



MOTORSPORT SOUTH AFRICA

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FINAL RULING OF MSA COURT OF APPEAL NO 377

Parties present: As per attendance register

Introduction

1. What is set out below constitutes the final ruling of MSA Court of Appeal No 377 and stands to be read in conjunction with the interim ruling issued by the Court on 25 November 2010.
2. Inasmuch as the interim ruling and the final ruling are to be read in conjunction, the one with the other, the material contained in the interim ruling will not be repeated but merely elaborated upon in order to illustrate this, the final ruling.

The dramatis personae

3. The key figures that feature in the dispute are set out below.
4. On behalf of Honda SA/Bikefin Honda:
 - 4.1 Mr. Barrie Barnard – General Manager, Motorcycle Division, Honda SA;
 - 4.2 Mr. Vaughan Swanepoel – Motorsport Manager (Motorcycles), Honda SA;
 - 4.3 Mr. Brad Anassis – Owner of Anassis Racing and the Team Manager of the Bikefin Honda team;
 - 4.4 Mr. Lance Isaacs – The competitor who rode motorcycle no 2;
 - 4.5 Mr. Dane Hellyer – The competitor who rode motorcycle no 77;
 - 4.6 Mr. Chris Leeson – The competitor who rode motorcycle no 99.
5. Those representing BMW Motorrad SA/Autohaus Towing Services BMW Team were:
 - 5.1 Mr. Rob Holder – Managing Director of BMW Motorrad SA;
 - 5.2 Mr. Marnie Gildenhuys – Team Owner and entrant of motorcycle no 34;
 - 5.3 Mr. Noddy van Greunen – Technician to the Autohaus Towing BMW team;
 - 5.4 Mr. Greg Gildenhuys, the competitor who rode motorcycle no 34.
6. Representing MSA:
 - 6.1 Mr. George Portman – President of the MSA Motorcycle Racing Commission, Chairman of the MSA Motorcycle Homologation Committee and permanent National Clerk of the Course;
 - 6.2 Mr. Kevin Bidgood – National Technical Consultant (“TC”);
7. For ease of reference, the different divisions of Honda shall be referred to as Honda Japan and Honda SA, while Honda Racing Corporation shall be referred to merely as HRC. For the sake of clarity, the references to Messrs Barnard, Swanepoel and Anassis are in their representative capacities of Honda SA, Anassis Racing and the Bikefin Honda team; the latter which in fact is Honda SA’s racing division/team while Anassis Racing is not merely an arm’s length third party service provider seized with the management of Honda SA’s racing team, but is an integral component of Honda SA and the latter’s motorcycle circuit racing initiatives. As such, the individuals aforementioned all make common cause, and are integrally involved in the motorcycle circuit racing activities of Honda SA; hence they are members of a group of persons who enter for and take part in competitions as contemplated in GCR122. In this manner, the individuals are all directly or indirectly involved in motor sport for the purposes of GCR173.



Directors: G. Nyabadza (Chairman), J.F. Pretorius (Chief Executive Officer), 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

BMW Motorrad SA/BMW Motorrad AG shall be referred to merely as BMW while the individuals cited above shall be referred to by their surnames.

Background

8. For many years the South African Superbike Championship was largely dominated by the four large Japanese motor cycle manufacturers, Honda, Yamaha, Suzuki and Kawasaki.
9. In the manner aforesaid, a comparative state of calm prevailed in South Africa and the championship would randomly rotate amongst the four Japanese manufacturers until the beginning of 2010 when BMW launched its first entry into the international superbike market, namely the BMW S1000RR.
10. While the launch of the BMW superbike had long been anticipated, what was entirely unexpected was its ability to immediately obliterate all competition which came in its way as is evinced by its success in the World Superstock Championship and the British Superbike Evo Championship.
11. No sooner had the BMW superbike been launched in South Africa than it commenced also dominating the South African Superbike Championship. Inasmuch as the BMW is equipped with a revolutionary Electronic Control Unit ("ECU"), the advent of which rendered certain sections of the South African rules obsolete inasmuch as they were intended to contend with situations which existed in terms of older technology; as was the case in the United Kingdom, the BMW superbike was bound to attract protests. Indeed, it is safe to assume that had the BMW superbike turned out to be a failure, it would have attracted no adverse attention. However, it is precisely its success which caused alarm amongst its competitors and the unusual nature of its ECU was an obvious focal point for any prospective protest.
12. In an apparent attempt to remain competitive, during or about June 2010 Honda SA introduced into the South African Superbike Championship three modified Honda Fireblade CBR1000RR motorcycles (the nomenclature which is not to be confused with that of the BMW, which is known as the S1000RR); these purporting to be examples of what Honda SA/the Bikefin Honda team claimed to be an evolutionary model bearing model no SC59E (the letter "E" allegedly pointing to "Evolution") as opposed to the standard motorcycle which bears model no SC59.
13. Notwithstanding the introduction of the SC59E "Evo Honda", the BMW superbike continued to prevail. Various protests and counter protests ensued and this Court was seized with determining the reciprocal appeals which arose from the protests; the eligibility of the BMW superbike which formed the subject matter of a final ruling dated 15 November 2010 which in turn is now the subject matter of an appeal to the National Court of Appeal. Post the delivery of the ruling aforementioned, it emerged that it corresponded largely with the rulings in respect of two similar protests in the United Kingdom which were launched against the eligibility of the BMW superbike on the basis of the peculiarity of its ECU.
14. This ruling is concerned with BMW's protest (and subsequent appeal) against the homologation and eligibility of the Evo Honda.

