



MOTORSPORT SOUTH AFRICA NPC

Reg. No 1995/005605/08

<http://www.motorsport.co.za>
e-mail maria@motorsport.co.za

First Floor, No. 9 Monza Close (Formerly 108), Kyalami Park, Midrand. P.O. Box 11499 Vorna Valley, 1686
Telephone (011) 466-2440. Fax: (011) 466-2262 National Number: 0861 MSA MSA (0861 672 672)

FINDINGS OF MSA NATIONAL COURT OF APPEAL NO. 157 APPEAL LODGED AGAINST THE DECISION OF MSA COURT OF ENQUIRY 1111

APPEAL HEARD AT MSA HEAD OFFICE AT 18H00 ON TUESDAY 05th
JUNE 2013

PRESENT:	André P Bezuidenhout	Court President
	George T Avvakoumides	Court Member
	Mike Clingman	Court Member
	Hector North	Appellant's attorney
	Michael North	Appellant's attorney
	Ed Murray	RKC Committee member
	Jennifer Verheul	Tyre Importer
	Vanessa Wood	RKC member / Club Steward
	Eldrid Diedericks	Clerk of the Course
	Jeff van Roon	RKC member
	Maria Buys	MSA Senior Sport Co-Ordinator
	Allison Atkinson	MSA Sport Co-Ordinator

INTRODUCTION

1. This is the judgment of National Court of Appeal 157.
2. The Appellant is The Rand Kart Club ("the Appellant").
3. The Appeal arises from the findings of Motorsport South Africa ("MSA") Court of Enquiry 1111 ("COE 1111") which dealt with events which transpired at an event held on 20 April 2013 at the Zwartkops International Kart Raceway in Pretoria ("the event").
4. The Appellant filed its Notice of Appeal pursuant to the judgment of the MSA COE 1111 which judgment was handed down on 10 May 2013.
(see *Appeal Bundle, Exhibit "L"*)
5. The Appellant claims that a gross miscarriage of justice has occurred and the penalties imposed are wholly inappropriate for the alleged offences. The COE 1111 handed down a variety of penalties pursuant to its findings:



Motorsport South Africa is the only recognised motorsport Federation in South Africa

Directors: S. E. Miller (Chairman), A. Scholtz (CEO – Operations), A. Taylor (Financial), K. Doig, J. du Toit, M. du Toit, P. du Toit, D. Lobb, N. McCann, C. Pienaar, B. Sipuka, D. Somerset, L. Steyn - Hon. Presidents : T. Kilburn, Mrs. B. Schoeman

- 5.1 the Appellant / organisers were directed to refund 50% of the entry fee of certain competitors;
- 5.2 the Clerk of the Course's licence was suspended for a period of 6 (six) months, of which 3 (three) months was suspended for a period of 2 (two) years;
- 5.3 MSA was directed to not issue the Northern Regions Karting Club and Appellant with permits unless the Northern Regions Committee appoints the Clerk of the Course, MSA Steward and Technical Consultant for all regional karting events for the remainder of the 2013 season.

(see Appeal Bundle, exhibit "J")

- 6. The Appellant was represented by attorneys during these proceedings.
- 7. An Appeal Bundle, comprising exhibits "A" to "N", was placed before this National Court of Appeal ("the Appeal Bundle"). Additional annexures were provisionally admitted as annexures "K" to "N". The Appellant prepared its own appeal bundle and applied that this Court of Appeal substitutes the MSA Appeal Bundle with the Appellant's Bundle. This application was dismissed. It is the responsibility of MSA to prepare the Appeal Bundle and it is the responsibility of the Appellant to prepare any additional documents it intends to place before this National Court of Appeal in a supplementary index to be added to the MSA official Appeal Bundle.
- 8. Annexure "O" was admitted into the Appeal Bundle, which contained communication between the Appellant's representatives and MSA.

THE CONTROL OF MOTORSPORT

- 9. The control of motorsport in South Africa is held by MSA, a Non-Profit Company in terms of the Company's Act 61 of 1973. MSA holds the sporting authority to govern motorsport as it is the delegated authority by the FIA, CIK and FIM. MSA is structured with a Board of Directors, a Secretariat, a National Court of Appeal, Specialist Panels, Sporting Commissions and Regional Committees. The Secretariat of MSA does not serve as bodies governing discipline of motorsport. It only attends to secretarial issues. Ms Maria Buys represented MSA in this capacity. The exercising of the sporting powers by MSA is done in terms of the sporting codes of the FIA, CIK and FIM. As such, MSA has the right to control and administer South African competitions for all motorsport events. The National Court of Appeal of MSA is the ultimate final Court of Judgment of MSA.

