



MOTORSPORT SOUTH AFRICA NPC

Reg. No 1995/005605/08

www.motorsport.co.za

2nd Floor, Meersig 1, Cnr. Upper Lake Lane & Constantia Boulevard, Constantia Kloof, Roodepoort. P.O. Box 6677, Weltevreden, 1715
e-mail: msa@motorsport.co.za Telephone (011) 675 2220 Fax: (011) 675 2219, National Number: 0861 MSA MSA (0861 672 672)

MOTORSPORT SOUTH AFRICA NATIONAL COURT OF APPEAL, 164

APPELLANT

VOLKSWAGEN MOTORSPORT A DIVISION OF VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD

IN RE

Appeal arising from the findings of MSA Court of Appeal 421

DATE OF HEARING

27 January 2016

Present (Officials):

Advocate André P Bezuidenhout

Attorney Jannie Geysler

Richard Schilling

Mike Clingman

Wayne Riddell

Allison Atkinson

Court President

Court Member

Court Member

Court Member

Sporting Services Manager: MSA

Circuit Sporting Coordinator

NATIONAL COURT OF APPEAL 164

1. On 27 January 2016, Motorsport South Africa ("MSA") enrolled National Court of Appeal 164 ("the appeal"). There was no objection to the constitution of the appeal panel.
2. This is the written judgment of the National Court of Appeal ("NCA") 164. The Appeal hearing took place on 27 January 2016 between 18h00 and 19h45. Judgment was reserved and it was directed that depending on the outcome of this Judgment, directions will be handed down as to the continuation of the matter, if need be. Proceedings were mechanically recorded. For the purposes of this Judgment reference is only made to the material issues as the remainder of the proceedings are of record.
3. The Appellant in this matter is Volkswagen Motorsport a Division of Volkswagen of South Africa (Proprietary) Limited ("Volkswagen" / "the Appellant"). The Appellant was represented in these proceedings by Adv Tremayne Dalrymple ("Adv Dalrymple") on the instruction of attorneys Chris Baker & Associates. The hearing was well attended with several interested parties in attendance. Attorney Hector North ("Mr North") represented Iain Pepper ("Mr Pepper") who is an interested party in the proceedings.
4. The Appeal arises from the findings of MSA Court of Appeal 421 ("the COA") which dealt with events that transpired on Saturday, 24 October 2015 at the Killarney Raceway, when the Clerk of the Course ("the COC") issued a notice that there would be a strip of various components in the Engen Volkswagen Cup Series ("the series") after the third heat on the day. The notice identified three pit bays behind the

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sport & recreation
Department
Sport and Recreation South Africa
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main garages at the Killarney raceway as a designated *parc ferme* where the strip would take place. Certain factual events transpired during the strip and a further technical inspection took place on Thursday, 29 October 2015, in Johannesburg where certain further events transpired. COA 421 dismissed the appeal of Mr Pepper and made adverse findings as to:

- 4.1 the decision to create a temporary *parc ferme* whilst scrutineering facilities existed at the Killarney circuit;
 - 4.2 the failures by the Technical Consultant to follow GCR 252 vi).
5. In consequence of the findings of COA 421, the Court found that the technical inspection was significantly flawed and set aside all findings and penalties arising from the flawed inspection. Following this decision, the Appellant promoted its leave to appeal. Leave to appeal was granted to this NCA on 27 November 2015.
 6. The payment of the appeal fees was waived by MSA (as it was entitled to do). Much was made by Mr North about this in his oral address to which this NCA will refer to below.
 7. The appeal bundle initially comprised exhibits "A" to "P". On the day of the hearing, the Appellant supplemented the appeal bundle by delivering two further exhibits, being "Q" and "R" to MSA. In addition, the Appellant provided this NCA with the Regulations and Specifications for the 2015 Engen VW Cup National Championship Series (updated 29 January 2015) ("the VW Cup Regulations"). MSA made available to this NCA these additional exhibits and they were provisionally added to the appeal bundle.
 8. The NCA is indebted to the legal representatives for their able contribution in the matter.

