that the SAEF appealed the decision to reject the recommendation for removal of Synephrine in response to requests from National Federations for the equine anti-doping system to be more flexible when contamination was suspected it was agreed to introduce an Atypical Findings (ATF) Policy (“the ATF Policy”) in the Equine Anti-Doping and Controlled Medication Regulations in 2021. Thus, the PR noted that had the ATF Policy been in place at the time of his ADRV charge, his results achieved in the Event would not have been disqualified under this Policy. Therefore, the PR submitted to the Tribunal to retroactively apply the ATF Policy of 2021 to this case and so that all of his competition results were maintained.

75. The PR also referenced CAS caselaw to support the argument for not applying an automatic disqualification of results and considered that the unique nature of this case warranted such application. The PR stated that he was devastated by the disqualification of his results and consequences of same and confirmed that these competition results were very important for his reputation as a professional rider and for his business. Hence, it was so difficult for the PR to accept an automatic disqualification of his competition results in a situation where he had established no fault or negligence for the AAF.

76. In this respect, PR then referred to the CAS case 2006/A/1025 Mariano Puerta v. International Tennis Federation (ITF), award of 12 July 2006¹⁵ as an example of a case where Hearing Panels may have to diverge from an automatic disqualification rule wherein it stated that the “problem with any “one size fits all” solution is that there are inevitably going to be instances in which the one size does not fit all[...], in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim”,.. and such is how the PR viewed his situation where he ensured that he did his best for the welfare of her Horse in an environment that was out of his control, and he thought he was acting in line with the principles of clean sport.

SUBMISSIONS OF THE PR- MR. VAN DER MERWE:

77. On a personal level, the PR confirmed that he made his living from the equine industry as a professional rider and also runs a large stable of yard with his wife, which

¹⁵ [TAS xxx \(tas-cas.org\)](https://tas-cas.org)

included a riding school and a breeding operation. He stated that currently he had 93 horses under his care and 60 of these horses are competition horses. He also stated that he teaches higher grade riders and has two people working for him who also teach lower grade riders. He confirmed that he was familiar with the EADCMRs and ensured compliance of these regulations throughout all stable operations with every section of his business being managed separately to prevent any cross contamination or incorrect distribution, for example there was never medication in feed room and vice versa.

78. The PR explained that at the beginning of 2019, he was using a low sugar grass – eragrotis with equifeeds used for roughage, in addition as a foal, the Horse had laminitis and required a low sugar diet to manage this condition. At the beginning of 2019, the PR described how his equestrian career was going very well and that he had great financial support from the owners he was working with, he was also very successful in competitions until he found out about the AAF. The PR then described the impact this had on his equestrian career i.e., when he received that notification from the FEI about the AAF, he stated that the notification of the AAF was detrimental to his career as he immediately lost his sponsorship, his vehicle and his owners separated from him over this period.

79. The PR also noted the Settlement Agreement offered to him by the FEI and that the terms of said Settlement Agreement included the disqualification of his competition results. The PR decided not to agree to these terms because he did not feel that he was in the wrong as his horse had no other advantage over other horses, the playing field was level, as they all had eaten the same grass, and the only reason he was selected for testing was due to his success at the Event. He noted that the playing field was more than level given the feed circumstances and that the FEI's testing regime for the purposes of ensuring a level playing field had got it wrong under the circumstances presented in this case.

VII. SUMMARY OF THE CLOSING STATEMENTS (HEARING DATED 18 OCTOBER 2021)

80. The FEI acknowledged that there was an appeal regarding the decision for Synephrine to remain in the current category on the EPSL however no decision was taken on this matter and the Parties requested a one-year stay, which was granted to see how the ATF Policy would work out in respect of Synephrine. The FEI furthered that this Policy had worked well to date and described the process of this Policy (the process wherein the FEI will decide whether or not an Atypical Finding (ATF) will be pursued as an Adverse Analytical Finding (AAF)¹⁶).

¹⁶ [ATF Policy.pdf \(fei.org\)](#)

The FEI explained that under this Policy the Specified Substances remained on the EPSL and were reported as an ATF rather than an AAF, and when the FEI is notified that an ATF has been returned, the FEI notify the PR, and request an explanation from the PR about such findings. The FEI would then they carry out an investigation based on these explanations if required. Once the FEI had gathered all the relevant information the FEI would submit the file to the professional ATF Panel for their consideration who would issue a Decision on the charge i.e., whether it would be pursued as an ATF or an AAF which decided as to whether or not the Athlete will be charged (i.e., if an AAF, charges will be made).

