MOTORSPORT SOUTH AFRICA
NATIONAL COURT OF APPEAL 172

APPELLANT:
MARCO SUTTER obo KEON RAMAPHAKELA

IN RE:
Appeal arising from the findings of
MSA Court of Appeal 456

DATES OF HEARINGS:
13 April 2021
2 February 2022
15 September 2022

OFFICIALS:

Adv André P Bezuidenhout	**Court President**
Adv George Avvakoumides SC	**Court Member**
Mr Jannie Geyser	**Court Member**
Mr Vic Maharaj	**MSA: Sporting Services Manager**
Mrs Allison Vogelsang	**MSA: Sporting Co-Ordinator**

LEGAL REPRESENTATIVES:

Mr Hector North	**For the Appellant (13 April 2021 & 2 February 2022)**
Assisted by Michael North	**For the Appellant (13 April 2021 & 2 February 2022 & 15 September 2022)**
Adv Tony Mundell SC	**For the Appellant (15 September 2022)**

INTRODUCTION

1. This is the written judgment of the National Court of Appeal 172 ("***NCA***"). The appeal hearings took place on 13 April 2021, 2 February 2022 and 15 September 2022, respectively.

2. There is no value to victory if it has been achieved unfairly or dishonestly. When a game or place is lost in motorsport, playing fair earns respect, whilst dishonesty, only brings shame.

3. This appeal brings into stark focus what motorsport officials do in order to ensure that motorsport events are competed in fairly. The officials in motorsport do their duties without monetary remuneration. They do so for the love of the sport. Officials must be provided with a respectful, appreciative and supportive environment in which to undertake their role. They need to be appropriately recognised and rewarded for performing their role. Officials are indeed one of the cornerstones of motorsport and they play a pivotal role in the success and the running of the sport event. They ensure that motorsport is competed in fairly, in accordance with the rules. Officiating can be fun, life-changing, contribute to leadership, personal development and is a practical strategy for the sport and recreation industry to encourage people in a non-playing role to stay involved in the sport. Without them, there will be no motorsport events.

4. The Appellant is the step-father of a ten-year old competitor ("***competitor 24***"). This NCA was informed that the incident happened in the first year that the Appellant became involved in motorsport ("***the exonerating refrain***"). The exonerating refrain was advanced by the Appellant on multiple occasions so as to indicate that the Appellant was not aware of certain practices, rules, or procedures in motorsport.

5. The protest and appeal proceedings were focussed on the alleged misconduct of the officials, in an attempt to overturn the decision of Mr Richard Vaughan, the Clerk of Course ("***CoC***") and the Stewards of the Meeting ("***the Stewards***") (who sat in a protest after the Appellant protested against the decision of the CoC). Notwithstanding wide reliance on the exonerating refrain, the Appellant embarked on a protest to the Stewards and the consequential appeal proceedings in a scurrilous way as appears from this judgment.

6. This appeal, enrolled by Motorsport South Africa ("***MSA***") as National Court of Appeal 172 ("***the appeal***"), regrettably, has taken almost one and a half years to finalise.

7. The Appellant was initially represented in these proceedings by Mr Hector North, assisted by Mr Michael North. At the last hearing on 15 September 2022, Adv Tony Mundell SC of

the Johannesburg Society of Advocates ("***Adv Mundell SC***"), appeared on behalf of the Appellant. MSA was represented by its Sporting Co-Ordinator, Mrs Allison Vogelsang, and its Sporting Services Manager, Mr Vic Maharaj ("***Mr Maharaj***").

THE INCIDENT AND EVENTS THAT FOLLOWED

8. The Appeal arises from the decision of Court of Appeal 456 ("***COA 456***") which dismissed an appeal against the decision of the Stewards arising from events that transpired on 12 December 2020 at the Kid-Rok National Karting Competition, held at Zwartkops Raceway, Pretoria ("***the Kid-Rok event***").

9. A T-86 sprocket (meaning that the sprocket comprised 86 teeth), was prescribed for the Kid-Rok event.[1] After heat 2, Mr Craig Martin, the Technical Consultant at the Kid-Rok Event ("***the Technical Consultant***") ("***Mr Martin***"), established that the kart of competitor 24 was fitted with a T-83 rear sprocket. Mr Martin recommended an exclusion of competitor 24 from heats 1 and 2 as the sprocket was in breach of the prescribed sprocket for the Kid-Rok event. He noted that the sprocket was impounded.[2]

10. Photographs of the impounded sprocket forms part of the Appeal Bundle.[3]

11. The CoC conducted a hearing and excluded competitor 24 from heats 1 and 2.

12. The Appellant protested against the finding of the CoC.[4] The essence of the protest was that the sprocket was checked only after heat 2 ended and that the Appellant believed that competitor 24 could not be excluded from heat 1 as the CoC only assumed that it was wrong in heat 1. Importantly, the Appellant did not contest whether the sprocket impounded after heat 2, was non-compliant. The Stewards rejected the protest and excluded competitor 24 from heats 1 and 2.[5]

13. The findings of the Stewards indicate that the Appellant refused to sign the Findings Sheet as he did not agree with the findings.

