

INTRODUCTION

1. This is the judgment of National Court of Appeal 150.
2. There are nine Appellants in this matter:
 - 2.1 the First Appellant is Bikefin Honda Racing (“the First Appellant”);
 - 2.2 the Second Appellant is Brad Anassis (“the Second Appellant”);
 - 2.3 the Third Appellant is Competitor Isaacs (“the Third Appellant”);
 - 2.4 the Fourth Appellant is Competitor Hellyer (“the Fourth Appellant”);
 - 2.5 the Fifth Appellant is Competitor Leeson (“the Fifth Appellant”);
 - 2.6 the Sixth Appellant is Honda South Africa (“the Sixth Appellant”);
 - 2.7 the Seventh Appellant is Barrie Barnard (“the Seventh Appellant”);
 - 2.8 the Eighth Appellant is George Portman (“the Eighth Appellant”);
 - 2.9 the Ninth Appellant is Kevin Bidgood (“the Ninth Appellant”).
3. This Appeal arises from events which transpired on 2 October 2010 at the Killarney Motor Racing Circuit (“the race meeting”). The Western Province Motor Club accepted an entry from the First Appellant, entrant license 40977, for the race meeting held on even date. The Third Appellant, Fourth Appellant and Fifth Appellant all competed with Honda Fireblade CBR 1000 RR designation SC59E motorcycles (“the Evo Honda”).
4. Competitor Greg Gildenhuys (“Mr Gildenhuys”) (competing with a BMW motorcycle) filed a protest to the stewards of the meeting, protesting the eligibility of motorcycles with race numbers 2 and 77 (both motorcycles were Evo Hondas, claiming that the motorcycles were not homologated as required (“the protest”) within the ambit of the homologation rules of Motorsport South Africa (“MSA”). There is no evidence that the Fifth Appellant competed at the race meeting.
5. Mr Gildenhuys did not personally appear in this appeal. His father, Marnie Gildenhuys (“Mr Marnie Gildenhuys”) testified in the protest (“the BMW protest”) and testified in this appeal.
6. The protest was dismissed by the stewards on 2 November 2010. An appeal was filed against the decision of the stewards to the Court of Appeal 377 (“COA 377”).
7. COA 377 was constituted and considered the appeal. A ruling was issued by COA 377 on 25 November 2010. Ultimately, on 18 January 2011, COA 377 issued its findings and imposed penalties on all nine Appellants, essentially finding that:

- 7.1 the Evo Honda was not homologated and was ineligible for competition in the South African Superbike Championship (“the Superbike Championship”);
- 7.2 a variety of penalties were imposed on the nine Appellants.
8. COA 377 made scathing remarks against most of the Appellants.
(see *Appeal Bundle, annexure “I9”, paragraph 61 to 67*)
9. COA 377 came to a conclusion that:
- 9.1 irrespective of the manifestation of fault, the homologation of the Evo Honda for competition purposes in South Africa constituted a grave dereliction of particularly the duties and obligations of the Chairman of MSA Homologation Committee and the Technical Consultant. These two individuals are the Eighth Appellant and Ninth Appellant;
(see *Appeal Bundle, annexure “I9”, paragraph 69*)
- 9.2 there has been severe prejudice to all superbike competitors other than the members of the First Appellant’s team. Such competitors have been severely prejudiced and denied an opportunity to compete on a fair and even footing with the First Appellant’s team as they do not have the opportunity to purchase and compete on the Evo Hondas.
(see *Appeal Bundle, annexure “I9”, paragraph 70*)
10. The Appellants filed an appeal to the National Court of Appeal dated 24 January 2011 (“the appeal”) on several grounds.
11. The Appellants and the BMW protest were represented by attorneys and Counsel during these proceedings. This National Court of Appeal is indebted for the able contributions made by all the legal advisors in this hearing.

THE CONTROL OF MOTORSPORT

12. The control of motorsport in South Africa is held by MSA, a Section 21 Company in terms of the Company’s Act, 61 of 1973. MSA holds the sporting authority to govern motorsport as it is the delegated authority by the FIA, CIK and 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. Mr Scholtz 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 *MSA Articles of Association*)

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

13. The Appellants filed a document which is marked “*Appeal to the National Court of Appeal*” (“the Notice of Appeal”).
(See *Appeal bundle, annexures “J1” to “J6”*)
14. The Appeal, in essence, contends that:
- 14.1 a gross miscarriage of justice has occurred;
 - 14.2 the penalties imposed are wholly inappropriate in the circumstances;
 - 14.3 COA 377 considered irrelevant facts and did not consider relevant facts;
 - 14.4 COA 377 considered irrelevant rules and did not consider relevant rules;
 - 14.5 COA 377 exceeded its powers in making the findings it did and imposing the penalties it did;
 - 14.6 COA 377 lacked jurisdiction to make the findings and impose the penalties;
 - 14.7 COA 377 did not apply itself to the facts before it impartially, fairly, equitably and without bias;
 - 14.8 COA 377 did not observe a fundamental rule of natural justice namely *maxim audi alteram partem*;
(see *Grounds of Appeal 5.1 to 5.8*)
15. In the National Court of Appeal’s view, the following material legal and factual issues (“the material issues”) crystallized in this appeal:
- 15.1 the effect and impact of the upgraded parts (“the upgraded parts”) on the eligibility of the Evo Hondas for homologation purposes (the upgraded parts were referred to in COA 377 as the “*modified components*”. The Appellants, in their documents referred to the upgraded parts as “*updates*”. For ease of reference, reference is made in this judgment to these items as the upgraded parts);
(see *COA, para 15*)
 - 15.2 whether there was a need to homologate the Evo Honda as a result of the upgraded parts and whether such upgraded parts were changes in specification that has been brought about by an evolution of the model concerned;
(see *COA, para 26*)
 - 15.3 whether the Evo Honda complied with homologation regulation 12.2 of the Circuit Racing Handbook (“SR 12.2”) of MSA;

