

**MOTORSPORT SOUTH AFRICA
NATIONAL COURT OF APPEAL, 166**

**APPELLANT
WALLY DOLINSCHKEK (Father of Competitor)**

**IN RE
Appeal arising from the findings of
MSA Court of Appeal 432**

**DATE OF HEARING
15 August 2017**

Present (Officials):

**Advocate André P Bezuidenhout
Attorney Jannie Geysers
Arnold Chatz
Mike Clingman
Wayne Riddell**

**Court President
Court Member
Court Member
Court Member
Sporting Services
Manager: MSA**

NATIONAL COURT OF APPEAL 166

1. On 15 August 2017, Motorsport South Africa (“MSA”) enrolled National Court of Appeal 166 (“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”) 166. The Appeal hearing took place on 15 August 2017 between 18h15 and 20h00. Judgment was reserved. 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 Wally Dolinschek (“the Appellant”), the father of Troy Dolinschek (“Competitor Dolinschek”). The Appellant was represented in these proceedings by Attorney Etienne Kemp (“Mr Kemp”) of Kemp Nabal Attorneys of Tyger Valley, Cape Town. Attorney Hector North (“Mr North”), assisted by Michael North (“Mr M North”), represented Tim Bishop (“Mr Bishop”) the father of competitor Tate Bishop (“Competitor Bishop”), who is an interested party in the proceedings.
4. The Appeal arises from the findings of MSA Court of Appeal 432 (“the COA”) which dealt with events that transpired on 1 April 2017, at the Killarney Raceway, Cape Town. At 12h51, Mr Bishop filed a protest against kart number 17, the kart of Competitor Dolinschek, on grounds that the kart was not being raced as supplied, that it was lightened and that the kart not only gained an advantage as a result of the modifications, but also that the modifications impacted on safety issues (“the modifications”).

(see Appeal Bundle, Annexure A15)
5. The Stewards, at 14h31, pronounced the outcome of the protest filed by Mr Bishop. The Stewards directed that the modifications to kart 17 were not legal, but that in the opinion of the Technical Consultant, Mr W Strydom, the modifications would confer no advantage and would not compromise the safety of the kart.

(see Appeal Bundle, Annexure A14)

6. Mr Bishop, on behalf of Competitor Bishop, on 5 April 2017, sought Leave to Appeal to a MSA Court of Appeal against the decision of the Stewards.
(see *Appeal Bundle, Annexure A5*)
7. COA 432 was convened and on 12 June 2017, announced its findings. In summary, it was held that the modifications were in breach of the Maxterino and Karting Regulations and that Competitor Dolinschek was to be excluded from the entire event of 1 April 2017. In addition, a fine of R500.00 was imposed in terms of GCR 176 and costs awarded.
(see *Appeal Bundle, Annexure A17*)
8. Mr Dolinschek successfully filed an application for leave to appeal on 15 June 2017, to this NCA and all appeal fees were paid.
(see *Appeal Bundle, Annexure A31*)
9. Leave to appeal was granted by a panel of this NCA on paragraphs 5.2, 5.4, 5.5, 5.6 and 5.8 of the application for leave to appeal, and the grounds of appeal were submitted. The appeal is accordingly properly constituted.
10. The appeal bundle initially comprised annexures "A" to "E". Annexure "F" was introduced following the issue of Procedural Directive 1, and during the hearing, annexures "G", "H" and "I" were admitted.
11. The NCA is indebted to the legal representatives for their able contribution in the matter.

THE STATUS OF PARTIES IN A NATIONAL COURT OF APPEAL

12. There is only one Appellant in this matter, Mr Dolinschek who is *dominus litus* in the prosecution of the appeal.
13. At the commencement of the hearing, Mr North raised issues that his client, Mr Bishop, was not afforded an opportunity to respond to the application for leave to appeal filed by Mr Dolinschek to the NCA. There is no provision available to an interested party to intervene in such application. If leave to appeal is granted by a

NCA, then interested parties are afforded an opportunity to participate in the hearing as provided for in the GCR's. Mr Bishop had no *locus standi* to intervene in the application for leave to appeal and MSA should not entertain any attempt by persons to derail or influence applications for leave to appeal filed by a party.