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1 See Appeal Bundle, Annexure A.
2 See Appeal Bundle, Annexure B.
3 See Appeal Bundle, Annexures D, E & F.
4 See Appeal Bundle, Annexure G.
5 See Appeal Bundle, Annexure H.

14. The Appellant filed an application for leave to appeal to a MSA Court of Appeal.[6] In that document, the Appellant, *inter alia*, took issue with the officials as to whether the sprocket found on the kart after heat 2 indeed contravened the Karting Regulations. He contended that the sprocket teeth were not counted by the Technical Consultant.[7] Additional grounds were advanced which included that the CoC failed to comply with GCR 254 ii) as it was claimed that the sprocket used by competitor 24 in heat 2, was not impounded by the officials at the conclusion of heat 2.[8] Based on this, the Appellant claimed that a gross miscarriage of justice had occurred and sought the right of appeal.

15. Mr Adrian Scholtz, the Chief Executive Officer of MSA, considered the grounds advanced and not surprisingly, based on the seriousness of the allegations against the officials, granted leave to appeal to the Appellant on 8 January 2021.[9]

16. On 15 January 2021, the Appellant filed a formulated appeal as he was obliged to do in terms of the GCRs.[10] The Appellant persisted that the sprocket teeth were not counted and contended that the Technical Consultant relied on the number written on the sprocket only. The Appellant moreover contended that when he requested the Stewards to count the number of teeth on the sprocket, he was advised that the sprocket had not been impounded by the relevant officials.[11] The Appellant therefore contended that it was impossible to identify the sprocket used by competitor 24, or to verify that the sprocket was non-compliant.[12]

17. COA 456 dealt with the matter on 2 February 2021.[13] The appeal was dismissed and the following was observed by COA 456 as to the appeal:

> "*Although the Court was of the opinion that the Appeal verged on being vexatious and / or frivolous, it was agreed that the appropriate sanction would be a caution given the Appellant's inexperience in motorsport. Mr Sutter is therefore cautioned to ensure that when he protests or appeals a decision that there are adequate grounds to do so.*"

18. The Appellant did not heed this caution. On 17 February 2021, an application for leave to

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6 See Appeal Bundle, Annexure I.1 to I.4.
7 See Appeal Bundle, Annexure I.1, paragraph 6.
8 See Appeal Bundle, Annexure I.2, paragraph 10.3.
9 See Appeal Bundle, Annexure J.1.
10 See Appeal Bundle, Annexures K.1 to K.3.
11 See Appeal Bundle, Annexure K.2, paragraph 8.2.
12 See Appeal Bundle, Annexure K.2, paragraph 8.3.
13 See Appeal Bundle, Annexures L.1 to L.5.

appeal to this NCA, was filed.[14]

19. The allegations levelled by the Appellant against the officials on duty at the Rok-Kid event escalated. The Appellant claimed that:

    19.1 video footage of the kart circuit at Zwartkops, obtained by the Appellant, will demonstrate, *inter alia*, that the sprocket was removed from *parc fermé* by a team mechanic of competitor 24. He claimed that the sprocket remained at the workshop "*to this day*";[15]

    19.2 the offending sprocket which was on the go-kart after heat 2, was not impounded;[16]

    19.3 the sprocket which served before COA 456 was not that of competitor 24. He claimed that the video footage will show that the sprocket was removed from *parc fermé* by the mechanic;[17]

    19.4 the CoC arrived outside the area where the protest was taking place "*with a sprocket in his possession*". This sprocket was not presented to the Stewards, nor was it tendered to the Appellant during the protest hearing.[18]

20. Based on these very serious allegations, the Appellant submitted that a gross miscarriage of justice had occurred.[19]

21. A Tribunal of this NCA granted leave to appeal to the Appellant in view of these very serious allegations.[20]

22. The Appellant filed his formulated appeal to this NCA on 9 March 2021.[21] The official grounds of appeal included that the sprocket was not impounded by the Technical Consultant and that the sprocket was indeed removed from *parc fermé* by competitor 24's mechanic.[22]

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[14] See Appeal Bundle, Annexures M.1 to M.4.
[15] See Appeal Bundle, Annexure M.2, paragraph 7.3.
[16] See Appeal Bundle, Annexure M.2, paragraph 8.
[17] See Appeal Bundle, Annexure M.2, paragraph 10.
[18] See Appeal Bundle, Annexure M.2, paragraph 10.
[19] See Appeal Bundle, Annexure M.4, paragraph 13.1.
[20] See Appeal Bundle, Annexure N.1.
[21] See Appeal Bundle, Annexures O.1 to O.4.
[22] See Appeal Bundle, Annexure O.2, paragraphs 7.2, 7.4 and 7.5.