(see COA, para 43)

- 15.4 whether the Evo Honda complied with the FIM homologation rule 2.9.7;
(see COA, para 38)
- 15.5 whether the Evo Hondas were eligible to compete at the race meeting pursuant to the provisions of article 2(xi) of appendix A to the General Competition Rules (“GCR’s”) of MSA;
(see COA, para 12)
- 15.6 whether the Evo Honda was homologated in South Africa by MSA;
(see COA, para 25)
- 15.7 whether the SSR’s prevail over the GCR’s;
(see COA, para 24)
- 15.8 in the event of a finding that the Evo Hondas were not eligible for competing at the race meeting, which of the Appellants should be sanctioned pursuant to the provisions of GCR 173;
(see COA, para 7)
- 15.9 whether the Eighth Appellant and Ninth Appellant, as MSA officials, should have been sanctioned by COA 377 pursuant to the provisions of GCR 78 and GCR 208(v);
(see COA, para 15)
- 15.10 Adv Burger, representing the BMW protest, submitted that the appeal should in any event fail in view of the Appellants’ non-compliance with GCR 218 as the Appellants filed the appeal on 24 January 2011 and paid their appeal fees one day later, on 25 January 2011.
(see BMW written submissions, para 2)

PROCESS FOLLOWED DURING THE APPEAL

16. All hearings of Appeals in terms of the GCR’s are held *de novo*.
(See GCR 208 viii)
17. This National Court of Appeal issued eight Procedural Directives. The details are on record.
18. MSA prepared the appeal bundle. The Appellants and the BMW protest submitted their own bundles to this National Court of Appeal. Accordingly, the following documents were received:
- 18.1 the appeal bundle submitted by MSA, together with an index and marked

- annexures “A” to “J6” (“Appeal bundle”);
- 18.2 the Appellants’ bundle which was finally paginated and marked “1” to “100” (“Appellants’ original bundle”);
 - 18.3 the Appellants’ supplementary bundle, which was paginated and marked “1” to “61” (“Appellants’ Supplementary Bundle”);
 - 18.4 BMW’s bundle paginated and marked pages “1” to “9” (“the BMW bundle”).
19. In view of the importance of this appeal and the allegations made between the parties, this National Court of Appeal directed that the witnesses testify under oath.
 20. The Appellants tendered the evidence of:
 - 20.1 George Portman;
 - 20.2 Kevin Bidgood;
 - 20.3 Barrie Barnard.
 21. For the BMW protest, the following witnesses testified:
 - 21.1 Marnie Gildenhuys;
 - 21.2 Rob Holder (“Mr Holder”).
 22. MSA presented the evidence of Charles Hennekam, the Technical Coordinator – Motorcycle Homologations Officer, FIM, (“Mr Hennekam”) in terms of GCR 220. His evidence was presented through Skype video conference between Johannesburg and Geneva.
 23. The Appellants and their representatives for the BMW protest filed written submissions.
 24. This National Court of Appeal issued Procedural Directive 6 to afford the parties the opportunity to inspect the Evo Honda on 1 March 2011 and to determine as at that date, whether the Evo Honda was fitted with two exhaust valve springs per valve.
 25. The Chief Executive Officer of MSA attended the strip of one of the Evo Hondas. The cylinder head was sealed with a seal which corresponds with the Ninth Appellant’s documentation. Upon a strip of the engine, the seal was broken and the valve springs were removed from one cylinder. The exhaust valve only contained one valve spring. For the reasons outlined below, there is no need to adjudicate on this issue.

26. The 2011 Superbike Championship is due to commence on 4 March 2011 at Kyalami. In view hereof, this National Court of Appeal expedited its findings to ensure certainty for the 2011 Superbike Championship where the Evo Honda is entered to compete. If required, this National Court of Appeal will expand on its reasons.

IN LIMINE

27. To ensure expedience of completing this appeal, and fairness to all interested parties, this National Court of Appeal issued eight Procedural Directives.
28. Pursuant to the issue of Procedural Directive 3, directing the Eighth Appellant and Ninth Appellant to produce all documents considered by the Homologation Committee to homologate the Evo Honda, the Appellants notified this National Court of Appeal that they intended to object to communications with the attorneys of the BMW protest and that the Appellants were prejudiced by Procedural Directive 3 as they were required to produce a host of documents at the hearing without the benefit of consulting their legal representatives.
29. This issue *in limine* was abandoned by Adv Mundell SC at the commencement of the hearing and it was consequently not necessary to adjudicate the issue.

THE MATERIAL GCR's, SSR's AND SR's

30. 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*)
31. All participants involved in motorsport events subscribe to this authority. As such, a contract is concluded based on the “*rules of the game*”.
32. The “*rules of the game*” of motorsport are structured in main on the Constitution of MSA, the GCR's, the SSR's and the SR's. Any competitor who enters a motorsport event subscribes to these “*rules of the game*”.
(see *GCR 19*)
33. It is expected of every entrant and competitor to acquaint themselves with the GCR's, SSR's and SR's constituting the “*rules of the game*” and to conduct themselves within the purview thereof.
(see *GCR 113 read with GCR 122*)
34. The Superbike Championship is a fiercely contested national championship. It is generally seen as one of the flag-ship motorcycle championships for non-modified motorcycles. Race meetings for the Superbike Championship attract multiple

entries of official importers, for example Suzuki, Honda, BMW and other manufacturers. The Superbike Championship attracts substantial attention from competitors, the public, printed and televised media. Championship contenders in the Superbike Championship are household names in motorcycle circles and are recognised as leading sportsmen and women in South Africa. Substantial sponsorship is invested in the Superbike Championship.