(see Articles 3, 4 and 5 of the MSA Memorandum)

(see Article 14 of the MSA Memorandum)

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

10. The notice of appeal claims that:
 - 10.1 a gross miscarriage of justice occurred;
 - 10.2 the penalties imposed against the Appellant were inappropriate;
 - 10.3 COE 1111 erred in eleven respects.

(see *Appeal Bundle, exhibit "L", paragraphs 4.1.1 to 4.1.11*)

11. In the National Court of Appeal's view the following material legal and factual issues crystallized in this Appeal:
 - 11.1 whether the events which transpired during the event constituted a *force majeure*;
 - 11.2 whether the COE 1111 complied with the provisions of GCR 175;
 - 11.3 whether the sanctions against the Appellant, the Clerk of the Course and MSA are sustainable.

12. The appeal was properly constituted in terms of GCR 208 and no person raised any objection thereto.

PROCESS FOLLOWED DURING THE APPEAL

13. At the commencement of the appeal, the President of the National Court of Appeal pointed out that his appointment as President of this National Court of Appeal did not appear from the printed version of the GCR's. MSA submitted to the President a written confirmation that his appointment was officially reflected on the MSA website and that the President was indeed appointed as the President of the National Court of Appeal. A supporting corrective circular was presented to this Court of Appeal. None of the attending parties objected to the appointment of the President notwithstanding their attention being drawn to the oversight.

14. All hearings of Appeals in terms of the GCR's are held *de novo*. In practical terms, this means that this National Court of Appeal adjudicates the matters raised before it by the parties and attendees. The hearing of appeals *de novo* does not mean that this National Court of Appeal serves as a verification institution to verify the correctness of each and every event, appointment and incident which transpired during the event and which may not have been brought to the attention of this National Court of Appeal.

(see *GCR 208 viii*)

15. At the commencement of the hearing, the Appellant was informed that it was not necessary to make any additional submissions or to lead any evidence in view of common cause facts of the matter and the grounds of appeal. All other parties present were notwithstanding invited to make submissions after this National Court of Appeal identified the three crystallized issues referred to in paragraph 11 above. None of the attending parties made any submissions.

THE MATERIAL GCR's AND THE APPEAL BUNDLE

16. The participation of motorsport competitors in events managed by MSA is based on the law of contract. MSA has the sporting authority and is the ultimate authority to take all decisions concerning organizing, direction and management of motorsport in South Africa.

(see *GCR INTRODUCTION – CONTROL OF MOTORSPORT*)

17. All participants involved in motorsport events subscribe to this authority. As such, a contract is concluded based on the “*rules of the game*”. There exists a ranking structure in the MSA Rules and Regulations. (General Competition Rules are referred to as “GCR’s”, Standing Supplementary Rules are referred to as “SSR’s” and Supplementary Regulations published for each event are referred to as “SR’s”). The “*rules of the game*” of motorsport are structured in main on the Articles of MSA, the GCR’s, the SSR’s and the SR’s. Any competitor who enters a motorsport event subscribes to these “*rules of the game*”. (Reference in this judgment to “*rules and regulations*” intends to refer to the broad meaning of the “*rules of the game*”. Specific references to GCR’s, SSR’s and SR’s are individually defined.)

(see GCR 19)

18. It is expected of every entrant and competitor to acquaint themselves with the GCR’s, SSR’s and SR’s constituting the “*rules of the game*” and to conduct themselves within the purview thereof.

(see *GCR 113 read with GCR 122*)

19. GCR 175 details the necessity for a hearing prior to the imposition of any penalty.

“175. NECESSITY FOR A HEARING PRIOR TO THE IMPOSITION OF ANY PENALTY

Except where circumstances make it impossible to do so, before imposing any penalty, the Clerk of the Course and/or Stewards of the Meeting, the Jury, a MSA Court of Appeal or MSA National Court of Appeal as the case may be, shall summon the parties concerned before them. Such summons shall either be delivered personally, or in appropriate cases by post, fax or e-mail to the relevant address. Every notice summoning an individual to a hearing shall state the capacity (eg. defendant, witness, etc.) in which he/she is being required to attend. The procedure at any hearing by the Stewards of the Meeting or the Jury, acting as a court of first instance, shall be in accordance mutatis mutandis with GCR’s relating to "hearing of protests". The procedure at any hearing of any appeal by a MSA Court of Appeal, or National Court of Appeal, shall be in accordance with Part "X" of the GCR’s. In the event of a MSA Court of Appeal or the National Court of Appeal, hearing an appeal or conducting a court of enquiry concerning the imposition of civil penalties, the competitor will be deemed to have committed the offence or offences alleged by the provincial authorities or the law enforcement officer concerned and the onus will be on the competitor to prove that he is not guilty of having committed the offence alleged.”