PROCEDURAL DIRECTIVE 1

9. In the morning of 27 January 2016, this NCA issued the following procedural directive:

"TO: WAYNE RIDDELL, MOTORSPORT SOUTH AFRICA
FROM: NATIONAL COURT OF APPEAL, 164

Procedural Directive 1

1. *The Appellant is directed to make available by 14h00 today, 27 January 2016, its formulated appeal provided for and contemplated in terms of GCR 212 B), read with GCR 219.*
2. *This Procedural Directive does not adjudicate whether the Appeal is properly constituted.*

Adv AP Bezuidenhout ***President, National Court of Appeal 164"***

10. This procedural directive was apparently not received by the Appellant, but it was received by the NCA members.
11. During the course of the day of 27 January 2016 exhibits "Q" and "R" were submitted to MSA by the Appellant but clearly not in response to the procedural directive.
12. At the commencement of the hearing, the issue of the formulated appeal was raised with Adv Dalrymple and he was invited to deal with the matter first, prior to the appeal continuing on the merits. Adv Dalrymple was afforded an opportunity to take instructions on the matter and to make submissions and Mr North, likewise, made submissions in this regard.
13. Before dealing with the matter further it is important to state that the appeal is prosecuted within the ambit of MSA's authority to control motorsport.

THE CONTROL OF MOTORSPORT, THE GCR'S AND THE SSR'S

14. The control of motorsport in South Africa is held by MSA, a Non Profit Company in terms of the Companies Act 61 of 1973 and Act 71 of 2008. MSA holds the sporting authority to govern motorsport as it is the delegated authority by the *Federation Internationale de l'Automobile* ("FIA"), *Commission Internationale de Karting* ("CIK") and *Federation Internationale de Motocyclisme* ("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. Wayne Riddell ("Mr Riddell") represented MSA in this capacity. The exercise of the sporting powers by MSA is in terms of the sporting codes of the FIA, CIK and FIM. As such, MSA has the right to control and administer South African National Championship competitions for all motorsport events. The National Court of Appeal of MSA is the ultimate final Court of Judgment of MSA. (see *Articles 3 to 7 of the MSA Memorandum*) (see *Article 35 of the MSA Memorandum*)
15. 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*)
16. 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"). The "*rules of the game*" of motorsport are structured in main on the Memorandum of MSA and the GCR'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 are individually defined.) (see *GCR 1*)
17. It is expected of every entrant and competitor to acquaint themselves with the GCR's constituting the "*rules of the game*" and to conduct themselves within the purview thereof. see *GCR 113 read with GCR 122*)
18. It speaks for itself that Volkswagen Motorsport will equally be acquainted with the GCR's in view of their pivotal role in the series.

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

19. The Appellant is *dominus litus* in this appeal. It is apposite nonetheless, to firstly deal with the Appellant's *locus standi* in view of the stance adopted by Mr North on behalf of Mr Pepper.

Whether Volkswagen Motorsport has locus standi in this appeal

20. Mr North, in his submissions launched a severe attack on the conduct of Volkswagen Motorsport in this appeal, its *locus standi* and the fact that the appeal fees were waived by MSA. In essence, Mr North submitted that Volkswagen Motorsport received favourable treatment from MSA which is an indication of bias in its favour. Mr North submitted that Volkswagen Motorsport has no *locus standi* to be heard. Mr North indicated that Volkswagen Motorsport is not a competitor. Mr North attempted to convince this NCA that on this ground alone, the Appellant should fail, irrelevant as to other issues.
21. A reading of the VW Cup Regulations (exhibit "Q") indicates that:
 - 21.1 Volkswagen Motorsport is responsible for the administration of the series subject to the over-riding authority of MSA (Regulation 3.a));
 - 21.2 the aim of the championship is to declare a National Engen VW Cup Champion (Regulation 2.a));

