



MOTORSPORT SOUTH AFRICA

Association incorporated under section 21
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MSA COURT OF APPEAL 378

**APPEAL LODGED BY BMW COMPETITOR GREG GILDENHUYS ARISING FROM A
PROTEST DECISION AT THE WESBANK SUPER SERIES EVENT HELD IN EAST
LONDON ON 30TH OCTOBER 2010.**

**HEARING HELD IN THE MSA BOARDROOM, 9 MONZA CLOSE, KYALAMI PARK AT
18H00 ON TUESDAY, 09TH NOVEMBER 2010.**

Present:	Ken Rolfe	-	Court President
	Darryn Lobb	-	Court Member
	Christo Reeders	-	Court Member
	Wally Pappas	-	MSA Steward
	George Portman	-	Clerk of the Course
	Kevin Bidgood	-	Technical Consultant
	Rob Holder	-	BMW
	Greg Gildenhuis	-	BMW
	Manie Gildenhuis	-	BMW
	Brad Anassis	-	Honda
	Vaughan Swanepoel	-	Honda
	Barrie Barnard	-	Honda
	Adrian Scholtz	-	MSA
	Maria Buys	-	MSA (Scribe)

The president introduced himself and the other court members. There were no objections to the composition of the court.

Purpose

1. The court of appeal was convened in terms of the provisions of GCR 220 of the MSA handbook to consider the appeal of Greg Gildenhuis pertaining to the Wesbank Super Series event held in East London on 30 October 2010 against the exclusion of motorcycle no 34 consequent upon a protest submitted by Brad Anassis for the reasons articulated in a written protest dated 29 October 2010 and submitted at 10h05.
2. Briefly, the protest and the subsequent appeal concerns primarily the eligibility of motorcycle no 34 when viewed against its technical capability to comply with the provisions of Rule 12.24 (f) which stipulates:
"Each importer must supply two homologated CDI units for each model of motorcycle being raced, complete with immobiliser, ignition and key, to the Technical Consultant prior to the motorcycle/s concerned being raced for the first time in the current season. Up to one hour before the commencement of qualifying, the Technical Consultant may request any rider to exchange his motorcycle's CDI unit for one of the 'control units' held by the Technical Consultant. Failure to exchange CDI units when requested to do so by the Technical Consultant will result in the offending competitor being excluded from the race meeting concerned."
3. Other purported infringements of the rules also form the subject matter of the protest. All of these were considered by the Technical Consultant ("TC") on the



Directors: G. Nyabadza (Chairman), J.F. Pretorius (Managing), A. Taylor (Financial), R. Brooks, P. du Toit, J.Lurie, E. Mafuna, A. Makenete, T. Moss, D. Pillay, Mrs. B. Schoeman, B. Smith, A van der Watt, P. Venske – Hon. President : T. Kilburn

day and the motorcycle was found to be compliant save for the subject matter of Rule 12.17 (c) which stipulates that:

“Fuel tanks with tank breather pipes must be fitted with non-return valves that discharge into a catch tank with a minimum volume of 250cc made of a suitable material.”

This aspect is addressed further below.

Summary of Evidence

4. The court was presented with the following written evidence:
 - 4.1 The protest, which comprises a single page;
 - 4.2 The TC’s report regarding the eligibility of motorcycle no 34;
 - 4.3 The protest findings;
 - 4.4 The notice of appeal and the grounds of appeal;
 - 4.5 Correspondence from BMW Motorrad South Africa dated 8 October 2010 which explains the procedure for changing the ECU (CDI) on the motorcycle concerned.

5. The most important evidence adduced during the hearing and which fundamentally motivates the ruling of this court is:
 - 5.1 An exchange of correspondence between BMW Motorrad South Africa and MSA between 25 March 2010 and 01 April 2010 from which it is apparent that BMW had explained the difficulty in complying with the ECU rule owing to the technical advancement of the motorcycle concerned and MSA’s acceptance of the situation;
 - 5.2 The concession made by MSA (fairly so) that at the very least BMW had been granted tacit, if not express, consent to enter the motor cycle concerned in the Wesbank Super Series during 2010;
 - 5.3 The evidence by the Technical Consultant, Mr Bidgood, which set out the intent and purport of Rule 12.24 (f) and the lengths to which he had gone to ensure on or about 25 October 2010 that the ECU fitted to the motorcycle indeed had now loaded on it the standard operating software (with optional HP facility added) which is obtainable only from BMW Germany, whereafter he had taken steps to ensure that the ECU could not be tampered with;
 - 5.4 The evidence by Mr Anassis that since the motorcycle’s first appearance in the competition, he had been suspicious that it could not comply with Rule 12.24 (f);
 - 5.5 The evidence by Mr Holder of BMW South Africa, confirmed by the TC, that the rider of motorcycle no 34 had never been requested to effect an ECU change as contemplated in Rule 12.24(f) .

Summary of proceedings and reasons

6. In terms of GCR 200 v) a) a protest against the eligibility of any vehicle must be submitted within 30 minutes of the vehicle being approved by the scrutineer.

7. Inasmuch as the protestor had been suspicious since its first entry about the eligibility of motorcycle no 34, an appropriate protest ought to have been submitted at the earliest opportunity. In the result, the belated protest of “the homologation and validation of the BMW 1000 cc motorcycle of rider no 34 Greg Gildenhuys” is time barred.

8. As is trite, no legislation can exist in a vacuum. Any legislation, including the rules under scrutiny by this court, must serve a purpose, i.e. there must be a reason for the existence of the rule concerned. Furthermore, rules have to be interpreted liberally, i.e. in a manner which will yield the least oppressive result.