81. The FEI confirmed that this Policy only came into effect in 2021 (after these proceedings began) and it cannot be applied retroactively as this case was opened before the Policy came into force. The FEI also noted that changes to this Policy can only be made with the express approval of the FEI Board. National Federations must be informed of any changes to this Policy before the updated Policy comes into effect. Accordingly, the FEI cannot apply this policy retroactively and as already noted, this case pre-existed the ATF Policy which means that they cannot apply a *lex mitior* principle to this situation as doing so would create a unlevel playing field for the cases that have been already settled.

The FEI further argued that these cases cannot be treated differently and that in order to protect the level playing field they had to disqualify these results in this case as per the other cases which have been settled to date and there was no room for any deviation from the charge of an ADRV.

The FEI stated that they fully understood that this was a very unfortunate situation for everyone involved and they acknowledged that the PR had always ensured the welfare needs of his Horses were paramount, however bearing in mind the principle of *lex mitior*, the FEI must apply the same rules for the same cases and in line with the rules in place in 2019.

82. In the closing remarks, the PR requested that the Tribunal reviewed the case from the PR's position i.e., that the vast majority of horses would have been positive for Synephrine if they had been selected for testing. The PR also stated that it was completely counter to the idea of a level playing field if only two horses are picked for testing out of a whole field at the Event, due to their success at the Event, and argued that such actions completely complicated the entire competitive field in South Africa because it removed the top competitors from the national championships when the common factor was the prevalence of Synephrine in all horses. Moreover, that all the

horses would have tested positive for Synephrine, which counteracted the very idea of a level playing field.

83. The PR then discussed what discretion the Tribunal had within the rules to change this decision and as such outcome for the PR. In this regard, the PR submitted CAS case law which required analysis of the spirit and purpose of the rule even where there is a mandated outcome, i.e., that you have to go behind this outcome and look at what the rule was intending to accomplish, as was the case in CAS 2013/A/3047 FC Zenit St. Petersburg v. Russian Football Union (RFU)¹⁷. In said case, the CAS panel said that according to Swiss Law there were various methods of interpretation, and one of these methods was looking at the spirit and purpose of the Rule which in this case would mean that the rule was in place to ensure there was a level playing field. Thus, the PR argued that taking into account this CAS case law- that the intention behind this rule was to create an equal playing field and that if applied in this case, it would create an unequal playing field.
84. The PR also referred to Article 9- Automatic Disqualification of Individual Results of the WADA Code and the commentary within this Article, that when an Athlete wins a gold medal with prohibited substances in his/her system it is unfair to the other Athletes in that competition regardless of whether it was their fault or not, and that only a clean athlete should be allowed to benefit, it was therefore discriminatory to eliminate the only riders whose horses happened to be tested due to their results in the competition and for that reason the PR submitted that the use of Article 9 of the WADA Code did not accomplish what the WADA Code was trying to achieve and requested that the Tribunal take this argument into account when considering remedies for this case.
85. The PR then proceeded to discuss the ATF Policy and confirmed it was true that they agreed to stay the proceedings until November 2021 to see how this ATF policy would operate. However, despite the new ATF Policy in place, which is operating successfully, this Policy was not in operation at the time of his AAF for Synephrine, and the PR submitted that should it have been, his case would not have been pursued as an AAF and no charges would have been issued. Thus, as such the PR was not able to prevent his competition results being eliminated, and these competition results are really important for the PR and despite all the offerings of a Settlement Agreement.

The PR stated that the elimination of these results was not acceptable given all the hard work it took to achieve these competition results notwithstanding the fact that

¹⁷ [TAS xxx \(tas-cas.org\)](https://www.tas-cas.org)

the whole field would have tested positive had they been selected. The PR further stated that the Tribunal does have authority to apply the ATF policy retroactively and that such authority can be found in Article 24.2.2 of the EADCMRs, which allows for the application of *lex mitior*. He further stated that the reason why this case was different was because the competition results of this case were significant. The PR requested that the Tribunal send this case back to the ATF Policy Panel to make the correct decision retroactively and that pursuant to the powers under the ATF Policy there was a means to allow the results of the Event to be maintained.