Analysis of the Evidence

15. Mr. Barnard on behalf of Honda SA readily conceded that the Evo Honda's had been modified in the respects set out below. Mr. Barnard's evidence with regard to the modified components was confirmed by Mr. Bidgood:
 - 15.1 Alternate head gaskets;
 - 15.2 Modified cylinder heads;
 - 15.3 Non-standard camshafts;
 - 15.4 The exhaust valves are equipped with double valve springs; and
 - 15.5 Non-standard front forks/dampers.
16. The concession aforementioned obviated the need for BMW to prove the modifications effected to the Evo Honda's.
17. Mr. Portman presented the Court with a copy of the 2010 FIM Homologation Schedule from which it appears that Honda Japan had through the offices of the FIM homologated the following models since January 2006:
 - 17.1 Honda CBR1000RR (SC57) Jan 06 – end;
 - 17.2 Honda CBR 1000RR (SC59) Jan 08 – end;
 - 17.3 Honda CBR1000RR (SC59) Jan 10 to present (new crankshaft);
 - 17.4 Honda CBR1000RR (SC59) Jan 09 – present (STD plus ABS version);
 - 17.5 Honda CBR1000RR (SC59) Jan 10 – present (STD plus ABS Version) – new crankshaft.



18. Significantly, the FIM Homologation Schedule does not reflect for 2010 a model SC59E which is equipped with the modified components which had been admitted by Mr. Barnard on behalf of Honda SA. What begs explanation (which was never forthcoming) is the reason for Honda Japan having seen fit to separately homologating during 2010 a version of their Model SC59 equipped with no more than ABS and a new crankshaft, yet it would neglect to in the same year homologate the model SC59E which is equipped with the significantly greater modifications as set out above.
19. The Regulations and Specifications for the 2010 South African Motor Cycle Road Racing Championship (SSR's) govern, inter alia, the eligibility and homologation of motorcycles. Rule 12.1 states as follows:
“Eligibility – motor cycles
 (a) *To be admitted to the championship motor cycles require homologation as per 12.2 below.*
 (b) *All motor cycles must comply in all respects with all the requirements of the applicable regulations.*
 (c) *...*
 (d) *All motor cycles must be 4-stroke and must be sold to the public in South Africa for road use.*
 (e) *All items, if not expressly mentioned in these regulations, must remain as originally produced and homologated by the manufacturer.*
 (f) *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.*
 (g) *The appointed MSA Technical Consultant has the ultimate authority in respect of decisions regarding the technical legality of any motor cycle.”*
20. Rule 12.2 provides for the following:
“Homologation
 •
 • *Motor cycles to be raced in the championship must be homologated by either the FIM or by MSA. Only motor cycles imported into South Africa by the recognised official importer of the specific make and which comply with these regulations shall be permitted to take part in the series subject to compliance with the additional criteria outlined below. Where FIM homologation is relied upon, the following shall apply:*
 • *The payment of the fee mentioned above will permit those motor cycles imported into SA by the official importer (VIN/chassis numbers to be supplied) that **comply** with **these** regulations **and** that appear in the FIM homologation records for the Stocksport/Superstock/Supersport categories to be raced. (emphasis added)*
 • *Where a particular motor cycle (**that complies with these regulations**) is not homologated by the FIM, the official South African Importers may make application to the MSA Motor Cycle Homologation Committee for a local homologation to allow the motor cycle to be raced in the series. In such cases, the following shall apply (emphasis added):*
 • *The importer concerned shall pay to MSA an (sic) homologation fee of R50 000, 00 excluding VAT which shall incorporate a fee towards the technical administration of the series.*
 • *At least 50 examples of the motor cycle concerned must have been imported into SA (proof must be submitted in this regard).*
 • *The official importer must submit one new motor cycle, chosen by the Technical Consultant, together with a completed Recognition Form A for inspection.*
 • *The homologation, or otherwise, of the relevant motor cycle shall be at the sole discretion of the MSA Motor Cycle Homologation Committee.*
 •
 • *Any motor cycle homologated under these rules shall be allowed to compete without time limitation subject to continued compliance with the appropriate technical regulations and payment of the required fee to MSA by the relevant official importer for the season in question.”*
21. Rule 12.8 provides as follows:
“(a) *Fork structures (spindle, stanchions, bridges, stem, cartridges, etc) must remain as originally produced by the manufacturer for the homologated machine. The external adjusters on the front forks (for making adjustments to preload, compression and rebound damping) must remain, and function, as per those on the homologated machine.*
 (b) *...*
 (c) *...*
 (d) *...*
 (e) *The upper and lower fork clamps (triple clamp, fork bridges) must remain as originally produced by the manufacturer for the homologated machine.*