(see GCR 220 in this regard)

PROCESS FOLLOWED DURING THE APPEAL

14. All hearings of appeals in terms of the GCR's are held *de novo*.
(see GCR 208 viii)
15. At the commencement of the hearing:
 - 15.1 the matter at first proceeded on the basis of Mr Kemp making submissions on aspects that appeared to have been common cause;
 - 15.2 Mr North was not willing to make certain concessions and Mr Kemp accordingly called Mr Dolinschek as a single witness in the Appellant's case.
16. The evidence of Mr Dolinschek is of record.
17. All interested parties were given an opportunity to address the NCA. The Appellant and his legal team informed the NCA that their flight departed back to Cape Town at 21h00 on the evening and towards the end of the hearing, the parties were under substantial pressure to complete their arguments.
18. On 16 August 2017, the Appellant forwarded additional written submissions to the NCA and Procedural Directive 2 was issued to afford Mr Bishop an opportunity to also amplify his submissions in writing, which were duly filed.

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

19. 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*)

20. 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*)

21. 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*)

22. 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*)

23. Mr Kemp, in his submissions, also emphasised the following statement which

appears in the introduction of the GCR's:

“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...”

(own emphasis)

(see GCR's Part I, Introduction)

24. He submitted that the NCA should give effect to the introduction of the GCR's to ensure fairness to the parties.

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

25. The Appellant is *dominus litus* in this appeal to the NCA.
26. The following grounds of appeal were advanced:
- 26.1 that COA 432 erred in not finding that the protest was brought out of time and was inadmissible;
- 26.2 that COA 432 erred in finding that kart 17 was in breach of the 2017 karting regulations and more particularly, section J 23.1(e), section J23.12(a) and section J23.12(c);
- 26.3 that COA 432 erred in finding that kart 17 was in breach of all three races of the event where evidence showed that the transgressions were only related to the first race of the event;
- 26.4 that COA 432 erred in not considering that the non-compliance was only in respect of one of the three races at the race meeting;
- 26.5 that COA 432 erred in imposing a penalty by excluding Competitor Dolinschek for the entire event on 1 April 2017.

(see Appeal Bundle, Annexure A22 and further)

THE MATERIAL GCR's and SSR's

27. The modifications made to kart 17 and the events which followed the initial process, bring in focus several GCR's and SSR's as well as the Technical Regulations and Specifications relevant to karts.

28. The facts of the matter should therefore be balanced against the following:

28.1 Article 1 a) of the Karting Regulations, deals with the administration of karting and provides as follows:

"1. ADMINISTRATION

a) *Karting is administered under the provisions of the General Competition Rules of Motorsport SA (GCR's), these Standing Supplementary Regulations (SSR's), other regulations and instructions which may from time to time be issued by Motorsport SA (hereinafter referred to as MSA) and the Supplementary Regulations published for each particular kart competition...."*

28.2 Section J 23 of the Karting Regulations, deals with general aspects of karting specifications, and provides as follows:

"SECTION J

23. KARTING SPECIFICATIONS – GENERAL

All Karts are to be raced as supplied, other than as listed below or as stated below for clarification where necessary.

In the event of a particular issue not be covered either in the published homologation documents which are available on the MSA web-site, then the general chassis specifications as they appear on the CIK web-site will apply. This is applicable to ALL chassis notwithstanding they are 750mm to 950mm chassis and homologated by an ASN or by Motorsport South Africa."