23. In June 2021 the Appellant filed an amended formulated appeal pursuant to the issue of Procedural Directive 3.[23] The amended formulated appeal, in paragraph 8, dealt with the grounds of appeal as to the *in limine* issues and paragraphs 9 and 10 thereof, with the merits of the matter (if the *in limine* issues would not succeed). The Appellant formulated its final grounds of appeal that:

    23.1 the sprocket was not impounded by the Technical Consultant;

    23.2 the mechanic of competitor 24 removed the sprocket from *parc fermé* and returned it to the workshop of the Birel team;

    23.3 the sprocket serving before the Stewards and before COA 456 was not the sprocket that was removed from the kart of competitor 24;

    23.4 the sprocket in MSA's possession was not the sprocket used by competitor 24.[24]

24. On 12 April 2021, Mr L C Shisinwana, on behalf of his son Tshepang Shisinwana, registered himself as an interested party to make oral submissions to this NCA and put forward a ten-page document.[25] Procedural Directive 1 was issued by this NCA.[26]

25. Several procedural directives were issued by this NCA and it was ultimately agreed between the Appellant and MSA that certain *in limine* issues would be dealt with first before the merits of the matter would be attended to.

26. The *in limine* hearing took place on 22 February 2022 and the points raised were dismissed. On 10 May 2022, the written reasons for dismissing the *in limine* points were handed down and it was directed that the appeal should continue on the merits of the matter.[27]

PROCESS FOLLOWED DURING THE APPEAL

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

(*see GCR 208 viii*)

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[23] The amended formulated appeal does not appear to have been included in the Appeal Bundle, but is of record.
[24] See amended formulated appeal, paragraphs 8, 9 and 10 dated June 2021.
[25] See Appeal Bundle, Annexures P.1 to P.10.
[26] See Appeal Bundle, Annexure P.11.
[27] See the written reasons of 10 May 2022 attached hereto as "NCA 172-A".

28. At the first two hearings, different Appeal Bundles were presented. We ultimately utilised the second Appeal Bundle and numbering which was amplified in the final hearing. Nothing turns on the different Appeal Bundles presented to us.[28]

29. The proceedings were recorded and there is no need to summarise all the evidence and events which transpired in this appeal. They are of record.

30. The devolutive effect of the appeal brings about a re-trial of the merits of the matter which means in the process of an appeal only those which are expressly and implicitly criticised by the Appellant. Through a hearing *de novo* a new trial is held on the substance of the issues therefore contended by the Appellant.

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

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

32. 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.

33. 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*)

34. The participation of motorsport competitors in events managed by MSA is based on the law

[28] For the purposes of this Judgment, the bundle marked "A" to "U", and supplemented, is referred to.

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*)

35. MSA is an international and nationally recognised sporting body by the Government of South Africa. Its sporting platform is substantial. It has approximately six 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.

36. 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*)

37. 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*)

38. The GCR's, SR's and SSR's thus constitute the "*rules of the game*" of motorsport.

39. Part VII of the GCR's and in particular GCR 143, 144, 151, 152, 156, 159, 162 and 167 detail the importance of officials and the key roles that they play in motorsport events.

(*see GCR's 143 to 171*)

40. 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*)

41. The duties of Technical Consultants are contained in GCR 167. Their roles are described as follows:

> "*Technical Consultants assume primary responsibility for all technical aspects of the category to which they are appointed. The advise the Clerk of the Course and the scrutineers regarding technical matters, and may assist where necessary….*"

and further

> "***Where disputes arise concerning technical matters, the final decision rests with the appointed technical consultant/s**. Their advice on technical matters may therefore not be disregarded or ignored by a Clerk of the Course, but they do not usurp his/her functions. Technical consultants may make recommendations regarding the imposition of penalties, where appropriate, but the actual imposition of penalties remains the duty of the Clerk of the Course.*"

(*see GCR 167*)

42. GCR 176 provides for penalties for technical infringements. It provides as follows:

> "*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 body) no advantage has been gained – the competitor shall be fined an amount not less than R750.* ***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 R50 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)

(*see GCR 176*)

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

43. The Appellant is *dominus litis* in this appeal.

44. The following aspects crystalised as to the legal and factual issues to be determined:

44.1 GCR 254 provides that all competing vehicles must be scrutineered for safety and general compliance with the group, category, or class entered. The CoC, the Stewards of the meeting, or MSA management, have the power to order the examination of any vehicle at their discretion. If during a post-event scrutiny it is found that a component is not in accordance with the regulations or specifications governing the category of sport concerned, the findings during the examination shall be reported and acted upon. It is now common cause that the sprocket found on the go-kart of competitor 24 after heat 2, did not comply to the prescribed sprocket and there was accordingly a technical infringement;

(*see GCR 254*)