(see GCR 175)

20. Part VIII of the GCR's provides for penalties to be imposed upon a breach by a person subject to the GCR's. GCR 177 details a scale of penalties in order of an increasing severity. It provides that:

"177. SCALE OF PENALTIES

The following scale indicates penalties in order of increasing severity:

- i) Reprimand*
- ii) Fine*
- iii) Time Penalty*
- iv) Exclusion*
- v) Suspension and withdrawal of licence*
- vi) Disqualification (may only be inflicted by MSA or by the FIA/CIK/FIM)*
- vii) In addition to any other penalty, forfeiture of championship points, which shall only be imposed by MSA or the National Court of Appeal, (except as provided for GCR 176). One or more of the above penalties may be imposed as a result of a single finding, or an option of paying a fine introduced. A fine may not, however, be imposed in lieu of exclusion for non-compliance with the technical regulations or specifications unless the contravention is of a minor nature that the appointed Technical Consultant agrees would afford absolutely no advantage to the competitor."*

(see GCR 177)

21. Courts of Enquiry are empowered through the provisions of GCR 211, which provides that:

"211. COURTS OF ENQUIRY

MSA shall be entitled to convene a Court of Enquiry to investigate a breach of any of the GCR's, SSRs or SRs, whether or not such breach has been the subject of a protest and/or appeal.

- i) Such Court of Enquiry shall be entitled to impose any of the penalties referred to in the GCR's, SSRs and SRs;*
- ii) In the first instance, such Court of Enquiry will be convened as an MSA Court of Appeal and any decision made by it may be considered by the National Court of Appeal.*
- iii) Any MSA Court of Appeal or National Court of Appeal sitting as a Court of Enquiry shall not be precluded from imposing a penalty notwithstanding that no penalty was imposed by any other court referred to in the GCR's."*

(see GCR 211)

22. Hearings, which include the hearings of Courts of Enquiry, are empowered through the provisions of GCR 220, which provides that:

"220. HEARINGS

All parties concerned shall be given adequate (generally a minimum of 7 days) notice of the hearing, and they shall be entitled to call witnesses. Every notice summoning an individual to a hearing shall state the capacity (eg. defendant, witness, etc.) in which he/she is being required to

attend. The hearing may proceed to judgment in default of appearance by any party or witness. In the case of an appeal to a MSA Court, the parties concerned shall state their cases personally.

Representation by a fellow competitor or club member is allowed, but such person may not be a practising attorney or advocate or be entitled to be admitted as either. Where the appellant is a practising attorney or advocate, MSA reserves the right to appoint a practising attorney or advocate as a member of the Court. Notwithstanding the foregoing legal representation is allowed in hearings conducted by the National Court of Appeal. Where an appellant intends exercising his/her right to legal representation, MSA is to be advised of this fact, and the identity of the representative, at least seven days prior to the scheduled hearing. MSA shall then decide whether or not to obtain legal representation of its own and/or to allow the other parties in the hearing to obtain legal representation. Where an appellant fails to advise MSA of his/her intention to exercise his/her right to legal representation in terms of this regulation, the court shall be empowered to take appropriate action so as to prevent prejudice to MSA and/or the other parties involved in the hearing. Hearings are not public and are reserved for the parties and representatives of the promoter and organisers concerned. MSA may, however, invite parties deemed relevant to the proceedings, to the hearing, in the capacity of observers. MSA are entitled to call upon witnesses, specialists or experts whose evidence they deem to be useful in assisting the court. The parties involved in the hearing are also entitled to call witnesses including specialists or experts, but it is their responsibility to ensure their attendance. Where a technical matter is concerned, the court shall consider the report of the scrutineers and recommendations of the MSA Technical Consultant (where applicable), and may not ignore these. The merits of, or grounds for appeal, may not be heard before the court has established that the appeal has been lodged in terms of GCR 214 and GCR 219. The appellant may call witnesses in this regard. The appeal court shall then give a finding on the admissibility of hearing the appeal. An appellant dissatisfied with the finding may appeal to the higher court but shall confine the appeal to showing why the lower court erred in finding the original appeal to be inadmissible. If the higher court finds that in the circumstances prevailing at the time the appeal to the lower court/s was correctly lodged, the grounds of the appeal shall be referred to the lower appeal court involved for hearing.”