9. As had been explained by the TC, in this particular instance, Rule 12.24 (f) exists so that the TC may speedily and conveniently ensure that the rider of a motorcycle in respect of which he may harbour misgivings with regard to the standard nature of the ECU can be directed to fit an ECU which the TC knows to be standard.

10. Ample evidence had been adduced from which the following became apparent:

- 10.1 The BMW S1000RR is technologically well advanced in comparison to its competitors and employs an ECU system which renders it difficult if not practically impossible to comply with the rule concerned;
- 10.2 The rule is outdated inasmuch as it addresses the position which prevails in respect of previous generation electronics and hence does not take cognizance of the latest developments such as are encountered in the BMW electronics. Evidence was presented that the rule will be significantly revised for 2011 as it is expected that all new motorcycles will introduce an ECU akin to the system employed by BMW;
- 10.3 In view of the tacit consent which MSA had granted BMW, the TC went to extraordinary lengths, alternative to the procedure described in Rule 12.24(f), however directed at satisfying the purport of the Rule, in order to ensure that the BMW ECU was equipped with standard software and that after the 25 October 2010 download, the ECU could not be tampered with;
- 10.4 Argument was advanced that the HP programme offers motorcycle no 34 an unfair advantage. However, it emerged that the programme is available to all BMW customers, irrespective of whether the motorcycle so purchased will be entered in competition and the HP programme had been downloaded onto motorcycle no 34's ECU when it first appeared in the competition.
11. By employing the aforementioned methodology, the TC had satisfied himself that any misgivings which might have existed with regard to the standard nature of the BMW ECU had been ameliorated. As much also appears from his technical report which immediately followed the protest. In the result, through the employment of alternative means, the TC had ensured as effective compliance with Rule 12.24 (f) as would be the case were he to have ordered an ECU change in respect of any other motor cycle employing older technology.
12. In the court's opinion, to merely slavishly follow the express wording of Rule 12.24 (f) would culminate in an iniquitous result not intended by the rule. To do so would be as ineffective and nonsensical as formulating a rule which would postulate that a competitor had to provide, for example, spare windscreens, seats or brake levers. Once a protester had been satisfied as to the standard nature of the software in an ECU, it would be difficult to conceive of a reason for a protest based merely on the purported non-compliance with the express wording of the Rule which would not have an ulterior or otherwise disingenuous purpose.
13. The TC further testified that in his view, no performance benefit had accrued to motorcycle no. 34. Having so satisfied himself, it is the court's view that the TC could only have acted in the manner aforesaid by having taken guidance from Rule 12.1 (f) which states:
*"The competitor is responsible for producing specifications and other material (e.g the service or owner's manual) to prove the legality of his/her motor cycle. **Legality can also be proved by way of comparisons with similar OEM parts**"* (emphasis added).
- It is plainly apparent that the legality of motorcycle no 34 had been proved through the production of "specifications and other material" and hence the TC ought expressly to have invoked the provisions of Rule 12.1 (g) which states:
"The appointed MSA Technical Consultant has the ultimate authority in respect of decisions regarding the technical legality of any motor cycle."
14. The foregoing should be read in conjunction with the provisions of the second bullet point of Rule 12.24 (g) which states:
"The Technical Consultant shall have the overriding authority to make a ruling in respect of any dispute regarding the eligibility or legality of the ignition/electrical system."

It appears as if the TC had given effect to the Rules set out above, albeit without expressly stating as much. It appears further as if these rules were not debated or considered during the protest hearing.

Inasmuch as the TC had given practical effect to the Rules concerned, he had become *functus officio* in that decision and it is the latter decision which ought to have been protested and deliberated upon by higher authority, not the "homologation and validation" of the motor cycle concerned. In this sense, the protest was completely misconceived and misdirected, other disqualifying reasons apart.

15. It was conceded that motorcycle no. 34 did not comply with Rule 12.17 (c) in that the breather system was not equipped with the prescribed one way valve. However, in the opinion of the TC no performance benefit was derived from this omission.

Ruling on appeal

16. On an overall consideration of the evidence, the court of appeal finds as is set out below.
17. The exclusion of motorcycle no 34 is overturned and the points scored by the competitor on the day are reinstated.
18. In respect of the compliance with Rule 12.17 (c) the court finds that motorcycle no. 34 indeed failed to comply with the Rule. Inasmuch as no performance benefit had been derived, in terms of GCR 176 (i) (a), the court imposes a fine of R500-00.
19. If any criticism is to be levelled at MSA it is this. Contrary to what had been contended for, namely that MSA would not consider a change to Rule 12.24(f) for the sake of accommodating a single manufacturer, as appears from the analysis set out above, alternative Rules exist within the confines of which the objectives of Rule 12.24(f) could have been satisfied. Had MSA, in collaboration with the TC, but undertaken a detailed analysis of the Rules and had properly implemented those Rules at the beginning of the season rather than towards the end of the season as the TC eventually did on 25 October 2010, the entire unseemly dispute between the parties might have been avoided.
20. The MSA has within its ranks considerable resources upon which it might draw to assist the MSA in the interpretation and enforcement of contentious Rules. It is recommended that the MSA avails itself of those resources and that it acts with greater expedience in order to obviate similar future disputes. It is recommended further that these resources also be called upon, in collaboration with the importers of motorcycles which are eligible to participate in the series, when amendments to the Rules are considered to ensure that the Rules conform as closely as possible to technology advances.
21. The unsuccessful protestor is ordered to pay costs in the amount of R3 000-00.
22. The successful appellant's appeal fee of R4 000-00 is to be returned to the appellant.