- (f) ...
 (g) ...”
22. Rule 12.26 provides as follow in relation to the cylinder head:
 “(a) *No modifications are allowed.*
 (b) *No material may be added, or removed from, the cylinder head.*
 (c) *The cylinder head and base gasket must be as homologated.*
 (d) *The valves, valve seats, guides, springs and retainers must be as originally produced by the manufacturer for the homologated machine. Any modifications or repairs to the valves shall only be permitted where allowed for and specifically detailed in the relevant workshop manual (not tuning manual). No modifications may be made to the valve seats, even where such modifications are allowed for in the relevant workshop manual.*
 (e) *Valve spring shims are not allowed unless fitted as standard to the homologated machine.*”
23. Rule 12.27 provides for the following in respect of the camshafts:
“No modifications are allowed, subject to the provisions of Article 12.28 below.”
 Rule 12.28 allows merely for modifications which will enable the “degreeing” of camshafts.
24. Mr. Holder pointed out that a contradiction exists with regard to homologation requirements in that GCR Appendix A allows for “change in specification brought about by evolution of a model concerned”, while the circuit racing regulations do not allow the same latitude. All the parties agreed that inasmuch as GCR 225 states that “*where there is a contradiction between the GCR’s and SSR’s the latter take precedence*”; hence SSR 12.2 takes precedence over the GCR Homologation Regulation.
25. Point 2 of the BMW appeal dated 11 October 2010 takes issue with the homologation by the FIM of the Evo Honda. Mr. Barnard conceded that the Evo Honda has not been homologated by the FIM whereupon Mr. Holder contended that SSR12.2 then finds application inasmuch as “*at least 50 examples of the motor cycle concerned must have been imported into SA (proof must be submitted in this regard)*”,
26. Mr. Portman proceeded to testify that inasmuch as a base model CBR1000RR had been homologated under model no SC59 in 2008 and further, that the Evo Honda model no SC59E constituted merely an evolution of the base model, FIM homologation was not required. Since the 2008 base model SC 59 had been duly homologated by the FIM, so he contended, it was equally not necessary for 50 examples of the Evo Honda SC59E to have been imported into the Republic of South Africa as the prerequisite number of standard SC59 motor cycles have been sold in South Africa since 2008. This argument is fallacious in that, upon a proper construction of the FIM and South African homologation regulations, the 50 unit sales benchmark applies to a particular motorcycle (howsoever equipped, but which “*complies with these regulations*”) and in respect of which FIM homologation had not occurred. The version propounded further fails to explain why Honda Japan would not for all subsequent versions of the Honda SC59 merely rely on the homologation by the FIM of the 2008 base model SC59. As appears from what is set out above, Honda Japan in fact saw fit to during 2010 homologate two incarnations of the SC59 which had effected to them significantly more modest modifications than those which appear on the Evo Honda.
27. Honda SA having conceded that the Evo Honda had not been homologated by the FIM, the Court sought to enquire into the origins of the SC59E Evo Honda motorcycle including the performance enhancing components with which it had been equipped.
28. Mr. Barnard (supported by Mr. Anassis) testified that the Evo Honda was a special production model built by Honda Japan during 2010 and equipped with performance enhancing components also supplied by Honda Japan. At this juncture it bears mention that HRC is a division of Honda Japan which manufactures, inter alia, performance enhancing components for the 2010 model SC59. The HRC website contains colour photographs of all the performance enhancing components aforementioned and these can be ordered freely from HRC via any authorised Honda dealer. However, in respect of the HRC performance enhancing components, the website contains the following disclaimer:
“HRC racing motor cycles are made for competition use ONLY and are NOT covered by warranty and NOT to be ridden on public roads.”
29. The Court enquired of Mr. Barnard whether the performance enhancing components as fitted to the Evo Honda’s had been obtained from HRC; since if so, the Evo Honda’s would be subject to the HRC disclaimer aforementioned which in turn would cause them to fall foul of the provisions of the SSR12.1(d) and (e). Mr. Barnard testified in response that apart from HRC which manufactures special performance enhancing components and the normal Honda Japan manufacturing division which builds the standard components, there exists within the normal structures and divisions of Honda Japan yet a further special division which especially manufactures the performance enhancing components which feature on the Evo Honda just for that motorcycle. It is difficult to conceive of a department which would be manufacturing special performance enhancing components which have not been developed already by HRC. No evidence of the existence of this department and the development work which it ostensibly performs was presented.

30. In response to the assertion that the Evo Honda was a special evolutionary model built by Honda Japan, Messrs Holder and Gildenhuys Snr testified that at the Killarney round of the National Wesbank Super Series event held on 12 October 2010, the frame numbers of the Evo Honda's had been noted and subsequently checked on the computer system which may be found at any authorised Honda dealer. They testified further that when they subsequently visited an authorised Honda dealer and the frame numbers which had been noted at Killarney were entered into the dealership's computer system, the specifications for a standard Honda CBR1000RR model SC59 were produced.
31. Mr. van Greunen further testified that he had attempted to order the performance enhancing parts fitted to the Evo Honda's from an authorised Honda dealer who informed him that they had no knowledge whatsoever of a modified model SC59E and could not supply any performance enhancing components.
32. For the first time at this juncture Mr. Barnard testified that authorised Honda dealers were also equipped with an alternative computer system to which there was limited access by only certain select employees. He testified further that were the relevant frame numbers to be entered into this special computer system together with the performance component order, the order would be "flagged" on the Honda system and the specifications for the Evo Honda would be revealed. It was also possible, according to Mr. Barnard, to not only order the special performance enhancing components by means of this special computer system, but an actual production model of the Evo Honda could also be ordered by means of the same system.
33. Inasmuch as the origin of the performance enhancing components remained a concern and hence the eligibility of the Evo Honda to compete in South Africa, Mr. Bidgood testified that he was present when the Evo Honda's were uncrated and he immediately sealed the engines. This aspect is further elaborated upon herein below.
34. Mr. Portman testified that whereas the "homologated machine" as meant in the FIM Rules is the 2008 model SC59, only in the case of a change to the crankcases of the homologated machine would a separate, new homologation be required by the FIM. Insofar as the Evo Honda SC59E remained equipped with the crankcases of the homologated machine, Mr. Portman contended that all other modifications were lawful, fell within the parameters of the 2008 FIM homologation of the SC59 and the MSA Homologation Committee was therefore entitled to and had indeed validly homologated the Evo Honda for competition use in South Africa. If Mr. Portman's interpretation of the FIM rules were to be followed to its logical conclusion, it would mean that as long as the crankcases remained unaltered, a manufacturer would have carte blanche as far as modifications to any of the internal components (apart from the modified front suspension components in this instance) are concerned. This plainly cannot be so for the reasons set out below.
35. At this juncture, an overview of the FIM Homologation Rules is prudent. In relation to the cylinder head, FIM Rule 2.7.8.2 provides as follows:
- *"No modifications are allowed.*
 - *No material may be added or removed from the cylinder head.*
 - *The cylinder head gasket may be changed.*
 - *The valves, valve seats, guides, springs, tappets, oil seals, shims, cotter valve, spring base and spring retainers must be as originally produced by the manufacturer for the homologated machine. Only normal maintenance interventions as prescribed by the manufacturer in the model's service manual are authorised.*
 - *Valve spring shims are not allowed."*
36. In respect of camshafts, FIM Rule 2.7.8.3 provides:
- *"No modifications are allowed.*
 - *At the technical checks: for direct cam drive systems, the cam lobe lift is measured; for non direct cam drive systems (i.e. rocker arms) the valve lift is measured.*
 - *The timing of the camshaft is free, however no machining of the camshaft sprocket is authorised."*
37. In respect of the front forks, merely the relevant sub-sections of FIM Rule 2.7.10.2 are quoted and they provide:
- 37.1 *"Forks structure (spindle, stanchions, bridges, stem, etc.) must remain as originally produced by the manufacturer for the homologated machine.*
- 37.2 *No **aftermarket** or **prototype** electronically- controlled **suspension parts** may be used. If original electronic suspensions are used, they must be completely standard (any mechanical or electronic part must remain as homologated). The original electronic system must work properly in the event of an electric/electronic failure otherwise it may not be homologated for FIM competitions (emphasis added).*
- 37.3 *The upper and lower fork clamps (triple clamp, fork bridges) must remain as originally produced by the manufacturer on the homologated machine."*
38. In diametric opposition to Mr. Portman's contentions, FIM Rule 2.9.7 under the heading "Parts and Product Update" states:
- "Any change in the specifications of the following parts of a FIM homologated motor cycle will require a new homologation of the model:*