44.2 any component found not to comply with the technical regulations and specifications, must be impounded. It is now common cause that the sprocket was impounded;

(*see GCR 254 ii)*)

44.3 the first issue in this appeal is whether competitor 24 should have been excluded from only heat 2, or from both heat 1 and heat 2, as a result of the technical infringement. GCR 183 provides for a sentence of exclusion from participation which may be pronounced by the CoC, the Stewards of the meeting and ultimately this NCA. The GCR specifically provides for the following:

> "*Where races or heats are run at the same meeting for a particular category of sport, an exclusion applied for non-compliance with the specifications in one race or heat shall apply equally to the other race or heat in the same category, <u>except in exceptional circumstances where it</u>*

is obvious that non-compliance was only in respect of one race or heat."

(own emphasis)

(*see GCR 183*)

The Appellant contends that SSR 11.a) overrides GCR 183 in that it provides that the contravention should only have applied in heat 2 of the Kid-Rok event:

"*Notwithstanding anything stated to the contrary in MSA's General Competition Rules, (Specifically GCR 176) any contravention of the karting technical regulations or specifications will result in automatic exclusion from the relevant race (in circumstances where it can reasonably be assumed that the contravention applies to the specific race only) or from the entire event/race meeting (in all other cases)*."

(own emphasis)

(*see SSR 11.a)*)

44.4 the second issue in this appeal is whether the protest was frivolous or vexatious within the ambit of GCR 206 which provides as follows:

"*If the Stewards of the Meeting, or any higher MSA appeal body, find a protest to have been lodged in bad faith and/or to be frivolous and/or vexatious, the protestor shall be deemed guilty of a breach of these rules. In such cases, any protest or appeal fees paid shall be forfeited and the offending party may be further penalised*."

(own emphasis)

(*see GCR 206*)

44.5 the costs to be awarded.

THE MERITS

45. The obligation imposed on competitors to ensure that their vehicles comply with the relevant technical regulations is an absolute and objective one. A breach of that obligation does not depend upon a fault being established. This principle underlies fair competition in motorsport and is consistent with the constant jurisprudence of the International Court of Appeal of the FIA, which is its highest jurisprudence.

(*see ICA-2014-03 Campos Racing, ICA 3/2010, RACB Prospeed ASBL, dated 30 November 2010, no. 20*)

46. Upon establishing that competitor 24 was in breach of the technical regulation and was running a T-83 rear sprocket instead of the T-86 sprocket which was mandated for the event, the Technical Consultant, Mr Martin, made the following recommendation:

> "*Recommendation: Exclusion Heat 1 and 2.*"
>
> (*see Appeal Bundle, Annexure B*)

47. The advice of the Technical Consultant on technical matters, may not be disregarded or ignored by the CoC as is specifically provided for in GCR 167.

48. We have already held in the *in limine* hearing that:

    48.1 the CoC provided a detailed explanation as to what the Appellant conveyed to him as being a person new to the sport;

    48.2 the peculiar information that the Appellant was new to the sport could only have been known by the CoC as it originated from the Appellant.

49. The allegations made by the Appellant in his pursuit of the protest and the appeal proceedings must be emphasised:

    49.1 he contended that the teeth of the sprocket were not counted by the Technical Consultant;

    49.2 he claimed that the sprocket was not impounded by the Technical Consultant;

    49.3 he contended that he requested the Stewards to count the number of teeth on the sprocket, but that he was told that the sprocket was not impounded;

    49.4 he contended that it was impossible to identify the sprocket used by competitor 24;

    49.5 he contended that it could not be verified that the sprocket in question was non-compliant;

    49.6 he contended that the sprocket in question was removed from *parc fermé* by a mechanic;

49.7 he claimed that the sprocket remained in a workshop *"to this day*";

49.8 he claimed that the sprocket which served before COA 456 was not that of competitor 24;

49.9 he claimed that the CoC arrived at the protest hearing with a sprocket in his possession which was not presented to the Stewards nor tendered to the Appellant during the protest hearing;

49.10 he contended in this hearing that the CoC appeared in a video in *parc fermé*.

50. These ten allegations are of a serious nature and if proven, would have been career ending for most of the officials.

51. Cornelis Dirk Liebenberg ("***Mr Liebenberg***") was called as a witness in these proceedings. Mr Liebenberg was the Team Owner and Principal of the Birel Team which supported competitor 24 during the Kid-Rok event.