35. The regulations and specifications for the 2010 motorcycle racing championship published in the SSR's and SR's comprise substantial detail as to the regulation of the championship. The aim of the Superbike Championship is to yearly declare a champion.

(see SR 3.a))

36. Indeed, appendix A to the GCR's details the general rules relevant to homologation. The homologation certificates pertaining to production motorcycle racing are so important that GCR 3 provides that all entrants or riders shall be in possession or have ready access to a homologation certificate pertaining to their motorcycle. Appendix A, rule 3, provides that:

GCR – APPENDIX A

“3. HOMOLOGATION FORMS FOR PRODUCTION CAR RACING AND PRODUCTION MOTORCYCLE RACING

All entrants or drivers in the above categories of motorsport shall be in possession or have ready access to a homologation certificate pertaining to their vehicle/machine. Failure to immediately produce an original certificate on request by a Clerk of the Course, Scrutineer or Technical Consultant, shall entail exclusion or the imposition of a fine by the Clerk of the Course, acting on the recommendation of a Scrutineer or Technical Consultant. A Scrutineer or Technical Consultant in making his recommendations will take into account the circumstances prevailing at the time, including ramifications resulting from the absence of the homologation certificate. Nothing, however, precludes a competitor from producing a homologation certificate belonging to a fellow competitor who is prepared to make his homologation certificate available. Obviously, should the vehicle not comply with the loaned homologation certificate, the case shall be dealt with as though the competitor concerned had produced his own homologation certificate. The cost of an homologation certificate is detailed in Appendix "R" of this Handbook. Every page of the homologation certificate must bear an original MSA rubber stamp imprint and must be signed in full in blue or red by an MSA staff member. Homologation certificates in the possession of competitors shall be deemed to be the definitive documents for the vehicles concerned and shall not be valid in photocopied form unless stamped and signed as stipulated herein.

(underlining own emphasis)

37. Rule 2 of the homologation rules for motorcycles in appendix A provides that:

GCR – APPENDIX A**“2. MOTORCYCLES**

- i) Except in cases where a motorcycle has been homologated by the FIM (refer to the regulations for the SA Motorcycle Road Racing Championship), the homologation of motorcycles is undertaken by the National Motorcycle Homologation Committee. This Committee consists of representatives from each of the major motorcycle importers and distributors, and MSA.
- ii) The Committee will normally convene to consider applications for homologation when necessary and applications for homologation must be submitted to the Chairman, National Motorcycle Homologation Committee, c/o MSA, P.O. Box 11499, Vorna Valley, 1686 not later than one month before the motorcycle is intended to be entered in competition.
- iii) Applications must be made on the official MSA Recognition Form, Duly completed in all respects and accompanied by the relevant fee stipulated by MSA. Failure to comply with these requirements in all respects will result in the delay of acceptance of the application pending receipt of the omitted items.
- iv) Applications which are incomplete in any respect will be rejected until the following meeting of the committee, or until such time as the omitted details are supplied.
- v) Homologation will become effective from the first Friday following the date of the meeting granting acceptance of the application.
- vi) No motorcycle may compete in any competition for which homologation is a necessary requirement until such homologation has been approved by the committee.
- vii) Applications for re-homologation of a motorcycle, where such is permitted by the MSA regulations, must be submitted in writing together with assurance that the specification of the motorcycle concerned complies with the current regulations for the category in which it will compete, and will be subject to the same conditions as in Art. 2ii) above.
- viii) When additional consignments of a model are imported subsequent to receipt of the original quantity, the committee reserves the right to examine and compare units selected at random from each consignment in order that the technical specifications are identical. Should these not be so, the committee may require a further application for homologation to be submitted in respect of the later imports if the committee decides that the differences could affect the eligibility and performance of the model concerned.
- ix) The regulations for the categories of motorcycle competitions for which homologation is required are published in this

Handbook.

- x) *The onus is on the competitor to prove that the motorcycle entered in a competition conforms with the information contained in the homologation documents.*
- xi) *All service bulletins must be submitted for the approval of the Homologation Committee when any change in specification has been brought about by the evolution of the model concerned. The President of the MSA Motorcycle Racing Commission and the Technical Consultant, at their sole discretion, shall be responsible for accepting or rejecting the change.*

(own emphasis)

38. Regulation 2.vi) emphasises the central importance of homologation in that it provides that **no motorcycle may compete in any competition for which homologation is a necessary requirement, until such homologation has been approved by the committee.**

(see Appendix A, Regulation 2.vi))

(own emphasis)

39. The National Motorcycle Homologation Committee consists of representatives from each of the major motorcycle importers and distributors and MSA.

(see Appendix A, Regulation 2.i))

40. The onus to prove that a motorcycle conforms to homologation documents rests on the competitor.

(see Appendix A, Regulation 2.x))

41. The Sporting Regulation ("SR") in addition to the GCR's also deals with homologation:

SR 12.2

"12.2 Homologation

Motorcycles to be raced in the championship must be homologated by either the FIM or by MSA. Only motorcycles imported into South Africa by the recognised official importer of the specific make, and which comply with these regulations, shall be permitted to take part in the series, subject to compliance with the additional criteria outlined below. Where FIM homologation is relied upon, the following shall apply:

- *The official importer must have paid to MSA a fee of R25 000 (excl. VAT) in order for its products to be raced in the series. This fee shall be payable annually, prior to the first race meeting of the season. Note: Where a local importer represents more than one motorcycle brand, any such additional brands may be raced subject to an additional fee of R5 000 (excl. VAT) being paid per additional brand over and above the base fee of R25 000.*
- *The payment of the fee mentioned above will permit those*

motorcycles imported into SA by the official importer (VIN/chassis numbers to be supplied) that comply with these regulations and that appear in the FIM homologation records for the Stocksport/Superstock/Supersport categories, to be raced.

