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FINDINGS AND REASONS OF MSA NATIONAL COURT OF APPEAL 151

INTRODUCTION

1. In the interest of attaining finality in terms of declaring a champion in the 2010 South African National Superbike Championship ("the championship"), this court dismissed the appeal in this matter immediately after conclusion of the hearing. The delays in this matter had already dragged on beyond what was reasonable in the circumstances, not to mention the inherent prejudice it held for the incumbent champion not being declared in the premier motorcycle championship. Judgment was reserved on all other outstanding and ancillary aspects, including its reasons for a number of rulings made during the course of the appeal. This is the judgment dealing with such outstanding and/or ancillary issues and the reasons therefor.

2. The appellant is the Bikefin Honda Racing team (also referred to herein as "BHR"). The respondent is Mr Greg Geldenhuise ("Geldenhuise" - who is known in motorcycle racing circles as "Gildenhuys"). Geldenhuise was a competitor in the championship. He competed with a BMW S1000 RR motorcycle ("the motorcycle").

3. A protest ("the protest") submitted by the team manager of BHR, Mr B Anassis ("Anassis") pertaining to the East London round of the championship held on 29 and 30 October 2010 culminated in this appeal. The protest was considered by the Stewards of the particular event resulting in a finding that the motorcycle was not compliant with the technical requirements applicable to motorcycles participating in the championship.

4. Geldenhuise appealed against his exclusion by the Stewards. This appeal was heard by MSA Court of Appeal 378 ("the COA") on 9 November 2010. The COA essentially upheld the appeal and overturned the exclusion of Geldenhuise. It also found that although the motorcycle did not comply with a specific technical regulation, it provided no performance benefit. As a result a fine of R500-00 was imposed upon Geldenhuise. It also ordered BHR to pay costs in the amount of R3 000-00.

5. BHR appealed against the findings of the COA and the penalty imposed on Geldenhuise. It is this latter appeal which this Court is seized with. The appeal was initially set down to be heard on 30 May 2011 ("the first hearing").

6. At the first hearing, this Court raised certain issues at the outset with Mr Mundell, who appeared for BHR, and Mr Marais, who appeared for Geldenhuise. This Court sought the input from the parties with a view to separate certain issues and to deal with them first. This resulted in BHR applying for and being granted an amendment of its notice of appeal (which it later contended it was "forced" to do). These issues and the events which ensued will be dealt with in more detail below. However, this resulted in the matter, firstly, being stood down at the request of Mr Mundell to consider his position and to take instructions and, secondly, in BHR requesting a postponement of the appeal (which was opposed by Mr Marais on behalf of Geldenhuise) on the basis that it was surprised by the issues raised by the Court and required time to consider them and how best to deal with them. The postponement was granted.

7. The appeal was again heard on 20 July 2011 ("the second hearing"). A member of this Court at the first hearing, Mr Arnold Chatz, was not available when the matter resumed. He was replaced by

Adv P Carstensen. This elicited an objection to the composition of the Court from BHR. The objection, rooted in the recusal it sought (which is dealt with below in more detail), was noted and the matter continued. A substantive application for the recusal of the other two original members of this Court by BHR was heard and dismissed.

8. Mr Mundell, after a brief adjournment to take instructions and despite this Court indicating that it would provide the reasons for the dismissal of the application for recusal at a later stage, nevertheless indicated that his client, BHR, required reasons for the dismissal of the application for recusal and applied for the appeal to be adjourned to afford his client an opportunity to consider its position regarding a possible application for review of the refusal of the recusal application. The application for a postponement and the request to be furnished with reasons before the matter proceeds in order for BHR to consider its position, were refused.

9. BHR, through Mr Mundell, then indicated its election to terminate its further participation in the appeal. Its legal representatives excused themselves from further attendance and did not participate in the appeal any further. This conduct is tantamount to an abandonment of the appeal which would have justified a dismissal of the appeal of BHR there and then as contemplated in the third sentence of rule 220 of the General Competition Rules ("GCR" or "GCR's"). The court elected to conclude the hearing, mainly because it is a hearing *de novo* albeit, in this instance, in the appellant's absence - in terms of and as contemplated in GCR 220, - culminating in the finding set out at the commencement of this judgment, i.e. dismissal of the appeal and reserving of all other outstanding issues.

10. Prior to commencement of the first hearing MSA had prepared a bundle of documents which was delivered to parties and the individual members of this Court well in advance of the date of the first hearing. The appellant compiled its own bundle of documents (duly indexed and paginated comprising some 174 pages) which were furnished to the members of this Court a day or so before the first hearing. At the first hearing the respondent submitted further documents supplementing the appellant's bundle with a further 61 pages. All references in this judgment (save where indicated otherwise) shall be to the indexed and paginated bundle of documents prepared by the appellant and supplemented by the respondent. These documents, in the absence of any *viva voce* evidence adduced by the appellant, constituted the main body of evidence on which this Court had to decide the issues. The content thereof was considered in context of all the other documents. The respondent did not contest any of the relevant factual information therein contained, although certain opinions (e.g. those expressed by Mr Portman) were contested.

11. It bears mention that experience has taught that unnecessary delays are often brought about and issues are not properly ventilated where the Court is not apprised of the facts and issues to be addressed beforehand. Unlike the situation in normal civil courts, there is no exchange of affidavits or pleadings to define issues. The Court more often than not, as in this case as well, has to resort to its own assessment or definition of the issues distilled from a bundle furnished to it. This methodology also facilitates curtailment of matters where such curtailment is attainable without resulting in an injustice. The notice of appeal, even when drafted by experienced legal representatives, often does not assist to clearly identify the issues to the extent that one would expect, as was the case here.

FACTUAL BACKGROUND

12. This appeal has its origin in a request on 4 March 2010 from BMW Motorrad ("BMW") regarding the process of and costs relating to homologation of the motorcycle. Homologation may loosely be described as the process to which a vehicle or part must be subjected for approval in order to race in a given series. In response, BMW was referred to the provisions of rule 12.2 of the regulations (these being the Regulations and Specifications for the 2010 South African Motorcycle Road Racing Championship contained in the Circuit Racing MSA Handbook) which pertain to homologation. It is apposite to bear in mind that rule 12.2 envisages two methods of homologation i.e. either by the FIM (Fédération Internationale de Motocyclisme - to which MSA is affiliated) or by MSA through its Motorcycle Homologation Committee). The latter method involves, *inter alia*, payment of a prescribed fee with the lodgement of an application and furnishing of a motorcycle for inspection. It is referred to as a "local homologation".

13. In this instance the motorcycle was homologated on the basis of its homologation by the FIM as appears from a list depicting the FIM homologated motorcycles for 2010 (page 136 of the bundle). The appropriate homologation fee was also paid. On 10 March 2010 Mr George Portman, the president of the Motorcycle Racing Commission at the time, confirmed on behalf of MSA that the motorcycle was "officially homologated" for local racing "as of (that day)". The MSA

technical consultant ("the TC") for the championship (or series), Mr Kevin Bidgood, also confirmed the homologation in writing on 24 March 2010. However the confusion which reigns regarding the difference between "homologation" and "technical compliance" with the particular rules relating to the championship, is evident from the protest underlying this appeal, surprisingly also among some of the officials of MSA (most notably Mr Portman). This is briefly dealt with below.

14. It appears that various aspects regarding the motorcycle's technical compliance with the relevant regulations were debated between MSA and BMW from time to time. It is not necessary to deal with these for purposes of this judgment (which include aspects like the use of "quickshifters" etc).

15. Prior to homologation and at the time when BMW first enquired as to the homologation of the motorcycle, compliance with, *inter alia*, rule 12.24 f) of the regulations was raised by Mr Portman on behalf of MSA. Rule 12.24 f) requires of an importer to supply two homologated "CDI" units to the TC prior to the motorcycle concerned being raced for the first time in the particular season. The rule further permits the TC, at his sole discretion, to request a rider to exchange the motorcycle's CDI unit with one of the two control units furnished to the technical consultant, provided this is done one hour or longer before the commencement of qualifying. For purposes of this judgment, it is assumed in favour of the appellant (without finally deciding) that a CDI unit is the same as an "ECU" unit because both is suggested to control ignition and fuel delivery to the engine. Sight is not lost of the fact that BMW pointed out that the motorcycle does not have a CDI unit but an ECU. This assumption is also not intended to be interpreted that this Court agrees unconditionally with the notion that a component which performs the same function as a prescribed or regulated component is therefore to be regarded as being the same component as the prescribed or regulated item.

16. Contrary to the suggestion of Mr Portman on behalf of MSA to BMW, the homologation of a motorcycle is not dependent on compliance with rule 12.24 f). The supply of the units needs to occur sometime <u>prior</u> to the motorcycle concerned being raced for the first time and not for purposes of homologation *per se*. Perhaps it bears mention that this Court has not lost sight of the fact that homologation does not exist totally independent of technical compliance with the applicable regulations and specifications. There is an "overlap". Rule 12.2 explicitly states that a homologated motorcycle "shall be allowed to compete <u>without time limitation</u> subject to <u>continued compliance with the appropriate technical regulations</u>." (Our emphasis).

17. FIM homologated motorcycles must also in terms of the second bullet of rule 12.2, comply with "these regulations". However, it is evident that the only "external" rule (i.e. a rule not prescribing a particular compliant inherent attribute or characteristic of the motorcycle itself in terms of its constituent parts), appears to be rule 12.24 f). The fact that compliance with this particular rule is only required to be met at some stage <u>after</u> homologation is proof of the fact that it is not a prerequisite for homologation. It is clear that a competitor will only face the prescribed sanction of exclusion in terms of rule 12.24 f) once the TC has exercised his discretion to request an exchange and the particular competitor has failed to comply with the request.

18. For technical reasons peculiar to the motorcycle, it was not possible to supply ECU units capable of being exchanged at the behest of the TC an hour or more before qualifying if and when a competitor was required to do so. It appears that this remained an ongoing issue despite the motorcycle being permitted to participate in the championship. It is also suggested in the documentation provided by BHR that strict compliance with rule 12.24 f) was also not demanded although compliance continued to be pursued over several months. Once the first race had come and gone without the TC being in possession of the two units, strict compliance with this rule was in any event no longer possible. However, this is not relevant for purposes of this judgment.

19. In so far as BMW's attempts to comply with rule 12.24 f) are concerned, it appears that BMW supplied two ECU's to the TC. The ECU unit of the motorcycle was apparently "programmed" under his supervision and sealed prior to the event at which the protest was lodged. At least one ECU (and probably two units) was also furnished to the TC some time prior to the event. Despite the fact that Anassis gave evidence before the COA that he had been suspicious since the motorcycle's first appearance in the championship that it could not comply with rule 12.24 f), it appears that BHR probably knew of the non-compliance by BMW with the particular rule, at the latest, on 6 October 2010 when Mr Portman unequivocally stated this fact in an e-mail which he copied to Mr Barnard who is involved with BHR. Mr Barnard is apparently the General Manager Motorcycle Division of Honda South Africa.

