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FINDINGS OF NATIONAL COURT OF APPEAL NO 149

INTRODUCTION

1. This appeal originated from a protest ("the protest") lodged by Mr Ian Young ("Young"), a competitor in the Rotax DD2 category ("the class") of the 2010 SA Rotax Max Challenge Series ("the series") held on 2 and 3 October 2010 at the Zwartkops International Kart Raceway ("the event") against a fellow competitor, Mr Marc Murray ("Murray"). Young protested the use of certain brake discs ("the discs") by Murray which he contended consisted of composite materials, the use of which was forbidden in terms of the applicable rules and regulations pertaining to the class at the event.

2. This Court interposes to mention that it will be approximately three months short of two years since the event by the time these findings ("the judgment") are delivered. The result of this judgment will largely, if not entirely, be of academic importance only. For a variety of reasons (for which this Court does not intend to apportion blame), including postponement of the appeal for purposes of obtaining evidence from the FIA/CIK and the manufacturer, CRG, regarding homologation and compliance of the discs, the appeal hearing could only be finalised on 30 May 2012, having commenced on 6 December 2010. It also bears mention that this Court is aware of the fact that the result of this appeal,

given the approach adopted and the view taken of the underlying issue, not to mention the inordinate delay in finalising it, may not be entirely satisfactory or satisfy everyone's sense of justice. Despite the relatively wide powers of this Court, the origin and nature thereof and the inevitable limitation to decide disputes within the ambit of the applicable rules and regulations, an approach to decide matters solely on equity will be impermissible and *ultra vires* the powers of this Court. To do so will make a mockery of the intention and purpose of those rules and regulations and will not instil the required confidence and certainty among administrators, officials, manufacturers, suppliers and, perhaps most importantly, competitors. Justice to serve the interests of the majority and for the "greater good" may be perceived as an injustice to the individual. This matter may be a case in point.

BACKGROUND

3. Murray participated in the event with a kart to which Duralcan brake discs were fitted. Duralcan is an aluminium alloy according to documentation submitted by the appellant. It is clearly significantly lighter than discs manufactured from cast iron or steel, presumably with an advantage over the latter in terms of, and due to, a reduction of the rotating mass. The use of these discs gave rise to the protest.

4. As was correctly pointed out on behalf of Murray during the appeal, the initial protest was couched in very specific terms referring to the provisions of the 2010 Sporting Regulations for the South African 2010 Rotax Max Challenge Series ("the SARMCS regulations") and the Rotax Mojo Max Challenge Technical Regulations ("RMMCT regulations") in terms of which the use of composite materials are "banned". The essence of the protest was that the discs consist of, or were manufactured from, composite materials.

5. The dismissal of the protest by the stewards, after consultation with the technical consultants (who deemed the discs to have been compliant and hence permissible) gave rise to an appeal.

Young's appeal was essentially formulated on the basis that the discs "are (not) pure aluminium" (as apparently claimed by Murray) and that the brake discs "are not to specification".

6. The appeal was heard on 3 October 2010 by MSA Court of Appeal 376 ("the COA"). The COA dismissed the appeal, ordered retention of the appeal fee and awarded costs in the amount of R5 000,00 against Young. Based on documentation submitted by or on behalf of Murray to the COA and an apparent agreement between the parties that the discs "were stamped and CIK homologated", it was essentially found that there was no evidence of the fact that the discs were not compliant with the regulations. It transpired during the hearing before this Court that the supporting documentation presented to the COA pertained to homologation of brakes in respect of "non-gearbox" karts; the class in this instance being a "gearbox" class.

7. The gist of the grounds of appeal filed on behalf of Young in support of the appeal to this Court was also that the discs consisted of banned composite materials which afforded a performance advantage and were not standard equipment supplied with the chassis raced by Murray. However, Young's appeal underwent somewhat of a metamorphosis by the time the hearing before this Court commenced. Mr North, acting for Young, pursued the appeal on the basis that the discs were "banned", they having been made from impermissible composite materials and because they were not homologated.