Where a particular motorcycle (that complies with these regulations) is not homologated by the FIM, the official South African importers may make application to the MSA Motorcycle Homologation Committee for a local homologation to allow the motorcycle to be raced in the series. In such cases, the following shall apply:

- The importer concerned shall pay to MSA an homologation fee of R50 000 (excl. VAT), which shall incorporate a fee towards the technical administration of the series.
- At least 50 examples of the motorcycle concerned must have been imported into SA (proof must be submitted in this regard).
- The official importer must submit one new motorcycle, chosen by the Technical Consultant, together with a completed Recognition Form 'A', for inspection.
- The homologation, or otherwise, of the relevant motorcycle shall be at the sole discretion of the MSA Motorcycle Homologation Committee.
- Should such an application for homologation be refused, 10% of the homologation fee paid shall be retained by MSA and the balance of the fee shall be returned to the applicant.

Any motorcycle homologated under these rules shall be allowed to compete without time limitation subject to continued compliance with the appropriate technical regulations and payment of the required fee to MSA by the relevant official importer for the season in question."

(underlining own emphasis)

42. Regulation 12, which is divided into 49 sub-paragraphs, details the regulations applicable to a variety of equipment of the motorcycles including minimum weights, fuel, frame, body and sub-frame specifications, front forks, air-boxes, cam-shafts, crank cases, etc.
43. The logic of such detailed regulations is easy to appreciate. Motorcycles which competitors intend to race in the Superbike Championship must compete on an equal footing according to the homologation standards of either the FIM or MSA. No non-homologated motorcycles can accordingly be raced in this flag-ship category.
44. Detailed technical regulations and specifications regulate the eligibility of motorcycles in the Superbike Championship. Regulation 12.1 provides as follows:

SR 12.1**“12.1 Eligibility – Motorcycles**

- a) To be admitted to the Championship, motorcycles require homologation as per 12.2 below.
- b) All motorcycles must comply in all respects with all the requirements of the applicable regulations.
- c) *The appearance from both the front and the rear, and the profile, of all motorcycles must (except when otherwise stated) conform to the homologated shape (as originally produced by the manufacturer).*
- d) *All motorcycles must be 4-stroke and sold to the public in S.A for road use.*
- e) All items, if not expressly mentioned in these regulations, must remain as originally produced and homologated by the manufacturer.
- f) *The competitor is responsible for producing specifications and other material (e.g. the service or owner’s manual) to prove the legality of his/her motorcycle. Legality can also be proved by way of comparisons with similar OEM parts.*
- g) *The appointed MSA Technical Consultant has the ultimate authority in respect of decisions regarding the technical legality of any motorcycle.”*

(underlining own emphasis)

45. The FIM Road Racing Superbike Regulations likewise contains detailed regulations to ensure that motorcycles compete within well defined parameters as per the manufacturers’ production specifications.

THE FACTS

46. On 22 February 2010, Vaughan Swanepoel (“Mr Swanepoel”), the Public Relations and Motorsport representative of the Motorcycle Marketing Division of the Honda South Africa (Pty) Ltd (“Honda”), addressed an e-mail to the Eighth Appellant informing that Honda intends to homologate an updated CBR 1000 RR. The communication requested the latest FIM homologated model listings.

(see Appellants Supplementary Bundle, page 1)

47. The FIM’s homologated motorcycle listing for 2010 reflects five Honda CBR 1000 RR motorcycles. Each of the different models was designated with letters and numbers “SC57” or “SC59”.

(see Appellants Supplementary Bundle, page 3)

48. On 26 February 2010, Mr Swanepoel asked for a confirmation of the requirements for homologation from the Eighth Appellant. This was responded to by the Eighth Appellant on 28 February 2010, with a list of items required.

(see Appellants Supplementary Bundle, pages 6 & 7)

49. By 3 August 2010, the Ninth Appellant agreed to seal the motors of the Evo Hondas.

(see *Appellants Supplementary Bundle*, pages 8 - 11)

50. On 10 August 2010, Mr Swanepoel supplied the Eighth Appellant and Ninth Appellant with certain information. Reference in this communication to the identification of the Evo Honda was referred to as the “*CBR 1000 RRA*”. It is clear from the FIM homologation listing referred to before, that no such a motorcycle appears on the list.

(see *Appellants Supplementary Bundle*, page 12)

51. The reference to the “*CBR 1000 RRA*” was perpetuated in further correspondence.

(see *Appellants Supplementary Bundle*, pages 13 to 17(a))

52. In an undated letter addressed by Honda to the Eighth Appellant, ten upgraded parts to the relevant motorcycle were identified. These were:

Part	Description
<i>Cylinder Head / Ports</i>	<i>Updated</i>
<i>Compression Ratio</i>	<i>Updated</i>
<i>Valve seat angles</i>	<i>Updated</i>
<i>Crankcase</i>	<i>Updated</i>
<i>ACG Set & Cam pulse generator</i>	<i>Updated</i>
<i>In & Ex Camshaft / Valve springs</i>	<i>Updated</i>
<i>Head & Base Gasket</i>	<i>Updated</i>
<i>Air Funnel set</i>	<i>Updated</i>
<i>25mm Internal Fork Assembly</i>	<i>Updated</i>
<i>Conrod Assembly Cushion (rear linkage)</i>	<i>Updated</i>
<i>Further technical specs available on request</i>	

(see *Appellants Supplementary Bundle*, page 13)

53. The Ninth Appellant later testified that three of the upgraded parts, i.e. the Crankcase, the ACG Set and Cam pulse generator and the Conrod Assembly Cushion were not found to be updated on the relevant motorcycle.

