

**MOTORSPORT SOUTH AFRICA
NATIONAL COURT OF APPEAL 170**

**APPELLANT
ARNOLD NEVELING**

**IN RE
Appeal arising from the findings of
MSA Court of Appeal 436**

**DATE OF HEARING
18 June 2019**

Present (Officials):

**Advocate André P Bezuidenhout
Mr Mike Clingman
Mr Jannie Geyser
Mr Adrian Scholtz
Ms Allison Atkinson**

**Court President
Court Member
Court Member
CEO: MSA
Sport Co-Ordinator: MSA**

INTRODUCTION

1. On 18 June 2019, Motorsport South Africa (“MSA”) enrolled National Court of Appeal (“NCA”) 170 (“the appeal”). The appeal was dealt with at the Roodepoort Head Office of MSA. There was no objection to the constitution of the appeal panel and the appeal was properly constituted.
2. This is the written judgment of the appeal. The appeal hearing took place between 18h09 and approximately 21h30. 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 these proceedings was represented by Mr Hector North, assisted by Mr Michael North. MSA was represented by its Sporting Co-Ordinator, Ms Allison Atkinson and the CEO of MSA, Mr Adrian Scholtz, also attended the hearing.
4. The original Appeal Bundle was replaced with a shortened version by consent between the parties, comprising 54 pages. There was no objection to substituting the Appeal Bundle.
5. This NCA acknowledges the able contribution of all the attendees and participants at the hearing, their capacity which appears from the attendance register, a copy of which is attached hereto as annexure “A”.

THE INCIDENT AND EVENTS THAT FOLLOWED

6. The Appeal arises from the findings of Court of Appeal 436 (“COA 436”) which dealt with events that transpired on 30 September 2018 at the National Rotax Karting event held at Zwartkops Raceway, Pretoria (“the event”).
7. The material facts of the incident which transpired during the event are not in dispute. The Appellant competed in the Fourth Round of the South African National Championship and committed a technical infringement by utilising an incorrect sparkplug (“the technical infringement”). Mr Wayne Robertson (“Mr Robertson”), the Technical Consultant, shortly after 10h00, issued a notice that the

technical infringement took place. Following on the notice from the Technical Consultant, the Clerk of Course, Mr Diedericks issued a notice to the Stewards which requested the exclusion of the Appellant from race 1 and start at the back of the grid for race 2.

(see Appeal Bundle, 8)

8. Under the rubric “*Stewards Notes*”, the Stewards thereafter decided that there was no advantage gained “*as per Promoter*” and imposed a monetary fine of R1 000.00 on the Appellant pursuant to the provisions of GCR 176 i) a).

(see Appeal Bundle, 7 and 8)

9. The events which followed the imposition of the penalty by the Stewards on the Appellant, can conveniently be summarised as follows:

- 9.1 Mr Vaughn Williams (“Mr Williams”), the entrant of Bradley Liebenberg, filed an application for leave to appeal against the decision of the Stewards on 3 October 2018 (“the Stewards’ decision”);

(see Appeal Bundle, 14 to 17)

- 9.2 in the application for leave to appeal, Mr Williams indicated that the Stewards failed to follow GCR 175 which requires a hearing prior to the imposition of any fine or penalty (except where circumstances make it impossible to do so);

(see Appeal Bundle, 17)

- 9.3 Mr Williams *inter alia* contended in his application for leave to appeal that the Appellant should have been excluded from race 1 and started at the back of the grid for race 2 which is in following of the notice issued by the Clerk of the Course to the Stewards;

(see Appeal Bundle, 8)

- 9.4 leave to appeal was granted to Mr Williams and he duly prosecuted the appeal in terms of GCR 212 on 9 October 2018;

(see Appeal Bundle, 18 to 21)

- 9.5 several appeal grounds were ultimately advanced in Mr Williams’ formulated appeal, the effect of which was that a gross miscarriage of

justice occurred and that the Stewards were wrong in imposing a monetary fine on the Appellant, rather than exclusion;