8. The point of non-homologation was premised on a number of bases. These were essentially that the discs were different in appearance from those reflected in the photographs and drawings of the homologated discs (a copy of the homologation document was furnished to the Court), that they were also completely different in terms of measurements and thickness and that the discs did not constitute equipment "originally supplied and mounted" to the chassis in question. The argument was also based on a performance advantage being afforded and certain other aspects.

9. It is not necessary to deal with all the different or remaining arguments in detail, other than to

mention that the discs appear to look the same as the drawings but different from the photographs (the drawing reflecting the same “wave” pattern along the outer edges whereas the photographs depict the usual “smooth/even” outer edge).

10. Evidence by Mr Bright, the assistant technical consultant (“the TC”) on the day, was that the discs in fact conformed to the different dimensions of the homologated items. It also appears from the documentation submitted that the Duralcan discs constitute optional items capable of being “originally supplied and mounted” to the chassis. However, these aspects all seem to be irrelevant in the context of another absent feature, being the homologation number dealt with below.

11. For purposes of this judgment, it will be assumed without finally determining the issue, that Duralcan discs were homologated as required by the SARMCS regulations read in conjunction with the RMMCT regulations. Far too much time and energy were wasted by both parties on peripheral issues, most of which could and should have been averted. No more need be said about it.

THE PRELIMINARY ISSUE

12. As has been set out above, the initial protest and even the notice of appeal filed in terms of GCR 219 focused mainly, if not exclusively, on the issue of non-compliance (and hence impermissibility) of the discs because they consist of or are made of composite materials which are banned. Although the issue relating to the alleged use of banned composite materials was never abandoned on behalf of Young, the focus at this hearing was largely on the issue of homologation and particularly, the absence of a homologation number on the alleged offending discs. This calls for consideration of essentially two issues.

13. The first is whether the appellant has properly raised the issue of homologation (and particularly also the issue of alleged absence of a homologation number on the discs) and if not, whether

he should be permitted to do so in the absence thereof. Put differently, is an appellant strictly bound by the content of the notice of appeal submitted in terms of GCR 219? We can do no better than to refer to what was said by MSA National Court of Appeal 151. The issue was dealt with as follows:

"(33) GCR 219 i) requires, inter alia, "all appeals (to) be in writing, specifying briefly the decision appealed against and the grounds of appeal ..." (Emphasis added). It therefore follows logically that an appeal which does not specify "the decision appealed against and the grounds of appeal" would be inadmissible. Similarly, where the decision of a Court of Appeal comprises multiple aspects or decisions, an appellant would be obliged to specify the individual decisions and the grounds upon which the attack on those decisions would be based. It also follows that a decision not specified as being one appealed against would fall within the remit of an inadmissible appeal if that decision is sought to be raised when the appeal is heard.

(34) Despite the fact that "all hearings and appeals are held de novo" in terms of GCR 208 viii), the appeal (or "appeal submission") determines, particularly from the appellant's perspective, the jurisdictional framework within which the hearing and appeal is to be held, albeit that it is also a hearing de novo. To the extent that an appellant would want to incorporate at the hearing of its appeal a decision not specified in writing as being one which is appealed against, such a challenge would be inadmissible and this Court will usually not be inclined to interfere with the particular finding, unless interference is called for on the basis that a gross miscarriage of justice will otherwise occur.

....

(38) ... While a party remains bound by its grounds of appeal, it does not necessarily constitute an insurmountable hurdle to a National Court of Appeal to deal with aspects on appeal beyond the grounds of appeal where a gross miscarriage of justice would otherwise occur. This (the alleged occurrence of a gross miscarriage of justice) is clearly the underlying basis upon which an appeal may be lodged with the National Court of Appeal. GCR 208 ix)a) is clear in this regard. By parity of reasoning, where

such an injustice will otherwise not occur, the appeal will be confined to the grounds of appeal. It will be senseless to embark upon a consideration of aspects which an appellant does not take issue with. The facts of each specific case will inform the decision as to whether a gross miscarriage of justice will or will not occur. It has to be borne in mind, despite the apparent anomaly it may bear, that all appeal hearings are also held as hearings de novo.