20. Given the competitiveness of most, if not all, of the participants in the championship and the professionalism, dedication and awareness regarding the doings of the opposition, it is simply inconceivable and highly improbable that the alleged evidence of Anassis was not true. It is necessary to interpose to mention that this court is also inclined to accept that Anassis in fact gave the evidence attributed to him by the COA in paragraph 5.4 of its findings. No evidence was adduced in this Court which challenged the finding of the COA that Anassis had given such evidence.

21. It is not only improbable that Anassis as the manager of a competitive and professional team such as BHR's would not have been aware of this non-compliance, but this inference is further supported by the absence of any challenge regarding this evidence in the appellant's notice of appeal, particularly given that the evidence allegedly given by the TC before the COA was explicitly challenged. It is glaringly apparent that the most significant finding of the COA on the protest (i.e. that it is time barred) was based on this evidence of Anassis. Had BHR intended to challenge the COA's findings regarding the evidence of Anassis, it would most likely have been stated in its notice of appeal.

22. It bears mention that the event to which the protest relates was preceded by an event in Cape Town on 2 October 2010 at which Geldenhuise had filed a protest against the eligibility of BHR's motorcycles. This protest *inter alia* culminated in a finding by the National Court of Appeal (NCA 150) that these motorcycles were excluded from "all events in which it was entered and all points earned by competitors (were) declared null and void for the 2010 Superbike Championship". The important effect of the result of this exclusion is dealt with below.

23. Not entirely unsurprisingly, Anassis filed the protest at the next event. The protest filed by Anassis on behalf of BHR is found at p 1 of the bundle. It was lodged on 29 October 2010 at 10:05 am. From the documentation furnished to this Court by the appellant and contained in its bundle, it is clear that it was not only Geldenhuise who competed with the particular motorcycle. However, the protest was lodged only against Geldenhuise's motorcycle.

24. It is not difficult to find the answer for this approach. Geldenhuise was clearly BHR's main opposition in the championship which, as a result of the dismissal of this appeal, he ultimately won. There is no doubt with this Court that this fact has a bearing on the motive with which the protest was lodged. This is dealt with below when the issue concerning GCR 206 (which relates to frivolous or vexatious protests), is considered.

25. At face value the protest is, firstly, a protest against the "homologation and validation" of the motorcycles. Anassis clearly found himself in good company. Just as Mr Portman did, Anassis misunderstood the concept of homologation as opposed to technical compliance, an aspect which has been dealt with in paragraph 16 above. If the protest was truly aimed at taking issue with the homologation of the motorcycle, the protest, if that was the correct procedure in terms of which to challenge the homologation (which need not be decided in this appeal), was woefully out of time by reason of not only Anassis' admission regarding his suspicions from the outset, but also because of the knowledge of BHR from 6 October onwards when it received Mr Portman's e-mail regarding the motorcycle's non-compliance with rule 12.24 f). However, for purposes of considering this appeal it is this Court's view that the protest should be considered for what it is clearly intended to be, i.e. a protest based on technical non-compliance of the motorcycle with rule 12.24 f).

26. The protest contains four further aspects of complaint against the motorcycle's technical compliance being:

- non-compliance with rule 12.14 e) (incorrectly stated as rule "12.4 (E)") relating to alleged non-compliant footrests;
- rule 12.16 h) and i) relating to the lower fairing;
- rule 12.17 c) and d) relating to the fuel tank breather system and filling of the fuel tank with fuel cell foam;
- rule 12.45 j) (incorrectly referred to as "12.45 (D)") relating to the presence of switches on the left handlebar.

27. According to the assessment of the latter four alleged aspects of technical non-compliance by the TC recorded in manuscript (see page 2 of the bundle), it appears, as also reflected in the findings of the COA, that the motorcycle was found to be compliant except for the fact that the breather system was not fitted with a non-return valve. It is regarded as expedient to deal with this issue at this juncture.

28. The essence of this appeal according to BHR's notice of appeal relating to rule 2.17 c), was that "there was no basis in fact, or in terms of any GCR, for the finding" relating thereto. It is abundantly clear that the factual findings of the TC and his evidence during the appeal before the COA formed the basis of this finding. In the absence of any evidence by the TC that he did not testify that "no performance benefit was derived from the omission" of the non-return valve, this Court accepts that the TC in fact expressed the opinion attributed to him by the COA. This issue also involves a "technical matter" as contemplated in GCR 220. The written report of the TC and his evidence before the COA constitute his "recommendations" as contemplated and which "may not be ignored" by this Court in terms of GCR 220. This, however, does not mean that this Court is obliged to accept such evidence as being conclusive. In this instance there is no persuasive countervailing evidence in this regard. Apart from the fact that it is difficult to comprehend how the absence of a non-return valve will afford an advantage, this Court is not persuaded that there are sufficient grounds upon which the findings of the COA regarding the presumption in GCR 176 i) a), should be disturbed. It is accordingly accepted that the absence of the non-return valve in the breather system of the motorcycle did not afford an advantage. There is therefore no reason to interfere with the findings of the COA in this regard.

29. The Stewards considered the protest and excluded Geldenhuise from the results of the event on the basis of their finding that the motorcycle did not comply with the "technical requirements in the Circuit Racing Handbook and relevant GCR's". Geldenhuise lodged an appeal against this finding within the stipulated time period and subsequently filed its formulated appeal in terms of GCR 214 C 2) on 1 November 2010. The COA found, that the protest of BHR was time-barred by reason of Anassis' own evidence (which is dealt with below). In respect of the non-compliance of the motorcycle with rule 12.17 c) regarding the absence of the non-return valve, a fine of R500-00 was imposed by the COA on Geldenhuise.

30. The criticisms and/or comments of the COA as recorded in paragraphs 19 and 20 of its findings are irrelevant for purposes of this appeal, despite BHR's disagreement with some of these observations as set out in its notice of appeal. These observations are simply not appealable findings within the ambit of GCR 215 in that neither a sentence or decision was pronounced upon BHR nor can it be said that it is, by reason of these observations, "subject to a decision" of MSA.

31. Against this summary of the factual background the remaining aspects of this appeal will be considered.

THE NATURE OF THIS APPEAL

32. It is necessary to briefly refer to the relevant GCR's pertaining to appeals from an MSA Court of Appeal to this Court. Ignoring for the moment the jurisdictional facts required in terms of GCR 208, GCR 214 E i) prescribes expressly and by necessary inference the form of the notice of appeal, the relevant fees payable and the time period within which such an appeal should be lodged. GCR 216 v) states clearly that "*an appeal submission which fails to comply with the conditions that prescribe the form, content and lodging procedures*", is inadmissible. The "*conditions that prescribe the form, content and lodging procedures*" are found in GCR 217 read with GCR 219. It is the latter GCR that requires closer scrutiny given the events which followed an issue raised *mero motu* by this Court at the first hearing concerning the form of the appellant's appeal. This is also dealt with below where the recusal application is considered in more detail.

33. GCR 219 i) requires, *inter alia,* "*all appeals (to) be in writing, specifying briefly <u>the decision appealed against and the grounds of appeal</u> ..."* (Emphasis added). It therefore follows logically that an appeal which does not specify "*the decision appealed against and the grounds of appeal"* would be inadmissible. Similarly, where the decision of a Court of Appeal comprises multiple aspects or decisions, an appellant would be obliged to specify the individual decisions and the grounds upon which the attack on those decisions would be based. It also follows that a decision not specified as being one appealed against would fall within the remit of an inadmissible appeal if that decision is sought to be raised when the appeal is heard.

34. Despite the fact that "*all hearings and appeals ... are held de novo"* in terms of GCR 208 viii), the appeal (or "appeal submission") determines, particularly from the appellant's perspective, the jurisdictional framework within which the hearing and appeal is to be held, albeit that it is also a hearing *de novo*. To the extent that an appellant would want to incorporate at the hearing of its appeal a decision not specified in writing as being one which is appealed against, such a challenge would be inadmissible and this Court will usually not be inclined to interfere with the

particular finding, unless interference is called for on the basis that a gross miscarriage of justice will otherwise occur.

35. From BHR's written notice of appeal (also referred to in the GCR's as an appeal submission) ("the notice") it appears that the following findings of the COA are identified as being those which are appealed (dealt with here in the order in which they appear in the notice):

35.1 The finding recorded in paragraph 18 of the COA's written findings annexed as annexure "A" to the appellant's notice of appeal ("the findings"), which relates to the non-compliance of the motorcycle with rule 12.17 c) of the regulations requiring the fitment of non-return valves (which discharge into a catch tank with a specified minimum volume) to fuel tanks with tank breather pipes. The COA imposed a fine of R500-00 because, based on the evidence adduced before it, "*no performance benefit had been derived*" - paragraph 4.1.1 of the notice.

35.2 The "finding" in paragraph 19 of the findings (in respect of which it is necessary to interpose to mention that paragraph 19 contains no finding but a criticism of MSA in dealing with the manner of accommodating the motorcycle and others like it in respect of an initial non-compliance with rule 12.24 f) of the regulations) - paragraph 4.1.2 of the notice.

35.3 The factual finding recorded in paragraph 4 of the findings (which paragraph contains no such factual findings but a summary of the nature of the written evidence which served before the COA - it was presumably intended to be a reference to paragraph 5 of the findings) - paragraph 4.1.4 of the notice.

35.4 The findings of what the evidence was of the technical consultant, Mr Bidgood ("the TC"), presumably the evidence that no performance benefit had been gained by Geldenhuise - paragraph 4.1.4 read with paragraphs 4.1.5, 4.2 and 4.3 of the notice.

36. The notice also criticised the interpretation and reasoning of the COA pertaining to, *inter alia*, the GCR's and the Standing Supplementary Regulations ("SSR's") particularly as are dealt with in paragraphs 8 and 10.3 of the findings of the COA.

37. Somewhat surprisingly but illustrative of what has been said in paragraph 11 above, the notice failed to specify the finding which, in the context of the original protest and BHR's ultimate appeal, is probably the most important of all. This is the finding recorded in paragraph 7 of the findings in terms of which it was found that the protest was time-barred for having fallen foul of the time limit prescribed for protests as required in terms of GCR 200 v) a) against the "apparent" ineligibility of the motorcycle. According to the summary of the evidence adduced before the COA as recorded in the findings (particularly paragraph 5.4 thereof read with paragraph 7), Anassis had been suspicious since the first participation of the motorcycle that it could not comply with rule 12.24 f) of the regulations (which is dealt with in more detail below).

