FINDINGS AND REASON OF NATIONAL COURT OF APPEAL NO 153

INTRODUCTION AND BACKGROUND

1. The conduct of the appellant in this matter, Mr Izak Maritz, formed the subject matter of the hearing before the MSA Court of Enquiry 1079 ("the COE") on 8 September 2011. This related to the appellant's conduct at the Annual General Meeting ("AGM") of the 4x4 Challenge Association held on 14 August 2011. It is not necessary for purposes of this judgment to deal with the appellant's conduct in any detail. The COE dealt with it comprehensively in its reasons for its findings.

2. It appears that the appellant did not personally attend the hearing before the COE. He was represented by his wife, Ms A Maritz, a fellow competitor. The COE found the appellant guilty of contravening GCR 172 iv). It imposed a penalty of exclusion from competition for a period of 12 months. However, the appellant's woes did not end there. It appears that MSA Court of Enquiry 1073 had previously imposed a suspended sentence of exclusion from participation in any competition for a period of 3 years on the appellant, presumably for similar conduct. It is not clear for what period the exclusion from participation by MSA Court of Enquiry 1073 was suspended.

3. It is accepted that the COE had considered the conditions of suspension and that the contravention which it found the appellant to have been guilty of, entitled it to put the suspended sentence of MSA Court of Enquiry 1073 into operation. It furthermore appears that the COE did not deem it appropriate that the periods of exclusion should be served concurrently, hence its finding that the appellant is suspended from participation in motorsport for an effective period of 4 years.

4. The findings of the COE were published and made known to the appellant on 21 September 2011.

5. On 23 September 2011, under cover of an e-mail from a certain Ms Tanya van der Linde, the appellant filed a notice of appeal ("the notice") (which is incorrectly couched as an application for leave to appeal) through his attorneys, Van Heerden and Krugel Attorneys ("the attorneys"). This Court considers the notice to be a notice of appeal in terms of the appropriate General Competition Rules ("GCRs"). Proof of payment of an amount of R5 000,00 to MSA as an appeal fee, was also provided.

6. On 3 October 2011 MSA furnished the appointed members of National Court of Appeal 153 ("this Court") with the notice, the

aforesaid proof of payment of the amount of R5 000,00 (including the covering e-mail) and the findings of the COE (including its attendance register). The members of this Court considered the documents and resolved to invite the appellant to submit comprehensive written argument confined to certain points ("the directive").

7. On 4 October 2011 the directive was conveyed to the attorneys in the following terms:

"Your clients' appeal to the National Court of Appeal ("NCA") has reference.

We have forwarded the relevant documents consisting of the written appeal, proof of payment of R5000 and the findings of the Court of Enquiry to the members of the NCA who will preside in this matter. We have been requested to raise certain issues with you and to request you to furnish the NCA with the required documentation at your earliest convenience but in any event by no later than the 12th October 2011.

You are requested to submit comprehensive written argument confined to the following points:

1. *Why should the appeal not be dismissed on the basis that it is an inadmissible appeal for want of payment of the correct appeal fee of R15000,00 as clearly set out in article 13 iv) of Appendix R?*
2. *Does the NCA have any authority to condone non-compliance with the requirement of payment of the correct appeal fee and if so, where does this authority arise from?*
3. *If it is found that the appeal not comply with the conditions that prescribe form, content and lodging procedures i.e. that it is an inadmissible appeal ito GCR 216 v) read with GCR's 214E I)* (sic) *and 219, what should the NCA's findings be iro the forfeiture or not of the incorrect appeal fee that was paid?*
4. *Is there any bar to the NCA dealing summarily with the issue raised above solely on the basis of the heads of argument and statements submitted? If so, why is the NCA not entitled to deal with it on this basis or why should it not be so dealt with?*

If you intend to adduce or wish to place before the NCA any evidence of any witness in this regard as contemplated in GCR 220 (irrespective whether the matter is summarily dealt with or not), you are requested to furnish the NCA with detailed statements of the

witness(es) you intend to call reflecting their full names, their relationship if any to the appellants and the import of the evidence they will give."

The content and import of the aforesaid communication is clear and self-explanatory.

8. Despite the fact that the response of the appellant was required by no later than 12 October 2011, the attorney responded by facsimile on 13 October 2011 with a letter stating the following:

"Bogemelde aangeleentheid asook u skrywe gedateer 4 Oktober 2011 het betrekking.