- Crankcase.
- Cylinder.
- **Cylinder head.**
- Crankshaft, connecting rods.
- **Camshafts, valves.**
- Carburation instruments.
- *Frame: main dimensions [in relation to wheel base, caster, steering head angle, relative location of the swing arm, relative location of the rear shock absorber(s) and linkages].*
- *New range of engine prefix numbers.*
- *New range of frame prefix numbers.”* (emphasis added)

39. FIM Rule 2.9.8 under the heading “Homologation of Parts and Products Update” provides as follows:

“Product updates on parts other than those stated in Article 2.9.7, such as the fairing or wheels require a homologation update.”

Accordingly the modified front suspension fitted to the Evo Honda would fall within the purview of FIM Rule 2.9.8 and also on this basis a homologation update was required; all other considerations apart which under FIM Rule 2.9.7 would in any event require a homologation update.

40. The FIM Rules are couched in simple and unambiguous terms. Upon an overall conspectus of the FIM Rules and the South African SSR’s set out earlier above which accord largely with the FIM Rules, it is plainly apparent that the Evo Honda purportedly bearing model number SC59E falls within the ambit of the FIM Rules, ought to have been separately homologated as a “new homologation of the model” and hence, could never validly have been homologated by the South African Homologation Committee based on the 2008 model SC59 for purposes of being eligible to compete in the South African Superbike Championship. By parity of reasoning, it follows that the Evo Honda’s also fall foul of the equivalent South African SSR’s set out above particularly inasmuch as it is not a motorcycle which “*complies with these regulations*” as set out in SSR 12.2.

41. The proper application of the FIM Homologation Rules presents further difficulties for Honda SA and the Evo Honda. FIM Rule 2.9.2 under the heading “Minimum Production Quantities and Market Availability” state:

- *“The minimum required production quantities consist of units with identical equipment intended for sale to customers.*
- *Evidence of production quantities must be certified by the manufacturer’s auditing firm and/or any other institution which may provide reliable documentation. This certificate must be written in English or French and the model/type must be specified.*
- *Market availability and sales to the public may be demonstrated by waybills, bills of lading and/or any other import, export or custom documents duly certified by the relevant authority.”*

At all material times Honda SA knew from the express wording of the BMW appeal that the homologation and eligibility of the Evo Honda were under scrutiny. This notwithstanding, no evidence whatsoever, documentary or otherwise was produced by Honda SA which could serve to satisfy the requirements of FIM Rule 2.9.2.

42. FIM Rule 2.9.2.2 under the heading “Subsequent Homologations for Superbike and Homologation for Supersport and Superstock” provide for the following:

“A manufacturer which has previously homologated a motor cycle in Superbike and is requesting a new homologation, or a manufacturer requesting a homologation for Supersport or Superstock, must follow the procedure below:

- *The manufacturer must have produced at least a quantity of 250 motorcycles prior to the homologation inspection. **The motorcycle must be on sale to the public at that time.***
- *The minimum quantity of 1 000 units must be reached by the end of June of the current year.*
- *The minimum quantity of 2 000 units must be reached 15 days before the last race of the Championship or Cup of the current year.*
- ***All motorcycles must be identical to the model to be homologated with the same specifications.***
- ***Proof of production quantities must be provided by certified documentation as stated in Article 2.9.2.***
- *The FIM will withdraw the homologation if these Rules are not respected”.* (emphasis added)

43. Inasmuch as the Evo Honda admittedly has not been homologated by the FIM notwithstanding however, that the performance modifications plainly dictated that the Evo Honda would “require a new homologation of the model” and indeed should have undergone such a new homologation, the provisions of SSR 12.2 find application in that “*at least 50 examples of the motorcycle concerned must have been imported into SA (proof must be submitted in this regard)*”, provided further that it “*complies with these regulations*”. Mr. Portman testified that at

the time of the hearing of the matter four Evo Honda's were present in South Africa while another two remained in a Customs bonded warehouse. It follows that the Evo Honda fails to comply also with this particular aspect of SSR 12.2.