38. The argument advanced on behalf of BHR during the recusal application that the COA and this Court is bound by the grounds of appeal raised by an appellant and that it cannot go beyond it, is not correct. While a party remains bound by its grounds of appeal, it does not necessarily constitute an insurmountable hurdle to a National Court of Appeal to deal with aspects on appeal beyond the grounds of appeal where a gross miscarriage of justice would otherwise occur. This (the alleged occurrence of a gross miscarriage of justice) is clearly the underlying basis upon which an appeal may be lodged with the National Court of Appeal. GCR 208 ix)a) is clear in this regard. By parity of reasoning, where such an injustice will otherwise not occur, the appeal will be confined to the grounds of appeal. It will be senseless to embark upon a consideration of aspects which an appellant does not take issue with. The facts of each specific case will inform the decision as to whether a gross miscarriage of justice will or will not occur. It has to be borne in mind, despite the apparent anomaly it may bear, that all appeal hearings are also held as hearings *de novo*.

39. It is this glaring omission from the notice which prompted this Court to raise the issue with Mr Mundell at the first hearing and to suggest an amendment to the notice - an approach for which this Court was later criticised by Anassis in his affidavit submitted in support of the application for recusal and by Mr Mundell during his submissions pertaining to that application. This criticism is surprising given the obvious deficiency in the notice. For the legal representatives of BHR not to have considered this aspect, is even more surprising.

40. An amendment of the notice was sought and granted to incorporate an allegation that the COA "*erred in finding that the complaint lodged on behalf of Bikefin Honda was time-barred as found in paragraph 7 of the judgment"*. In doing so, a potentially fatal flaw in BHR's appeal was sought to be rectified. It bears mention that Mr Marais on behalf of Geldenhuise did not oppose the amendment sought. A request by this Court for BHR to prepare and submit an amended written notice which accords with and incorporates the amendment, went unheeded and never occurred.

41. In effect and despite this Court's granting of the verbal amendment, there is therefore still no notice before this Court reflecting in writing that the finding in paragraph 7 of the findings is being appealed. No explanation was ever tendered why this Court's request in this regard was ignored. Moreover, there is no compliant "appeal submission" regarding this important aspect (i.e. that the protest against the eligibility of the motorcycle is time-barred) before this Court.

42. There is nothing to suggest (nor was it suggested on behalf of BHR) that a gross miscarriage of justice will occur if the appeal is confined to the written appeal submissions put forward on its behalf. On the contrary, Mr Mundell argued that BHR was forced to seek the amendment, implying that it would not have done so had the issue not been raised by the Court. This argument boiled down to this: The finding of the COA that the protest was time-barred was considered to be part of the reasoning of the COA because if it was a finding, the COA would not have continued to consider rules 12.24 f) or 12.17 c). Only findings are appealed and not reasons. Hence it was decided that it is not necessary to specifically appeal the content of paragraph 7 of the findings. This argument has no merit. The COA clearly made a finding that the protest was time-barred. There could and should have been no doubt about that. This Court agrees that it was perhaps not necessary for the COA to embark upon a consideration of rule 12.24 f) once it found that the protest was time-barred. Having done so, it simply recorded its views on the merits of the protest in respect of the non-compliance with rule 12.24 f). It has to be borne in mind that it too conducted a hearing *de novo*. The COA also deemed it necessary to deal with the admitted non-compliance of the motorcycle with rule 12.17 c), and to impose the penalty it deemed appropriate. No proper identifiable grounds were advanced in BHR's notice of appeal regarding this finding and the penalty imposed save for a generalised "standard" averment in paragraph 3.1.2 thereof and wide, non-specific averments in paragraphs 4.1.5 and 4.3 thereof. There is no reason for this Court to interfere with the findings of the COA as recorded in paragraphs 7, 17 and 18 of its written judgment of 16 November 2010.

43. If any prejudice (or perceived gross miscarriage of justice) results from this failure by the appellant, it has only itself to blame. However, it is inconceivable that it can be suggested that the appellant was prejudiced because of the amendment (allegedly forcibly sought). The result of this Court's finding is that there is in effect no amendment. This effectively puts the appellant in exactly the position it wanted to be in as argued for by Mr Mundell. Put differently, it is difficult to conceive how a gross miscarriage of justice can result from an appellant's considered unequivocal choice not to lodge an appeal to a particular finding particularly where the appellant itself contends that this Court is confined to only consider the appeal in the context of the grounds advanced in its notice of appeal. Its appeal is being considered, firstly, within the jurisdictional framework it contends should be applied in such an instance.

44. On this point alone (i.e. the absence of a challenge to the finding of the COA that the protest regarding eligibility of the motorcycle is time-barred) the appeal accordingly falls to be dismissed.

45. However, even if this Court is wrong on this point, it does not assist the appellant. Even if it is accepted that the notice, if read in its context, constitutes an appeal against the finding in paragraph 7 of the findings of the COA, the verbal amendment which was granted (but not properly effected) constituted a properly raised appeal against paragraph 7 of the findings despite the requirements of GCR's 217 and 219 i) or that a gross miscarriage of justice will occur if the court does not extend its enquiry to encompass this finding of the COA, the appeal must still fail for a number of other reasons. These reasons are dealt with below.

THE NATURE OF THESE PROCEEDINGS: HEARING *DE NOVO*

46. Many of the submissions of Mr Mundell on behalf of BHR seemed to have been premised on the basis that the hearing in this Court is akin to an appeal one would normally encounter in the civil courts of our country. He argued, for instance, that this Court is confined to the appeal as advanced by the appellant. This would include, so he argued, confinement to the approach of the Stewards in respect of whether the protest had been timeously lodged as required by GCR 201 iv) and whether the protest was otherwise admissible. The fact that they did not regard the protest as being frivolous or vexatious (by reason of not having entered into that debate) also

precludes this Court from engaging in consideration of this aspect, he argued. To illustrate his argument, he gave an example of a situation where five findings were made by a Court of Appeal, but only one is appealed. He argued that this Court would then not be permitted to revisit the four unchallenged findings. He submitted that the fact that the hearing is a hearing *de novo* does not permit a wider investigation. This Court disagrees with these submissions.

47. The question regarding the nature and purpose of an appellant's raising of certain specific grounds of appeal and the question whether this Court is confined to those grounds have already been partially dealt with above. What has been stated above need not be repeated.

48. The facts of each individual case will inform the decision as to the permissible scope of the hearing. The avoidance of a gross miscarriage of justice will always be the overriding consideration in this process. This involves a value judgment individual to each case. In addition, there is nothing in the particular GCR's to suggest that the words "*de novo*" should not bear their ordinary meaning which is "afresh" or "anew". (See Trilingual Legal Dictionary, 3rd Edition, JUTA, p 175).

49. Experience has taught over many years that the summary nature of protest hearings by Stewards, the fact that representation of the parties involved is usually either in person or by another lay person, the fact that protests and notices of appeal are often drafted by lay persons and that there is no formal exchange of pleadings, predispose these hearings to inaccuracies of which Anassis' formulation of the protest is an excellent example. A lack of experience to adduce relevant evidence, probably due to a combination of a lack of knowledge and understanding by one or both parties involved of what they should prove extending often also to those presiding at such hearings. Reflection after the fact often brings to the fore aspects which parties realise should have been addressed.

50. It behoves no argument that simple justice between person and person demands sufficient opportunity to ventilate and resolve disputes in order to prevent the inevitable frustration being brought about if disputes are not resolved satisfactorily. Motorsport, by its nature, evokes varied emotions and responses, not only amongst competitors *inter se* but also between competitors and officials which often results in evidence being given from emotive and subjective perspectives, which renders it prone to error and misconception.

51. In broader terms, motorsport does not differ from life in general regarding the need to regulate the activity in the interests of fairness, conformity and safety. This requires the imposition of sanctions in the event of transgressions and provision of general dispute resolution mechanisms, both of which may (and often do) involve highly technical assessments, measurements and evidence in respect of which opinion may widely vary (e.g. how to correctly measure the distance between two critical points).

52. Those presiding in lower tribunals (including Stewards) have varying degrees of experience in motorsport but are often not legally trained. This, from time to time, results in aspects such as admissibility of evidence and prejudice not being afforded the required importance in their application in hearings.

53. In the context of what has been set out in the preceding paragraphs, the need was identified and reaffirmed over many years that the only manner in which to prevent the occurrence of a gross miscarriage of justice is to permit hearings to be conducted *de novo* in the true sense of the word within the confines of and subject to the GCR's (some of which may limit the scope of a hearing as set out above). Legal practitioners who are used to trials and appeals being conducted in terms of either the Criminal Procedure Act, 51 of 1977 or the Supreme Court Act, 59 of 1959 and the Uniform Rules of Court promulgated in terms thereof (not to mention a variety of other legislative provisions regulating form and procedure), find the concept of a hybrid system (when an appeal is conducted as a hearing *de novo*) to be strange, perhaps understandably so.

54. This difficulty is often also compounded by the fact that the law of evidence as applied in the ordinary criminal and civil courts, are not as strictly applied in motorsport matters in terms of the GCR's. Hearsay evidence is, for instance, explicitly permissible in terms of GCR 200. However, many of the general principles of the law of evidence are applied (albeit less strictly) and not simply thrown overboard. Principles of fairness and common sense dictate a less stringent application of the law of evidence by those presiding in these matters (particularly the lower tribunals) so as not to be overly restrictive in effectively ventilating the issues for adjudication in these disputes. At the same time, it is this approach which often calls for caution in the process

of evaluating evidence, especially in appeal hearings. For, *inter alia* this reason, many of the members of this Court are practising legal practitioners (attorneys and counsel) of many years standing who are or have been involved in motorsport at some or other level. All the other permanent members have extensive experience as current or former competitors, officials, administrators and sometimes a combination of all of these capacities.

55. An important aspect of a hearing *de novo* as opposed to an appeal in the strict sense of the word (as usually encountered in civil or criminal matters in courts of law), is that it is intended to permit consideration of all relevant evidence pertaining to the issues to be adjudicated. This would often include evidence which was either not considered in the lower tribunal or not available at the time. Put differently, "new evidence" may be considered provided it is relevant. The concept of "new evidence" may even include evidence which did not necessarily exist at the time of the initial hearing which is under appeal. An example would be evidence of a technical nature by an expert obtained after the initial hearing being appealed. However, it may also relate to any other fact only established thereafter.

56. This particular case is an example of this concept, particularly the fact that the appellant's motorcycles were excluded from all events in the championship by the National Court of Appeal 150, a judgment handed down on 4 March 2011. A copy of this judgment was introduced by the appellant as part of its bundle. This aspect and its relevance in the context of this appeal, is dealt with below.

57. In this case, the concept of a hearing *de novo* means that this Court has to step into the shoes of the Stewards to adjudicate the protest afresh or anew albeit on the basis of facts and information which the Stewards may not have had or considered (and very likely did not have or consider). However, this Court is not bound by what the Stewards found or considered as is contended by Mr Mundell on behalf of BHR. The protest is considered anew in the context of all the evidence available at the time of the *de novo* hearing.