(see GCR 220)

THE FACTS

23. The material facts of the matter are not in dispute. During the event, the Karting Commission prescribed that the only controlled wet weather tyre would be the Mojo manufactured tyre. This much is confirmed from SSR 15.

(see Appeal Bundle, Exhibit “A”, paragraph 15)

24. A variety of penalties were handed down to competitors. Competitors who used incorrect tyres during the races were excluded from the race.

(see Appeal Bundle, Exhibit “D”)

25. Exhibit "F" of the Appeal Bundle reflects certain protests which were received by the officials during the event. These protests indicate that there was a variety of protests reported as to the use of Bridgestone tyres which is not the controlled tyre.

(see Appeal Bundle, Exhibit "F")

26. Mr Allen Bouw ("Mr Bouw") addressed a communication to MSA on 24 April 2013 pointing out that he lodged a protest on behalf of competitor number 11 in the Cadet Class.

(see Appeal Bundle, Exhibit "H")

27. The Clerk of the Course filed his report with MSA and stated that the qualifying and the race were in wet weather. In addition, that some of the competitors used the incorrect tyres and that they were penalised accordingly.

(see Appeal Bundle, Exhibit "B", page 3)

28. In the Stewards' report it was recorded that inclement weather marred the start of an excellent race day and that it was a well organised event by the Appellant. In addition, it recorded that there was a tyre problem and that wet weather tyres could not be supplied to a number of competitors.

(see Appeal Bundle, Exhibit "C", page 1)

29. Mr Ed Murray ("Mr Murray"), on 28 April 2013, filed an e-mail with MSA which was dealt with by COE 1111. In this National Court of Appeal, no person attending the hearing challenged the correctness of the facts submitted by Mr Murray who is the representative of the official supplier of the controlled tyre in question. From the e-mail of Mr Murray, the following appears:

- 29.1 Ed Murray Racing CC is obliged to keep sufficient stock of the controlled tyre in South Africa and in fact does so;
- 29.2 the tyres are stored at a warehouse in Edenvale for reasons of security, storage temperature and space;
- 29.3 an unusual amount of wet weather tyres were sold during the wet Friday practice and Jennifer Verheul (Murray) took orders for the supply on Saturday;
- 29.4 sixteen sets of wet weather tyres were delivered to the event on Saturday;
- 29.5 a sudden demand on the wet Saturday exceeded the supply;
- 29.6 Mr Murray's business concern did hold sufficient tyres in South Africa being thirty six sets of wet weather tyres in Edenvale and eighteen sets in Cape Town;
- 29.7 there was no arrangement for the supply of wet weather tyres at the race meeting and there is no previous similar incident in the South African Karting history similar as to what was expected of Mr Murray on the day.

(see Appeal Bundle, Exhibit "I")