(see Appeal Bundle, 18 to 21)

9.6 the Appellant, in the meantime, made submissions to MSA in which the competency of the appeal of Mr Williams was challenged on several grounds, *inter alia*, that there was a failure to sign certain documents at the event;

(see Appeal Bundle, 22 to 31)

9.7 COA 436 was constituted on 5 February 2019 and considered the appeal of Mr Williams;

(see Appeal Bundle, 35 to 37)

9.8 the findings of COA 436 were announced on 28 February 2019 and held as follows:

9.8.1 that there was no dispute as to the non-compliance of the sparkplug used by the Appellant;

(see Appeal Bundle, 36)

9.8.2 according to Mr Robertson, the Appellant gained an advantage as a result of the technical infringement;

(see Appeal Bundle, 36)

9.8.3 the Stewards' decision was overturned, and the Appellant was excluded from the event;

(see Appeal Bundle, 36)

9.8.1 the *locus* of Mr Williams to have prosecuted the appeal was upheld in his favour;

(see Appeal Bundle, 36)

9.8.2 certain obiter comments were made;

(see Appeal Bundle, 36)

9.9 the Appellant filed an application for leave to appeal to the National Court

of Appeal in terms of GCR 212 on 7 March 2019;

(see *Appeal Bundle*, 38 to 44)

9.10 a panel of this National Court of Appeal on 25 March 2019, granted leave to appeal.

(see *Appeal Bundle*, 45)

10. The Appellant's formulated appeal was filed on 31 March 2019 and covers multiple grounds which we largely find unnecessary to summarise or to deal with herein in view of our finding. They are of record.

(see *Appeal Bundle*, 46 to 52)

PROCESS FOLLOWED DURING THE APPEAL

11. All hearings of appeals in terms of the GCR's are held *de novo*.

(see *GCR 208 viii*)

12. Three witnesses testified, whose evidence is of record and there is no need to summarise their versions herein. The witnesses were:

12.1 Mr Ed Murray ("Mr Murray") who was the Promotor ("the Promoter") referred to under the notes made by the Stewards;

12.2 Mr Robertson, the Technical Consultant;

12.3 Mr Bradley Liebenberg, who was the driver of Mr Williams.

13. All interested parties were given an opportunity to address the NCA.

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

14. It is apposite at the outset to deal with the control of motorsport and where the officials and the "*rules of the game*" originate from.

15. MSA is 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. 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*)

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

(see *GCR INTRODUCTION – CONTROL OF MOTORSPORT*)

17. MSA is an international and nationally recognised sporting body by the Government of South Africa. Its sporting platform is substantial. It has approximately eight thousand licence holders and it sanctions approximately five hundred sporting events every year in South Africa. The organisation of events under the control of MSA is a quality certification stamp which ensures that all participants can be assured that competition takes place within the boundaries of fair sporting events, with certainty as to good administration and results. For national events, national prizes and championships are awarded and organisers and promoters receive substantial accreditation for having the MSA stamp of approval for their events.

18. All participants involved in MSA sanctioned 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 the 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)

19. In addition to the GCR’s there are also Supplementary Regulations (“SR’s”) that an organiser and promoter of a competition is obliged to issue and Standard Supplementary Regulations (“SSR’s”) issued by MSA.

(see GCR 14 & GCR 16)

20. The GCR’s, SR’s and SSR’s thus constitute the “*rules of the game*” of motorsport.

21. GCR 143 to GCR 171 detail the importance of officials and the key roles that they play in motorsport events.

(see GCR’s 143 to 171)

22. Motorsport events cannot take place without the involvement of officials. The important officials in the current instance are the Clerk of the Course, the Technical Consultant and the Stewards. Officials are instrumental in the organisation of an event and to ensure that the governing of the event takes place within the ambit of the GCR’s, SR’s and SSR’s. These officials ultimately deal with allegations of infringements by competitors, conducting hearings and ultimately imposing penalties where infringements take place.