(own emphasis)

28.3 Section J 23.1 e), deals with the bodywork regulations and provides as

follows:

“e) BODYWORK – GENERAL

Karts in all classes, except Cadets, must be fitted with CIK approved bodywork and fitment attachments as per CIK homologation or the approving federation and MSA endorsement in the case of the Cadet, Micro, Mini and Maxterino classes. All bodywork must be securely and safely fixed to the chassis/frame so as not to become dislodged. All bodywork on homologated chassis must be used as homologated kits, i.e. no ‘mix and match’ sets are permitted...”

(own emphasis)

28.4 Section J 23.12 a) deals with bumper regulations and provides as follows:

“23.12 BUMPERS (Not Body Work)

a) **General** – There shall be front, rear and side protection. Side pods or any side bumper incorporated in the side pods shall comply with the CIK or manufacturers specification (in the case of ASN homologations and shall not project by more than 2mm beyond the line drawn through the outside of the rear wheels and the front wheels in the straight-ahead position but this may be exceeded when using wet weather tyres. Bumpers must be firmly welded, bolted or clamped to the chassis in such a manner so as to prevent dislodging in the event of a collision. All requirements and measurements stated in this section apply to the kart without driver and must be complied with prior to leaving the pre-race paddock before each practice or race...”

(own emphasis)

28.5 Section J 23.12 c) deals with rear bumper regulations and provides as follows:

“(c) Rear Bumper -

*Shall comply with the CIK specification for **all** classes and regardless of the status of the class or event. In the case of the Cadet and classes using the 89.5 and 95cm chassis, all rear*

*bumpers and protection shall be similar to the CIK type. CIK regulation 2.5.3 Refers- * The rear protection must be made of hollow plastic moulded in one piece and must not present any danger as regards safety. Furthermore, the structure must be moulded plastic without foam filling, and the wall thickness must be constant in order to provide uniform strength**

28.6 GCR 200 deals with the time limits of protests and provides as follows:

“200. TIME LIMITS FOR PROTESTS

- i) A protest against acceptance of an entry, instructions to competitors or the length of the course:

 - a) Race and speed events – not less than one hour before the start of practice for the event in question.*
 - b) Other events – not less than one hour before the start of the event in question.**
- ii) A protest against handicap, make up of a heat, or qualification for a heat or final – not less than one hour before the time laid down for the start of the event, heat or final.*
- iii) A protest regarding starting position/s – within ten minutes of the notification of such positions.*
- iv) A protest against a decision of a Scrutineer or Clerk of the Course, by the competitor directly concerned – within 30 minutes of that decision being notified to that competitor in writing. For rallies, if this notification is handed down during the running of the event, the time limit for lodging a protest shall be 30 minutes after the relevant competitor/s has/have completed the leg during which the notification was received.*
- v)

 - a) A protest against the eligibility of any vehicle, or part of vehicle, when the alleged ineligibility is apparent – within 30 minutes of the vehicle being approved by the scrutineer.*
 - b) A protest against the eligibility of any vehicle, or part of vehicle, when the alleged ineligibility is apparent but only become visible at a later stage – within 30 minutes of the protestor or protested having finished the race or event, whichever is the later.**

- c) *If any part or parts have been changed after scrutineering and are alleged to be ineligible – within 30 minutes of the protestor or protested having finished the race or event, whichever is the later.*
- vi) *A protest against the eligibility of any vehicle, or part of vehicle, when the reason for the alleged ineligibility is not apparent, but it is alleged that the vehicle is performing in a manner which suggests that it is ineligible – within 20 minutes of the performance that give rise to the protest.*
- vii) *A protest against any mistake or irregularity occurring whilst the competition is taking place – within 30 minutes of the protestor finishing the event.*
- viii) *A protest concerning the results of a competition – within 30 minutes of the publication of provisional results or, if results are published in accordance with GCR 141 (x) (c), within 7 working days of the date of electronic publication (normally via email or publication on the MSA website)*
- ix) *A protest against points in a championship – **within 7 working days of the first publication of the points in dispute in an official document (e.g. interim championship points logs, programmes, etc.).***
- x) *A protest concerning driving conduct – 30 minutes after notification to competitors of the Clerk of the Course’s decision on the incident concerned.”*

