



MOTORSPORT SOUTH AFRICA NPC

Reg. No 1995/005605/08

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MSA COURT OF APPEAL 464

HEARING WAS HELD VIA ZOOM ON 08 MAY 2023 AT 17H00

Court:	Mr. Steve Harding	-	Court President
	Adv. Francois Van Der Merwe	-	Court Member
	Ms. Arlene Brown	-	Court Member
Attendance:	Ms Carnita Low	-	Appellant - Mother and Entrant of competitor Kent Swartz
	Mrs Karen Boshoff	-	Protestor
	Mr Mitch Coetzee	-	Clerk of the Course
	Mr Ian Richards	-	MSA Steward
	Mrs Jackie Schreiber	-	Club Steward
	Mr Ed Murray	-	Rotax Promoter
	Mr. Vic Maharaj	-	MSA Sporting Services Manager
	Ms. Allison Vogelsang	-	MSA Circuit Sport Coordinator

FINDINGS:-

BACKGROUND AND PRELIMINARY

1. These are the findings of a court of appeal, which was held virtually, using the Zoom platform.
2. It is an appeal brought on behalf of driver of kart 458, Kent Swartz, against his exclusion on 15 March 2023 by an alternate panel of stewards, from the results of Heat 3 of Round 1 of the SARMC Junior Max National Karting Championship held at Idube Raceway on 04 March 2023, following a protest by competitor 437, Wian Boshoff. Both competitors are minors.
3. At the commencement of the hearing on 13 April 2023 the court expressed concern that the protestor had not been notified of and invited to the hearing. The court was strongly of the view that the principles of natural justice and, in particular, the *audi alteram partem* rule, require that all parties having a material interest in the outcome of the appeal should be afforded the opportunity to participate in the appeal hearing. The protestor is clearly such a person and

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Directors: A. Roux (Chairman), A. Scholtz (Chief Executive Officer), R. Beekun (Financial),
Mrs. D Abrahams, Mrs. D. Ballington, K. Govender, M. Hashe, FC. Kraamwinkel, C. Oates, S. Themba, G. Waberski
Honorary President: R. Schilling

accordingly the hearing was postponed until 08 May 2023 in order to enable Motorsport South Africa (“MSA”) to provide adequate notice to the protestor, who was in the position of a respondent in relation to the appeal.

4. At both the initial and resumed hearing the appellant was represented by his mother and natural guardian Mrs Carnita Low Swartz while at the resumed hearing Mrs Karen Boshoff, represented her son Wian Boshoff.

THE DECISIONS GIVING RISE TO THE APPEAL

5. The protest was lodged with the race secretary by or on behalf of the respondent on 04 March 2023 at 14h39. The details of the protest read as follows:- *“protesting and to do strip of competitor 458 Kent Zwarts (sic) enjin (sic), exhaust, wiring lume (sic), battery, carburater (sic) crank, crank sensor and every enjin (sic) component weighed according to specifications”*. The document continued with a request that the engine and all accessories be sealed after heat 3 and for the strip to take place in Johannesburg.
6. It appears that the original stewards of the event Roger Stephen and Dean Rice, then directed that:- *“The engine and components listed above will be boxed and sealed as per the request. Competitors will be notified where and when the strip will take place.”* Further directions were given specifying the requirement for a deposit and for an alternate panel of stewards to deal with the findings.
7. Nowhere is it recorded that the original stewards adjudged the protest to be admissible, however given the fact that they directed that the engine and components be sealed in order for a technical inspection to take place it must be assumed that they considered the protest to have met all of the required formalities. This issue will be returned to later in these findings.
8. On the date of the technical inspection the protestor endeavoured to amplify the protest, by the submission of an additional protest document.
9. On 15 March 2023 a technical examination (“strip”) of the engine and components was conducted in the presence of a technical consultant, Mr Robertson, the clerk the course of the event, Mr Habig as a technical adviser and the protestor was represented by an experienced representative with appropriate technical knowledge.
10. The findings of the alternate stewards Mr Ian Richards and Mrs. Jackie Schreiber record that:- *“The following items were checked as per the original handwritten protest submitted by Mrs K Boshoff on 4 March at 14:20. Exhaust, crank, wiring loom, battery, carburettor, crank sensor, every engine component weighed according to specification. All items as listed were checked in accordance with the SARMC technical specifications. All items checked were found to be with in the specification as listed in the submitted protest with the exception of the battery which is a non-Rotax approved part as specified in the 2023 RMC global technical regulations article 6.8.”*
11. The relevant article 6.8 records that 4 different batteries are permitted. These are the following:-
YUASA YT7B-BS,
ROTAX RX7-12B,
ROTAX RX7-12L, and

ROTAX LiFePo4.