...

(48) The facts of each individual case will inform the decision as to the permissible scope of the hearing. The avoidance of a gross miscarriage of justice will always be the overriding consideration in this process. This involves a value judgment individual to each case. In addition, there is nothing in the particular GCR's to suggest that the words "de novo" should not bear their ordinary meaning which is "afresh" or "anew". (See Trilingual Legal Dictionary, 3rd Edition, JUTA, p 175).

(49) Experience has taught over many years that the summary nature of protest hearings by Stewards, the fact that representation of the parties involved is usually either in person or by another lay person, the fact that protests and notices of appeal are often drafted by lay persons and that there is no formal exchange of pleadings, predispose these hearings to inaccuracies of which (the appellant's) formulation of the protest is an excellent example. A lack of experience to adduce relevant evidence, probably due to a combination of a lack of knowledge and understanding by one or both parties involved of what they should prove extending often also to those presiding at such hearings. Reflection after the fact often brings to the fore aspects which parties realise should have been addressed.

(50) It behoves no argument that simple justice between person and person demands sufficient opportunity to ventilate and resolve disputes in order to prevent the inevitable frustration being brought about if disputes are not resolved satisfactorily. Motorsport, by its nature, evokes varied emotions and responses, not only amongst competitors inter se but also between competitors and officials which often results in evidence being

given from emotive and subjective perspectives, which renders it prone to error and misconception.

(51) In broader terms, motorsport does not differ from life in general regarding the need to regulate the activity in the interests of fairness, conformity and safety. This requires the imposition of sanctions in the event of transgressions and provision of general dispute resolution mechanisms, both of which may (and often do) involve highly technical assessments, measurements and evidence in respect of which opinion may widely vary (e.g. how to correctly measure the distance between two critical points).

(52) Those presiding in lower tribunals (including Stewards) have varying degrees of experience in motorsport but are often not legally trained. This, from time to time, results in aspects such as admissibility of evidence and prejudice not being afforded the required importance in their application in hearings.

(53) In the context of what has been set out in the preceding paragraphs, the need was identified and reaffirmed over many years that the only manner in which to prevent the occurrence of a gross miscarriage of justice is to permit hearings to be conducted de novo in the true sense of the word within the confines of and subject to the GCR's (some of which may limit the scope of a hearing as set out above). Legal practitioners who are used to trials and appeals being conducted in terms of either the Criminal Procedure Act, 51 of 1977 or the Supreme Court Act, 59 of 1959 and the Uniform Rules of Court promulgated in terms thereof (not to mention a variety of other legislative provisions regulating form and procedure), find the concept of a hybrid system (when an appeal is conducted as a hearing de novo) to be a strange, perhaps understandably so.

(54) This difficulty is often also compounded by the fact that the law of evidence as applied in the ordinary criminal and civil courts, are not as strictly applied in motorsport matters in terms of the GCR's. Hearsay evidence is, for instance, explicitly permissible in terms of GCR 200. However, many of the general principles of the law of evidence are applied (albeit less strictly) and not simply thrown overboard. Principles of fairness and common sense dictate a less stringent application of the law of evidence by those presiding in these matters (particularly the lower tribunals) so as not to be overly

restrictive in effectively ventilating the issues for adjudication in these disputes. At the same time, it is this approach which often calls for caution in the process of evaluating evidence, especially in appeal hearings. For, inter alia this reason, many of the members of this Court are practising legal practitioners (attorneys and counsel) of many years standing who are or have been involved in motorsport at some or other level. All the other permanent members have extensive experience as current or former competitors, officials, administrators and sometimes a combination of all of these capacities.

(55) An important aspect of a hearing de novo as opposed to an appeal in the strict sense of the word (as usually encountered in civil or criminal matters in courts of law), is that it is intended to permit consideration of all relevant evidence pertaining to the issues to be adjudicated. This would often include evidence which was either not considered in the lower tribunal or not available at the time. Put differently, "new evidence" may be considered provided it is relevant. The concept of "new evidence" may even include evidence which did not necessarily exist at the time of the initial hearing which is under appeal. An example would be evidence of a technical nature by an expert obtained after the initial hearing being appealed. However, it may also relate to any other fact only established thereafter.