Post Hearing Events

44. As has been stated above, during the course of the hearing of this matter, Mr. Bidgood testified that he had sealed the engines of the Evo Honda's immediately as they were being uncrated.
45. However, after the hearing had concluded and the protagonists had left the courtroom, Mr. Bidgood stated that he had omitted to add to his testimony that the engines of the Evo Honda's had not been sealed immediately, but only after he had completely stripped them, measured the performance enhancing components against a set of engineering drawings which he had in his possession at the time, whereafter the engines were reassembled and sealed. Mr. Bidgood also had in his possession the engineering drawings upon which he purportedly relied and he produced them there and then, albeit that he did not hand the drawings to the Court members. Upon further informal questioning from the Court members as to the origin of these engineering drawings, Mr. Bidgood suggested that he had obtained the drawings from the FIM.
46. It is inconceivable that Mr. Bidgood would or indeed could have obtained engineering drawings from the FIM in respect of a motor cycle which on Honda SA's admission had never been homologated by the FIM; however, beyond mentioning the improbability of this version of events as propounded by Mr. Bidgood, the Court comes to no further conclusions with regard thereto.

The Interim Ruling

47. Following the conclusion of the evidence, and after further deliberation during which the concerns which the Court expresses elsewhere were identified, the members of the Court elected for the Court to reconvene as early as possible in order to hear further evidence in respect of certain aspects of the evidence on record which appeared to require clarification. Under the circumstances, the Court informed MSA that it ought to be convened as a Court of Enquiry under GCR 211 (ii); however MSA elected to retain the Court's status as a Court of Appeal and to endow it with the capability of conducting an enquiry into those aspects which the Court members deemed it prudent and advisable to be subject to further investigation. In particular, the Court requested MSA to convey to Honda SA/the Bikefin Honda team that at the reconvened proceedings they were to produce every scrap of paper which might serve to substantiate the homologation and eligibility of the Evo Honda's. The Court members had also resolved to procure the presence of the competitors at the reconvened hearing as it was anticipated that the provisions of GCR93 and related rules might become relevant.
48. Under the circumstances and pending the Court reconvening in order to conduct further enquiries into unclear aspects of the evidence which had been adduced, the Court issued an interim ruling on 25 November 2010 which contained what can only be described as the most pointed warning which this Court could issue at the time, namely:
- "5. *The Court has identified several anomalies which bring into question the validity of the purported homologation of the motorcycles in question by the FIM. By necessary inference, the Court therefore harbours certain misgivings with regard to the local homologation of the motorcycles in question and hence their eligibility to compete in the National Wesbank Super Series. In view of the inconclusive nature of the evidence at the Court's disposal, it cannot conclusively rule on the eligibility of motorcycles no 2 and 77.*
8. *However, it bears mention that the participation of the motorcycles in question is subject to the aforementioned appeal and subject further to the ultimate findings of Court of Appeal 377. In the event that the Court may find that the motorcycles in question indeed have not been appropriately homologated; either by the FIM or MSA or either homologation is otherwise defective, the motorcycles in question will as a bare minimum be excluded from the final event of the season which is scheduled to occur during the weekend of 27/28 November 2010 and any points which may so be scored will be set aside."*
49. Given the express nature of the interim ruling, it would indeed have been prudent for Honda SA/the Bikefin Honda team to have rather entered into the final round of the National Wesbank Super Series those motorcycles which had competed in the championship prior to the introduction of the Evo Honda's. However, as matters turned out, Honda SA/the Bikefin Honda team elected to enter for the final round of the competition three Evo Honda's; those campaigned by Messrs Isaacs, Hellyer and Leeson aforementioned under competition numbers 2, 77 and 99 respectively. Competitor no 2's Evo Honda was sealed after the final event of the season to confirm its status. It does not appear as if competitors 77 and 99's motorcycles were so sealed. However, the TC would be aware of the identity/status of the remaining motorcycles and for purposes of the penalties imposed is directed to inform MSA appropriately.

Events subsequent to the handing down of the interim ruling

50. Both opposing parties have intimated that irrespective of the outcome of this final ruling, the "unsuccessful" party would refer the dispute to the National Court of Appeal. In order to inform

the National Court of Appeal fully in relation to the subsequent background events (in the event that the aforesaid stated intentions should come to pass) what follows below under this heading are merely coincidental remarks (obiter dicta); none of which served to inform or otherwise influence the conclusions to which this Court have come or the penalties imposed.