52. Mr Liebenberg testified that:

52.1 from his recollection, competitor 24 had an off-track altercation in the first heat;

52.2 he inspected the kart of competitor 24 and instructed one of the team mechanics to change the sprocket and the chain as it was binding;

52.3 the mechanics working for him at the time were quite knowledgeable;

52.4 the mechanics fitted a T-83 sprocket which, when it was exposed, he admitted that it was "*our mistake*";

52.5 on 13 December 2020, i.e., one day after the Kid-Rok event, he forwarded a WhatsApp message to the Appellant that stated the following (the WhatsApp was admitted in the Appeal Bundle as annexure "V"):

> "*The leave to appeal has to come from Marco challenging his DQ in race 1 based on a non sealed part infringement at end of race 2. He can acknowledge he race 2 DQ but state that a race 1 DQ is not acceptable. It should perhaps be mentioned that an 86 sprocket was used in race 1 (as per a WhatsApp message on the ROK group) which*

is in fact not compliant with the MSA technical change bulletin requirements and it was changed for heat 2 to the specification as per the kid ROK specific technical requirements as per a MSA official bulletin. This transpired to be incorrectly interpreted and non compliant since a revised version was published (look on the MSA…"

52.6 as to whether the go-kart of competitor 24 was fitted with a T-86 sprocket in heat 1, he testified that a T-86 sprocket was used at another racetrack, Idube, some weeks before the Zwartkops event (the event in question);

52.7 whilst being examined by Mr Maharaj, explained that he did not check the size of the sprocket as he trusted the mechanics. He could not remember what explanation they gave but they apologised and said that they were sorry;

52.8 Mr Liebenberg took ownership of the mistake with the Appellant;

52.9 upon being questioned by members of the NCA, he indicated that he relied on the affirmation of a mechanic that when the go-kart came back from Idube to Zwartkops that it was in exactly the same configuration as it was at Idube;

52.10 when he confronted the mechanic as to fitting the wrong sprocket, the mechanic admitted that he made a mistake and that the sprocket was allowed as it was "*in the range*";

52.11 during re-examination by Adv Mundell SC, he was shown a second WhatsApp message originating from the ROK Idube National event. The WhatsApp message was produced and admitted in the Appeal Bundle as annexure "W". He was asked whether he could confirm from the messages that the virtual notice board for Idube stated a fixed rear sprocket of T-86. He responded that he really could not remember and that he would be guessing;

52.12 during further questioning by members of the NCA, he explained that he posted the 13 December 2020 WhatsApp message to say that he could not do anything as he was not the entrant for competitor 24, but the Team Principal;

52.13 he testified that he honestly believed that they were 100% wrong for race 2, but as to race 1, he felt that it was very harsh to disqualify someone for something that was not checked;

52.14 when questioned as to why his evidence was not brought to the attention of the CoC or the Stewards, he testified that he informed the Appellant that he should inform the Stewards that the exclusion for heat 2 was acceptable ("*that you are happy*") and as far as he and the mechanic were concerned, the go-kart came back with a "*big sprocket from Idube*". He does not know whether the Appellant heeded the advice or not;

52.15 upon a further question whether he informed the Appellant to take responsibility for the incorrect sprocket in race 2, he answered "*Yes it is the team's responsibility*".

53. The CoC, Mr Vaughan, testified for a second time in this hearing. During his evidence, the following emerged:

53.1 on a question by one of the NCA members whether any evidence was given to him that the kart complied with the regulations regarding the sprocket in heat 1, he explained that he informed the Appellant that there were many competitors in the class and that one of them would be prepared to assist with the loan of a sprocket. He denied that he was ever informed that the sprocket was damaged;

53.2 he denied that the different size sprocket on the kart in heat 1, was ever raised with him;

53.3 during examination by Adv Mundell SC, he testified that he did not question how the incorrect sprocket was fitted. According to him the sprocket was incorrect and the recommendation by the Technical Consultant was an exclusion that he was obliged to honour unless something to the contrary was brought to his attention;

53.4 when confronted whether he exercised a discretion or simply imposed the recommendation of the Technical Consultant, he disagreed with Adv Mundell SC that he simply imposed the recommendation. He testified that he did consider the matter, that he had a discussion with the Appellant and at no stage was he made aware of anything other than that the kart was running the wrong sprocket and that he was asked to be reasonable in view thereof that the Appellant was new in karting and he requested leniency;

53.5 he explained to the Appellant that he could not apply leniency on the basis of inexperience and that he could not be lenient towards others. He did not believe that there were any exceptional circumstances that required him to do anything

different to what he did.

54. None of the mechanics referred to by Mr Liebenberg were called as witnesses in the hearing. The mechanic that did the strip-down in the *parc fermé* was also not called by the Appellant. No explanation was given as to why these witnesses who should have been called in the hearing, did not testify. Their evidence would have been important to elucidate the facts in dispute and to confirm first-hand as to the fitment of the T-86 sprocket and which sprocket was fitted in heat 1 of the event.

55. Mr Liebenberg's evidence, well intended as it may be, does not stand scrutiny. He relies on an event that transpired a month before the Kid-Rok event to demonstrate that the kart was fitted with the correct sprocket. Mr Liebenberg did not fit the sprocket. His mechanics did. None of the mechanics were called as witnesses so that it could be established from them first hand as to what size sprocket was fitted for practice and heat 1. Peculiarly, the WhatsApp message to the Appellant one day after the event, i.e., 13 December 2020, made no reference to the replacement of the sprocket and chain after heat 1 as testified by Mr Liebenberg. The only reason advanced in the WhatsApp message addressed the question whether the notification of the sprocket size was correctly issued.