- 21.3 the series is open to VW Cup cars constructed by VW Motorsport (Regulation 4.b));
- 21.4 no drivers will be eligible to compete in the series if they are not fully paid up members of the Engen VW Cup association which will be managed by VW Motorsport (Regulation 5.a));
- 21.5 all competitors must ensure compliance with advertising decals of the series sponsors (which includes VW) (Regulation 10 and in particular 10.e));
- 21.6 specific regulations are included for an appointed Technical Consultation and Technical Inspections (Regulations 18 and 19);
- 21.7 the only permissible engine is a unit supplied by VW Motorsport which is sealed and may not be stripped or worked on by competitors or their teams.
22. Volkswagen South Africa has a corporate relationship with motorsport in South Africa. It is a corporate member and registered as such by MSA. According to Mr Riddell they pay their licence fees every year. As a corporate member they are intricately involved in a National Series (in this instance the 2015 Engen VW Cup National Championship series).
23. There is absolutely no merit in the submissions made by Mr North in this regard. This NCA was informed during the hearing (nobody disputed this) that Volkswagen Motorsport is a corporate member of MSA within the ambit of the General Competition Rules ("the GCR's"). GCR 26 defines a corporate member as follows: "**26. CORPORATE MEMBER**" means anybody recognised by and affiliated to MSA as a club or association, associate member, company and / or closed corporation, and registered as such."
24. All of these Regulations demonstrate the pivotal role which VW Motorsport plays in the series and its involvement therein to make the series one of the recognisable National Series events administered under the control of MSA. It is accordingly disingenuous to contend that VW Motorsport do not have *locus standi* to have issues resolved within the ambit of the tribunals of MSA, including this NCA.
25. This NCA accordingly finds that VW Motorsport has *locus standi* and that the submissions made by Mr North are rejected.

Whether the appeal is properly constituted in terms of GCR 212 B) read with GCR 219

26. GCR 212 B) provides for when leave to appeal should be requested by a party and procedures to be followed in an application for leave to appeal to an NCA. This GCR provides as follows:

"212. LEAVE TO APPEAL

B) Leave to Appeal to an MSA National Court of Appeal

Where a matter is considered by an MSA Court of Appeal, a party aggrieved at the outcome may apply to the NCA for leave to appeal. Such application for leave to appeal must be submitted in writing, detailing fully the background to the matter and the reasons why leave to appeal should be granted, within 7 (seven) days of the written notification of the MSA Court of Appeal's findings and be accompanied by payment of a fee of R3000.

Three (3) members of the NCA shall consider an application for leave to appeal on the papers only (no hearing will take place) and their decision shall be final.

Where the NCA panel rejects an application for leave to appeal, the fee paid shall be forfeited. The NCA may, but shall not be obliged to, call for an application for leave to appeal to be supplemented, should the applicant wish to do so, in the respects deemed necessary and within a specified reasonable period not exceeding 5 (five) days. Where the NCA panel grants leave to appeal, the applicant shall submit a formulated appeal (see GCR 219) within 7 (seven) working days of the leave to appeal being granted, together with payment of the appeal fee of R15 000.00 (the leave to appeal fee paid will be credited against this amount so the actual additional amount payable will be R 12 000). Failing submission of a formulated appeal and payment of the required fee within the stipulated time frame, the right of appeal shall automatically lapse and any fees paid shall be forfeited.

Such formulated appeal shall be considered during a formal hearing by the NCA. No member of the NCA shall be disqualified from being involved in any appeal solely by reason of having been involved in an application for leave to appeal in the same matter. The members of the NCA may, but shall not be

obliged to, direct verbal argument to be submitted on and/or for the papers to be supplemented in any respect as deemed necessary. They shall not be obliged to furnish any reasons for any decision taken or directive issued."

(our emphasis)

27. GCR 219 deals with the form of an appeal and appeal fees. This GCR provides as follows: **"219.FORM OF APPEAL AND APPEAL FEES**

i) All appeals shall be in writing, specifying briefly the decision appealed against and the grounds of appeal, the relevant rule numbers, be signed by the appellant, and shall state the address to which communications shall be sent.

ii) Payment of appeal fees may be in the form of either cash, a cheque or electronic funds transfer (EFT), provided however, that payment (in the case of a cheque or EFT), is honoured within 48 hours of same having been tendered, failing which the appeal will be considered null and void and the appellant will be subject to any disciplinary action which MSA may deem fit.

iii) MSA may, at its sole discretion, waive the necessity for payment of an appeal fee, if circumstances warrant (such waiving of the appeal fee shall normally only be considered in cases where the appeal is being lodged by an official).

(our emphasis)

28. Much was said during the appeal about exhibit "O" and whether it is a formulated appeal or not. The document comprised 34 pages:

28.1 the first page ("O1") bears the Volkswagen Motorsport name and logo;

28.2 the second page ("O2") contains an index containing a variety of documents;

28.3 exhibit "O4" is addressed to the Court Members of this NCA dated 3 December 2015 by Mike Rowe ("Mr Rowe"), the Motorsport Manager of Volkswagen Motorsport. It is in essence a helpful recordal of the sequence of events with reference to documents and information which Mr Rowe clearly believe would be of importance in this NCA.