THE COURT'S DECISION TO RAISE A SEPARATION OF ISSUES

58. The best starting point for any discussion on the topic of a separation of issues is to mention that a separation of issues is not a foreign concept in ordinary day-to-day litigation in the civil courts of our country. This is an appropriate (and even obligatory) course to adopt in any matter where it may serve to curtail proceedings and/or where it is convenient. Convenience in this context includes the opportunity to dispose of certain aspects which may have a bearing on the remainder of the impending proceedings either by determining a specific approach or course of action (rather than a number of different approaches or courses being covered in evidence) or where a particular issue may be decisive of the case as a whole. The overriding idea is to avoid a protracted hearing if curtailment thereof is conveniently attainable.

59. It is therefore not surprising, as an example, that specific provision is made for a separation of issues in terms of the Uniform Rules of Court (rule 33(4)) promulgated in terms of the Supreme Court Act, 56 of 1959. In terms of those rules, it is obligatory for litigating parties to consider a separation of issues if it is convenient to do so and may serve to curtail proceedings. It could hardly have come as a surprise that this Court (as constituted at the first hearing) would consider a separation of issues given that two of the three members were legal practitioners with practical litigation experience collectively exceeding 60 years.

60. The importance of the expeditious finalisation of disputes in motorsport is reaffirmed in the note to GCR 218. Furthermore, GCR 220 provides explicitly for a separation of issues as appears from the last four sentences of that particular GCR, in terms of which it is obligatory for a court to consider the issue of whether the appeal "has been lodged in terms of GCR 214 and GCR 219". GCR 214 prescribes the time limits within which notices of intention to appeal and notices of appeal should be lodged depending on the origin of the decision being appealed. GCR 219 prescribes the form and content of notices of appeal (or "appeal submissions"), payment of certain peremptory appeal fees and the consequences of failing to pay same. GCR 220 clearly envisages that the consideration of whether there has been compliance with GCR's 214 and 219 may on its own entail a full separated hearing and even an appeal by an appellant dissatisfied with a finding that the appeal is inadmissible which, if overturned, then reverts back to the court seized with the original appeal. It bears mention that it is implied in the GCR's that any other form of a separation of issues would also be permissible if it may assist "to ensure expeditious finalisation of disputes" which is "essential to motorsport".

61. It is also not unsurprising, given that the expeditious finalisation of disputes is essential, that the Stewards are obliged to consider at the outset the issue of the form of a protest, whether it is accompanied by the correct fee and whether it has been timeously lodged before they may deal with the merits of or grounds for a protest. An adverse finding on the admissibility of a protest may then be appealed. The process in this regard is specifically dealt with in GCR 201 v).

62. This Court, in the process of stepping into the shoes of the Stewards - which the COA was obliged to also do and, in fact, did, given the factual background relating to the application for homologation of the motorcycle and the ensuing facts pertaining to compliance with rule 12.24 f), formed the *prima facie* view that a separation of issues may be indicated. This was motivated by not only dictates of convenience and expediency, but also the provisions of GCR's 201 iv) and 220. This included issues relating to the form of the appeal (relating to the specifying in writing of the decision appealed against and the grounds of appeal - pertaining to the process of homologation) and an absence of a challenge of paragraph 7 of the findings of the COA.

63. This Court, as it was dutybound to do, raised this aspect with the legal representatives of the opposing parties because it seemed to have the potential of curtailing the proceedings. Having raised this aspect, this Court was not only criticised for this but also eventually accused of being biased for having done so.

64. Solely on the documentation submitted by the appellant and the evidence ostensibly adduced before the COA, it appeared to this Court, whose members are also seasoned competitors in motorsport, that the appellant, armed with certain information relating to an alleged non-compliance of the motorcycle, kept the proverbial "ace up its sleeve" to use at the eleventh hour to suit its own championship aspirations by eliminating its main competition, instead of raising the issue at the earliest possible opportunity. This approach, *prima facie*, smacked, at the very least, of bad faith and vexatiousness.

65. It appeared to this Court that the same evidence relating to the first issue (i.e. the time-barring of the protest) may also be relevant to consider a possible breach of the rules in terms of GCR 206. That is to say that the possible vexatiousness of the protest arose directly from the timing thereof. This Court, given its line of provisional thinking, was obliged to raise the issue with the parties, which is what it did.

66. It bears mention that a protest which is in bad faith, frivolous or vexatious, despite it not being explicitly stated to be an inadmissible protest in terms of GCR 203, has to be dismissed because it is in bad faith, frivolous or vexatious. The fact that GCR 206 states explicitly that a penalty may be imposed over and above forfeiture of the protest fee, supports the inference that such a protest may not be entertained. The content of GCR 205 serves as further confirmation of this result of a protest which is in bad faith, frivolous or vexatious. A protest in breach of GCR 206 must therefore be dismissed regardless of whether the protest may have merit otherwise.

67. If it is demonstrated that a competitor (or entrant) had knowledge of a competitor's non-compliance with either the prescribed homologation rules or other rules requiring technical compliance, but such knowledge is retained to use towards the end of a season in the hope of influencing a closely contested championship with a belated protest, such a protest can hardly be described as anything but being in bad faith or vexatious. Such opportunistic abuse of the rules simply offends one's sense of fair play. However, proof of a contravention of GCR 206 will not be easily discharged mainly because it involves a finding relating to a state of mind (unlikely to be admitted by the offender but most likely to be inferred from surrounding circumstances). The other side of the coin is that proof of bad faith or vexatiousness (to be established on a balance of probability) is unlikely to escape such a finding that GCR 206 has been breached.

68. It is highly unlikely that the Stewards would have had any inkling that Anassis had the suspicion to which he testified as recorded in paragraph 5.4 of the findings of the COA. It is equally inconceivable that a transgression of GCR 206 would not have been considered by the Stewards if they had been privy to such evidence. The submission of Mr Mundell that this Court is prohibited from considering a breach of GCR 206 because the Stewards had not found the appellant in such breach is devoid of merit. This Court is enjoined to consider the protest *de novo* with the evidence available at the time of the hearing of the appeal.

69. Against the aforesaid backdrop it is clear that it was prudent and convenient to consider the two issues referred to above separate from all the other issues.

THE OBJECTION TO THE COMPOSITION OF COURT AT THE SECOND HEARING

70. This aspect has been briefly referred to in paragraph 7 above. The objection to the composition of the Court at the second hearing borders on the bizarre.

71. The basis of the objection, according to Mr Mundell and his instructing attorney, was that the recusal application should be heard by all the members against whom it is directed, including the member who was not available for the second hearing. Mr Mundell was constrained to concede that the application for recusal could only be aimed at the two remaining members of this Court at the second hearing and not at Adv Carstensen. This concession was wisely made because he had not been party to any of the aspects of alleged objectionable conduct of the remaining members of this Court. However, his consideration of and assistance with adjudication of the various applications and this objection was invaluable.

72. With Mr Chatz being absent in any event, it is difficult to understand why there would be an objection to his absence. By his absence he was not there to adjudicate the matter in any event! What the appellant sought to achieve had fortuitously occurred. The objection was ill-considered and without merit. It should never have been raised.

THE APPLICATION FOR RECUSAL

73. The principles underlying consideration of an application for recusal are trite. These principles have been reaffirmed (and to some extent, refined) over the years in a number of cases which dealt with this topic. A "distillation of the law" is dealt with by Wallace J in the recent matter of *Ndlovu v Minister of Home Affairs and Another 2011 (2) SA 621 (KZD) at par [20] - [22]* with reference to "a trilogy of cases in the Constitutional Court" (these being *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) paras 35-48; South African Commercial Catering and Allied Workers' Union and Others v Irwin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) paras 11-17* and *Bernert v Absa Bank Ltd [2011] ZACC paras 28-37) at paras 21 and 22* as follows:

> "*[21]. The correct approach to an application for a recusal is objective, and the onus of establishing it rests on the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality, arising from the judge's oath of office, requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law, and judges' ability, by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second is the double requirement of reasonableness, in that both the person who apprehends bias and the apprehension itself must be reasonable.*
>
> *[22]. A judge confronted with an application for his or her recusal must bear in mind that he or she has a duty to sit in all cases in which they are not disqualified from sitting. Litigants must not be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide it in their favour. Judges do not choose their cases, and litigants do not choose their judges. Accordingly, an application for recusal must be based on substantial grounds for contending that a reasonable apprehension of bias would be entertained by the reasonable person in possession of all the correct facts."*
> (Our emphasis)

74. This Court has also considered the authorities referred to on behalf of the appellant and the respondent regarding this issue.

75. In *South African Commercial Catering and Allied Workers' Union and Others v Irwin & Johnson Ltd (Seafoods Division Fish Processing) supra* par [16] Cameron AJ (as he then was) deals with the "double requirement of reasonableness" by stating that it "also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The Court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable."

76. The members of this Court (as they were at the second hearing) are well aware of the principles concerning the conduct of judicial officers to ensure that justice is not only done, but also seen to be done. Given the vast collective experience of the members of this Court as practising legal practitioners, this is particularly so with regard to the extent and level of involvement of the court in the process of adjudicating disputes such as the present. It is apposite to refer to the remarks of Harms JA (as he then was) in *Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA)* where the following is stated in paragraph [3]:

"... a Judge is not simply a 'silent umpire'. A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources ..."

77. In paragraph [4] of the same text Harms JA continued as follows:

"*A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration in any event, an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed."*

78. It is necessary to interpose to mention, given the appellant's repeated "threats" of a review, that for the word "appeal" the word "review" could (and should) be substituted in the extract quoted in paragraph 77 above. This remark is not to be understood that this Court necessarily agrees that it would be competent to apply for a review of these proceedings. There is direct authority to the contrary (see the unreported judgment of Blieden J in *Hare v The President of National Court of Appeal No 140 and Motorsport South Africa, South Gauteng High Court, case no 09/2058*). This is an aspect which need not be considered but will receive appropriate attention should the appellant's "threats" of review be brought to fruition - most probably in the same division which heard the *Hare*-matter.

79. In the *Take and Save*-matter *supra* the presiding judge *a quo* openly displayed a strongly held belief that certain questions could not be answered in favour of the defendant, which view he expressed at a crucial stage where the last of the opposing party's witnesses had to be cross-examined (and obviously before the defendant had presented its evidence). This display was found not to constitute a basis upon which his recusal could be sought. In paragraph [17] of that matter it is stated "... *a deadly legal point forcefully made by the Court during argument cannot give rise to an apprehension of bias in the eye of 'reasonable, objective and informed' litigant in possession of 'the correct facts'*."