(own emphasis)

28.7 Article 11 of the Karting Regulations, deals with the penalties and provides as follows:

“11. PENALTIES

- i) *Any breach of these regulations, or the supplementary Regulations for any competition, whether or not any penalty is specified therein, may be subject to the penalties laid down in the general competition rules of MSA and the imposition of such conditions as MSA may deem appropriate.*
- ii) *Any contravention of the karting technical regulations and specifications will generally result in automatic exclusion from*

the relevant race (where appropriate) or the entire event. The only exception will be in instances where no advantage has been gained, in accordance with the provisions of GCR 176. Refer also to the provisions of Article 22 of the MSA Karting Regulations. Notwithstanding there having been no advantage gained, a competitor found using any component which is not compliant with the relevant engine or chassis, example exhaust, air box, and radiator and or carburattor specifications will be liable for automatic exclusion...

(own emphasis)

29. The specific karting penalties must be considered together with GCR 176 which deals with technical infringements and provides as follows:

176. PENALTIES FOR TECHNICAL INFRINGEMENTS

i) Where a vehicle/machine is found not to comply with the applicable technical regulations and specifications the following penalties will apply:

a) Where, at the sole discretion of the appointed Technical Consultant (or similar technical representative or body) no advantage has been gained – the competitor shall be fined an amount not less than R500. **In the event of a dispute, any contravention of the technical regulations will be deemed to afford an advantage, until the contrary is proven.**

b) Where advantage has been gained:

- the driver/rider concerned shall be excluded from the results of the event/race meeting concerned and may be precluded from participation in up to three further events/race meetings counting towards a similar championship or series, **details of which must be stipulated by the Clerk of the Course.** If the championship or series concerned has less than three rounds to run, the penalty may also be applied retrospectively (i.e. exclusion from previous events) to achieve the desired number of events.

- *the entrant, if other than the driver/rider, may be fined an amount of up to R10 000.*
- ii) *None of the above shall preclude MSA from taking further action against an offending competitor and/or entrant, should such action be deemed warranted.*
- iii) *MSA reserves the right to publish the details of any non-compliance with the technical regulations and resultant penalties.”*

(own emphasis)

29.1 GCR 220 deals with hearings in general and provides as follows:

“220. HEARINGS

... All parties concerned shall be given adequate (generally a minimum of 7 working days) notice of the hearing, and they shall be entitled to call witnesses...

The parties involved in the hearings are also entitled to call witnesses, including specialists or experts, but it is their responsibility to ensure their attendance. Where a technical matter is concerned, the Court shall consider the report of the scrutineers and recommendations of the MSA Technical Consultant (where applicable) and may not ignore these.”

30. It is against the backdrop of these GCR's and Karting Regulations, that the merits must be considered.

THE MERITS

- 31. It is at the outset apposite to make some general observations as to the approach of parties to hearings before the NCA.
- 32. An Appellant is *dominus litus* and can present its case as it deems fit. The NCA in granting leave to appeal on specific grounds does not limit the NCA's ability to look at the matter *de novo*. It is not open for a party to therefore claim that it came to the NCA unprepared as the grounds upon which leave to appeal were granted, did

not cover the sporting incident in its totality. The grounds of appeal always play itself off against the framework of the factual events which gave rise to a dispute and its ultimate elevation to the NCA.