…..

(57) In this case, the concept of a hearing de novo means that this Court has to step into the shoes of the Stewards to adjudicate the protest afresh or anew albeit on the basis of facts and information which the Stewards may not have had or considered (and very likely did not have or consider). However, this Court is not bound by what the Stewards found or considered .... The protest is considered anew in the context of <u>all the evidence available at the time of the de novo hearing</u>."

14. In this particular appeal, the COA expressly addressed in its

findings, the issue of homologation and whether the discs complied with the regulations. Young's notice of appeal to this Court, despite the focus on the issue of composite materials, expressly states:

"The Court ruled that since the break (sic) disks (sic) were CIK homologated that they were allowed. We appeal this decision."

15. This Court therefore finds that the issue of homologation of the discs has been properly raised by the appellant. Even if we are wrong on this point, this case is an excellent example of where we would have been inclined to consider the issue on the basis that by not doing so, a gross miscarriage of justice may occur. If, for example, this appeal was confined to the issue of whether the discs consisted of composite materials and, yet the evidence clearly showed that the discs were not homologated items, to ignore the latter issue (assuming the issue of the composite materials to have gone against appellant) thereby effectively ignoring and indirectly sanctioning the use of impermissible components, would not satisfy any reasonable sense of justice. However, it has to be emphasised that it would be imperative for the issue to be raised and properly ventilated by either the appellant or the Court. An appellant should also not be permitted to direct the attention of his opponent on one issue in the hope of succeeding on another in respect of which the respondent has not been afforded a fair opportunity of addressing and disputing same.

16. In this particular instance the instance of homologation and the alleged absence of homologation numbers was fully addressed and ventilated by all parties concerned. Accordingly, this Court will consider what it regards to be the real or central issue in this appeal.

ISSUES FOR ADJUDICATION

17. The following issues fall to be adjudicated:

17.1 The first issue is whether there were any prescribed compulsory requirements which the discs had to comply with in terms of the SARMCS regulations ("the first issue").

17.2 The second issue, if the first issue is answered in the affirmative, is what these prescribed compulsory requirements were and whether the discs were compliant.

It follows, as night follows day, that if the discs were not compliant, Murray would be excluded from the results of the event.

The first issue

18. One of the primary concerns of the members of this Court during the hearing of this appeal, was whether the RMMCT regulations (which are essentially the international technical regulations) are applicable in terms of the SARMCS regulations (the South African regulations). Neither of the representatives assisting the parties could direct this Court with any measure of clarity to the "link" between the South African and the international technical regulations. The former do not contain any specific requirements regarding brake discs other than an oblique reference in paragraph 3 of the supplementary technical regulations regarding the chassis which are permissible and that front brakes are compulsory in the DD 2 class (and not permissible in any other class).

19. The answer to this question is to be found in the fourth unnumbered paragraph of paragraph 1 of the SARMCS regulations. Whilst they are definitely not the epitome of clarity, the particular paragraph describes the concept of the Rotax Mojo Max Challenge programme "and specifying the regulations for the national RMC's in various countries which are the basis for the qualification for the RMCGF". In this context it is apposite to point out that the South African Rotax Max Challenge is a "national RMC". Interestingly (and somewhat inexplicably) the South African regulations explicitly provide for the regulations which will apply to "any international Rotax Max Challenge event" but contains no similar provision in respect of the national events which they seek to regulate.

20. In our view, and despite what seems like a lacuna in the South African regulations, the only reasonable inference to be drawn from paragraph 1 of the SARMC regulations, is that the RMCCT regulations also apply to South African Rotax Max Challenge events, of which the event in question was one. The parties to this appeal were also *ad idem* that the RMMCT regulations apply and should serve as the barometer against which the technical compliance in a dispute such as the present, should be measured.