80. Lastly, the remarks of Schreiner JA in *R v Silber 1952 (2) SA 475 (A) at 481F-H* are appropriate (as referred to by Blieden J in *Coop and Others v South African Broadcasting Corporation and Others 2006 (2) SA 212 (WLD) at 216H-J*) which are *"bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the Court thinks that at that stage one or other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the Court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias can ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."*
(Our emphasis)

81. At 217A-D of the *SABC*-matter *supra* Blieden J stated the following:

"*A trial is a living phenomenon. It has a life of its own that changes from day to day if not from hour to hour. The Judge in his efforts to come to a just and proper decision is enjoined to*

participate in this phenomenon. Because he at one time adopts a provisional prima facie view, does not in any way demonstrate bias one way or the other.

It is the duty of every judicial officer to be an active participant in the trial. It is the duty of counsel and attorneys to explain this to their clients who are not experienced in the rough and tumble world of court litigation. Because my body language at some stage or other indicates my admitted irritation or impatience, this is because of the way the proceedings are being conducted and cannot be construed as bias in favour of one or other of the litigants and most certainly cannot lead any reasonable informed layman, duly advised by his legal advisors as already mentioned, to come to the conclusion that I will not impartially and fairly determine the issues in this case to the best of my ability."
(Our emphasis)

82. Before the grounds upon which BHR relies for its application for the recusal of the original two members of this Court ("the application") is carefully scrutinised, it is necessary to briefly mention that one of the MSA employees attending the first hearing, recorded the proceedings on a handheld recording device, presumably because of the importance of the matter and the attention which the previous appeal between the same parties had generated in the media. This Court and the parties attending were aware of the fact that this was done. However, the recording inadvertently continued uninterruptedly even during periods when the hearing was not formally being conducted (i.e. also recording private and privileged discussions between the members of this Court). After the first hearing, the appellant's attorneys requested to be furnished with a copy of this recording. One of the grounds upon which the application was brought, is based on part of a private discussion between the members of this Court. The appellant's attorney had prepared a transcript of this recording which is also annexed to the substantive application. There is no reason to doubt that this, for purposes of this judgment, is a reasonably accurate transcription.

83. Mr Mundell was at pains to stress that the appellant does not rely on actual bias, but a reasonable suspicion of bias that this Court (as constituted at the first hearing) would not bring an open and unbiased mind to bear in considering the appellant's appeal. This suspicion, allegedly entertained by Anassis who is also the deponent to the founding affidavit to the application, was allegedly formed on the basis of the following incidents or occurrences (which this Court will also deal with on the basis of these being the grounds for the application):

    83.1 Firstly, the fact that the Court *mero moto* raised the issue (and its *prima facie* view) that a separation of issues was indicated in the sense of considering the admissibility of the protest and whether it was in fact time-barred as found by the COA.
    83.2 Secondly and perhaps most importantly, the indication by this Court that it required ventilation of a possible breach of GCR 206 (i.e. that the protest was in bad faith, frivolous or vexatious), and that it failed to forewarn the appellant that it would raise this issue.
    83.3 Thirdly, that one of the Court members, Mr Harding, had acted for BMW some 30 years ago and that this fact had not been disclosed to the parties, particularly the appellant.
    83.4 Fourthly, that Court requested that the parties should be prepared to address the issue of a possible award of costs and to present a rough indication of the costs expended by themselves in the process of dealing with the appeal.

84. Before the individual main grounds referred to above are scrutinised, certain general observations need to be mentioned which underlie the overall assessment whether Anassis and the appellant were or acted as reasonable persons - other than Anassis it is unknown who the natural person is who allegedly entertained the apprehension or fear of bias on behalf of the appellant. Anassis as the manager of the Bikefin Honda Racing Team had testified before the COA regarding his suspicion of non-compliance of the motorcycle with rule 12.24 f) - an aspect which has been dealt with above. The appellant abandoned its participation in the proceedings which it had commenced as a result of which Anassis did not testify and the veracity of certain statements by him unfortunately not being able to be tested. However, Anassis, a well-known and seasoned competitor and an experienced manager who, despite his claim in paragraph 13 of his affidavit filed in support of the application ("the affidavit") that he is a layperson with no legal training, is unlikely not to have had a good (if not extensive) knowledge or the process of homologation and the various technical requirements set out in the SSR's and the regulations. The manner in which he completed the protest is proof of this fact.

85. He alleges in his affidavit that the origin of the information on which the protest was based was information conveyed to him by riders in the appellant's racing team and information furnished to

him by the TC - an allegation which surfaced for the first time when Mr Mundell made certain submissions during the first hearing. Despite the fact that the relevance of his evidence regarding his suspicion before the COA was clear in terms of the issue of the protest being time-barred, as it would also be regarding a possible breach of GCR 206, Anassis did not deny that he in fact gave such evidence. Given that he pertinently dealt with this issue in paragraphs 24 and 25 of the affidavit, it is reasonable to expect, had he not given the evidence attributed to him, that he would have denied it in no uncertain terms. This is another reason why the Court accepts, on the conspectus of evidence, that Anassis in fact gave such evidence. He was probably oblivious to its importance in terms of the ultimate finding of the COA recorded in paragraph 7 of its findings.

86. Of more concern reflecting adversely on Anassis and borne out by the transcript, is the appellant's attempt (which could only have originated from Anassis) to change the character or nature of the protest. Anassis intended at all times to protest the "homologation and validation" of the motorcycle (based on his somewhat misguided understanding thereof in the context of rule 12.24 f) and the four other aspects of technical non-compliance listed in the protest). These all relate to "apparent" aspects of alleged ineligibility which would render GCR 200 v) applicable. Having listened to the debate between Mr Mundell and the Court, there was clearly a change of tack by Anassis. Through Mr Mundell it was suggested that his protest was motivated by or based on information relating to performance of the motorcycle as a result of an ineligibility which was not "apparent" (conveyed to this Court by Mr Mundell as being "an ineligible performance enhancer contained in motorcycle 34 through this high performance kit"). This Court does not hesitate to state that this was a transparent attempt by either the appellant or Anassis or both to extricate themselves from the horns of a dilemma and nothing but an attempt to mislead this Court. The appellant's attorney confirmed in an e-mail of 23 May 2011, prior to the commencement of the first hearing, that the appeal is about homologation and validation of the motorcycle. The first word regarding suspicious performance suggestive of ineligibility was after the adjournment sought by and granted to Mr Mundell to take instructions when the issues of the time-barring of the protest and a possible contravention of GCR 206 were raised.

87. This Court suspects, and it is put no higher than that, that the about turn made by Anassis to attempt to persuade this Court that the protest was lodged in terms of GCR 200 vi), was because he recognised that his suggestion that the protest was lodged in terms of GCR 200 v) was doomed to failure and would reflect adversely upon him. Mr Marais correctly pointed out that rule 12.39 would have been the appropriate rule if performance enhancement by reason of modification of the ECU was really the complaint. Mr Anassis would have made this clear in the protest he completed on behalf of BHR for the reasons already dealt with above. He did not because performance enhancement was not the issue. The Court's suggestion to Mr Mundell (recorded in paragraph 297, pp 33 and 34 of the transcript) that time sheets will probably be the best objective manner in which to assess the allegation of an obvious performance advantage, may have played a part in the appellant's decision not to adduce the evidence of Anassis. So too the fact that suspect performance may have resulted in exclusion of Geldenhuise from that particular event but not the championship. Non-homologation would have been far more advantageous (as BHR's own exclusion proved). Having elected to convey to this Court that the protest originated in performance enhancement, Anassis had painted himself into a corner. If he had come to testify, an exclusion of Geldenhuise from the event would have made no difference to the outcome of the championship. He could not revert back to homologation being the issue. How would he explain his change of tack at the first hearing?

88. Mr Marais introduced into the evidence a number of time sheets when the hearing continued in the appellant's absence, which do not bear out the allegation of Anassis which Mr Mundell conveyed to this Court. According to the time sheet of the practice immediately preceding the filing of the protest, Lance Isaacs (on a Honda of the BHR team) recorded a best time of 1:21.802 in lap 9 with a best speed of 172.558 km/h. Geldenhuise recorded a best time of 1:21.864 and a best speed of 172.427 km/h. From the time sheets introduced on behalf of the respondent it is clear that there was nothing unusual in the performance of the motorcycle on the day in question and that the performance could be regarded as being generally consistent with what had transpired earlier in the season. This raises a question mark of some substance over the credibility of Anassis and possibly played no small part in the decision to rather abandon the appellant's participation in the appeal (and to later explain it on the refusal of the application and the fears of bias), rather than to run the risk of it being confirmed that the obvious performance enhancement issue holds no water. On the basis of the time sheets provided to this Court, it is difficult to conceive any other reasonable inference. Anassis and BHR, through their legal representatives, seemed to have attempted to mislead this Court.

89. Three of the four aspects of alleged technical non-compliance raised in the protest (other than the alleged non-compliance with rule 12.24 f)) relate to aspects of technical compliance which must have been clearly visible and hence "apparent" to any experienced motorcycle competitor and manager such as Anassis. Yet the TC confirmed that the motorcycle was compliant in all of these respects except in respect of the issue of the non-return valve in the fuel tank breather system.

90. Anassis' overall conduct in respect of the aspects dealt with above, leads this Court to question not only his motive when the filed the protest, but also his clear lack of objectivity and suspicious credibility exhibited in this matter. This does not accord with what one would expect of a reasonable person, let alone a reasonable experienced manager of a professional racing team. He seemed prepared to say anything as long as it would advance the case of the appellant regardless of what the truth was.

91. This Court reiterates that it is unfortunate that the appellant saw fit to abandon its participation in the appeal and that the version of Anassis could not be evaluated on the basis of his *viva voce* evidence. In the absence thereof, this Court was constrained to make its findings on the evidence available to it.

92. Given Anassis' unfounded allegations against the members of this Court (as constituted at the first hearing), it is appropriate to record the methodology adopted by these members, not only in this specific instance, but without fail in all other matters prior to this particular hearing. Although a bundle of documents were furnished to the members by MSA sometime before the first hearing, the appellant's more extensive bundle was furnished very shortly before the hearing. Members of the National Court of Appeal usually meet half an hour or so before the hearing commences to discuss issues and exchange views on how best to conduct the proceedings. This may include dealing with preliminary issues, a separation of issues and the like. It is very difficult if not impossible to have such discussions beforehand due to each members'individual commitments disregarding for a moment that the members of the National Court of Appeal are not remunerated for their services. This is also what happened in this particular instance. All of this is relevant in the context of the reckless, irresponsible and defamatory statements made by Anassis in attributing to the members of this Court as constituted at the first hearing a biased motive against the appellant.

<u>The first ground - paragraph 83.1 above</u>

93. It will suffice to again refer to the content of paragraphs 58-69 above where it is clearly demonstrated that it was perfectly reasonable for this court to consider and raise a separation of issues, particularly pertaining to the admissibility of the protest and whether it was time-barred. It is not surprising that Mr Mundell submitted that had it not been for the other aspects relied upon, this issue on its own would probably not have justified a suspicion of bias.