56. It is the obligation of competitors to ensure that the vehicles with which they compete meet the regulations of the event. The Appellant was the entrant in terms of GCR 122 and was obliged in terms of GCR 113 iv) to satisfy himself as to the eligibility of the vehicle for the event. The Appellant failed to do so, and moreover, failed to call witnesses who could have confirmed this through their personal fitment of the sprocket.

57. The Appellant, at no point in time, contended that the running of the T-83 sprocket did not afford an advantage to competitor 24. GCR 176 i)b) specifically provides that the driver concerned shall be excluded from the results of the event / race meeting.

58. The importance of technical compliance by competitors is demonstrated by the penalties prescribed for technical infringements provided for in GCR 177. Fines may not be imposed on competitors *in lieu* of exclusion for non-compliance **unless the contravention is of a minor nature and the technical consultant agrees that it would afford absolutely no advantage to the competitor**.

59. No such a finding was made by the Technical Consultant.

60. Exceptional circumstances in relation to technical irregularities are admitted under very limited criteria.

(*see G-Drive Racing, dated 10 September 2013, with reference to ICA 21/2009, FFSA Hexis Racing AMR, dated 14 October 2009; ICA 26/2009, Pekaracing NV, dated 23 February 2010; ICA 1/2010, DMSB Young Driver AMR, dated 18 May 2010*)

61. The Appellant clearly did not establish exceptional circumstances within the purview of GCR 183 either in his engagement with the Technical Consultant or when he engaged with the CoC.

62. What remains is to determine whether any evidence / facts were presented by the Appellant to the Technical Consultant, the CoC or the Stewards, so as to invoke SSR 11 a).

63. The Appellant did not establish any evidence / facts with the Technical Consultant, the CoC or the Stewards so as to invoke SSR 11 a). To the contrary:

    63.1 the Appellant, at first, pursued the protest by raising the exonerating refrain and by asking for leniency;

    63.2 the Appellant was fully aware thereof that the incorrect sprocket was fitted for heat 2. By the time that he spoke to the CoC, based on the evidence, he already knew that Mr Liebenberg, as the Team Principal, accepted full liability for his error and that of the mechanics;

    63.3 the Appellant, at no point in time, raised with the CoC or the Stewards, any excuse as to damage to the go-kart in heat 1 which resulted in the replacement of the sprocket in heat 2;

    63.4 by 13 December 2020, the Appellant was advised by the Team Principal, Mr Liebenberg, as to a possible defence that could be taken, being that the procedures for implementing a technical bulletin change was not followed by MSA;

    63.5 the advice of Mr Liebenberg was not implemented. To the contrary, the Appellant embarked on a scurrilous attack on every one of the officials that he dealt with, the Technical Consultant, the CoC and ultimately the Stewards, by accusing them of serious dereliction of duties and ultimately, that they manufactured evidence by presenting a different sprocket to the scrutineers and the COA as the offending sprocket was retained by the mechanics, "*to this day*";

63.6 the Appellant showed no restraint whatsoever in his attack against the officials. He contended that there was no hearing with the CoC and that the Stewards were derelict in their hearing;

64. In absence of the Appellant presenting evidence or facts to the CoC or Stewards so as to establish "*circumstances from where it can reasonably be assumed that the contravention applied to the specific race only*", the Appellant is exclusively to be blamed for not presenting this evidence and for embarking on the scurrilous attack against the officials which has proven to be without merit.

65. The evidence of Mr Liebenberg as to the sprocket which was fitted in heat 1 was clearly hearsay. The high watermark of his evidence was that the kart was fitted a month earlier with a sprocket that remained on the kart for heat 1. He had no personal knowledge of this but only relied on what a mechanic would have fitted to the kart. The mechanic who could have been called to testify as to the exact sprocket which was fitted, was not called by the Appellant.

66. Mr Maharaj, for MSA, in his closing submissions, submitted that it is mystifying that the Appellant did not produce Mr Liebenberg as a witness at either the protest hearing or at COA 456. No meaningful explanation was advanced to this NCA as to why Mr Liebenberg's evidence only surfaced in this NCA.

67. Adv Mundell SC invited us to consider whether the principles handed down in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) 132 and particularly at 152, should not find application in this matter.

68. This NCA is of the view that it has not been shown in this matter that the CoC did not apply his mind to the relevant issues in accordance with the GCR's and what SSR 11 a) entails:

68.1 the CoC conducted a hearing;

68.2 the Appellant participated in the hearing;

68.3 the Appellant brought no circumstances to the knowledge of the CoC and the Stewards as to why the technical contravention should have applied to the specific race only, i.e., heat 2;

68.4 the Appellant did not explain anything to the CoC (or later to the Stewards) as to alleged damage in heat 1 which resulted in the sprocket change;

68.5 the CoC considered the recommendation of the Technical Consultant who recommended exclusion.