21. In terms of paragraph 3.1 of the RMMCT regulations, the brake system of the class "must have a valid CIK-FIA homologation". Paragraph 6 thereof provides that "composite materials (carbon fiber (sic) etc.) are banned except for the seat and the floor tray".

22. Article 2.11 of the CIK-FIA Karting Technical Regulations provides, *inter alia*, that "brakes must be homologated by the CIK-FIA" and that "carbon brake discs are forbidden". Article 2.25.2 of the same regulations which deals with homologation, identification and control of equipment or constituent parts, provides that "it must be possible to identify the homologated or approved equipment by the technical descriptions (drawings, dimensions, etc.) on the Homologation or Approval Form." Article 34 of the 2010 MSA Karting Handbook also removes any possible residual doubt as to the purpose of homologation. It provides that "homologation is the identification of equipment or materials used for the purpose of competition in kart racing."

23. It is clear, in our view, that homologation, at its core, aims to achieve and enforce two principles. The first is the availability of controlled equipment or parts to all competitors and the second is the ability to control the use thereof to provide as even a playing field as possible. This is clearly the intended aim of the CIK-FIA Homologation Regulations which provide in paragraph 8.3 in respect of brakes that "the letters CIK-FIA (or the CIK-FIA logo) and the homologation number shall be permanently on all brake elements mentioned above. They shall be clearly visible when the brakes are fitted to a chassis." (Our emphasis). The brake "elements" referred to in the particular paragraph of the homologation regulations, include the brake discs. The homologation number in respect of the homologated brakes permitted to be used on the chassis raced by Murray (manufactured by CRG), is "82/FR/11".

24. In terms of the homologation document pertaining to the brakes homologated by CRG, the photographs clearly depict the manner and position in which the homologation number appears on each individual component of the brake system, including the brake discs. It is interesting to note that the photographs do not depict the letters "CIK-FIA" or the logo as required by the homologation regulations of the CIK. For present purposes, however, this is not relevant. The CIK clearly saw fit to issue the homologation document (and to permit homologation) without the particular letters or logo being affixed.

25. It therefore appears that the first issue has to be resolved on the basis that there are prescribed compulsory requirements pertaining to the discs which applied in the present instance. These are the requirements of the RMMCT regulations read with the CIK-FIA Karting Technical and Homologation regulations.

The second issue

26. From the available documentation submitted to this Court by or on behalf of both parties, it appears that the manufacturer and the head of the CIK-FIA technical department, Mr Arnaud, (as was also argued on behalf of Murray), adopt the view that there is no general ban on the use of composite materials in brake systems. It is, so it was argued, no more than "a general prohibition". The argument was also developed on the basis that there is hardly a component which will not be of a "composite" nature if the prohibition is to be applied in its widest sense. An example would be cast iron, steel and even paint - all of which consist of different substances combined in a "composite unit". It was furthermore argued on behalf of Murray that one should also look at the particular regulations dealing with a specific component in order to determine whether the general prohibition also applies in that instance.

27. We agree. The documentation referred to, the regulations themselves and the application of logic and common sense support this approach. It is also clear that the regulations pertaining to brakes specifically deal with a prohibited substance, namely carbon - which may not be used. The homologation documents also reflect that the material used for, *inter alia*, the discs, is not defined or prescribed. Lastly, the change reflected in the 2011 RMMC technical regulations is also helpful in assisting with the interpretation. Aluminium alloys are specifically mentioned as not falling within the category of prohibited material.

28. This Court is therefore not persuaded that Duralcan discs are prohibited in terms of the applicable regulations. Accordingly, and in so far as Young's appeal is directed at the participation by Murray with discs allegedly made from prohibited composite material is concerned, the appeal has to be dismissed. For the reasons set out above, this Court is also not persuaded that Duralcan discs were not homologated for purposes of the international regulations.

29. This brings to the fore the last issue under this rubric. It relates to the homologation numbers.

30. It is an incontrovertible fact that the discs, in order to be compliant, would have had to bear the homologation number in a manner which would have to be "visible" and "permanent". The discs were inspected by this Court, the parties and their representatives. It is equally incontrovertible that the discs in their current state (i.e. after having been removed and impounded) reflect neither the homologation number nor the words "CIK-FIA" (or, as an alternative, the prescribed logo). This fact, in our view, is dispositive of the whole appeal.