1. *Eerstens bied ons plegtig om verskoning aan dat ons nou eers na u toe terugkeer met betrekking tot kerende korrespondensie en rondom u vra* (sic) *aan ons gestel. Skrywer was werklikwaar opgehou deur verhore in die Hooggeregshof en Landdroshof en is hierdie die eerste moontlike geleentheid om u nodige vrae te kan beantwoord op u bogenoemde skrywe.*
2. *Ons het 'n indringende* (sic) *konsultasie met ons kliënte, tesame met ons Advokaat in hierdie aangeleentheid,*

Advokaat AA Botha, opgestel, en sodra ons voormelde konsultasie gefinaliseer het, stuur ons onmiddellik 'n memorandum aan u kantore op die beantwoording van vrae soos aan ons kantore gerig.

3. *Ons vertrou u vind bogenoemde in orde en onderneem ons om die nodige dringende aandag en erns aan hierdie aangeleentheid te skenk, ten einde enige verdere oponthoud te vermy."*

The content of this letter is similarly self-explanatory. It bears mention that the gist of the response of the attorneys is that they were busy and that they would respond immediately once a consultation had been finalised with the counsel which was instructed.

9. MSA, at the request of this Court, forwarded the following response to the attorneys:

"We have been requested by the members of the NCA appointed to deal with this matter to convey to you the following in response to your letter of 13 October 2011:

1. *Your excuse for not attending to the matter as directed is*

totally unacceptable and is actually tantamount to an admission to being contemptuous of the NCA's directive. Your Mr van Heerden will be well advised to take the time to read the authorities where excuses of this nature have been dealt with by the Supreme Court of Appeal and even more recently, by the Constitutional Court. If he is too busy and other matters are more important he should not be dealing with this particular matter. He cannot hope to serve the interests of his client by the attitude displayed in his aforesaid letter.

2. *To compound matters, Mr van Heerden is apparently under the impression that he is able and entitled to dictate the pace and direction of this appeal. Kindly note that he will not be permitted to do so and conduct of the nature displayed, not countenanced.*

3. *The National Court of Appeal will decide on the issues raised and directed to be dealt with (should the appellant so wish) with or without your client's input. The appellant is afforded an opportunity to submit the written argument, should he so wish, by no later than close of business on Wednesday 19 October 2011."*

The message conveyed to the attorneys on behalf of this Court is

also self-explanatory, save to reiterate that a further extension was granted to the appellant to respond, should he have chosen to do so, by no later than close of business on Wednesday 19 October 2011.

10. On 18 October 2011 Mr J J van Heerden responded as follows with a letter forwarded to MSA by facsimile:

"Bogemelde aangeleentheid asook die onaangename skrywe gerig aan ons kantore op 17 Oktober 2011, waarvan ons op die inhoud gelet het, het betrekking.

1. *Eerstens wil skrywer aan u uitwys dat ons vorige skrywe, 8 dae na ontvangs daarvan deur ons kantore beantwoord is.*
2. *Ons het steeds kollegiaal en eties opgetree en om verskoning gevra. Dit, ten spyte daarvan om korrespondensie te beantwoord binne 8 dae, nie 'n onredelike of onbillike tyd daarstel nie.*(sic)
3. *U gaan egter verder in u genommerde paragraaf 1, en verwys u na die Hoogste Hof van Appèl en die Konstitusionele Hof en die uitsprake wat daarmee gepaardgaande gaan. Ons wens sommer by voorbaat aan u uit te wys, dat ons voorstel u, u deeglike* (sic) *vergewis van*

die uitsprake, en die kontekstuele betekenis daarvan. Dit is duidelik uit daardie sake dat verwys word na gevalle waar die Konstitusionele Hof en Hoogste Hof van Appèl datums, enige iets van 8 tot 18 maande vooruit bekom word, en waar die prokureurs dan, by voorbaat, van hierdie datums weet, en steeds nie hulle hoofde van betoog en opponerende verklarings op tyd liasseer nie, en dan met werklas verskonings vorendag kom. (sic) *Die Hoogste Hof van Appèl sal voorgenoemde nie duld nie volgens die uitspraak.*

4. *U vergelyking van die saak en verwysing na die konstitusionele Hof en Hoogste Hof van Appèl sake, is met alle respek eenogig, onvanpas en totaal uit verband geruk.*