VIII. JURISDICTION

86. The Tribunal has jurisdiction over this matter pursuant to Article 38 of the Statutes, Article 159 of the GRs, the EADCMRs, as well as Article 18 of the IRs. The PR is a member of the SAEF, which is a member of the FEI, as such the PR is bound by the EAD Rules. The jurisdiction of the Tribunal is undisputed.

IX. LEGAL DISCUSSION

87. The Tribunal is satisfied that the laboratory reports relating to the A sample reflect that the analytical tests were performed in an acceptable manner and the findings of the laboratory are accurate. The Tribunal is further satisfied that the test results evidenced the presence of Banned Substances in the A sample taken from the Horse at the Event and such results constitutes sufficient proof of the violation of Article 2.1 of the EAD Rules by the PR. The Tribunal notes that the PR did not challenge the accuracy of the test results or the positive findings. As a result, the Tribunal accepts that FEI has also established the adverse analytical findings and has sufficiently proven the objective elements of the violation in accordance with Article 3 of the EAD Rules.

88. Pursuant to Article 10.2 of the EAD Rules, the period of Ineligibility for an Article 2.1 EAD rule violation, *i.e.*, the presence of a Banned Substance in a Horse's sample is two (2) years, subject to a potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6 of the EAD Rules.

89. In cases brought under the EADCMRs, a strict liability principle applies as described in Article 2.1.1 of the EAD Rules. Once an EAD Rule violation has been established by the FEI, the PR has the burden of proving that they bear "*No Fault or Negligence*" for the rule violation pursuant to Article 10.4 of the EAD Rules, or "*No Significant Fault or Negligence*" pursuant to Article 10.5 of the EAD Rules. In order for Articles 10.4 and 10.5 of the EAD Rules to be applicable, the PR must establish, as a threshold requirement, how the Prohibited Substance entered the Horse's system.

90. As confirmed by various CAS panels as well as FEI Tribunals, the PR must present facts substantiated with concrete evidence to establish how the prohibited substance entered the Horse's system. Speculation or theoretical possibilities are not sufficient. In this regard, the Tribunal notes that due to the Horse's history of tying up and laminitis, the PR ensured that in order to maintain the utmost health and wellbeing of the Horse, he controlled its diet and fed it with a low sugar hay (eragrostis) supplied by Midfeeds, the largest supplier of horse feed in South Africa. This feed was the only one available in South Africa and contained Synephrine. The PR corroborated these claims with documentary evidence and expert reports¹⁸ to support the origin of the source as detailed in the evidence presented by the PR at section V of this Decision which explained that the source of Synephrine was naturally occurring in teff hay and that "Teff hay is a 'low sugar hay' which is prevalent in certain regions including South America and Southern Africa. In addition to being relied upon as a horse feed in those regions (due to the fact that it is so readily available there, relative to other types of feed)"¹⁹.

91. As a result, the Tribunal finds that the PR established – on a balance of probability – how the Banned Substance entered the Horse's system i.e., via a source of feed and/or forage²⁰ and that he bears No Fault or Negligence for the positive finding in the Horse's Sample and qualified for the application of the Article 10.4 of the EAD Rules –i.e., the two-year period of Ineligibility is eliminated completely.

92. The Tribunal notes that Article 10.2 of the EAD Rules provides that for a violation of an article 2.1, a Person Responsible shall be fined up to fifteen thousand (15'000) CHF and appropriate legal costs shall also be imposed. However taking into account the FEI's recommendation that as a result the particulars of the proceedings of no fault and negligence and that the PR could not have reasonably known or suspect that the use of Teff grass as the main source of nutrition to the horses, could cause the positive findings of Synephrine, the Tribunal agrees with the FEI that no fine shall be imposed on the PR and each party shall bear its own legal and other costs incurred in connection with the proceedings.

X. DISQUALIFICATION OF RESULTS

¹⁸ Exhibits 4-5 of the PR's Submissions.

¹⁹ Exhibit 5, Expert Report of Dr Kimberly Brewer dated 31 March 2020.