31. The technical regulations are replete with examples of many other components (including certain engine components) which have to bear a number or word or both. The absence of the required markings (whether they be numbers, words, logos or a combination thereof) will make it impossible to determine *ex post facto* whether the particular part or component is compliant with the regulations (whether for homologation purposes or otherwise).

32. While it is quite conceivable that the use of the equipment may cause a required marking to be effaced or erased, sense has to be made of the fact that the marking has to be visible and permanent. In a particular instance (of which this case is perhaps an example) it may have harsh results for an innocent party who falls foul of the requirement of visibility and permanency of markings on certain components which have inadvertently been effaced or erased if the requirement is strictly applied. However, strict requirements make for harsh results - a concept not at all foreign to motorsport. An example would be the post-race thickness of undertrays/planks fitted to Formula 1 racing cars. Despite the fact that the undertrays/planks tend to make contact with the circuit during the race, a certain minimum thickness is required and any car falling foul thereof, would simply be excluded regardless of whether it was the result of an intentional incorrect suspension set up or inadvertent "excursion" off the track.

33. In this particular instance it is not difficult to imagine the enormous problems it would present if competitors could successfully raise the absence of obligatory markings (or, as in this case, homologation numbers) on the basis of normal wear and tear. It would simply result in the regulations not being capable of enforcement. It will be impossible to determine whether a particular component is in fact the prescribed or homologated item. The principle of "identification" will not be served.

34. In this particular case, it is almost inconceivable that the manufacturer would place a homologation number on the friction surface of the disc where it would be bound to disappear or wear off. The homologation documents in respect of brake systems homologated by CRG (for both gearbox and non-gearbox karts), reflect numbers which are applied to bolting flanges and not the friction surfaces. If a different methodology in respect of Murray's discs was applied, it remains unexplained why the manufacturer would do something as silly as that (and there is no other way to describe it). This Court has not lost sight of the fact that Mr Bright gave evidence that the discs, when he inspected them after lodgement of the protest, had a number. However, Mr Bright was unable to tell the Court what that number was. The findings of the COA suggest that there was a number at the time of that hearing or, at least, when the protest was heard - something was apparently "stamped". It is difficult to accept that such a number will disappear spontaneously. Murray also informed this Court that the discs had a number.

35. On the available evidence presented to this Court during the appeal hearing, it is simply not possible to find that the discs bore a number, that the number was the relevant homologation number referred to above and that the discs were accordingly validly homologated items in terms of the CIK-FIA homologation regulations as required by the RMMC technical regulations. It remains unpersuaded regardless of who bears the onus to either demonstrate compliance or the absence thereof.

CONCLUSION

36. In the result, it is found that

36.1 it cannot be determined whether the discs were homologated due to the absence of visible and permanent homologation numbers;

36.2 in the absence of visible and permanent numbers to enable identification, the discs were, consequently, not homologated;

36.3 Murray is excluded from the result of the event.

THE ORDER/FINDINGS

37. In the result and for the sake of completeness, the findings of the Court are recorded as follows:

37.1 The appellant's appeal is allowed;

37.2 Mr Marc Murray, is excluded from the results of the 2010 SA Rotax Max Challenge Series final which was held at the Zwartkops International Kart Raceway on 2 and 3 October 2010;

37.3 The appellant's appeal fee is to be returned subject to retention of 25% of such appeal fee payable as administrative costs in terms of paragraph iii) of the "Notes" to article 13 of Appendix R to the 2010 MSA Handbook;

37.4 MSA is requested to deal with all other fees thus far forfeited and costs paid by the appellant in terms of the protest and the appeal to MSA Court of Appeal 376, commensurate with the result of these findings.

COURT MEMBERS: ADV W P DE WAAL SC
MR A CHATZ
MR J GEYSER

THESE FINDINGS ISSUED ON 11th JULY 2012