5. *En om dan verder te gaan en te se dat ons Meneer van Heerden 'n houding voorhou in 'n voorafgaande skrywe, dit terwyl ons plegtig om verskoning vra, getuig van absolute swak smaak. U paragraaf 2, is u eie assumpsie en aannames wat u maak. Daar word hoogstens* (sic) *kapsie geneem van hierdie aannames en assumpsie wat gemaak word, naamlik dat skrywer op sy eie tempo en passie* (sic) *wil werk, en stel skrywer voor dat u eers met die skrywer in verbinding tree en sodanige bevestiging kry en eerder 'n wag voor u pen plaas* (sic), *voor u sulke versinsels kwyt raak.*

6. *Wat paragraaf 3 betref, wens ons aan u uit te wys dat in*

terme van die Konstitusionele Reg, ons kliënt 'n reg het op regsverteenwoordiging. Daardie reg kan uitgeoefen word deur enige Advokaat wat hy wil brevetteer. Skrywer as prokureur is blote (sic) *instrument wat op instruksies van ons kliënt werk. Ons het instruksies ontvang om 'n Advokaat te brevetteer en die Advokaat sal hierdie stukke opstel. Ons konsulteer more oggend om 11h30 op voormelde aangeleentheid en sal ons, ons stukke optrek en liasseer."*

11. Short on the heels of the aforesaid facsimile of 18 October 2011, by the attorneys a letter followed by facsimile dated 19 October 2011, enclosing proof of payment of a further amount of R10 000,00 to MSA. The content of this letter reads as follows:

"Above mentioned (sic) *matter as well as your letter dated 4 October 2011 refers.*

1. *We do not intend to deal with every issue raised in the above mentioned* (sic) *letter, as will appear from our answer hereunder, our failure to deal with every allegation should not be seen as admission of the presumptions contained in your letter.*
2. *At the outset, in regards* (sic) *to paragraph 4 of our letter, we need ti* (sic) *enquire on what basis it is , and we herein*

require specific reference to a rule in your Rule book , that entitles you to deal with Appeals by means of heads of arguments and statements submit (sic), *as it would be clearly in contravention of paragraph 208 viii* (sic) *of your rule book.*

3. *Kindly advise at your earliest convenience.*

4. *With regards* (sic) *to your allegations contained in paragraph 1 to 3 of your letter, our clients enquired from your offices the fee payable in relation to an Appeal to be lodged, to which the answer was that an appeal fee had to be paid in terms of Annexure* (sic) *R to these rules, it was not specified that the fee payable has to be done in terms of rule 13 (iv)* (sic) *of Annexure* (sic) *R, and more specifically that the amount had to be R15 000.00*

5. *With regards* (sic) *to paragraph 1 to 3 of your letter, we refer you to Section* (sic) *214 A* (sic) *i, read with Section* (sic) *180 as well as the notes to Appendix R 13 iv* (sic), *we therefore submit that at this stage it would be totale inappropriate for us to file any heads of argument in this matter.*

6. *We require from you, the date set for the continuation of the Appeal in terms of paragraph 214 A ii* (sic) *as well as 214 B, and included* (sic) *herewith proof of payment in the amount of R10 000.00 as well as the R 5000.00 and look forward to*

your urgent response."

12. The aforesaid scathing communications (i.e. the letters of 18 and 19 October 2011) emanating from the attorneys, elicited the following response sent by MSA at the request of this Court:

"We have forwarded your letters of 18 and 19 October 2011 to the relevant members of the National Court of Appeal ("NCA"). We have been requested to convey the following to you:

1. *The content and tone of your letters of 18 and 19 October 2011 have been noted.*
2. *Kindly note that the content of the letter of MSA of 17 October 2011 emanated from the NCA, which is reiterated, particularly in so far as paragraphs 2 and 3 are concerned because of its renewed relevance given the persistence of the contemptuous and insulting attitude adopted. Mr van Heerden will be well advised to consider the remarks by Thring J in Soller v Soller 2001 (1) SA 570 (C) at 573B-F.*
3. *The NCA expects and demands that its directives will be and is* (sic) *adhered to. In the event that a party is unable to comply with such directives and good reason exists for such inability, the proper approach is to seek either an extension*

or condonation (or perhaps both) in the proper manner.