²⁰ See for example: [2014/BS03 HEARTBEAT](#), [2014/BS04 KINKA's BOY](#), [2014/BS05 VITESS SC](#), [2016/BS06 DENDROS](#), [2016/BS09 GRANADA](#), [2017/BS29 CONCORDIA 7](#), [2018/BS15 TARYSMART](#), [2019/BS32 ESA-35](#) (for cases involving Oripavine and Morphine) or [2017/BS31 HSM CORNELIO](#), [2020/BS09 LINKIN PARK & 2020/BS 10 COME BACK](#), [2019/BS24 CAROLINE](#) (for cases involving Ractopamine)

93. The Tribunal has taken into account the detailed arguments and caselaw presented at the oral hearing by both Parties in respect of the arguments pertaining to the disqualification of results and notes that Article 9.1 of the EAD Rules provides that an EAD Rule violation 'in connection with a Test in a given Competition automatically leads to the disqualification of the result of the PR and Horse combination obtained in that Competition with all resulting consequences, including forfeiture of any related medals, points and prizes'. Furthermore, the Tribunal notes that such rule applies even if the period of Ineligibility is reduced or eliminated under Article 10, e.g., on the basis of No (or No Significant) Fault or Negligence, "Even if a Sanction is reduced or eliminated under Article 10 below, such reduction or elimination shall under no circumstances reverse the automatic Disqualification of Individual Results mandated by this Article 9."
94. Thus, despite the detailed arguments and caselaw submitted by the PR, the Tribunal confirms that taking into account case of CAS 2017/A/4927 Misha Aloyan v. International Olympic Committee (IOC), award of 16 June 2017 and in particular paragraph 75 which stated that "the "Automatic Disqualification of Individual Results" appears to be nothing else than an objective consequence of an objective fact, i.e. of the finding of an anti-doping rule violation, and an effect of a retroactive assessment of a condition of ineligibility: no athlete using a prohibited substance (unless authorized on the basis of a valid TUE) can compete; if an athlete is later found having competed while a prohibited substance was in his/her body, his/her individual results are disqualified. The disqualification is not a sanction, but only the reinstatement of an objective condition, which explains why its application" is "automatic".
95. The Tribunal agrees that this case confirms that there is no room for any form of discretion in relation to the rule regarding mandatory automatic disqualification of the individual results in connection with an Anti-Doping Rule Violation and as such they do not have the discretion or jurisdiction to deviate from the rule that was in place in 2019 as doing so would create an unlevel playing field and provide a disadvantage to the PR's who already entered into a Settlement Agreement with the FEI. In addition, since the PR has not submitted any proof that the Horse was clean on any of the other days, all the results from the Event should be disqualified.
96. Finally, despite the request of the PR for the Tribunal send this case back to the ATF Policy Panel to apply the 2021 ATF Policy retroactively as a means to allow the results of the Event to be maintained the Tribunal notes that as such Policy only came into effect in 2021 (after these proceedings began) it cannot be applied retroactively as the PR's case commenced before the Policy came into force. The Tribunal also notes that any amendments to the ATF Policy will only be made with the express approval of the FEI Board. National Federations must be informed of any changes to this Policy before the updated Policy comes into effect, thus, they cannot apply a *lex mitior*

principle to this situation as doing so would create a unlevel playing field for all the other cases that have already been settled.

XI. SANCTIONS

97. In summary, the Tribunal imposes the following sanctions on the PR in accordance with Article 167 of the GRs and Article 10 of the EAD Rules:

- a. **upholds the charge that the PR violated Article 2.1 of the EAD Rules;**
- b. **confirms that the PR bears No Fault or Negligence** for the Rule Violation and therefore **he shall not serve any period of Ineligibility** and the otherwise applicable period of Ineligibility shall be eliminated in accordance with the Article 10.4 of the EAD Rules;
- c. **disqualifies the result of the PR and Horse combination** obtained in the Event, and the consequent forfeiture of all medals, points, prize money, etc. won, pursuant to Articles 9 and 10.1.2 of the EAD Rules;
- d. **confirms that this violation of the EAD Rules shall not be considered a prior violation** for the purpose of Article 10.8 (Multiple Violations) of the EAD Rules in accordance with the Article 10.8.3 of the EAD Rules;
- e. **orders that each Party shall bear its own legal costs** incurred in connection with these proceedings.

98. This Decision is subject to appeal in accordance with Article 12.2 of the EAD Rules. An appeal against this Decision may be brought by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt hereof.

99. This Decision shall be notified to the PR and to the NF of the PR and to the FEI.

100. This Decision shall be published in accordance with Article 13.3 of the EAD Rules.

DECISION TO BE FORWARDED TO:

- a. The Parties: Yes
- b. The NF of the PR: Yes
- c. Any other: No

FOR THE TRIBUNAL



Ms Constance Popineau (FRA), One-Member Panel