33. GCR 208 viii) provides that all hearings and appeals are held *de novo*. That being said, there is a body of evidential material that is built up during the proceedings since an event / race incident, which are placed before the NCA through the appeal bundle. These documents, if not particularly challenged and placed in dispute, serve before a NCA informing it of the factual events which gave rise to the dispute. It is always open for a party to challenge any specific document or part thereof. In this instance, there was no material challenge to most of the factual events, hence Mr Kemp initially commenced the matter by addressing the NCA as to the appeal merits. A NCA is not a court of law and whilst a certain decorum is followed, it is not expected of an Appellant to prove, for example, the protest, the hearings of Stewards, etc.
34. The onus is on the Appellant to advance evidence / admissions as to why his appeal should succeed. To this end, the Appellant is in total control of its appeal and interested parties can raise issues which are relevant to the appeal grounds.
35. The grounds of appeal were clearly defined by the Appellant. A reading of it indicates that it traverses whether the modifications were in breach of the karting regulations and if so, whether the protest was brought out of time and was admissible. Following the outcome of those enquiries, the COA was challenged as to which penalties should be imposed and these remain in focus, before this NCA.
36. The following facts appears from the appeal bundle, as supplemented during the hearing:
 - 36.1 the protest of Mr Bishop was filed at 12h51 after race 1. The Stewards did not reject the protest that it was out of time. They indeed entertained it and at 14h31 announced their judgment;
(see Appeal Bundle, Annexures A19 and A20)
 - 36.2 the modified parts were not presented as exhibits in the hearing before the NCA. Mr Bishop relied on a document marked as annexure "F" and which was provisionally indexed following the issue of Procedural

Directive 1. Certain aspects of annexure "F", were clearly common cause and the parties agreed that certain photographs could be relied upon by this NCA:

36.2.1 annexure "F5" shows a modified side pod and sidebar compared to a standard side pod and sidebar. It can be seen from this photograph that a portion of the side pod on the left-hand side is cut away and a metal extension upon which the side pod rests (the sidebar), is also cut away;

36.2.2 annexures "F11" and "F12" shows the bumper mount in question. A bumper mount is used to fit the rear bumper to the kart. The metal mount was replaced by Competitor Dolinschek and the bumper was rubber mounted;

36.3 the parties agreed that whilst the photographs reflected in annexure "F" were not taken of kart 17, that the modifications to the kart of Competitor Dolinschek, were substantially similar to the ones shown in the photographs;

36.4 in essence, the modifications comprised:

36.4.1 a cut away of a portion of the side pod;

36.4.2 a cut away of a metal piece of the sidebar;

36.4.3 an exclusion of the metal bracket which serves as a bumper mount.

37. Mr Dolinschek testified that:

37.1 he has been involved in karting for approximately five years;

37.2 he is the entrant of Competitor Dolinschek, who is ten years old;

37.3 the reason why the modifications were made, was that the same chassis was previously used (during cross-examination, he conceded that this

happened in 2016) by his son in a 125 cc event. In cross-examination, he conceded that his son has not raced in 60 cc and 125 cc events on the same day, during the 2017 race season. He stated that it was possible to race in two classes by replacing the engine and it was put to him that whilst it was possible, it would not be practical to do that;

37.4 he gave little thought as to the modifications at the time, but conceded on a question by a Court member that he knew that the modifications were in breach of the Karting Regulations;

37.5 albeit reluctantly, he ultimately conceded that he was aware that the modifications used in kart 17 were illegal for use in the class;

37.6 the modifications were “fixed” before heat 2, albeit that he understood from the Technical Consultant, Mr Strydom, that it need only be corrected before the next race event, i.e. on a different date;

37.7 an affidavit of Mr Frank MacBeath which was not objected to by Mr North was submitted. The affidavit stated the following:

“I, Frank MacBeath, hereby confirm 100%, that I gave Wally Dolinschek a new standard/uncut sidebar to fit onto Troy’s kart on the 1st of April 2017 for use in the 2nd and 3rd heats – as there were none available to purchase at any of the kart parts suppliers on that day. I also confirm seeing him race with it.”

37.8 Mr North did not object to this evidence through the submission of an affidavit. It is clear from Mr MacBeath’s affidavit that he merely supplied a standard / uncut sidebar. No mention is made in the affidavit of the side pod and the bumper mount;

37.9 he introduced a statement from the Technical Consultant, Mr Strydom. The introduction of the document into evidence was objected to by Mr North, but the contents of the statement cannot be ignored. It indeed states the following:

“I, Wynand Strydom, hereby confirm having seen Kart No. 17 of

Troy Dolinschek, race with the correct parts, bumper brackets, sidebar and bodywork for the 2nd and 3^d heats of the race of April the 1st 2017.