51. Given the debate which the Court members conducted with Messrs Portman and Bidgood with regard to the import and purport of FIM Rule 2.9.7 in the presence of the parties, it was reasonably expected of the representatives of Honda SA/the Bikefin Honda team as well as Messrs Portman and Bidgood to independently have reconsidered their respective interpretation and understanding of FIM Rule 2.9.7 and it was incumbent upon them to have taken the appropriate action in the event of either or all of them concluding that the homologation of the Evo Honda was possibly or indeed defective and that it was ineligible for competition purposes. However, no such reconsideration appears to have occurred as the Honda SA/Bikefin Honda team persisted in entering for the final round of the competition the three Evo Honda's aforementioned while Messrs Portman and Bidgood in their respective capacities as the COC and the TC also failed to consider or implement any sanction against the Honda SA/Bikefin Honda team which had entered the three aforementioned Evo Honda's for the final round of the competition.
52. In contra distinction, the Autohaus Towing BMW team and the Jonway BMW team (competition number 22 ridden by Mr. Nicholas Grobler) were earmarked for significantly harsher treatment.
53. The Court of Appeal 378 handed down a final ruling with regard to the eligibility of the BMW superbike on 16 November 2010. Appropriately paraphrased, the Court of Appeal 378 concluded that through the application of acceptable alternative methods, the TC had ascertained that the software downloaded on the BMW superbike's ECU was indeed "standard" and conformed to the VIN specific software originally downloaded by the BMW factory when the motorcycle was manufactured.
54. The import of this ruling appears to have been lost on both the COC and TC and both the Autohaus Towing BMW team and the Jonway BMW team were promptly ordered to effect an ECU change prior to qualifying on Saturday, 27 November 2010 in accordance with Rule SSR12.24 (f) which provides: *"... up to one hour before the commencement of qualifying, the Technical Consultant may request any rider to exchange his motor cycle'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."*
55. The ECU (CDI) changes were duly effected, however the Jonway BMW refused to start, its original ECU was replaced and competitor Grobler was ordered to start from the back of the grid for the first race. Qualifying was duly completed and race one later that same day was won by the Autohaus Towing BMW team (competition no 34 under the control of Mr. Greg Gildenhuys) while the Bikefin Evo Honda bearing competition no 2 under the control of Mr. Isaacs finished in second position.
56. Court of Appeal 378 was provided with persuasive written evidence which emanated from technical personnel employed by BMW Motorrad AG which set out the unpredictability of any BMW superbike's response to an ECU change and the potentially dangerous consequences which may ensue consequent upon an ECU change. That hearing was attended by the COC, Mr. Portman.
57. GCR156 (vii) provides that the Clerk of the Course shall: *"Take his own decisions within the limits and scope of his authority as set forth in GCR's, SSR's and SR's for the event"*.
58. Notwithstanding that the only ECU change which may competently be ordered is as for provided in SSR 12.24 (f), the COC nevertheless saw fit to, after the conclusion of race one, order an ECU exchange between the BMW superbikes entered by the Autohaus Towing BMW team and the Jonway BMW team respectively. The ECU changes were also accompanied by ignition lock and key changes notwithstanding that no rule exists which would endow either the COC or the TC with the authority to order such a change.
59. Subsequent to both motorcycles actually starting their respective engines, the now exchanged ECU's were removed and retained by the TC, only to be handed back to the teams concerned during the morning of Sunday, 28 November 2010 shortly prior to the commencement of the second race. It is a matter of recorded history that both motorcycles suffered electronic defects while Gildenhuys Jnr crashed out of contention and was unable to complete race two. The precise cause of the crash, however, is unclear.
60. On Monday, 29 November 2010 the President of this Court enquired of MSA when the Court would be reconvened to finalise its enquiry. Rather than reconvene the Court, MSA directed the Court to issue a final ruling on the strength of the evidence adduced on 9 November 2010 on the basis that it was intended for the dispute to be referred directly to the National Court of Appeal. The interference in the activities of a Court of Appeal seized with any dispute, particularly one of the gravity of the incumbent dispute, ought to be frowned upon and discouraged in the future. Of further concern, given the duties of the appointed Stewards under GCR 152 and further, that the TC is directly accountable to MSA, is MSA's failure to have acted

either immediately or at any later stage once it became apparent that certain competitors were being subjected to non-existent rules.

Conclusions

61. On a balance of probabilities, the Court finds that the motor cycle which is described as the “Evo Honda”, ostensibly bearing model no SC59E is in fact nothing more than a standard Honda CBR1000RR model SC59 which has been mechanically modified by unidentified parties which for the purpose used performance enhancing mechanical components of an unknown origin and source.
62. The members of this Court conducted a simple Google search of the purported model number “SC59E”. The search revealed the specifications for the 2008/2009 Honda CBR1000RR. In the result, the evidence that the model number SC59E particularly denotes the modified 2010 Evo Honda falls to be rejected.
63. The evidence that a separate computer system exists which would reveal the specifications for the modified Evo Honda if the identical frame number is to be entered allied to an order for the performance components which reveals the specifications for a standard Honda CBR1000RR when entered upon the normal/usual Honda dealership computer is doubtful; moreover since the evidence presented by the BMW representatives suggest that the Honda dealership which had been consulted is unaware of the existence of the Evo Honda, the special computer system or the specific performance enhancing components which are peculiar to the Evo Honda.
64. For the reasons set out above, the Court finds that the modified Evo Honda is not a special production motor cycle manufactured and modified by Honda Japan, was never homologated by the FIM while it ought to have been, does not comply with any of the relevant FIM Rules, equally does not comply with any of the relevant South African SSR’s and hence, ought never to have been homologated for competition in South Africa by the MSA Homologation Committee.
65. Honda SA through the offices of its managing director, Mr. Barnard and its motorsport manager, Mr. Swanepoel, have for many years imported and made available for competition purposes products mass produced by Honda Japan and which would be commercially available to the international public at large. Likewise, Anassis Racing and the Bikefin Honda team, respectively owned and managed by Mr. Anassis (a former national competitor) have been involved in motorcycle racing, particularly the South African National Superbike Championship during which it exclusively used Honda products, for as many years.
66. Mr. Portman in fulfillment of the multiple roles which he occupies in the sport of motorcycle racing in South Africa has made an invaluable contribution to the sport during the past 20 years. He is generally regarded as the most experienced COC in the country and the only COC with extensive international experience. It is essential that his skills, ability and knowledge be retained for the general benefit of the sport in South Africa.
67. Mr. Bidgood fulfils an equally important role as the National TC, as he has done for many years. The interaction between the National TC and the COC is of vital importance as appears from GCR167 which, inter alia, provides the following:
“Technical Consultants assume primary responsibility for all technical aspects of the category to which they are appointed. They advise the Clerk of the Course and the scrutineers regarding technical matters and may assist where necessary. Should a Technical Consultant’s advice not be heeded, this must be reported to the Clerk of the Course and failing satisfaction, to the Stewards of the Meeting. Technical Consultants may be utilised by MSA in an advisory capacity and to assist with the homologation of vehicles.”
 and
“Where disputes arise considering technical matters, the final decision rests with the appointed Technical Consultant/s. Their advice on technical matter may therefore not be disregarded or ignored by a Clerk of the Course but they do not usurp his/her functions. Technical Consultants may make recommendations regarding the imposition of penalties, where appropriate but the actual imposition of penalties remains the duty of the Clerk of the Course.”
 and further
“While Technical Consultants are available to give advice to officials and/or competitors they report to and are responsible to MSA directly.”
68. The five individuals aforementioned collectively command a wealth of experience spanning many years. Precisely how they had collectively procured the homologation in South Africa of the Evo Honda would have occupied the bulk of the enquiry which would have been undertaken by this Court had it been allowed to reconvene its activities. However, the unlawful homologation could have come about as a result of only the following factors:
 - 68.1 A negligent and incompetent misinterpretation of the relevant FIM Rules as read with the relevant South African SSR’s;
 - 68.2 The representatives of Honda SA and/or Bikefin Honda team misleading (irrespective of whether intentionally or negligently) the MSA Homologation Committee as to the true nature of the origins of the Evo Honda, the performance enhancing modifications effected thereto and its eligibility to compete in South Africa;