29. Adv Dalrymple, during his submissions, made necessary and obvious concessions. He submitted that the failure of Volkswagen Motorsport to have filed a notice of appeal should not be fatal to their case:

29.1 he correctly, during his submissions, conceded that exhibit "O" does not constitute a notice of appeal in strict compliance with GCR 212 B) read with GCR 219;

29.2 he submitted in the main that the document, exhibit "R", which was only produced on the day of the appeal (the document is signed by Adv Dalrymple and appears to be what is generally known as heads of argument relied on by Counsel in legal matters to assist the tribunal with a recordal of the submissions made by the litigant) contained two paragraphs, being paragraphs 6 and 10 which could be interpreted as identifying the grounds of appeal;

29.3 he further submitted that a proper consideration of the GCR's in particular the Introduction to the GCR's provide that this NCA should grant condonation to Volkswagen Motorsport to file a notice of appeal within the ambit of the two relevant GCR's. He submitted that the preamble encourages the participation of Volkswagen Motorsport which includes the ability of Volkswagen Motorsport to participate in this NCA. He argued that paragraphs 6 and 10 of the heads of argument, in substance, should inform the NCA and the other interested parties of the grounds of appeal. He argued that the GCR's fairly, equitably and properly applied by the NCA, should support the Appellant's case. The preamble provides that:

"INTRODUCTION

Control of Motorsport

Delegation of Power

That the powers granted to it may be exercised in a fair and equitable manner, MSA has drawn up these rules, known as the General Competition Rules, hereafter referred to as the GCR's, which generally

conform to the Codes of the FIA, CIK and FIM.

SO THAT THE ABOVE POWERS MAY BE EXERCISED IN A FAIR AND EQUITABLE MANNER MSA HAS DRAWN UP THE PRESENT GCR'S AND SSR'S. THE PURPOSE OF THESE GCR'S AND SSR'S AND THEIR APPENDICES IS TO ENCOURAGE AND FACILITATE MOTOR SPORT IN SOUTH AFRICA. THEY WILL NEVER BE ENFORCED SO AS TO PREVENT OR IMPEDE A COMPETITION OR THE PARTICIPATION OF A COMPETITOR, SAVE WHERE MSA CONCLUDES THAT THIS IS NECESSARY FOR THE SAFE, FAIR, OR ORDERLY CONDUCT OF MOTOR SPORT IN SOUTH AFRICA."

- 29.4 Adv Dalrymple also tendered a postponement of the hearing to afford all interested parties the opportunity to avoid any prejudice to them by the failure of Volkswagen Motorsport to have complied with the two relevant GCR's. He stated that all the interested parties were present and that a postponement could cure any prejudice.
30. Mr North submitted that none of these arguments have any merit. He submitted that in his twenty years of appearing in the NCA, the NCA has not given any latitude to an appellant as requested by Volkswagen Motorsport. He was vocal in his criticism of MSA as to the waiving of the appeal fee by Volkswagen Motorsport. He submitted that there was no explanation as to why Volkswagen Motorsport failed to file a notice of appeal and in absence of an explanation, it is a backdoor attempt to submit exhibit "R" as the "notice of appeal". He finally submitted that GCR 212 B) was peremptory that an "appeal shall automatically lapse" if the formulated appeal was not filed within seven days of leave to appeal being granted.
31. It is against the above that this NCA has to adjudicate the appeal:
- 31.1 the NCA is the highest tribunal in motorsport as a final Court of judgment to finally settle any disputes in appeal which occurs in MSA's territory. Leave to the NCA can only lie in following GCR 212 B). A party aggrieved by the outcome can apply, as Volkswagen Motorsport did in this matter, for leave to appeal;
- 31.2 the application for leave to appeal was not part of the appeal bundle before this NCA. It is indeed a different tribunal which considered it at the time. The application for leave to appeal was taken on the papers submitted by Volkswagen Motorsport only;
- 31.3 GCR 212 B) is peremptory. It provides that a formulated appeal (see GCR 219) shall be submitted within seven working days of the leave of appeal being granted. The GCR is clear in its ambit "**failing submission of the formulated appeal, the appeal shall automatically lapse**";
- 31.4 GCR 219 is equally clear in its formulation. An appeal shall be in writing, specifying briefly the decision appealed against and the grounds of appeal;
- 31.5 it is demonstrably clear and understandable why the grounds of appeal must be in writing:
- 31.5.1 the grounds should identify the decision appealed against and the grounds for so contending;
- 31.5.2 the grounds will inform all the parties as to the issues which are in dispute;
- 31.5.3 the grounds will inform all the parties which witnesses need to be called and which witnesses should be available in rebuttal;
- 31.5.4 the grounds will inform all the parties which aspects of the facts are in dispute;
- 31.5.5 the grounds will crystalize the legal questions to be considered during the appeal;
- 31.6 to run appeals without formulated appeals will lead to complete chaos in the administrative tribunals of MSA and in particular in the NCA. Issues of relevancy will become uncontrolled and will bring the complete process of appeal hearings into disrepute;
- 31.7 the regime in motorsport for resolving disputes between parties are all based on the **lodging of a protest in writing, setting forth the grounds for the protest and the issue protested against;** (see GCR 198)
- 31.8 following adjudication of protests, when leave to appeal is requested to a MSA Court of Appeal (see GCR 212 A)), an appellant is requested to submit a formulated appeal (see GCR 212 A) iii) which specifically again makes reference to GCR 219 **which shall be in writing specifying briefly the decision appealed against and the grounds of appeal).**
32. Volkswagen Motorsport failed to file the formulated appeal in terms of GCR 212 B) and GCR 219.
33. The GCR's apply equally to all persons subject to the jurisdiction of MSA, irrelevant of their status or importance. It is important to stress that compliance with the "rules of the game" therefore applies equally to a single competitor, entrant, promoter or any other person involved in motorsport irrelevant