I confirm this, as he passed the scrutineering point and pointed this out to me even though he was only asked to change parts at that time, for the following meeting.”

(own emphasis)

- 37.10 when confronted during cross-examination that the modification to kart 17 was limited to the sidebar referred to by Mr MacBeath, he conceded that the side pod and the bumper mounts were not replaced;
- 37.11 there is a direct conflict between the version of Mr Dolinschek and Mr Strydom as to whether the modification was “fixed”. According to Mr Strydom, “*the correct parts, bumper brackets, side bar and body work*”, were corrected. During the hearing, Mr Dolinschek did not support this version when it was pointed out to him that Mr MacBeath only offered a standard / un-cut sidebar;
- 37.12 as to the issue whether the modifications would have been apparent, Mr Dolinschek conceded that the modifications to the bumper and to the bumper mount, would not have been apparent. He maintained that the cut away from the side pod was apparent and that he did not hide it in any way. Indeed, the cut away portion was covered with pink duct tape which was obvious.
38. In considering the merits, it is important to emphasise that in race events, entrants and competitors are bound by the sporting codes and particularly regarding the eligibility of race vehicles:
- 38.1 GCR 113 provides that entrants, competitors and drivers are bound by the sporting codes applicable to the events;
- (see GCR 113 ii)
- 38.2 in addition, these persons shall, before any competition, satisfy themselves as to the eligibility and safety of the vehicle;

(see GCR 22 iv))

38.3 in addition, these persons shall ensure that a vehicle is maintained in an eligible and safe condition throughout the competition.

(see GCR 113 v))

Were there modifications to kart 17?

39. Based on the evidence before this NCA, the Appellant conceded that the three modifications were present on kart 17. The Appellant is the entrant of his 10-year-old son and as such he should and must have been aware of the provisions of the GCR's and the Karting Regulations, prohibiting modifications. Karting is an extremely basic form of racing in which entrants largely make use of homologised equipment.
40. Modifications are generally not allowed and the karts must be raced as supplied. This much appears from Section J 23.1 (e) and J 23.12 (a) and (c) which are clear in their ambit. Bumpers and sidebars have a protective measure for rear and side protection. The side bumpers and side-pods therefore have safety feature criteria which cannot be impacted on through modifications.
41. There was an attempt to convince this NCA that the issue by MSA of Circular 13 of 2017 on 27 June 2017 can be relied on for the benefit of the Appellant that the Karting Regulations were not clear as to the specifications for the karts. The Circular was issued post the event incident on 1 April 2017 and the inference that the mere issue of the Circular should be interpreted by the NCA that there was not sufficient clarity in the original regulations to competitors, does not persuade this NCA. In any event, Mr Dolinschek conceded that he knew that the modifications were in breach of the Karting Regulations.
42. This NCA accordingly finds that there were three modifications made to the kart, being:
- 42.1 a cut away of a portion of the side pod;
- 42.2 a cut away of a metal piece of the sidebar;

42.3 an exclusion of the metal bracket which serves as a bumper mount.

Was the protest out of time?

43. The Appellant contended that the protest of Mr Bishop was out of time. The Appellant claims that a protest could have been filed after scrutineering of kart 17.
44. The time limit for protests is designed to ensure that protests are dealt with speedily and that disputes do not linger on without adjudication. The time limits for protests provide for different types of protests and broadly distinguish between apparent protests regarding eligibility and those which are not apparent.
45. The Appellant has not made out a case, nor advanced any evidence that a competitor must be present when the scrutineering of other karts take place. There is no policing obligation on a competitor to be present when other karts are inspected.
46. The Appellant's case in this regard is merely that, as scrutineering was completed, Mr Bishop should have known about the modifications. This argument is not persuasive.
47. There is no dispute between the parties that upon completing race 1, the protest was filed and the scrutineers adjudicated the matter as referred to above. The Stewards at the time made no finding that the protest was out of time and there is no evidential ground to find in favour of Mr Dolinschek in this regard.
48. This NCA accordingly finds that the protest was not out of time and that the protest complied with GCR 200 v) b).