54. On 17 August 2010, the Ninth Appellant informed Mr Swanepoel that he can see some “*problems with the new bikes*” and whilst he did not yet know the solution, he needed to get all the information. On 19 August 2010, Mr Swanepoel forwarded an e-mail to the Ninth Appellant and undertook to provide a variety of detail relevant to the Evo Hondas.

(see *Appellants Supplementary Bundle*, page 16)

55. In a letter of 23 September 2010, Honda Motor Company Limited Japan issued a letter to MSA. In the letter, reference was again made to the “*CBR 1000 RRA*” designation. The model code of the Evo Hondas appears the most definitively on a Product Update Bulletin of Honda. The model code is reflected as “*SC59E*”. Again,

the model is described as a “*CBR 1000 RRA*”.

(see *Appellants Supplementary Bundle, page 17*)

56. In an e-mail of 23 September 2010, the Ninth Appellant emphasised that for the Evo Honda to be eligible for homologation it must be sold to the SA public as a road going model. In addition, the Ninth Appellant specified that he would need technical drawings and specifications of the updated parts (“the updated parts”). He also stated that samples of the parts would suffice.

(see *Appellants Supplementary Bundle, page 18*)

57. Later on 23 September 2010, Mr Swanepoel enquired from the Eighth Appellant and Ninth Appellant whether the homologation process for the Evo Honda was not completed.

(see *Appellants Supplementary Bundle, page 19*)

58. On 27 September 2010, the Ninth Appellant again emphasised that the Evo Honda must be sold to the public and it required homologation due to it being a non-standard model. He recorded that he was willing to waive the drawings at that time, but that he must have something in the future to be able to have some reference for checking the model. He concluded in the letter that he had no problem that the Evo Hondas could compete in the national event of that weekend.

(see *Appellants Supplementary Bundle, page 30*)

59. On 28 September 2010, the Eighth Appellant addressed a letter to Mr Swanepoel and reserved the right to revisit the facts. Until then, he advised that the Evo Hondas were “ok” to race.

(see *Appellants Supplementary Bundle, page 31*)

60. On 1 October 2010, the Eighth Appellant informed Mr Swanepoel that after further checks have been done by the Eighth Appellant and Ninth Appellant, they are both satisfied that the Evo Honda fully complies with the homologation requirements, and is therefore homologated for use in the Superbike Championship.

(see *Appellants Supplementary Bundle, page 32*)

61. The evidence of all the witnesses was recorded and in view of the urgency of this matter, the evidence is not fully summarised herein.

62. In the Appellants’ case, the Seventh Appellant, Eighth Appellant and Ninth Appellant were called to testify. At the time of presenting the evidence of the Eighth Appellant, the Appellants’ Supplementary Bundle was not available. The Appellants’ original bundle was clearly in disarray, it not being paginated or compiled to contain the most relevant correspondence and documents which eventually surfaced in the Supplementary Bundle. The Appellants indicated that they may consider recalling the Eighth Appellant, but this did not happen. The Eighth Appellant’s evidence, with specific reference to the documents which later surfaced in the Supplementary Bundle, was clearly unsatisfactory. The essence of the Eighth Appellant’s evidence was that the Evo Honda was an upgrade or evolution of the homologated Honda CBR 1000 RR Fireblade. As such, it was

unnecessary to homologate the Evo Honda.

63. The Ninth Appellant's evidence was of poor quality. He was an argumentative and evasive witness. At one point in time he threatened not to continue with his evidence and he had to be called to order by the Court. He conceded that it was the first time that he was involved in the homologation of a motorcycle in South Africa and that he had no knowledge of the GCR's, SSR's and SR's insofar as homologation is concerned. As such, he relied on the knowledge of the Eighth Appellant who he believed was well versed with knowledge of regulations. He originally testified that the exhaust valve had two valve springs. He later changed his version in this regard that it only had one exhaust valve spring.
64. The Seventh Appellant impressed us with the frankness of his evidence. He explained that the Evo Honda was manufactured by the Research and Development Department of the Honda Corporation in Japan. The Evo Hondas were specifically imported into South Africa for competing in the Superbike Championship. As a result of the events which culminated in this appeal, the Evo Hondas are currently not marketed to the public in South Africa. Even an order for parts will be flagged by the computer system. The Seventh Appellant conceded that he does not have any technical knowledge, indeed, he holds a LLB degree. He could not advance any evidence regarding the upgraded parts.
65. Mr Marnie Gildenhuis testified and gave an introduction as to the events which transpired at the race meeting at Killarney. He noticed certain changes on the Evo Hondas and ultimately filed the BMW protest. The standard production fork of the Honda motorcycle is manufactured by Showar. The Evo Honda was fitted with an after market fork structure by an Italian manufacturer called Adriani. In terms of SSR 12.8.a), fork structures must remain as originally produced by the manufacturer for the homologated machine.

(see SR 12.8.a))
66. Mr Marnie Gildenhuis drew attention to certain printouts of an official Honda agency where attempts were made to order the updated parts.