- 68.3 A conscious and intentional decision by the individuals concerned to ignore and transgress the relevant FIM Rules and South African SSR's in order to allow the Evo Honda to compete in South Africa.
69. Irrespective of the precise manifestation of fault, the homologation of the Evo Honda for competition purposes in South Africa constituted a grave dereliction of particularly the duties and obligations of the chairman of the MSA Homologation Committee and the TC.
70. At Regional level, competitors in the Regional Superbike A class are strictly subject to the National rules with regard to the standard nature of motor cycles which are eligible to compete in the National championship. The rules are vigorously enforced including a "no practice" rule in terms of which a competitor is not allowed to practice at any circuit within a month prior to an event occurring at that circuit. This rule is intended to discourage wealthy teams from exclusively reserving the circuit for practice purposes and in so doing allowing their riders to gain an unfair advantage over less affluent competitors. No purpose whatsoever will be served by strictly imposing the National rules upon Regional competitors who are encouraged to in due course progress to National competition level, while clandestinely allowing ineligible motorcycles to compete in the National championship when plainly the modifications which form the subject matter of this ruling would offer the competitors which campaign the modified motorcycles a significant advantage over a competitor who is constrained to campaign a motorcycle which complies strictly with the South African SSR's. In this manner, whether advertent or inadvertent, all superbike competitors other than the members of Honda SA/the Bikefin Honda team have been severely prejudiced and denied an opportunity to compete on a fair and even footing with the Honda SA/ Bikefin Honda team.
71. As a result of the careless conduct of the individuals aforementioned, it is indeed unfortunate that the positions of the competitors in the Bikefin Honda team have also been compromised. GCR93 addresses the declaration/undertaking which is to be signed by every competitor. Sub-rule (iii) provides for an undertaking in the following terms:
"I declare that any vehicle/machine entered by me will comply with all regulations and specifications pertaining to the event entered/category of motorsport concerned. I accept, subject to my rights of protest and appeal that action will be taken against me, as the entrant and/or driver and/or rider in accordance with the provisions of MSA's regulations if my vehicle/machine is found not to comply with the relevant regulations and specifications".
72. GCR97 provides as follows:
"An entry which contains a false or incorrect statement shall be invalid and the entrant may be deemed guilty of a breach of these rules and the entry fee may be forfeited. In addition, MSA reserves the right to take any further action it may deem necessary against the entrant in terms of these regulations".
73. In respect of the duties and obligations of an entrant, GCR113 provides as follows:
"In particular entrants shall:
- (i) hold the appropriate licence issued by their parent ASN or FMN;*
 - (ii) be bound by the provisions of the Sporting Codes applicable to the event, such agreement being signified by the signature of the holder on the licence;*
 - (iii)*
 - (iv) before a competition, satisfy themselves as to the eligibility and safety of the vehicle and the competence of its driver(s) / rider/s;*
 - (v) ensure that a vehicle is maintained in an eligible and safe condition throughout the competition;*
 - (vi)*
 - (vii)*
 - (viii)*
 - (ix) understand and accept the full consequences of GCR93 notwithstanding that the signatory may be the driver or another party authorised by the entrant;*
 - (x)*
 - (xi) be responsible for the presentation of the competing vehicle to scrutineering insofar as:*
 - (a) it conforms to the group, category or class and/or regulations governing the event including any modifications which have been performed on it;*
 - (b)*
 - (c)*
 - (xii)*
 - (xiii)*
 - (xiv) have the prime responsibility for all acts and omissions of all persons connected with his entry (notably his driver(s), mechanic(s), pit personnel, passengers and service crews) and for ensuring that they comply with the rules and regulations and be responsible for the payment of any fines levied upon such person."*
74. GCR116 provides for the following in respect of individual responsibility:
"All persons who during a competition are connected with an entry are not absolved from their individual responsibility under any relevant regulations because of the responsibilities assumed by the entrant or his/her representative."