69. Can it thus be said that the CoC failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice? (The words of Corbett JA in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* supra).

70. In the absence of any circumstances advanced by the Appellant (within the ambit of SSR 11 a), and exceptional circumstances (within the ambit of GCR 183), the CoC cannot be said to have erred. He enquired into the circumstances that there was a technical infringement. No evidence or facts were provided to disregard the recommendation of the Technical Consultant and the CoC cannot be faulted in his finding and the penalty imposed.

FINDINGS

Issue 1: Exclusion from Heats 1 and 2

71. The Stewards correctly found that the kart of competitor 24 was fitted with an incorrect T-83 sprocket after heat 2 which did not meet the technical regulations.

72. The sprocket did not comply with the technical regulations and specifications.

73. The sprocket was impounded by the officials.

74. The Technical Consultant recommended an exclusion of competitor 24 from heats 1 and 2. No circumstances were provided by the Appellant to have deviated from an exclusion.

75. The CoC accepted the recommendation from the Technical Consultant and after providing a hearing to the Appellant, accepted the recommendation of the Technical Consultant whereafter competitor 24 was excluded from heats 1 and 2.

76. The Appellant filed a protest to the Stewards who correctly dismissed the protest, there being no exceptional circumstances where it was obvious that non-compliance was only in respect of one race.

77. Accordingly, on the facts of this matter, we find that Mr Vaughan did apply his mind to the

relevant issues. It cannot be said that he arrived at the decision capriciously. It cannot be said, given the evidence of Mr Vaughan, that he did not apply his mind to the matter or took into account irrelevant considerations.

78. Both GCR 183 and SSR 11 a) involve a consideration of "*circumstances*" within the ambit of the GCR's and the SSR's. Based on the evidence before us, the CoC considered the circumstances and there is nothing to say that the Stewards did not do the same.

79. The Appeal as to the first issue, must accordingly fail.

Issue 2: Whether the Protest was Frivolous or Vexatious in terms of GCR 206

80. There exists a regime of overview in motorsport. Decisions of the CoC are subject to overview by the Stewards and ultimately, the decisions of the Stewards of the Meeting, serve under the overview of Courts of Appeal and this NCA. It is through this hierarchy that competitors can rely thereon that disputes can be resolved in an orderly manner through the different structures of the GCR's.

81. GCR 206 prohibits frivolous and vexatious protests if the Stewards or any higher MSA Appeal body finds that a protest was lodged in bad faith, as being frivolous, or being vexatious.

82. The Appellant was invited to make written submissions to this NCA as to why the protest (and the subsequent proceedings on appeal), or parts thereof, should not be held to be frivolous and / or vexatious. We have considered the submissions advanced on behalf of the Appellant. We deal with the most pertinent ones that require specific reference, below. The submissions, not specifically mentioned, did not persuade us that the protest was *bona fide*.

83. The Appellant contends that GCR 206 does not find application as it is limited to a protest. The Appellant contends that there are no provisions in the GCR's concerning frivolous and vexatious pursuit of appeals.

84. This NCA is not persuaded by this argument:

    84.1 GCR 206 is clear that if the Stewards of the meeting **or any higher MSA Appeal body** finds that the protest has been lodged in bad faith and / or to be frivolous and / or vexatious, the protestor shall be deemed guilty of a breach of the rules;

84.2 the Appeal to this NCA arose from the decision of the Stewards. The Appeal of the COA 456 likewise arose from the decision of the Stewards;

84.3 any higher MSA Appeal body which is considering a protest against the decision of the Stewards is dealing with a protest which is the first step of a party aggrieved by the decision of the CoC or official, which is dealt with by the Stewards.

85. The Appellant contends (paragraph 15 of the written submissions), that he and his legal advisors only became aware of Mr Liebenberg's evidence a few days prior to 15 September 2022. This contention is in direct conflict with the evidence of Mr Liebenberg as to what he informed the Appellant of and in particular, the WhatsApp message of 13 December 2020. The argument that the Appellant only recently became aware of Mr Liebenberg's version, accordingly has no merit.

86. As to the scurrilous allegations against the CoC and the video footage, even the most basic investigation by the Appellant could have identified Mr Vaughan and avoided the unwarranted attack on him that he did not conduct a hearing based on the video footage.

87. The Appellant failed to persuade the Stewards that the decision of the CoC was wrong. When the Stewards pronounced at the hearing that the protest failed, the Appellant refused to sign the Findings of the Protest Hearing (exhibit "H"). He thereafter embarked on the scurrilous allegations which we have traversed before. The Appellant showed no restraint in his wide ranging allegations against the Technical Consultant, the CoC and the Stewards.