23. It is expected of every entrant and competitor to acquaint themselves with the GCR’s and to conduct themselves within the purview thereof.

(see GCR 113 read with GCR 122)

24. GCR 22 defines an “*entrant*”. It means any person or body who enters a vehicle in a competition and who is in possession of a licence. It is common cause that Mr Williams was a licenced entrant of MSA at the time of the event in question.

(see GCR 22)

25. GCR 113 deals with the obligations on entrants which includes that an entrant shall ensure that they sign on at documentation with their driver in order to formalise their legal standing at the event in question.

(see GCR 113)

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

26. The Appellant is *dominus litus* in this appeal.
27. The following aspects crystallised as to the legal and factual issues to be determined:

27.1 National Karting Circular 4 of 2018 introduced certain amendments on 13 March 2019, with immediate effect. The amendments, in essence, implemented a rule change that penalties shall no longer be imposed by the Clerk of the Course, but directly by the Stewards **following a hearing**. Once the Stewards have made a decision, that decision, for obvious reasons, cannot be subjected to a protest to the same Stewards and an appeal against the decision of the Stewards was provided for by providing for the lodging of an application for leave to appeal to MSA. How the Stewards dealt with the report of the Technical Consultant in this matter, is the essential factual matter to be considered and to determine the legal consequences which follow therefrom;

(see Appeal Bundle, 1 to 3)

(see Appeal Bundle, 1, Section A, para 9)

27.2 whilst the Appellant advances several grounds of appeal, these grounds only require consideration upon determination whether the Stewards' decision can be sustained;

27.3 the cost to be awarded.

THE MERITS

28. The amendment of National Karting Circular 4 of 2018 provided as follows:

“A. Following the recent Karting Commission meeting, the following amendments are made to the National Karting Regulations, with immediate effect:

SECTION A

9. OFFICIALS

...

With immediate effect, penalties shall no longer be imposed on competitors by the Clerk of the Course. Penalties shall instead be imposed directly by the Stewards (**following a hearing**), either of their own volition or acting on a report from the Clerk of the Course. This will free up the Clerk/s of the Course to get on with running the event and allow for matters to be more thoroughly investigated before decisions are taken.

It stands to reason that, once the Stewards have made a decision (to impose a penalty or otherwise), said decision cannot then be the subject of a protest. For regional and national events, any decision made by the Stewards is subject to appeal, as is currently the case, and requires in the first instance the lodging of an application for leave to appeal to MSA – see GCR 212.

Where competitors lodge protests against other competitors, the Stewards will continue to hear such protests as has always been the case.”

(our underlining and emphasis)

29. Paragraph 11 of National Karting Circular 4, in addition, dealt with the responsibilities of an entrant in addition to those outlined in GCR 113. It provides that:

“11. PENALTIES

*xiii - In addition to their responsibilities outlined in GCR 113, **entrants are advised that it is also their responsibility to sign on at documentation on behalf of the driver/s they represent.** Any failure to do so may result in the imposition of a penalty and/or an entrant not being recognised as such, at the discretion of the Stewards of the Meeting.”*

(see Appeal Bundle, 1)

(our emphasis)

30. Insofar as GCR 113 requires that the driver signs on at documentation, paragraph 11 of the Karting Circular 4 required the entrant to sign on at documentation “*on behalf of the driver*” which they represent.

(see GCR 113 and Karting Circular 4)

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

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

Except where circumstances make it impossible to do so, before imposing any penalty, the Clerk of the Course and/or Stewards of the Meeting, a MSA Court of Appeal or MSA National Court of Appeal as the case may be, shall summon the parties concerned to appear before them. ...”