(see *BMW Bundle*, annexures "MG2" and further)
67. Mr Holder testified that there exists substantial confusion as to the model designation which the Appellants required to be homologated. No Honda CBR 1000 RR (SC59E) has ever been homologated. The FIM homologation, rule 2.9.7 requires a new FIM homologation if there were any changes in certain specifications. He testified that a central feature of the Superbike Championship is that motorcycles which are raced are available to the public in South Africa for road use. For motorcycle manufacturers, such as BMW, the rationale for participating in the Superbike Championship is to showcase its production motorcycles against the competitors' production motorcycles. Manufacturers hope that their production motorcycles perform better than the other manufacturers' production motorcycles and as a result of that, the manufacturer hopes to see an increase in sales. This encourages competition between manufacturers to spend more on product development. Competition within the ambit of the rules has a

positive effect on the motorcycle industry and on the sport of motorcycle racing. However, if one team is allowed to make modifications to their production motorcycles that do not comply with the regulations and if they are able to race such motorcycles without obtaining the necessary homologation, it undermines the series. If modifications are allowed, it creates unhappiness in motorsport and it could lead to participants withdrawing from the championship.

THE MERITS

In Limine: Whether the Appellants complied with GCR 214 E?

68. The BMW protest firstly submits that the Appellants failed to comply with GCR 218 in that they lodged their appeal on 24 January 2011 and only paid the fines and fees on 25 January 2011. It is contended that this amounts to a non-compliance which renders the appeal inadmissible and that the appeal should be dismissed on this ground alone.
69. Properly interpreted, what the BMW protest claims is that whilst the Appellants had seven days within which to file an appeal to the National Court of Appeal, which they did, the process of filing the appeal was not correct. On the sixth day after the judgment of COA 377, the appeal was lodged and on the seventh day, the appeal fees and fines were paid. In the present instance, it cannot be said that there was any prejudice suffered by any interested party or MSA as both the appeal fee and the fines were paid within the seven day period provided for in GCR 214 E.
70. It is common cause that the penalties and appeal fees were paid the day after the appeal was lodged. The BMW protest submits that this falls foul of GCR 218 which provides:

“In the case of fines and/or costs being payable, these must be paid prior to an appeal being lodged.”

(see GCR 218)
(own emphasis)

71. The heading of GCR 218 clearly states that the GCR deals with the suspensive effect of appeals. The GCR concludes with a special note. This note emphasises the purpose and intent of the GCR that the expeditious finalisation of disputes is essential to motorsport:

“NOTE: The provision of GCR 218 are to prevent prejudice to other competitors and to ensure expeditious finalisation of disputes which is essential to motorsport.”

(see GCR 218)

72. GCR 216.v) deals with inadmissible appeals. It provides that:

“v) an appeal submission which fails to comply with the conditions that

prescribe the form, content and lodging procedures;”

(see GCR 216.v)

73. GCR 219 deals with the form of appeals and appeal fees. It provides, at the sole discretion of MSA, to waive the necessity for payment of an appeal fee. Reference is drawn to this GCR to indicate that the form of an appeal and the payment of appeal fees are not issues which should result in an over-formalistic approach to appeals to limit the ability of Appellants to seek redress within the ambit of the GCR's. MSA in this instance has not objected to the filing of the appeal and the payment of the fees and fines in the manner in which the Appellants have done.
74. This appeal deals with materially important disputes regarding the Superbike Championship of 2010. It also impacts substantially on the 2011 Superbike Championship. It is in the best interest of motorsport that the appeal be adjudicated on its merits.
75. There has been substantial compliance by the Appellants with the spirit, purpose and intent of GCR 214 E in their filing of the appeal. Whilst the chronology of the filing of the appeal was reversed by the Appellants, there was and is no prejudice to any interested party or MSA in consequence thereof.
76. To dismiss the appeal on this technicality will in all probability result therein that a further protest will be filed at the next event whereafter the complete process of appeal and appeal to this National Court of Appeal will in all probability eventuate.
77. It is in the interest of all the parties that this appeal be adjudicated on the merits.
78. The point *in limine* is therefore rejected.

Whether there was a need to homologate the Evo Honda as a result of the performance upgrades?

79. It is clear from the facts of this matter that Honda intended to homologate the Evo Honda. This is clearly evidenced from the documents contained in the Appellants Supplementary Bundle. The Evo Honda is not contained in the FIM's homologated motorcycle listing for 2010. No reference is made to a Honda "CBR 1000 RRA" or a Honda with a model code "SC59E".
80. There were ten upgraded parts identified by Honda in their communication with MSA. These included critical components including the cylinder head / ports, valve seat angles, crankcase, inlet and exhaust cam shaft / valve springs, air funnel set and fork assembly. In COA 377, it was common cause that there were five upgraded parts being the alternate head gaskets, modified cylinder heads, non-standard cam shafts, the exhaust valves were equipped with double valve springs and non-standard front forks / dampers.
81. The five upgraded parts which were common cause before COA 377 were

postulated to Mr Hennekam during his evidence. He indicated that:

- 81.1 an upgrade to the exhaust valve spring from one to two valve springs would require a homologation;
 - 81.2 the fitment of non-standard front forks / dampers would require a homologation.
82. The case put forward by the Appellants is that GCR Appendix A, article 2 (xi) provides that service bulletins recording changes in specification are considered at the sole discretion of the Eighth Appellant and Ninth Appellant for accepting or rejecting a change. It is accordingly the Appellants' case that all the upgraded parts were simply changes in the specification of the parts brought about by the evolution of the model concerned.
83. This argument is flawed for a variety of reasons:
- 83.1 the homologation of motorcycles, except where they have been homologated by the FIM, is undertaken by the National Motorcycle Homologation Committee. These are the express provisions of Appendix A, Article 2 (i);
 - 83.2 the National Motorcycle Homologation Committee consists of representatives from each of the major motorcycle importers and distributors and MSA. This is the express provisions of Appendix A, article 2 (i);
 - 83.3 no motorcycle may compete in any competition for which homologation is a necessary requirement until such homologation has been approved by the National Motorcycle Homologation Committee. This is the express provision of Appendix A, article 2 (vi);
 - 83.4 service bulletins must be submitted to the National Motorcycle Homologation Committee when any change of specification has been brought about by the evolution of the model concerned;
 - 83.5 once the service bulletin is so submitted, the President of the MSA Motorcycle Racing Commission and the Technical Consultant (in this instance, the Eighth Appellant and Ninth Appellant), at their sole discretion, shall be responsible for accepting or rejecting the change;
 - 83.6 the Appellants clearly ignore the balance of the provisions of Appendix A, article 2. As a matter of fact, the "*committee*" which considered the homologation of the Evo Hondas did not meet the requirements of Appendix A, article 2 (i). No committee of representatives from each of the major motorcycle importers and distributors and MSA were convened. In the present instance, the Eighth Appellant and Ninth Appellant merely took the decision upon them and clearly disregarded the composition of