4. *The NCA issued a clear directive of what it requires from the appellant or his legal representatives should they wish to use the opportunity. It is not in the habit of explaining beforehand why directives were issued or to enter into debate on the issue (particularly not where it is apparent why it was done). It also does not intend to do so now. No justification for the directive of 4 October 2011 need be given.*

5. *No written argument as requested was submitted despite an extension to do so being granted. It appears from the latest letter of his attorneys that the appellant does not intend to do so. The appellant is entitled to adopt the stance evinced in the letters referred to above and he will also be advised, no doubt, that he does so at his own peril.*

6. *The matter (particularly the issues set out in the letter of 4 October 2011 to the appellants attorneys) will, as made clear before, be considered in due course without the advantage of the appellants input.*

7. *If the appeal is not dismissed summarily, the appellant will be advised of the date of the further hearing in due course.*

8. *The appellant is reminded of the provisions of GCR 208 (i)* (sic) *and paragraph (iii)* (sic) *under the "Notes" to article 13 of Appendix R."*

This latter communication is self-explanatory, particularly in so far as the approach adopted by this Court is concerned.

IS THE APPEAL ADMISSIBLE OR INADMISSIBLE?

13. The starting point in finding the answer to the question whether the appeal is admissible or inadmissible is GCR 208 ix). It makes it clear that there is no appeal from a judgment or order of an MSA Court of Appeal to the National Court of Appeal except where "*it is alleged that a gross miscarriage of justice has occurred and/or where it is claimed that the penalty is wholly inappropriate for the offence*".

14. A simple reading of the notice reveals that it is neither alleged that a gross miscarriage of justice has occurred nor is it claimed that the penalty is wholly inappropriate for the offence. With regard to the latter requirement, the closest that the notice gets to this jurisdictional requirement, is an allegation that the sentence is "*harsh*". Absent the required allegation and/or the claim of inappropriateness of the penalty, the appellant simply has no right of appeal. The introductory portion of GCR 208 ix) makes this clear in that it is stated: "*Notwithstanding anything to the contrary in any GCR ...*" GCR 215, entrenching the right of appeal of competitors,

persons or bodies referred to therein does not alter the position by reason of the introductory words to GCR 208 ix)".

15. This appeal accordingly falls to be dismissed purely by reason of the absence of any allegation that a gross miscarriage of justice has occurred and/or the absence of a claim that the penalty is wholly inappropriate for the offence. However, this Court will accept in the favour of the appellant that the otherwise inadequate grounds contained in his notice imply an allegation of a gross miscarriage of justice and/or a claim that the penalty is wholly inappropriate for the offence. This finding is made solely because the appellant was not invited to address this particular deficiency in his notice. Given the attitude and approach of his attorneys, it seems clear that it would in any event not have made any difference had such an opportunity been granted. The assumption (and it is purposely put not higher than that) in favour of the appellant, should not be seen as condonation of a wholly inadequate notice and that this Court will necessarily treat deficient notices of appeal in a similar manner in future.

16. The second aspect which is important to bear mention, is the provisions of GCR 211 ii) which specifically states that a Court of Enquiry convened by MSA, will be "*convened as an MSA Court of*

Appeal causing any decision made by it to be considered by the National Court of Appeal". Applied to the present facts, this means that the COE was convened and its findings made as an MSA Court of Appeal.

17. This brings into play the provisions of GCR 214 E i) in terms of which "*the formulated appeal and relevant fee*" as determined in Appendix R to the GCR's must be lodged within the prescribed period. The appeal was lodged within the prescribed period, but the relevant prescribed fee was not lodged. Article 13 iv) of Appendix R is clear. The relevant appeal fee which should have accompanied lodgment of the appeal was R15 000,00. The appellant only paid an amount of R5 000,00. GCR 214 E i) is also echoed in GCR 217 in so far as the peremptory payment of the relevant appeal fee as annually determined and published in Appendix R is concerned.

18. There is no indication and it is thus accepted that MSA has not waived the necessity for payment of the prescribed appeal fee in terms of GCR 219 iii). The proof of this fact lies therein that the appellant firstly paid the incorrect amount of R5 000,00. Thereafter the appellant's attorneys attempted to rectify this fatal deficiency in the appeal by depositing R10 000,00 on 19 October 2011. Had

there been a waiver, neither amount would have been paid.

19. GCR 216 v) cannot be more clear. Any appeal submission (which is nothing but "*the notice of appeal*") which fails to comply with the conditions that prescribe the form, content and lodging procedures determined in the GCR's, shall be inadmissible. It follows that the appellant's appeal is therefore inadmissible in that it falls foul of the "*lodging procedures*".

IS IT PERMISSIBLE TO SUMMARILY DEAL WITH THIS APPEAL?