94. There is no indication that Anassis was informed of the very common methodology to separate issues. Given that he probably did not draft his own affidavit, but that it was drafted and/or settled by one or more of BHR's legal representatives, the absence of an exposition of what he was informed of by these representatives leads this Court to infer that he was not informed of the correct facts. Had he been so informed, the scurrilous remarks in his affidavit would never have been made (unless he elected to make them regardless of the correct facts). Perhaps it is no coincidence that the issue of an alleged "intention" or "predisposition" by this Court - albeit immediately retracted by Mr Mundell - already came to the fore during Mr Mundell's submissions at the first hearing as reflected in paragraph 267 of the transcript.

95. It is apposite to mention that it is unfortunate that neither Anassis nor those representing BHR, could see that the Court's suggestion that an amendment to the notice of appeal may be necessary, was made to assist the appellant to provide the jurisdictional framework to be able to consider the issue of whether the protest was time-barred or not, and for no other reason or with no motive adverse to the appellant. The subjectivity of the appellant and Anassis did not permit them to realise particularly in the absence of good advice - so it seems - by those who could be expected to have known better, what the Court was attempting to achieve. The issue regarding the amendment has been dealt with in paragraphs 37 to 44 above.

<u>The second ground - paragraph 83.2 above</u>

96. It was more than reasonable for this Court, having to consider the protest (as being the origin of this appeal) on the information contained in the bundle (including*, inter alia*, Anassis' suspicions of non-compliance - all of which have been dealt with in paragraphs 64 to 67 above) to have entertained a concern which it required to be addressed that there might have been a breach of

GCR 206. The COA had received direct evidence from Anassis himself which indicated that the appellant may very well have kept the information "up its sleeve" to use when it best suited itself. For the same reasons and on the basis as set out in paragraph 95 above, there was no merit in this ground relied upon by BHR.

The third ground - paragraph 83.3 above

97. This ground relied upon for the application stems from paragraphs 151-166 of the transcript. From the transcript or the recording itself, any reasonable person would have understood that Mr Harding represented "BMW" in respect of a race car which was raced that apparently did not comply with the technical regulations applicable at the time, as a result of which an appeal to an appeal tribunal similar to this Court was lodged. This all happened "over 30 years ago".

98. A reasonable, objective and informed person would on the correct facts never have apprehended that this Court will or may not bring an impartial mind to bear on the adjudication of this appeal, The facts apparent from the transcript are the following:

98.1 Mr Harding represented one particular non-compliant competitor;
98.2 That appeal stemmed from a motorcar as opposed to motorcycle racing;
98.3 It all happened in excess of 30 years ago;
98.4 Mr Harding is an attorney who earns his living as an attorney in private practice, which is an honourable profession with strict ethical rules;
98.5 Mr Harding is likely to have a good understanding of his ethical duties when sitting as a member of this Court;
98.6 This Court did not exist "over 30 years ago". We referred to a similar structure which existed under the former controlling body of motorsport;
98.7 The "disclosure" of Mr Harding was the cause of some amusement (indicated by the fact that the transcript reveals "laughter" among the members of this Court) indicating that this aspect was clearly not regarded as being of any moment;
98.8 The respondent in the appeal, is Geldenhuise and not "BMW" albeit that BMW clearly had a vested interest and active involvement with all riders of BMW motorcycles in the championship (facts which can be clearly gleaned from the background set out above and the grounds of appeal filed in consequence of Geldenhuise's appeal to his exclusion by the Stewards which gave rise to the hearing before the COA).

It should be noted that it would have made no difference if this appeal could be regarded as an appeal by BMW.

99. Any apprehension of bias on the part of Mr Harding based on the facts set out in paragraph 98 above, would not be reasonable, but patently ridiculous and not deserving of further consideration. However, this Court deems it necessary to refer to the content of paragraphs 53-58 of Anassis' affidavit filed in support of the application. He alleges to have learned of Mr Harding's involvement with "shock and surprise" which would have prompted the appellant to have raised an "appropriate objection" (whatever that may mean). What is somewhat concerning of Anassis' affidavit (as stated before, clearly drawn and settled by his legal representatives) is that his legal representatives considered the "transcript" (presumably the "recording") and should have been aware of the aforesaid facts. Yet, they either did not inform Anassis of the correct facts or, if they did so, Anassis "and the appellant" elected to form their apprehension nevertheless and disregarding these facts. This can hardly constitute a "reasonable apprehension" for purposes of satisfying the test upon which an application for a recusal should be granted. Apart from alleging that this Court launched a "procedural attack" against "the appellant's appeal" and that he, had he known of Mr Harding's "prior association" he would "most certainly have raised an objection", accuses this Court unashamedly (and clearly with the assistance of his legal representatives) of "a deliberate election to withhold (this) information from the appellant so as to prevent the appellant from making an informed choice". (Our emphasis).

100. Unlike Anassis, this Court had knowledge of all the correct facts and did not give Mr Harding's alleged momentous disclosure a second thought as being one which should be disclosed. To have done so in the context of his involvement, the parties involved, the time period which has elapsed and that another entity was controlling motorsport in South Africa at that time was regarded as being a silly basis upon which anyone could possibly form an objection. This particular ground of appeal can also be described as "silly".

101. An aspect which should be mentioned is that Mr Mundell, contrary to Anassis' allegation in his affidavit, submitted that Mr Harding's involvement with BMW "may be irrelevant" but that the fact that it was not disclosed made it relevant. He explicitly submitted that it is not being suggested

"that Mr Harding has a direct or indirect interest" but that it should have been disclosed or, as he put it,"raised".

102. There is no merit in the third ground upon which the application was brought.

The fourth ground - paragraph 98.4 above

103. Anassis alleges in his affidavit (paragraphs 67 and 68 thereof) that this Court's request to the parties contained in an e-mail sent by Mr Scholtz on 27 June 2011 regarding the issue of costs, "reinforced" his apprehension of bias. It is apposite to quote to this request as contained in the particular e-mail which was formulated as follows:

"The parties are requested, without derogating from the general scope of proper preparation to fully deal with all issues raised in and relating to the appeal, to also bear in mind and be prepared to deal with the following:

1. *The possibility that the Court may, subject to argument by the parties, deal with the separated issue together with other elements of the appeal itself, i.e. some of the issues going to the root of the dispute as delineated in the amended notice of appeal. It is not a given that this will be so and cannot be put any higher than a possibility that the Court may adopt an approach to expedite the hearing by going to the nub of the dispute, if at all possible and without it resulting in an injustice.*
2. *The parties should prepare fully on the issue of costs and who should bear such costs. It is suggested that the parties each submit an exposition of its own costs incurred in broad (as opposed to finite) detail.*
3. *MSA is also requested to prepare an indication of its costs expended and, if at all possible, to circulate it to the parties well in advance so that they are able to deal with it if it becomes relevant at all.*
4. *The party requesting that evidence be given under oath must submit full written argument not later than, at least, one week prior to the recommencement of the appeal setting out the legal basis upon which such an oath can be administered during proceedings before the NCA.*
5. *If the separated issue is resolved in favour of the appellant, the parties should be prepared to immediately continue with the hearing on the remaining issues.*
6. *The appellant should forthwith submit a notice of appeal incorporating the amendment granted to it (and no wider than that) by the NCA at its previous sitting. This amended notice must be furnished to the respondent no later (within reason) than it being submitted to MSA."*

104. It is clear from Anassis' affidavit that his interpretation of the request of this Court to the parties to deal with the issue of costs at the reconvened hearing was interpreted by him against his distorted and unreasonable apprehension of bias which has been dealt with above. Having found that there was no basis in logical reason for Anassis (and hence the appellant) to have harboured any apprehension of bias, it follows almost as a matter of course, that this ground must also fail. A reasonable person considering this Court's request on a basis of being informed of the correct facts and that this request is common for courts to raise with litigating parties without thereby necessarily displaying an objectionable preference of party's case against another, would not have drawn the inference that Anassis alleges he drew. If his legal representatives did not properly inform him of this fact, it would be regrettable. If they did, it enhances his unreasonableness. There is perhaps no better example of a court indicating what its *prima facie* view is than the instances where the Supreme Court of Appeal gives notice to an appellant that an increase in the sentence of the lower court may be considered. If there was merit in Anassis' concern, the court would have to recuse itself in each of those instances.

105. It is found that there is absolutely no merit in this ground. It smacks of a grasping at straws in an attempt to bolster an application of questionable merit.

THE REFUSAL OF A POSTPONEMENT TO FURNISH REASONS

106. Immediately after dismissing the application for a recusal and this Court explicitly indicating that it would provide reasons for the dismissal of the application in due course if required, the appellant requested a postponement of the matter in order to consider the reasons and to consider whether to bring a review application or not. Mr Marais opposed this application on behalf of Geldenhuise, *inter alia*, relying on the provisions of GCR 66 ii) (which excludes a review) and GCR 122 iii) (which records renouncement of the right to have recourse to any arbitrator or tribunal not provided for in the rules other than with the written consent of MSA). He also raised various aspects of prejudice to Geldenhuise which included

106.1 the fact that Geldenhuise is funding his own legal expenses in respect of the proceedings before this Court;
106.2 the personal adversity to a rider for not receiving acknowledgement for what he had actually achieved (i.e. the championship);
106.3 the adverse consequences for manufacturers for not being able to ride on the back of the success of a particular rider in terms of its marque and also in respect of future involvement e.g. importation of motorcycles, sponsorship, etc;
106.4 that it is contrary to the interests of MSA not to have a champion declared as soon as possible.

Mr Mundell advanced only one aspect of prejudice namely the fact that BHR "may be involved in a matter that drags on and may be a nullity".

107. There can hardly be any doubt without apportioning blame to anyone specific, that this matter had remained unresolved far beyond the bounds of reasonableness. It was important to attain finality as soon as possible. This Court had made this fact clear already at the first hearing. The correspondence which ensued after the first hearing between MSA and particularly the appellant's attorneys regarding the resumption of this appeal distinctly created the impression with this Court that the appellant was, contrary to the claims of its attorney, attempting to drag the matter out as far as possible. It has to be borne in mind that when this appeal resumed, BHR full well knew, by reason of its exclusion from the championship, that it could not win the championship. Even if the appeal succeeded and Geldenhuise was excluded from the results of the meeting in question, he would still have been the winner of the championship. The only remaining purpose to persist with the appeal was to delay Geldenhuise being declared the champion. There were constant claims of unavailability of certain witnesses (notably Anassis and another person - possibly Mr Barnard - who would have been in Sierra Leone).