(see GCR 175)

32. The necessity for hearings is a cornerstone of natural justice in motorsport when penalties are imposed. No penalty can be imposed without a hearing, except where circumstances make it impossible to do so, as provided for in terms of GCR 175. No such circumstances were claimed in the current instance and no party contended that such circumstances existed. There was sufficient reason for the Stewards to consider the technical infringement and to call the Appellant to a hearing. The Stewards advanced no reason why a hearing was not conducted.
33. As a matter of fact, whilst the Stewards clearly took a decision to impose the monetary fine on the Appellant, it appears that they did so following an informal process by speaking to the Promotor, but not having a hearing as they should have done in terms of GCR 175.
34. There was an attempt by the Appellant to validate the conduct of the Stewards by claiming that the Promotor was a registered Technical Consultant by MSA (but not appointed on the day in question). There is no merit in this contention whatsoever.
35. The Stewards abdicated their responsibility to conduct a hearing following the report of the Technical Consultant and their approach to the Promotor for his view confused and convoluted the matter even more.
36. By no stretch of the imagination can the conduct of the Stewards be interpreted as being a hearing. They did not notify the Appellant to attend the hearing and they did not call on Mr Williams to attend the hearing. The Stewards embarked on a frolic of their own to speak to the Promotor and to gather his view.

37. In absence of a hearing by the Stewards, there has been a fundamental breach of the cornerstone of justice which demands in motorsport that no penalty can be imposed without a hearing.
38. The effect of COA 436 was that it imposed a sanction and conducted a hearing in consequence of the technical infringement which is common cause. COA 436 did not appreciate that there was no hearing conducted by the Stewards and it could not remedy the error of the Stewards for avoiding a hearing by conducting its own hearing as a Court of first instance.
39. GCR 154 provides for the powers of MSA to enquire into a matter as envisaged in terms of GCR 211. Courts of Enquiry are formed to investigate a breach of any of the GCR's, SSR's or SR's, whether or not such breach has been the subject of a protest and / or an appeal.
40. The technical infringement of the Appellant is common cause, but the consequence thereof, is not. More particularly, whether the technical infringement gained the Appellant an advantage, or not. The current circumstances warrant a formal enquiry by a Court of Enquiry in which the Appellant and the Technical Consultant should be called upon to investigate whether an advantage was gained by the technical infringement, or not.
41. This NCA considered whether it should refer the matter back to the Stewards to conduct a hearing or for this NCA to act as a Court of Enquiry to determine the factual consequence of the technical infringement, i.e. whether the Appellant gained a technical advantage or not. This NCA decided not to refer the matter back to the Stewards or to act as a Court of Enquiry in the first instance.
42. It is not in the interest of motorsport for this NCA to sit as a Court of first and last instance in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one Court has been required to consider the issues raised.

(see Public Protector vs SARB (2019) ZACC 29: Constitutional Court, and in particular paragraph 246 and its endorsement of the Fleecytex Judgment and the authority quoted therein)

43. MSA should direct that a Court of Enquiry be appointed to investigate the consequence of the technical infringement. A Court of Enquiry will be best suited to do so, and it will also ensure that there remains within the structure of MSA a remedy process for an aggrieved party to appeal a finding of a Court of Enquiry to bring the matter to finality.
44. MSA is directed to appoint a Court of Enquiry as a matter of priority as per the order and findings below.
45. This judgment therefore does not make any finding as to the technical infringement and its consequences as to an advantage or not for the Appellant.
46. Whilst strictly speaking not necessary to deal with any of the other grounds of appeal, the Appellant contended that there were several deficiencies in the *locus standi* of Mr Williams to have pursued the application for leave to appeal which lead to COA 436. There is no merit in these contentions. Mr Williams' signature appears on the document produced at documentation of the event and his signing-on at document in any event falls within the purview of National Karting Circular 4, paragraph 11, xiii. This issue is disposed of in this NCA.
47. As to costs before this NCA, no award as to costs is made in view of this NCA's directive that a Court of Enquiry investigates the consequence of the technical infringement.