the National Motorcycle Homologation Committee. It is clearly logical that the entry of motorcycles by manufacturers for competition in the Superbike Championship is an important aspect to be considered not only by MSA but also by the representatives from each of the major motorcycle importers and distributors;

- 83.7 the attempts by the Appellants to style the upgraded parts as mere “*changes in specifications*” do not stand scrutiny. The evidence of the Seventh Respondent itself nullifies this submission. He testified that the Evo Hondas were manufactured by the Research and Development Department of Honda. The ten upgraded parts cannot, by any stretch of imagination, be styled as consequential changes in specifications. The following example clearly evidence the absurdity of the argument; the front forks assembly for a 2010 standard mass production road machine (see *Appellants Supplementary Bundle, page 21*) were upgraded to an “*Andriani pressurized cartridge with adjustable ride height and twin chambers*”. SR 12.8 specifically provides as follows:

“12.8 **Front Forks**

- a) *Fork structures (spindle, stranchions, bridges, stem, cartridges, etc.) must remain as originally produced by the manufacturer for the homologated machine...*”

The upgraded parts in this instance were clearly in conflict with SR 12.8.

(see SR 12.8)

84. None of the essential procedural steps for homologation were indeed taken by the Eighth Appellant and the Ninth Appellant to apply with Appendix A, article 2. Their reliance on a portion of Appendix A, article 2(xi) is rejected. There has been no effort by the Appellants to even demonstrate their compliance with the remainder of the homologation requirements detailed in Appendix A, article 2. They appear to have simply extracted a single sentence which, in specific circumstances, bestows a sole discretion on the Eighth Appellant and Ninth Appellant to accept or reject a change in specifications. The skewed application by the Appellants of this article cannot be supported.

85. Much has been said about GCR 225 which provides as follows:

“225. *Where there is a contradiction between the GCR’s and SSR’s, the latter take precedence, except where the category regulations provide otherwise...*”

(see GCR 225)

86. The GCR’s are defined in part 1 of the GCR’s. It means the General Competition Rules with all the Appendices. This includes Appendix A to which this National Court of Appeal has drawn attention above.

(see GCR 1)

87. The SSR's are defined as:

"Means the Standing Supplementary Regulations issued by MSA."

(see GCR 14)

88. The SR's are defined as:

"Means Supplementary Regulations that a promoter or organiser of a competition is obliged to issue."

(see GCR 16)

89. The SSR's do not contain any substantial provisions regarding homologation. The SSR's comprise SSR 1 to SSR 83.

90. The SR's relevant to the 2010 South African Motorcycle Racing Championship do contain detailed provisions regarding homologation. These SR's have been referred to and quoted above.

(see SR 12.2)

91. There is accordingly no conflict between any homologation GCR's and homologation SSR's in the current instance.

92. There appears to be no conflict in any event between GCR Appendix A, article 2 and SR 12.2. It must be emphasised that the SR's are supplementary regulations that the promoter or organiser of a competition is obliged to issue. The homologation requirements contained in SR 12.2, lays down the additional criteria (as is specifically provided for and detailed in the first paragraph, fourth line of SR 12.2).

93. Even if there was a conflict, which this National Court of Appeal finds there is not, the SR's can never override the GCR's.

94. The Evo Honda does not appear on the FIM homologation list and the Appellants have not contended that the Evo Honda is eligible for racing in the Superbike Championship based on the FIM homologation. Their case is that an earlier model was homologated by the FIM and that all the upgraded parts were indeed only *"changes in specification"*.

95. Where a particular motorcycle is not homologated by the FIM, the South African importer may make application to the MSA Motorcycle Homologation Committee for a local homologation. In that instance, the minimum requirement that at least fifty examples of the motorcycle concerned must have been imported into South Africa must be met.

96. This National Court of Appeal emphasises that the Appellants in any event do not rely on SR 12.2 in pursuit of success in their appeal.

97. There was a need to homologate the Evo Honda as a result of the upgraded parts.

The upgraded parts did not merely constitute a specification brought about by the evolution of the model concerned.

Whether the Evo Honda complied with the homologation requirements of regulation 12.2?

98. The Evo Honda did not comply with the homologation requirements of regulation 12.2. The model was not homologated by the FIM and there were not at least fifty samples of the motorcycle concerned imported into South Africa.
99. Moreover, the Evo Honda was not legally homologated in compliance with GCR, Appendix A, article 2.

Whether the Evo Honda complied with FIM homologation rule 2.9.7?

100. FIM rule 2.9.7 under the heading "*Parts and Product Update*" provides:

"any change in the specifications of the following parts of a FIM homologated motorcycle, will require a new homologation of the model:

- *Crankcase*
- *Cylinder head*
- *Crankshaft*
- *Connecting rods*
- *Camshaft, valves*
- *Carburation instruments*
- *..."*

101. The cylinder head upgraded part at least fall foul of this rule. This National Court of Appeal accordingly finds that the Evo Honda does not comply with FIM homologation rule 2.9.7.