THE MERITS

30. It is the Appellant's case that a gross miscarriage of justice occurred. The Appellant carries the onus in this regard.
31. There are no material facts in dispute in this matter as previously pointed out.
32. The "*rules of the game*" within which MSA and all its structures operate, appear from the GCR's, SSR's and SR's. The disciplinary structures of MSA, i.e. decisions by the Stewards, Courts of Enquiry, Courts of Appeal and National Courts of Appeal, depend on the mandating provisions of the "*rules of the game*". The authority of the disciplinary structures is not limitless. The disciplinary structures can only operate legitimately within the confines of the mandating provisions. To emphasise the point, the disciplinary structures of MSA cannot, for example, impose a penalty against a person who is subject to the "*rules of the game*" that that person cannot view, for example, the next televised Grand Prix event or forfeits the racing car or motorcycle to MSA. All penalties imposed on persons subject to the "*rules of the game*" must therefore be in compliance with the mandating provisions.
33. Courts of Enquiry are appointed to investigate a breach of any of the GCR's, SSR's or SR's. As such, they are obliged to take all necessary steps to comply with GCR 175. GCR 175 is clear that **except where circumstances make it impossible to do so** before imposing any penalty, a sanctioning body **shall summons the parties concerned before them**. The logic behind this GCR is simple. Hearings should take place in the presence of persons who may be penalised and to meet the age-old principle of *audi alteram partem*. A review of the list of persons present at the COE 1111 does not reflect that the Appellant was represented at the hearing. There are also no recordal or reasoning that the Appellant was notified to participate in the COE 1111 so as to make applicable the first sentence of GCR 175 so that the COE 1111 could continue in the absence of the Appellant.
34. GCR 175 and GCR 220 were not met by the COE 1111 to ensure the attendance of the Appellant and the appeal must accordingly succeed on this ground alone.
35. There is no evidence that a *force majeure* existed. The failure of the non-compliant competitors to have acquired wet weather tyres was exclusively of their making. There is nothing to gain say the statement of Mr Murray and the COE 1111 erred in finding that a *force majeure* existed.
36. The COE 1111 intended not to penalise compliant competitors. Non-compliant competitors were exonerated and the Appellant, who had no fault in the failure of the non-compliant competitors to have sufficient wet-weather tyres, was red-carded. The reasoning to penalise the Appellant as organiser and to excuse the non-compliant competitors cannot be sustained. The penalty handed down does not fall within the ambit of Part VIII of the GCR's and particularly within the ambit of GCR 177.

37. As to the penalties imposed by the COE 1111, they cannot be endorsed. The conceptual conundrum which the COE 1111 reasoned itself into, is reflected from the following finding it made:

“The Court takes exception to the written submission sent in by Mr. Ed Murray. The actions of Mr. Murray are viewed in a very dim light by the Court. As a tyre supplier it is his duty to supply sufficient tyres. Under the circumstances, the court is of the view that it would be unfair to penalize the competitors too harshly for using the incorrect tyres and would re-instate them were this not to the advantage of all other competitors who complied. Accordingly the penalties stand but the organisers are direct to refund 50% of the entry fee to the competitors. The status of the event could also be scrapped but this would impact negatively on all competitors and as such, this avenue is not considered.”

(see Appeal Bundle, Exhibit “J”, page 2)

38. The COE 1111, as a result of this finding, placed itself in an impossible situation that both compliant and non-compliant competitors could equally complain (based on the incorrect application of the *force majeure* finding) as to unfair treatment. The only way that the COE 1111 could therefore validate its findings was the red-carding of the organisers which was wholly unwarranted in the circumstances.
39. The penalty imposed against the Clerk of the Course is clearly inappropriate as none of the competitors complained that the failure of the Clerk of the Course prejudiced them in any meaningful manner. As to the protest by Mr Bouw on behalf of competitor 11, the competitor was clearly not competing in compliance with the controlled tyre and the protest that he was “forced to race on Bridgestone” has no merit.

(see Appeal Bundle, Appendix “F”, page 3)

40. The penalty imposed on the Clerk of the Course is substituted by a reprimand in terms of GCR 177 i).
41. The directive by the COE 1111 that MSA is directed not to issue permits unless officials are appointed by a specific committee, clearly falls outside the mandating provisions of GCR 211 and is accordingly set aside.

FINDINGS

42. As to the legal and factual issues which arose in this appeal, this National Court of Appeal finds that:
- 42.1 the events which transpired during the event and which lead thereto that some of the competitors elected to race / practice / qualify on an uncontrolled tyre, to wit a Bridgestone tyre, did not constitute *force majeure*;
- 42.2 the COE 1111 did not comply with the provisions of GCR 175 insofar as the Appellant is concerned;

- 42.3 the sanctions handed down against the Appellant and the Clerk of the Course are not sustainable;
- 42.4 the directive issued against MSA as to the appointment of officials is not sustainable;
- 42.5 the appeal succeeds and all penalties against the Appellant are set aside;
- 42.6 the penalty against the Clerk of the Course is set aside and substituted with a reprimand;
- 42.7 the findings of the Stewards and Clerk of the Course at the event as to the individual competitors, are reinstated;
- 42.8 the directive to MSA as to the appointment of officials for forthcoming events organised by the Appellant, is set aside.

COSTS

43. There is no order as to costs in this matter in view of the agreement reached between the Appellant and MSA.

Handed down at Johannesburg on this the 20TH day of June 2013.

Electronically Signed

**Adv André P Bezuidenhout
Court President**

Electronically Signed

**Adv George T Avvakoumides
Court Member**

Electronically Signed

**Mr Mike Clingman
Court Member**