108. Because of the anticipated involvement of Mr Anassis this Court had planned accommodating his evidence on all relevant aspects (not only in respect of the separated issues), and arrangements were made for the proceedings to commence at 2 pm on the day of the second hearing. The matter had to be finalised. In the absence of other form of prejudice raised by the appellant, this Court viewed the potential prejudice to Geldenhuise and motorsport in general as far more compelling, weighty and persuasive against any further delay.

109. With regard to the application for a further postponement in the context of the considerations referred to above, this Court was of the view that a further postponement could only result in a gross miscarriage of justice. It also seemed quite apparent that the decision of the appellant to abandon its further participation had clearly been decided on beforehand should the application fail.

110. Lastly, reference should again be made of the sentiments expressed by Harms JA in the *Take and Save Trading CC*-matter referred to in paragraphs 76 and 77 above. The gist of it is that it is preferable that matters be proceeded with and finalised. Aspects such as the dismissal of the application for recusal should and could then be addressed thereafter (assuming that it would be competent to bring a review application). For a party, who initiated particular proceedings, and then to abandon its further participation is, at best, not only questionable, but also ill-advised and hardly ever justifiable. It would serve no purpose to repeat what has been stated above in this regard.

ADDITIONAL REASONS FOR DISMISSAL OF THE APPEAL

<u>The effect of the appellant's exclusion from the championship</u>

111. In paragraph 45 above reference was made to the fact to the appeal must be dismissed for a number of reasons other than the one dealt with in paragraphs 37 to 44 above.

112. The first concerns the requirement of "aggrievedness" with a decision, act or omission of an organiser, official, competitor, driver (which includes a "rider" in terms of GCR 21) or other person connected with the competition in which the protestor is or has been taking part in. GCR 197 determines the scope of the right to protest. It reads as follows:

"The right to protest lies solely with any competitor or official who may consider himself/herself aggrieved by any decision, act or omission of any organiser, official, competitor, driver or other person connected with any competition in which he/she is or has been taking part/officiated in".

113. In terms of GCR 19 “competitor” includes an entrant such as BHR. GCR 197 makes it clear that the right to protest, in so far as a competitor or entrant is concerned, is limited in scope and application. The word “solely” puts it beyond any doubt that all the requirements mentioned in the GCR have to be met in order for it to be a protest in respect of which consideration may rightfully be demanded as a matter of course. These requirements are:

113.1 It has to be a protest by a competitor (or entrant) as defined in GCR 19 i.e. a person or body whose entry is accepted for or who competes in any competition;
113.2 The competitor/entrant has the right to protest only where he/she/it considered himself/herself/itself aggrieved by a decision, act or omission. “Aggrieved” can only mean rightfully aggrieved;
113.3 The decision, act or omission must be attributable to an organiser, official, competitor, rider or other person connected with any competition (which means an event in which a motorcycle takes part and which has a competitive nature, “event” and “meeting” also being defined in respectively GCR’s 40 and 42) in which he/she/it is or has been taking part in.

114. There is no doubt that the appellant as an entrant would normally be entitled to lodge a protest in respect of an event such as the East London round of the championship in which its own motorcycles had been participating. The question concerns the requirement of the appellant as an entrant being aggrieved (i.e. rightfully aggrieved) in the context of the facts of this case, with an act or omission by Geldenhuise and whether such act or omission is connected with a competition in which it had been taking part in. An example of this requirement would be that a competitor or entrant in the 600cc class will not be entitled to lodge a protest against a competitor or entrant in the Superbike class (unless the protestor also competed in the latter class). The reason for this is that the competitor in the 600cc class cannot be rightfully aggrieved by anything decided, performed or omitted because it was unconnected with the competition in which the protestor had been taking part in. It is for this reason that a person who has not entered and has not participated a particular event, cannot protest another competitor or entrant even if the potential protestor has information which would otherwise justify lodgement of a protest.

115. By reason of the fact that BHR had been excluded from the championship in terms of the findings of NCA 150 handed down on 4 March 2011, it was effectively removed from the results of any of the events in which it was entered. It can also not be rightfully aggrieved by any act or omission of Geldenhuise (or any other competitor or entrant for that matter) because BHR was not rightfully “connected” with the particular competition having been excluded therefrom. The purpose of exclusion is to divest the recipient of the penalty of any and all rights which it otherwise would have been entitled to but for the exclusion e.g. protests, appeals, awards, etc.

116. The fact that the pronouncement of exclusion had not yet been made when the protest was lodged, is for the reasons dealt with in paragraphs 55 to 57 above immaterial because this is a hearing *de novo* based on the facts available to this Court (also the facts with regard to the status of the appellant) as at the date of this hearing. To hold otherwise, would be tantamount to an absurdity. This case being one in point. It would constitute exactly the gross miscarriage of justice which this Court is enjoined to avoid if the appellant’s protest was regarded as a “lawful” (the word “admissible” is purposely avoided not to create confusion) where it competed “illegally” with motorcycles so out of kilter with the regulations regarding technical compliance that they were excluded.

117. To summarise, the appellant, for purposes of the protest, cannot be regarded as an entrant rightfully aggrieved by an act or omission of Geldenhuise because BHR was not “connected” with the event in respect of which it lodged the protest.

118. This Court has not lost sight of the fact that GCR 197 requires the decision, act or omission to have been of one of the identified persons connected with the competition in which the protestor “is or has been taking part in”. However, it clearly and logically implies that the protestor must also be connected with the event where the decision, act or omission is taken, performed or omitted. Put differently, the “transgressor” must be connected with the “protestor” and the protestor must be connected with the “transgressor”, such connecting factor being the competition jointly being participated in.

119. In the result it is found that the appellant, by reason of its exclusion from the championship did not have a right to protest, as a result of which the appeal has to be dismissed.

The appellant's waiver of its right of appeal

120. Because of Anassis' knowledge or suspicion of the non-compliance of the motorcycle with GCR 12.24 f) and other aspects of technical non-compliance read with the deemed knowledge or these rules in terms of GCR 122 i), he must be regarded as having had knowledge of not only the time limits for protests as set out in GCR 200, but also the right of appeal in terms of GCR 215 (particularly in respect of the MSA's decision to regard the motorcycle as homologated and to permit it to race without having complied with GCR 12.24 f) and any other GCR with which it did not comply). Given that BHR had the opportunity, if not to appeal the motorcycle's homologation and the decision to permit it to race whilst not complying fully with the regulations, to lodge a protest at the first event where the appellant's motorcycles also competed, the appellant must be taken to have waived its right of appeal. A waiver implies an election, in this case by the appellant, to accept the consequences of inaction with full knowledge of its rights (such full knowledge being deemed to have been present in so far as it may *de facto* not have been the case). A right which has been waived cannot be enforced.

121. The appeal is therefore to be dismissed also because the appellant has, or is deemed to have, waived its right to protest.

Inadmissibility of appeal for want of compliance with GCR 200 v) a)

122. For the reasons set out in paragraphs 85 to 87 above, it is found that Anassis at all material times intended to lodge and in fact lodged the protest in terms of GCR 200 v) a). No evidence was adduced or direct proof available regarding the time at which the motorcycle was approved by the scrutineer. It is not clear whether such evidence was available to the COA. It seems that the COA based its finding in this regard on the fact that Anassis had entertained the suspicion of the motorcycle's non-compliance not on the time which lapsed after approval of the motorcycle by the scrutineer, but that the protest was time-barred because it should have been lodged at the event immediately subsequent to Anassis forming his suspicion and that it would have been time-barred even if lodged within the prescribed period after approval by the scrutineer at the particular event. For the reasons already dealt with above, this finding appears to be correct and this Court is disinclined to conclude differently.

IS THE PROTEST IN BREACH OF GCR 206?

123. Independently of the findings in paragraphs 44, 117, 119 and 120 above, the appeal should be dismissed by reason of the protest constituting a breach of GCR 206 (which has been partially dealt with in paragraphs 64 to 67 above). The lodging of a protest where the protestor does so without "clean hands" (its own motorcycles being illegal) and to abuse the right to protest (also dealt with above), can hardly be a protest other than in bad faith and vexatious.

124. It is accordingly found that the appellant by reason of the opportunistic use of prior "knowledge" of Anassis (and probably also other members of its team) was in breach of GCR 206 as a result of which the appeal should be dismissed and an appropriate penalty considered. The issue of the penalty is dealt with below.

CONSIDERATION OF AN APPROPRIATE PENALTY IN RESPECT OF BHR'S BREACH OF GCR 206

125. It is not difficult to comprehend that a breach in terms of GCR 206 is regarded as a breach of some gravity. Not only is conduct falling within the remit of bad faith and vexatiousness unfair, but it is also deplorable. It should be discouraged in no uncertain terms. It should also be no different in this particular matter. This Court has made it abundantly clear how it views the appellant's conduct. It is simply not in the interest of motorsport to do what the appellant did. To an extent, it, strictly speaking, also constitutes a breach of GCR 172 iv). However, it is not necessary for this Court to pay any further consideration to BHR's conduct in the context of GCR 172 iv). A breach of GCR 206 constitutes a self-standing breach.

126. The appellant was afforded a hearing as contemplated in GCR 175. It elected to abandon this opportunity - an aspect already dealt with above. A breach of, *inter alia*, any GCR is subject to the imposition of a penalty as provided for in GCR 177. It may be mentioned that, should the imposition of a fine be considered to be the appropriate penalty, such a fine if imposed by this Court, may not exceed R50 000-00 in terms of article 11 of Appendix R. It also behoves no discussion that any penalty or part thereof may be suspended - an aspect which this Court has dealt with in other matters and which is a matter of record.

127. In this particular instance the Court regards the appellant's breach in a serious light. It is intended to impose a penalty that will serve as a deterrent not only to the appellant to refrain from

such conduct, but also to any other competitor or entity entitled to lodge protests to refrain from such conduct. Protests tarnished by bad faith, frivolity or vexatiousness have no place in motorsport and constitutes an abuse of the rules and regulations which aim to provide for *bona fide* dispute resolution. It is also highly inconsiderate and indiscriminate of the resources provided, the time of those who become involved as a result thereof and an unnecessary wastage of finances. Those who engage in such gratuitous abuse should not be surprised by the extent and gravity of the penalties which is likely to be imposed in such instances.

128. In this particular matter, the facts have already been dealt with *in extenso*. The Court has considered all of these facts. The appellant, and particularly Anassis, can hardly claim ignorance. It is a professional team with seasoned competitors and a manager of significant experience in motorsport. On its behalf it was claimed to spend "millions of Rands" annually in motorsport, particularly motorcycle racing. There is no reason to doubt that statement.

129. It is not only the conduct of the appellant in lodging the protest towards the end of the season in the hope of gaining an advantage with the "ace up the sleeve" which this Court has duly considered, but also its conduct during these proceedings and its persistence with an appeal when it could no longer serve any useful purpose or contribution. In addition, due consideration has also been given to the attempt to mislead this Court as to the nature of the protest and the scurrilous and serious allegations levelled against the members of this Court (as constituted at the first hearing).