FINDINGS

48. The NCA finds that:
 - 48.1 the Stewards failed to conduct a hearing pursuant to the provisions of GCR 175 on 30 September 2018;
 - 48.2 the findings of COA 436 against the Appellant and imposing a penalty on him are set aside in its entirety in view thereof that there was no hearing conducted by the Stewards;

- 48.3 MSA is directed to appoint a Court of Enquiry in terms of GCR 211 read with GCR 154, to investigate whether the technical infringement of the Appellant during the event gained him an advantage or not, and to impose a suitable penalty pursuant to the provisions of the GCR's, SSR's and SR's;
- 48.4 the Appeal succeeds on the grounds only that there was a failure of the Stewards to apply the provisions of GCR 175 and makes no finding as to an advantage gained or not, as a result of the technical infringement;
- 48.5 no order is made as to costs in the current judgment.

OBITER COMMENTS

49. COA 436 made several obiter comments which requires our consideration:

- 49.1 the Stewards were severely reprimanded by COA 436 for having failed to consult a Technical Consultant on the question of advantage and having failed to apply the rule regarding exclusion correctly. We cannot fault these obiter comments, suffice it to emphasise that the material failure of the Stewards was their failure **to have conducted a hearing prior to the imposition of any penalty**. The Stewards should be informed as to their failure to have conducted a hearing and the judgment of this NCA. In addition, their approach to the Promotor of the event to have opined on the notice of the Technical Consultant, was unfortunate, unnecessary and compounded the error of the Stewards;
- 49.2 COA 436 encouraged MSA to revisit the provisions of National Karting Circular 4 and its impact as to competitor protests and appeals. The 2018 racing season has come and gone, and this point may be moot. For clarity purposes, whilst the motivation recorded in National Karting Circular 4 is appreciated insofar as it was intended to "*free up*" the Clerk of the Course, this incident is an example that the normal motorsport overview structure of the Clerk of the Course imposing penalties and the Stewards having the ability to consider this following a hearing, remains advisable;

49.3 COA 436 observed that the presence of Mr Hector North and Mr Michael North under the “*observer status*” was a contravention of GCR 210 vi). Insofar as it necessitates clarification, legal representation for parties is only allowed in the NCA. By affording legal practitioners “*observer status*” in Courts of Appeal, should not lead to an abuse of such “*observer status*”. Presiding Officers at Courts of Appeal should ensure that legal practitioners who are afforded “*observer status*” in Courts of Appeal, **should not participate in the proceedings in whatsoever manner by guiding parties or influencing them directly or indirectly.** Courts of Appeal should not hesitate to exclude observers where legal practitioners are allowed “*observer status*” and where they influence or direct proceedings through oral or written participation. Our obiter comment in this regard should not be interpreted or held as a finding as to the conduct of Mr Hector North or Mr Michael North as held by COA 436.

HANDED DOWN AT CAPE TOWN ON THIS THE 23RD DAY OF JULY 2019.

Electronically Signed

**Adv André P Bezuidenhout
Court President**

Electronically Signed

**Mr Mike Clingman
Court Member**

Electronically Signed

**Mr Jannie Geyser
Court Member**

ANNEXURE "A" - ATTENDANCE REGISTER - NCA 170 - 18 JUNE 2019

<u>NAME</u>	<u>EMAIL ADDRESS</u>	<u>REPRESENT</u>
Adv Andre Bezuidenhout		Court President
Mike Clingman		Court Member
Jannie Geysers		Court Member
Hector North		Attorney - Arnold Neveling
Michael North		Attorney - Arnold Neveling
Arnold Neveling		Appellant
Richard Shuttle		Commission President
Ed Murray		Promoter
Wayne Robertson		Technical Consultant
Vaughn Williams		Entrant - Bradley Liebenberg
Corrie Liebenberg		Father of Bradley Liebenberg
Bradley Liebenberg		Competitor
Andrew Shillinglaw		MSA Steward
Adrian Scholtz		MSA CEO
Poka Lehapa		MSA
Allison Atkinson		MSA