Did Mr Dolinschek repair the modifications after race 1?

49. As to the issue whether kart 17 only raced with the modifications during race 1, it is patently obvious that the evidence of Mr Strydom is clearly incorrect. He claims that all three modified parts were replaced. The Appellant states that only one of the parts was corrected. This ground of appeal must therefore fail on the basis of

conflicting versions in which the Appellant produced the evidence himself.

50. The evidence produced before this NCA brings into disrepute the third ground of appeal in which the Appellant claimed:

*“that COA 432 erred in finding that kart 17 was in breach of all three races of the event **where evidence showed that the transgressions were only related to the first race of the event.**”*

(own emphasis)

51. Accordingly, as to the ground of appeal that COA 432 erred that the non-compliance was not in respect of all three races, this ground must likewise fail as a result of the conflict of evidence between Mr Strydom and the Appellant, the Appellant conceding that two of the items were not corrected after race 1.

Was there any advantage gained by the modifications?

52. It is the case of Mr Bishop as defined in the protest that the modifications also resulted in a weight reduction of the kart. This has not been challenged during the proceedings, by the Appellant with any counter-evidence. The Appellant relies exclusively on an interpretative issue of the GCR's to argue that there was no advantage gained by the modifications as detailed below insofar as Mr Strydom opined that there was no advantage gained.
53. GCR 176 provides that in the event of a dispute regarding a technical infringement, the technical infringement will be deemed to afford an advantage until the contrary is proven. There is sound logic in this provision. It is for the offender to then show that the technical infringement did not result in an advantage. It cannot be expected that a fellow competitor must produce evidence that there was an advantage gained by the modification. Motorsport does not work like this. There are Technical Regulations and Specifications that need to be complied with and if there is a breach and a dispute as to whether the breach afforded an advantage, the offender must prove that there was no advantage.
54. Mr Kemp contends that the opinion of Mr Strydom that there was no advantage gained, together therewith that COA 432 agreed with this, are sufficient for the

Appellant to discharge the onus provided for in GCR 176 i) a). This interpretation he submits (as fortified through the provisions of GCR 220 that provides that the Technical Consultant's recommendations may not be ignored) should compel us to find that there was no advantage gained. Mr Bishop, to the contrary contends that the Appellant cannot reasonably argue that he did not anticipate a need to deal with whether he obtained an advantage from his admitted breach of the regulations.

55. It is clear from the protest that Mr Bishop disputed the eligibility of kart 17 and immediately claimed that an advantage was gained as a result of the infringements. The moment that there is a dispute in this regard, the offending competitor will need to establish and discharge the onus that no advantage could be gained. We are not certain as to what was produced to Mr Strydom to have reached the conclusion. Mr Strydom's finding in this regard must be tested. Unfortunately, there is absolutely no evidence either in the findings of Mr Strydom, from the record of COA 432, or presented during this hearing. The Appellant failed to produce any evidence before this NCA and confined his submission relying on the opinion of Mr Strydom and the findings of COA 432. The Appellant could easily have called Mr Strydom to testify on this aspect. The Appellant neither called Mr Strydom, nor advanced any factual aspect to discharge the onus.
56. Upon a reading of GCR 176 it cannot mean that the Technical Consultant's decision can never be disputed by anyone. That much the GCR does not say. To allow the Technical Consultant a final decision on this aspect will result in absurdity and chaos in motorsport as it can never be challenged. His view must be able to be considered by disputing parties and ultimately the structures of MSA must be able to consider whether the Technical Consultant's view is correct or not. It is only logical that when an offending competitor has breached the Technical Regulations and Specifications, that the onus will be on him to prove that no benefit was gained when there is a dispute as to the consequences of the Technical Regulations and Specifications breach. GCR 220 merely provides that the recommendations of a Technical Consultant "*may not be ignored*". The GCR does not say that it must be followed in all instances.
57. This NCA finds that the appeal on this ground, therefore also fails.