of the series, its commercial standing and size or level of involvement in the sport. Preferential treatment for non-compliance with the GCR's cannot be given to any corporate entity, any person or competitor.

34. There was no dispute during the oral submission made in the NCA that the Appellant did not comply with the strict provisions of GCR 219. Adv Dalrymple, his instructing attorney Mr Baker and Volkswagen Motorsport are commended for the openness with which this concession was made.
35. The submission of Mr North that Volkswagen Motorsport attempted to gain entry to the appeal "*through the backdoor*" is without merit and requires no further consideration.
36. As to the waiving of the appeal fee by MSA, it is in MSA's exclusive discretion to do so within the ambit of GCR 219 iii) and no negative inference can be drawn from the facts which were placed before us in this regard.
37. The attention of the Appellant and all the involved role-players is specifically drawn to the finding of this NCA recorded below that the NCA did not consider the merits of the appeal at all and that the dismissal of the appeal should not be construed as adjudicating that this NCA determined whether there were technical infringements by any of the involved competitors on whether the *parc ferme* was properly designated by the clerk of the course during the event.
38. This judgment accordingly only dealt with the issue whether the appeal was properly constituted and it is unfortunate that the matter cannot proceed to the merits.

FINDINGS

39. The NCA finds that:
 - 39.1 the Appellant failed to comply with GCR 212 B) by not submitting its formulated appeal within seven days from being granted leave to appeal in compliance of GCR 219 i);
 - 39.2 in terms of GCR 212 B) the appeal automatically lapsed;
 - 39.3 the appeal is dismissed.
40. This judgment of the NCA should not be interpreted nor be construed as having dealt with the merits whether any competitor breached the Technical Specifications of the series or whether the creation of the *parc ferme* by the COC was proper or not.

ADMINISTRATIVE COSTS

41. When an appeal to the NCA generally fails, the Appellant is penalised with the forfeiture of the total appeal fees which, in terms of the current GCR's, is a composite amount of R15 000.00. In this instance, the appeal lapsed and MSA waived payment of the appeal fees after leave to appeal was granted. The Appellant did pay an amount of R3 000.00 to MSA when leave to appeal was granted.
42. The appeal did not deal with the merits of the matter and there is no further need to impose additional administrative costs. The amount of R3 000.00 paid by the Appellant is forfeited.

HANDED DOWN AT JOHANNESBURG ON THIS THE 01ST DAY OF FEBRUARY 2016.

Electronically Signed

**Adv Andre P Bezuidenhout
Court President**

Electronically Signed

**Mr Jannie Geyser
Court Member**

Electronically Signed

**Mr Richard Schilling
Court Member**

Electronically Signed

**Mr Mike Clingman
Court Member**