12. The alternate panel of stewards then went on to find that in accordance with the MSA National SARMC Sporting Regulations, Article 13 j) the competitor is excluded from Junior Max Heat 3.
13. Article 13 j) expressly provides that “notwithstanding anything stated to the contrary in MSA’s General Competition Rules, (specifically GCR 176) any contravention of the karting technical regulations and specifications will result in automatic exclusion from the relevant race, (in circumstances where it can reasonably be assumed that the contravention applied to the specific race only) or from the entire event/race meeting (in all other cases).” We are not aware what circumstances were taken into account by the alternate panel of stewards in reaching the decision to exclude the competitor from heat 3 only.
14. For sake of completeness it is recorded that MSA amended the technical regulations for the series on 06 April 2023 to include the Motorbatt MB7U battery (as used by the appellant) although this amendment clearly does not have retrospective effect.

THE APPEAL

15. Following on these findings an application for leave to appeal and appeal was submitted on behalf of competitor 458 by his mother Mrs Carnita Low Swartz and this appeal was placed before us consequent upon the granting of such leave.
16. The appeal was based on a set of alleged extraordinary facts which were set forth in an affidavit by the representative of the series promoter Mr Ed Murray which reads in part as follows:

“2. As the sole distributor of authorised parts for the Rotax series, EMR Karting supplied and sold the Motorbatt MB7U battery used by driver Kent Swartz during the MSA SARMC National Karting Championship Round #1 as a substitute battery, under the extraordinary circumstances detailed below:

- a. Due the supply chain delays and challenges created by the COVID-19 Pandemic, no Imported Rotax Batteries were airfreighted to South Africa from the 15th of March 2020 onward and Rotax batteries were only Imported by sea-freight until today.*
- b. For this reason, locally sourced, technically suitable substitute batteries were allowed from the time that racing resumed later in 2020.*
- c. Substitute batteries were then supplied and sold by South African Rotax Promotor and dealer network to competitors to avoid a breakdown in the series.*
- d. If substitute batteries were not supplied and sold under the force majeure and/or supervening impossibility of performance created by the supply chain difficulties due to COVID-19, competitors who required batteries would have been prejudiced by having to stop racing due to a part that could not be supplied, due to the supply chain challenges.*
- e. Additionally, the series which had already started would potentially have had to stop due the unforeseen and supervening impossibility of performance relating to the supply imported batteries to anyone in need of batteries.*
- f. Approximately 42% of all batteries sold by EMR have been substitute batteries (of the exact same technical*

specification, weight, and voltage as the imported batteries) were supplied and sold to Rotax competitors during the period from June 2020 until today to-

- i. ensure that the series could continue and competitors who started the race year could continue the year,*
 - ii. to mitigate against any prejudice to any registered competitor; and*
 - iii. to ensure that competitors could continue to enjoy the series notwithstanding that the imported Rotax Batteries were not always available due to unforeseen and extraordinary reasons, beyond the control of the Rotax Promotor.*
3. *Despite the COVID-19 restriction on imports having now been lifted, a limited number of imported Rotax Batteries are available as supply of Rotax batteries is consolidated with engines and oil in three shipments per year.*
 4. *During 2021, one hundred and sixty-four (164) participants raced the SARMC series, and one hundred and eighty-one (181) raced in 2022. One hundred and ninety five (195) competitors have registered racing numbers to date in 2023 and more than 100 of these have already raced in a regional or national race. Currently the stock holding of imported Rotax Batteries is insufficient to supply the entire competitor community registered to participate in the Rotax National and Regional series.*
 5. *There are currently too few Rotax Batteries available to replace the amount of substitute batteries sold and supplied. The next shipment of Rotax imported batteries is due to arrive in June 2023."*