20. GCR 220 prescribes a variety of aspects concerning the hearing. Whilst hearings are almost invariably held *viva voce* and in person, nothing in GCR 220, either expressly or by implication, determines that it has to be so. A hearing implies a fair and just application of the principle of *audi alteram partem*. Put differently, an appellant (particularly, but not necessarily, where there is no opposing or other interested party) should be given a fair and just opportunity to state his case, even if it is as this Court directed i.e. by means of full written argument and any witness statements which the party involved may elect to submit.

21. Moreover, GCR 220 explicitly provides that the merits of or grounds

for appeal may not be heard before it has been established that the appeal has been lodged in terms of (meaning no less than "*in compliance with*") GCR 214 and GCR 219. The provision that an appellant may call witnesses "*in this regard*" means nothing more than the fact that evidence by witnesses may be adduced, even by means of statements and/or affidavits. It enjoins this Court and any other court dealing with an appeal, to first establish the admissibility or otherwise of the appeal. If the process of establishing the admissibility of an appeal is able to be served justly and fairly by means of a summary hearing as initially envisaged by this Court (which the appellant was invited to participate in and to make submissions also in respect of the notion that the hearing may be summarily be disposed of), it is unnecessary and senseless to convene a court to hear *viva voce* argument and/or evidence and the incumbent inconvenience and expense readily avoidable by adopting the former procedure.

22. In the result it is found that this Court is empowered to summarily deal with this appeal. The only prerequisite of such a procedure is that it should be conducted in a just and fair manner with due regard for the right of the appellant to be heard. The directive issued by this Court, which the appellant's attorneys elected not to heed, provided exactly such an opportunity. The appellant has

elected not to avail himself of this opportunity.

23. Just as the civil and criminal courts of this country cannot function if they were subjected to the whims of the parties appearing before them or of their legal representatives, so this Court (and all other courts, tribunals and the like of MSA) cannot function. For an attorney such as the appellant's attorney to basically ignore the directives of this Court on the basis that he is busy with other things is, to say the least, totally unacceptable.

24. What is even worse, is to then be afforded another opportunity to comply with the directive (as happened in this case - effectively an extension of a further 7 calender days within which to submit the appellant's written argument) but to effectively tell this Court that he will submit whatever needs to be submitted in his own time once consultations with counsel had taken place. This is contemptuous in the extreme and will not be countenanced.

25. The appellant's attorney's last approach was, contrary to the directive of this Court, to "*demand*" that a *viva voce* in person hearing be scheduled. This approach of the appellant and his attorney, they adopted at their own peril. As conveyed to the appellant's attorney (and hence the appellant), this Court will not

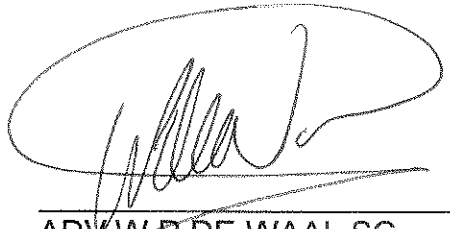
permit a party or their legal representatives to dictate the direction in and pace with which a matter will be finalised. This particular case should serve as a guide to others who may consider a similar approach.

CLOSING COMMENT

26. An aspect this Court may mention, is the possibility of condoning the failure of a party to comply with the provisions of GCR 208 ix), 214, 217 and/or 219. There is no application for condonation before this Court. Accordingly the issue of condonation need not be considered. However, this Court may mention that there appears no indication, either expressly or by necessary inference, that this Court has the power to condone non-compliance with the aforesaid GCR's. There are strong indications to the contrary. Because this issue need not be decided for the reasons set out above, it requires no further consideration. The comment by this Court will obviously not bind any other court in respect of this particular issue and should not be seen to do so.

FINDINGS

27. In the result, the appellant's appeal is dismissed and the appeal fee of R15 000,00 (paid in two instalments) is forfeited in terms of paragraph iii) of the "Notes" to article 13 of Appendix R.



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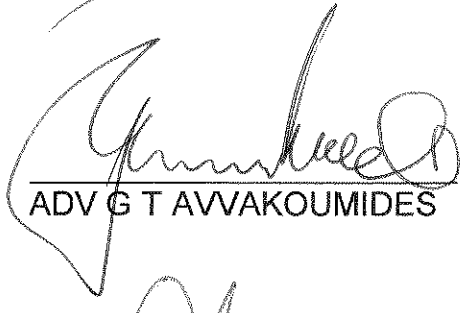

ADV G T AVVAKOUMIDES

MR J GEYSER

25 OCTOBER 2011