Whether the Evo Honda was eligible to compete at the race meeting pursuant to the provisions of article 2(xi) of appendix A to the General Competition Rules ("GCR's") of MSA?

102. The Eighth Appellant and Ninth Appellant had no authority to allow the Evo Honda to compete before it was homologated in any race meeting. The provision of GCR Appendix A, article 2 (vi) specifically prohibits participation of a motorcycle in a race meeting before it is homologated.

Whether the Evo Honda was homologated in South Africa by MSA?

103. The Evo Honda was never legally homologated in South Africa by MSA. This is in

any event not the case of the Appellants and none of the evidence supported such finding.

Whether the SSR's prevail over the GCR's?

104. Whilst GCR 225 provides that the SSR's take precedence over the GCR's, GCR 225 does not find application in the present instance as there is no conflict between the homologation provisions of the GCR's and the SSR's. No homologation provisions are found in the SSR's.
105. The homologation provisions in the SR's are clearly sub-ordinate to the GCR's. This is in any event, not the Appellant's case.

In the event of a finding that the Evo Honda was not eligible for competing at the race meeting, which of the Appellants should be sanctioned pursuant to the provisions of GCR 173?

and

Whether the Eighth Appellant and Ninth Appellant, as MSA officials, should have been sanctioned by COA 377 pursuant to the provisions of GCR 78 and GCR 208(v)?

106. These two issues can conveniently be dealt with together.
107. The First Appellant is a registered entrant in the Superbike Championship. The Second Appellant was its representative and signed the race entry form. The Second Appellant did not sign the race entry form in his personal capacity. He clearly did so in his representative capacity of the First Appellant.
108. The Third Appellant and Fourth Appellant competed in the race meeting with Evo Hondas.
109. There is no evidence that the Fifth Appellant competed at the race meeting.
110. The Sixth Appellant has no relationship with MSA. It is the importer of the Evo Honda.
111. The Seventh Appellant was a witness in COA 377.
112. The Eighth Appellant and Ninth Appellant were MSA officials.
113. COA 377 was faced with a clearly undesirable situation. It was constituted as a Court of Appeal. Amidst the proceedings, it issued the interim ruling. In consequence of the interim ruling, COA 377 requested MSA that (it) ought to be convened as a Court of Enquiry under GCR 211 (ii).

114. It is common cause that COA 377 did not progress to obtain additional evidence and therefore relied on circumstantial reasoning to make its findings.
115. Through a flawed inferential reasoning process of making adverse inferences against entities and individuals who failed to participate in the further proceedings before COA 377, that Court ultimately speculated as to whether there has been a grave dereliction of duties by the Eighth Appellant and Ninth Appellant to homologate the Evo Hondas or whether, put in its simplest form, there has been outright collusion to allow the Evo Hondas to participate or an attempt to mislead the Eighth Appellant and Ninth Appellant by Honda.
116. This National Court of Appeal finds that there was no basis upon which COA 377 could have made any reliable findings that there was any collusion between the Appellants. The Eighth Appellant and Ninth Appellant failed to apply the GCR's and SR's but it cannot be said that they did so in collusion with any one of the other Appellants. The Eighth Appellant and Ninth Appellant have many years of experience in motorsport and have impressive credentials. From the evidence presented to this National Court of Appeal and the documents considered, it appears that they simply erred upon the application of the applicable regulations.

FINDINGS

117. This National Court of Appeal finds that:
 - 117.1 the Appellants did not discharge the onus to demonstrate that the Evo Honda was homologated as required in terms of the homologation regulations;
 - 117.2 the appeal of the First Appellant fails. The Evo Honda was not eligible to compete at the race meeting as it was not homologated to participate in the Superbike Championship;
 - 117.3 the appeal of the Second Appellant succeeds as he acted in a representative capacity and not in a personal capacity;
 - 117.4 the appeals of the Third Appellant and Fourth Appellant are dismissed. They competed with the Evo Honda which was not homologated, at the race meeting;
 - 117.5 the appeal of the Fifth Appellant succeeds, there being no evidence that he competed at the race meeting;
 - 117.6 the appeals of the Sixth Appellant, Seventh Appellant, Eighth Appellant and Ninth Appellant, succeeds, as there was no basis to issue sanctions against them for the reasons previously adumbrated;

117.7 MSA is directed that all championship points earned by the Third Appellant and Fourth Appellant pursuant to an entry and competing with an Evo Honda at the race meeting and at any other race meetings during the 2010 Superbike Championship, are forfeited.

PENALTIES

118. The penalties imposed by COA 377 are set aside.
119. The First Appellant is fined R50 000.00, in terms of GCR Appendix R, article 12.
120. The Third Appellant and Fourth Appellant are each fined an amount of R10 000.00 which is suspended for a period of three years on condition that the Appellants are not again convicted for competing in a motorcycle event with a motorcycle which is not homologated in terms of the GCR's and SR's.
121. The Evo Hondas are excluded from all events in which it was entered and all points earned by competitors are declared null and void for the 2010 Superbike Championship.

COSTS

122. The Appellants paid a composite appeal fee. In view thereof that the Appeals of the First Appellant, Third Appellant and Fourth Appellant are dismissed, this National Court of Appeal makes no order as to repayment of the appeal fee.
123. The unsuccessful Appellants are each directed to pay costs in the amount of R10 000.00 each to MSA.

Handed down at Johannesburg on this the 04TH day of March 2011.

Electronically Signed

Adv André P Bezuidenhout
Court President

Electronically Signed

Adv George Avvakoumides
Court Member

Electronically Signed

Mr Mike Clingman
Court Member

Electronically Signed

Mr Jannie Geyser
Court Member

Electronically Signed

Mr Richard Schilling
Court Member

Electronically Signed

Mr Willie Venter
Court Member