17. At the resumed commencement of this appeal the court enquired whether the factors set out in the above affidavit could be accepted as correct or whether there was any dispute in this regard. Mrs Boshoff on behalf of the respondent indicated that the respondent did not accept these contentions and placed the same in issue.
18. Mrs Low called Mr Murray to give evidence in support of the appeal and Mr Murray testified to the facts as recorded above. Mr Murray was extensively cross-examined by Mrs. Boshoff. Much of that cross examination took the form of legal argument, and criticism of Mr Murray over the fact that a circular was not issued earlier to amend the regulations; criticism which was conceded by Mr Murray. The only real disputed fact in relation to the circumstances surrounding the supply of batteries turned on the issue of the capacity of the relevant batteries and their rating measured in amp/hour units. The Motorbatt MB7U battery has a 7 amp/hour rating in contrast to the ROTAX LiFePo4 battery which is rated at 4 amp/hour. Mrs Boshoff was unable to provide any evidence in relation to the amp/hour rating of the 2 other Rotax batteries permitted in terms of article 6.8 of the Rotax Global Technical Regulations.
19. The court accepts the evidence of Mr Murray that the amp/hour battery rating is simply a measure of the amount of energy capable of being stored in the battery which would have no effect on the performance of the engine and that the higher number of amp hours simply indicated that the battery would deliver power for longer period of time than a battery with the smaller storage capacity, but that this would have no effect on the performance of the engine in sprint racing.

20. Mrs Low, on behalf of the appellant, made a number of submissions which included the submission that the protest was defective, inasmuch as it failed to state the grounds for the protest as required in terms of the provisions of GCR 198 ii).

FINDINGS

21. Appeals in terms of the GCRs are held *de novo* (GCR 208 viii). This court is accordingly empowered to consider the validity of the original protest. The protest can be broadly described as a shotgun fishing expedition seeking to find any possible technical irregularity as grounds for the exclusion of the appellant. We agree with the appellant that nowhere in the original protest, (nor indeed the additional protest document referred to in paragraph 8 above, which was correctly ignored by the alternate stewards), did the protestor endeavour to establish any grounds whatsoever which would provide a basis for the protest.
22. It is the view of this court that the regulations do not in any way empower a competitor to require a technical inspection of the kart of another competitor, by way of a protest, without proper cause. In the absence of advancing adequate grounds for the protest no legitimate cause is established. One would expect that if the reason for the protest, was that the kart was performing in a way which would suggest that it is ineligible, that this allegation would at least be made, and facts put forward to support the suggestion. (GCR 200 vi) indeed envisages this kind of protest). A further reason why these grounds for the protest are essential for a valid protest is that the stewards cannot properly determine whether the protest has been timeously lodged in terms of the provisions of GCR 200, particularly insofar as it may relate to eligibility, in the absence of such grounds.
23. We consider that a sweeping request for a technical inspection of this nature without adequate grounds, in the hope of finding some technical basis for the exclusion of another competitor, is unsportsmanlike and to be discouraged.
24. For these reasons we hold the view that the protest should have been ruled ineligible by the original stewards and that the technical inspection should not have been proceeded with.
25. We are further of the view that the factual circumstances surrounding the issues relating to battery supply for this series, and the fact that the battery in question was supplied to a considerable number of competitors by the series promoter and authorised importer and distributors of Rotax products, as established in this appeal, are such as to justify this Court of Appeal waiving the penalty and decision appealed against, in accordance with the powers afforded us in terms of GCR 221.
26. Given the findings in relation to the eligibility of the protest and the exercise of the power given to MSA Courts of Appeal to waive the decision and penalty is not necessary for us to consider the arguments advanced by the appellant in relation to tacit or explicit accession to the use of the battery, force majeure, legitimate expectation and estoppel.
27. Our findings are therefore as follows:-
 - a. The original protest in this matter is found to have been ineligible;
 - b. The findings and penalty of the alternate stewards on the protest are set aside;
 - c. The protest fee should be retained in full by MSA;

- d. Any deposit paid by the protestor to cover the costs of the technical examination shall be used by MSA firstly to defray any expenses incurred by MSA in relation to the technical examination, secondly in payment of technical consultants at the rate prescribed in Appendix R, and any surplus remaining shall be paid to the appellant to cover the cost of rebuilding the engine; and
- e. The Appeal fees should be refunded to the Appellant less administrative costs of 25%.

The parties are reminded of their rights as per GCR 212 B

The findings are issued by email 11 May 2023.

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