88. The allegations levelled against the officials had no factual basis whatsoever. Indeed, Mr Mundell SC abandoned paragraph 8.2 (and 8.3) of the grounds of appeal[29] which dealt with the issue whether a sprocket used in heat 2 was compliant, whether the teeth thereof were counted, and whether the sprocket was impounded within the ambit of the GCR's.

89. The only issue that remained was whether the Appellant should have been excluded from heat 1 as well. That issue, which the Stewards were called upon to deal with, was dismissed by them on the evidence presented to them. The Appellant is to be blamed for withholding evidence from the Stewards which was made available at the proverbial eleventh hour in this Appeal (the evidence of Mr Liebenberg).

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[29] See Appeal Bundle, Annexure "K.2".

90. The manner in which the Appellant prosecuted the protest was vexatious. Dissatisfied with the decision of the Stewards, the Appellant showed no restraint whatsoever. He embarked on a scurrilous attack against all the officials as set out in this judgment.

91. The Appellant was cautioned by the COA 456 in its findings when it specifically recorded that, albeit that the COA was of the opinion that the appeal verged on being vexatious or frivolous, the Appellant was cautioned, given his inexperience in motorsport.

92. The Appellant was represented in these proceedings by competent attorneys at law, and ultimately, Senior Counsel. He did not heed the caution of the COA and if anything, escalated the scurrilous remarks as previously dealt with against the officials.

93. Leave to appeal was granted by a panel of this NCA, based on the serious allegations which the Appellant made, which have now been shown to be without merit whatsoever and vexatious.

94. This NCA received submissions from the Appellant pursuant to Procedural Directive 6, on the issue whether the proceedings were frivolous or vexatious. Regrettably, no submissions were made as to a suitable sanction / penalty to be imposed in the event that this NCA holds the Appellant in breach of GCR 206.

95. Mr Maharaj, for MSA, submitted that the whole process, starting with the original protest right up to this NCA, was frivolous and vexatious. On his reading of GCR 206, he submitted that it would not be appropriate for MSA to recommend that penalties be imposed on the Appellant in terms of GCR 206.

96. The second submission made by Mr Maharaj is incorrect for the reasons already outlined herein.

97. In imposing a suitable penalty, this NCA nonetheless took into account the contravention, the facts which it knows regarding the Appellant, and balanced it against the interest of the motorsport society. In this regard:

    97.1 we have accepted that the Appellant is a first offender for frivolous or vexatious proceedings in a motorsport Tribunal;

    97.2 we have considered the seriousness of the allegations made by the Appellant and the interests of the officials involved as well as the interest of MSA;

97.3 we have specifically considered the impact of a sanction on the minor competitor in view thereof that the Appellant is the guardian of the competitor;

97.4 we have considered the fine provisions of Appendix R which provides for a maximum fine of R300 000.00.

98. In arriving at a suitable sanction and penalty, this NCA ultimately concludes that the Appellant was fully aware that the T-83 sprocket during heat 2 was non-compliant with the Karting Regulations. The Appellant embarked on a vexatious protest and in the subsequent proceedings in which he continued to challenge the decision of the Stewards, he resorted to scurrilous allegations against the officials in his pursuit to have competitor 24 reinstated in heat 1. The manner in which the protest and the proceedings to set the decision aside, earned no respect, but shame.

99. This NCA finds that:

99.1 the appeal against the decision of COA 456 which upheld the decision of the Stewards is dismissed. Competitor 24 is excluded from heat 1 and 2 of the Kid-Rok National event held on 12 December 2020;

99.2 the Appellant contravened GCR 206 in that the protest against the decision of the Stewards was filed vexatiously. That process continued in the proceedings of the leave to appeal application to the CEO of MSA, COA 456, leave to appeal to this NCA, and the proceedings in this NCA. In view of the dissolutive effect of this appeal which originates from the protest, all proceedings which challenged the decision of the Stewards, are held to have been vexatious in terms of GCR 206;

99.3 the Appellant is fined an amount of R100 000.00 (one hundred thousand rand) for his breach of GCR 206 and, in addition, is suspended from motorsport (as an entrant or a competitor) for a period of 12 (twelve) months. The suspension, in turn, is suspended for a period of 3 (three) years on condition that the Appellant is not again found in breach of GCR 206 for lodging frivolous and vexatious protests during the period of suspension;

99.4 the Appeal fee is forfeited by the Appellant.

100. In view of the importance of this judgment, MSA is directed to ensure that the judgment is brought to the knowledge of its registered licence holders.

HANDED DOWN AT JOHANNESBURG ON THIS THE 6th DAY OF OCTOBER 2022.

Adv André P Bezuidenhout
Court President

Electronically Signed

Adv G Avvakoumides SC
Court Member

Electronically Signed

Mr Jannie Geyser
Court Member