130. Due cognisance is also taken of the manner in which the appellant, through his legal representatives, approached this Court and those representing the respondent. What was displayed is an attitude which is prescriptive, presumptuous, derogatory, threatening and aggressive topped with an inappropriate arrogant tone, all indicative of an absence of due restraint and professional courtesy. This pertains not only to the allegations by Anassis in his affidavit, but also, particularly, to the e-mails of Mr Michael North of 27 June 2011 and 13 July 2011. The content of the letter of Mr North sent by e-mail on 27 June 2011 is incorporated by reference in the affidavit of Anassis. It is not difficult to see that the author of the letter and the person who drafted Anassis' affidavit, was probably one and the same. It unmistakably has the same "fingerprint". The appellant and its legal representatives will be well-advised to consider what has been said in respect of conduct of this nature in *Soller v Soller 2001 (1) SA 570 (CPD) at 572H-573E*. This Court, with due respect and deference can do no better than to repeat the words of Thring J. Although it was void in the context of the litigant also being an attorney, it equally applies to the legal representatives involved in this matter:

*"One expects better of (*them).*"*

It matters not that a client instructs and/or authorises correspondence of the nature referred to above (as confirmed was the case by Mr Hector North in his letter of 15 July 2011). Duly admitted attorneys and counsel are not mere puppets of their clients. Professional courtesy should never bend the knee to an approach as was repeatedly adopted in this case.

131. Lastly, this Court does not ignore the fact that Mr Barnard (to whom reference was also made above) had apparently approached the father of Geldenhuise after the outcome of the appeal dealt with by the National Court of Appeal 150, mooting the possibility of a resolution of this appeal. As a result thereof, Mr Marais, on behalf of, *inter alia*, Geldenhuise, addressed a letter to Mr Scholtz of MSA dated 7 March 2011 which was clearly brought to the attention of Mr Barnard and probably the appellant.

132. It is necessary to refer to the content of Mr Marais' letter. The relevant paragraphs read as follows:

> *3. We have been instructed by our clients to address this letter in the spirit and interest of motorsport in South Africa.*
> *4. There appears no purpose to proceed with the above appeal as the effect if my clients lose the appeal is limited to the points of one race and they will still be the winners of the category they raced in for the year 2010. My clients are of the view that it is in the interest of motorsport to put the events of last year behind the racing of this year.*
> *5. It would be appreciated if you can take this matter up with the appellant to establish if they share the views of my clients and are prepared to withdraw the appeal. I must be honest I think that the appellants through Mr Barrie Barnard, the General Manager Motorcycle Division, Honda South Africa has indicated this intention with his approach to*

Marnie Gildenhuys after the outcome of the recent appeal. I must compliment Mr Barnard for this gesture as this was sportsmanlike and the action of a gentleman.

6. *If my clients have to forfeit the points of the particular race as a similar gesture they are prepared to do so.*
7. *Please understand this letter is purely to act in the interest of motorsport and not to admit the outcome of the hearing before the MSA Court of Appeal was in any aspect wrong."*

133. It appears that Mr Scholtz took the matter up with Mr Barnard and reported on 8 March 2011 that the offer to withdraw the appeal was declined. It is a pity that the responsible and reasonable approach of Mr Marais fell on deaf ears.

134. In the context of all these facts and considerations, this Court considered imposing a substantial fine in addition to an exclusion/ preclusion from participation in any form of motorcycle racing. This Court has decided against this route. It is deemed appropriate if the appellant is excluded/precluded from participation which, if suspended on certain conditions, will hopefully serve to prevent similar conduct in future. The effect of one of these conditions pertaining to the issue of payment of costs in lieu of a fine, is deemed sufficient. These costs are substantial.

COSTS

135. This Court's authority to award costs is derived from GCR 196 read with paragraph i) of the "Notes" to article 13 of Appendix R to the MSA Handbook containing the GCR's, SSR's and appendices. It is clear that this Court has a wide and unfettered discretion regarding costs although it is rarely exercised in favour of successful respondents. This discretion clearly includes the discretion to order an unsuccessful party to pay the costs of not only MSA, but also the costs of individuals who are mulcted in costs as a result of an appeal. It is to be noted that the costs of dismantling of an engine or gearbox referred to in GCR 196 does not confine the order regarding costs of an individual to those specific costs, but should be seen as an extension of the wide and unfettered discretion referred to in the first part of the particular GCR. This is clear from the introductory words of the second paragraph in GCR 196 i.e. the words "In addition". Moreover, in so far as there may be any doubt as to whether costs may include the costs incurred by fellow competitors, paragraph i) of the "Notes" to article 13 of Appendix R puts the issue beyond doubt or dispute. This Court is specifically enjoined to "take into account" the "costs incurred by fellow competitors who may be subject to the appeal".

136. As stated above, it is unusual for this Court to order an unsuccessful appellant to pay the costs of a successful respondent. Perhaps the time has come for this Court to consider indemnifying successful respondents on a more frequent basis. One of the reasons why it is not a frequent occurrence is that this Court does not want to discourage *bona fide* appeals where a potentially unsuccessful appellant runs the risk of not only forfeiting a substantial appeal fee, but also being ordered to pay the costs of successful parties to the appeal. However, each case has to be considered in the context of its own specific facts.

137. In this particular case there is no doubt that it would be just and equitable for the appellant to pay Geldenhuise's costs in this appeal. The reasons why this is so, has been extensively dealt with above. It relates not only to the fact that the protest was lodged in bad faith and with vexatiousness, but also to the persistence of the appellant with an appeal when it could and should have accepted the offer of settlement of the respondent (referred to above). To this should be added the allegations of Anassis contained in his affidavit preceded by similar allegations in the correspondence emanating from the appellant's attorneys, all of which were also considered.

138. Furthermore, it bears mention that the surprising unpreparedness of the appellant's legal representatives to deal with the (hardly surprising if not entirely predictable) issues raised by this Court at the first hearing and requesting a postponement was not overlooked. Having been granted a postponement, the appellant then elected to widen the scope of the appeal with an unfounded application for recusal which added to the costs which Geldenhuise had to incur to deal with this application, quite apart from the fact that it necessarily caused a hearing which should have been concluded at the first hearing, to run into a second day.

139. To all of these considerations may be added the fact that the appellant, apart from preparing a substantive application for recusal, ignored virtually each and every request or directive of this Court as set out in the e-mail of 20 July 2011of Mr Scholtz to the respective parties. Last but not least, being dissatisfied with this Court's ruling on the application for recusal and the refusal to furnish reasons for this finding before the matter continues, the appellant elected to abandon

proceedings which it had started, which, as stated before, appears to have been a decision which had already been taken earlier. Mention should also be made of the attempt to stifle the functions of this Court by Anassis' unavailability (which occurred solely because Anassis elected to further his own interests regardless of the interests of this Court and the respondent - he allegedly had arranged to compete in one leg of an eight event series in the USA) well-knowing that this Court indicated that it requires ventilation of a possible breach of GCR 206. Anassis was the main, if not the sole player in this investigation of a breach of GCR 206.

140. Presumably by reason of the fact that the dismissal of the appeal has the automatic effect in terms of paragraph iii) of the "Notes" to article 13 of Appendix R of forfeiture of the appeal fee, MSA has indicated that it does not seek any further order as to costs. Accordingly no such order will be made.

141. With regard to the respondent's costs this Court considered the amount for which the appellant should be liable. Geldenhuise's attorneys submitted to this Court their invoice to the respondent's father. It entails an invoice pertaining to the work of two attorneys i.e. Messrs Marais and Hol. In the ordinary course, this Court would have been inclined to only allow the costs of one attorney. However, the appellant itself conducted this appeal represented by senior counsel and two attorneys who attended at all times. This Court assumes, by reason of the ethical duty upon attorneys to charge reasonable fees, that there is no unnecessary duplication in the work performed by the respondent's attorneys. This Court also has not lost sight of the fact that the invoice represents the bill as between attorney and own client. To the extent that the order regarding costs imposed by this Court entails a punitive component, it is intended to be so given the facts and conduct of the appellant referred to above, which need not be repeated. If the fees charged by the respondent's attorneys are converted to hourly tariffs, those tariffs appear eminently reasonable. It is not surprising and does not shock this Court that a total of 65 hours (which include both hearings) were spent by the respondent's attorneys on this matter. It is unfortunate that the appellant did not present its attorney's bill. This Court predicts that a comparison between that bill and the bill of the respondent's attorneys is likely to demonstrate that the amount of R147 060-00 (which includes VAT at 14%) is not unreasonable. It is reasonable that the appellant be held liable for these costs. It had an opportunity to settle the matter early on by not pursuing this appeal. It elected not to do so and did so at its own peril.

142. In so far as this Court's authority to order the appellant to pay the respondent's costs is concerned, this Court intends to order payment of such costs as part of the conditions of suspension, which, for the same reason dealt with above, this Court regards as a reasonable condition.

THE ORDER/FINDINGS

143. In the result and for the sake of completeness the findings of the Court is recorded as follows:

1. The appellant's appeal is dismissed.
2. The appellant is found to be guilty of a breach of GCR 206 in that it filed a protest in bad faith and with vexatiousness.
3. The appellant as an entrant is precluded from participation in circuit motorcycle racing for a period of 2 years calculated from the date on which these findings are published by MSA.
4. The preclusion referred to in paragraph 3 is suspended for a period of 3 years on the condition that:
    - 4.1 the appellant is not again found guilty of a breach of GCR 206 or any other breach of the rules where it is found that it acted in bad faith or with vexatiousness or pursued frivolous issues;
    - 4.2 the appellant pays an amount of R147 060-00 in respect of the respondent's costs, such payment to be made within 48 hours (from the dates and time of publishing of these findings by MSA as set out in paragraph 3 above) as stipulated and contemplated in GCR's 196 and 222;
    - 4.3 payment of the amount of R147 060-00 is made directly to Marais Attorneys, First National Bank-Table View, account number 62025273252, branch code 203809;
    - 4.4 proof of payment (whether by cash, cheque or EFT), be furnished by fax or e-mail to MSA and to Marais Attorneys;
    - 4.5 any and all other amounts payable by the appellant be paid within the time period permitted in terms of these findings.

5. The appellant's appeal fee of R15 000-00 is forfeited in terms of paragraph iii) of the "Notes" to article 13 of Appendix R.
6. It is confirmed, for the sake of clarity, that the appellant's protest fee of R5 000-00 is forfeited and payable to MSA (in so far as it has not been paid) as if it is an order for payment in respect of costs, which is to be made within the period as contemplated in GCR's 196 and 222.

ADV W P DE WAAL SC

MR S HARDING

ADV P CARSTENSEN