75. In respect of the responsibility of drivers, co-drivers and passengers the relevant sub-sections of GCR121 provides for the following:
- (v) must decline to compete in a vehicle which they know to be ineligible for the competition entered;*
 - (xii) must be aware of the contents of these regulations and in particular of the driving conduct required for the event entered;*
 - (xiii) must agree to be bound by these regulations; such agreement being signified by the signature of the holder on the licence application form”.*

It is inconceivable that the competitors concerned did not know or ought not reasonably to have suspected; given the performance enhancement enjoyed by the Evo Honda's, that the motor cycles were ineligible for competition in South Africa.

76. Finally, GCR122 provides for the following:
- “Every person, group of persons, etc organising a competition or taking part therein shall by doing so or by and upon applying for an organising permit, or by and upon applying for a licence from MSA or by and upon entering for a competition, be deemed to have and recognise that they have:*
- (i) made themselves acquainted with these rules;*
 - (ii) submitted themselves without reserve to the consequences resulting from these rules and any subsequent alteration thereof and agreed to pay as liquidated damages any fines or costs imposed upon them within the maxima set out in appendix R”.*

No evidence whatsoever was adduced on behalf of Honda SA/the Bikefin Honda team or competitors Isaacs, Hellyer and Leeson which might have served to circumvent the deeming provisions of GCR122.

77. It would be remiss of this Court not to comment adversely upon the demeanour of Mr. Barnard and Mr. Anassis. By and large, their evidence was vague, unconvincing and evasive and in several instances patently untrue. The overriding impression was that they were possessed of facts and details which they were reluctant to disclose to this Court. As stated above, the Court informed MSA that it sought an opportunity to reconvene to further enquire into certain aspects in respect of which it harboured certain misgivings and Honda SA was requested to produce the information set out earlier. The intention to reconvene was also stated in the interim ruling of 25 November 2010. Inasmuch as Honda SA presented the Court with no documentary evidence whatsoever on 9 November 2010 which might have proved the homologation and eligibility of the Evo Honda, the Court reasonably anticipated that Honda SA might leap at the opportunity to set the matter to rights. For reasons unknown, however, Honda SA seemingly elected to rather place its fate in the hands of the National Court of Appeal. Inevitably, an adverse conclusion stands to be distilled also from this omission.

Penalties

78. The findings and the penalties set out herein follow consequent upon MSA's ruling that this Court be endowed with the capacity to also conduct an enquiry in relation to aspects which would in the ordinary course transcend the narrow aspect of the appeal. In the result, the Court derives its jurisdiction from GCR208 (v) which provides;
- “A court of enquiry shall act as courts of first instance in all matters and will also consider disciplinary matters not heard during the event by the stewards or a tribunal.”*
79. Furthermore, the Court relies on GCR210 (ii) which provides as follows:
- “Any MSA court of appeal may impose a penalty notwithstanding that no penalty was imposed by any other court referred to in the GCR's.”*
80. Messrs Barnard, Swanepoel, Anassis, Portman and Bidgood are found guilty of a breach of rules as contemplated in GCR172:
- (ii) any action having as its object the entry or participation in a competition of:*
 - (a) a vehicle which has not been accepted for homologation in a competition of racing requiring such a qualification, or*
 - (b) a person or a vehicle otherwise than (a) above, known to be ineligible therefor.*
 - (iv) any proceeding or act prejudicial to the interests of MSA or of motor sport generally;*
 - (vi) misbehaviour or unfair practice.”*
81. Competitors Isaacs, Hellyer and Leeson are equally found guilty of a breach of the provisions of GCR 172 (ii) as well as GCR 172 (iv) and (vi).
82. The decision of the MSA Motorcycle Homologation Committee to homologate the Evo Honda is hereby set aside.
83. Under GCR 186 as read with GCR 188 the Evo Honda's as described above are disqualified to take part in or be connected with any competition whatsoever.
84. Under GCR 184 as read with GCR 173, Messrs Barnard, Swanepoel, Anassis, Portman and Bidgood are all suspended for a period of three (3) years from taking part in any capacity whatsoever in any competition held nationally under the auspices of the MSA; which suspension is suspended for a period of five (5) years provided that they are not found guilty of a breach of any GCR, SR or SSR during the five (5) year suspension period.
85. Competitors Isaacs, Hellyer and Leeson are sentenced to a penalty of exclusion from participation in terms of GCR176 (i) (b) as read with GCR182 (ii); the intention being that they

shall be removed from the results and all the points forfeited of each event/competition in which the Evo Honda's have been entered and ridden by the competitors concerned as contemplated in GCR183. Finally, the entrant (if other than the riders) of the offending motorcycles is fined in an amount of R8 000,00 per unlawful entry for the final event of the 2010 season in terms of GCR176(i)(b) for an aggregate fine of R24 000 in respect of this offence in that the Evo Honda's are found to be in breach of the applicable technical regulations and specifications and had gained an advantage. The Court considered imposing a fine in respect of each event other than the final event for which the three Evo Honda's had been unlawfully entered; however ultimately concluded that the fine imposed serves as an appropriate indication of the Court's displeasure.

86. In terms of GCR177 (ii) as read with appendix R (item 12) as read further with GCR 173, for the breach of GCR172 (ii), (iv) and (vi) Honda SA/the Bikefin Honda team are sentenced to the payment of a fine of R20 000,00.
87. The appeal fee paid by competitor Gildenhuys is to be refunded.
88. Honda SA/the Bikefin Honda team are directed to pay costs in the amount of R10 000,00.

All parties are reminded of their rights of appeal to the MSA National Court of Appeal.

Findings sent via email 18/01/2011

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