PENALTIES

58. COA 432 imposed a fine of R500.00 on Competitor Dolinschek, in terms of GCR 176 and excluded him for the entire event on 1 April 2017.
59. Competitor Dolinschek is a minor and there is no evidence that he was personally involved in the modifications. We are of the view that fine in the amount of R500.00 and his exclusion from the entire event on 1 April 2017 are suitable penalties for him in the circumstances.
60. COA 432 did not impose any penalty on Mr Dolinschek, as the entrant.
61. It is of the utmost importance that there is fair play amongst karting competitors and that the rules of the game are followed by entrants and competitors. The seriousness of a non-compliance with the Technical Regulations and Specifications, is clear from the GCR's. It provides for automatic exclusion from the relevant race or the entire event.
62. GCR 176 i) b) specifically provides that where the entrant is someone other than the driver, such a person may be fined an amount of up to R10 000.00. There is a heavy duty on an entrant to ensure compliance with the GCR's. It is in the hand of an entrant (who is a major) to ensure that there is compliance with the Technical Regulations and Specifications.
63. From the evidence before us, it is clear that Mr Dolinschek breached the Technical Regulations and Specifications in flagrant disregard through the modifications.
64. The modifications made by Mr Dolinschek had the consequence that the matter was litigated through all the structures of MSA. It is important to emphasise that it was only in this NCA that Mr Dolinschek conceded that two of the modifications were not corrected for the second and third races.
65. The consequence of the modifications is obvious in this matter. A substantial time and effort was wasted by parties in filing protests, attending meetings of the Stewards and following the process ultimately to this NCA. It must always be borne in mind that whilst motorsport is unique in providing different platforms for

competitors to file protests and seek adjudication of disputes, the tribunals are generally manned by officials who do their work without any, or for little, remuneration for the love of the sport. The wasted efforts as a result of the modifications resulted in:

- 65.1 the need for a protest by Mr Bishop;
 - 65.2 the need for a meeting of Stewards;
 - 65.3 an application for leave to appeal by Mr Bishop;
 - 65.4 constituting COA 432 and the hearing;
 - 65.5 leave to appeal to this NCA;
 - 65.6 the appearance of multiple parties at the NCA with legal representation by two parties.
66. We are of the view that the entrant is directly responsible for the technical infringement and that he should be penalised with a fine. In consequence, a fine of R10 000.00 is imposed on the entrant, Mr Dolinschek.

FINDINGS

67. The NCA finds that:
- 67.1 the appeal is dismissed;
 - 67.2 Competitor Dolinschek is fined an amount of R500.00 and he is excluded from the entire event on 1 April 2017;
 - 67.3 Mr Dolinschek, in his capacity as the entrant of kart 17, is fined an amount of R10 000.00 for entering the kart in breach of the 2017 Karting Regulations Sections J 23.1 (e), J 23.12 (a) and J 23.12 (c).

ADMINISTRATIVE COSTS

68. The appeal fee is forfeited.
69. The Appellant is directed in terms of GCR 196 to pay administrative costs in an amount of R3 000.00 to MSA.

HANDED DOWN AT JOHANNESBURG ON THIS THE 24TH DAY OF AUGUST 2017.

Electronically Signed

**Adv André P Bezuidenhout
Court President**

Electronically Signed

**Mr Jannie Geyser
Court Member**

Electronically Signed

**Mr Arnold Chatz
Court Member**

Electronically Signed

**Mr Mike Clingman
Court Member**