2nd Floor, Meersig 1, Cnr. Upper Lake Lane & Constantia Boulevard, Constantia Kloof, Roodepoort
e-mail: msa@motorsport.co.za Telephone (011) 675 2220

MSA COURT OF APPEAL 466

HEARING WAS HELD VIA ZOOM ON 26 JUNE 2023 AT 18H00

Court:	Mr Steve Harding	Court President
	Mr Wayne Riddell	Court Member
	Ms Samantha van Reenen	Court Member
	Ms Carnita Low	Court Member
In Attendance:	Mr Tim Bishop	Appellant – Father of minor competitor Tate Bishop
	Ms Arlene Brown	Clerk of the Course
	Mr Mike Rowe	VW Motorsport
	Ms Jannet Wood	GTC Coordinator
	Mrs Allison Vogelsang	MSA Sporting Coordinator
	Mr Vic Maharaj	MSA Sporting Manager

BACKGROUND AND PRELIMINARY

1. These are the findings of a court of appeal, which was held virtually, using the Zoom platform. At the outset of the hearing the parties were asked whether there was any objection to the court as constituted. No such objection was received, and the matter proceeded.

2. It is an appeal brought on behalf of driver of Supacup Car number 94, Tate Bishop, against the findings and penalty imposed on the driver by the stewards of the Extreme Festival event held at Zwartkops Raceway on 20 May 2023.

3. The protest was against the findings and penalty imposed by the clerk of the course on the applicant for a transgression of Article 20 of the MSA National Sporting SSRs for GTC and GTC Supacup championships. To understand the action of the clerk of the course and the subsequent protest it is necessary to have some understanding of the relevant regulation.

4. The applicable extracts of the relevant article of the regulations set out as follows:

20. PRACTICE / TESTING

20.1 Each GTC and GTC SupaCup Team / Competitor must nominate and communicate their official test track to Jannet Wood prior to the 1stevent of the year. Jannet Wood will record and control the information. Competitors may not test/practice at any other circuit other than their nominated circuit ~~from the time the circuit closes for the first race meeting of the MSA calendar year until the end of the last race meeting of the MSA calendar year~~ ***for the calendar year 1 January to 31 December. Refer SSR 2.9. The home circuit for the WCT Team, Fast Development Team and Lee Thompson Racing Team is the Zwartkops circuit.***
20.4 The Controllers may permit alternative practice arrangements for a good technical reason ON PRIOR WRITTEN APPLICATION. If possible, this application should be received by the Controllers at least a week before the requested date.

20.5 Infringement of the testing rules (art 20) will carry a 5-grid place drop for the start of race 1 of the next event for each car and driver in the illegal test. The competitor may also be excluded from qualifying for repeated transgressions.

It is to be noted that the version of Art 20.1 as set out above is an amended version which took effect on 12 May 2023, that is to say, prior to the event in question. The changes to Art 20.1 are indicated above, by the striking through of the deletions and the additions are indicated in bold**.** It should be noted that as of 14 April 2023, the date of the WhatsApp exchange referred to below, the article had not yet been amended.

It is noted that the regulations make no provision for an application to change the official test circuit, although it could be inferred that this would be within the powers of the controllers as conferred upon them by art 20.4.

5. It is common cause that the appellant gave notice of their official test track to Jannet Wood at the commencement of the season, nominating the Killarney circuit in Cape Town as the applicable official test track. It is also common cause that the appellant practised at the Killarney circuit prior to the first round of the championship held at Killarney and at Zwartkops prior to the 2nd round of the championship which was held at that venue.

6. It is also common cause that a WhatsApp was addressed to Jannet Wood on 14 April 2023 by Tim Bishop the father of the appellant which read as follows:-
"Secret news for you (please keep to self) but you need to know for pitting. Tate will be with Lee (LTR) going forward. So we will be with them for the rest of the season from a pit and logistics point of view. (And Tate's car based there)"
This message was acknowledged, and a few further messages were exchanged, between Tim Bishop and Jannet Wood, the contents of which are not relevant save to say that they were broadly encouraging on the part of Jannet Wood.

THE PENALTY IMPOSED BY THE CLERK OF THE COURSE

7. The clerk of the course, having become aware that the appellant had practised at both circuits, convened a hearing in relation to the possible transgression of article 20 of the regulations as quoted above. The WhatsApp in question was brought to the attention of the clerk of the course at the hearing. The clerk of the course found that "due to #94 having changed circuits and moved his car to LTR (Zwartkops) this is his 2nd test track for 2023 without formal request

permission. WhatsApp sent to Jannet Wood on 14 April 2023 but no request to change home circuit". (It would appear from Art 20.1 that the terms "official test track" and "home circuit" are used interchangeably and have the same meaning).

8. Having reached this conclusion, the clerk of the course was left with no alternative but to impose the mandatory penalty set out in Art 20.5 of a 5 Grid Place drop for the start of race one of the event and imposed this penalty. The outcome of the hearing was communicated to the appellant at 10:05 on Friday, 19 May 2023. (The timing generally is significant to these findings and will be dealt with later.)

THE PROTEST

9. A protest was timeously filed on behalf of competitor Bishop and ultimately heard by the stewards of the meeting. The stewards found after the hearing that; the competitor had nominated his official test track as Killarney prior to the first event of the year as required by Art 20.1. They observed that there is nothing in the regulations regarding the changing of official test tracks during the year and observed equally that Art 20.4 provides for alternative practice arrangements. They further observed that these alternative practice arrangements need to be requested from the controller in writing prior to testing. This was in the opinion of the stewards never requested.

10. As a result, the stewards found that the appellant did test at a circuit other than his official test track and upheld the decision of the clerk of the course. It is significant to note that this hearing was only conducted on Saturday, 20 May and that the findings were provided to the appellant less than 45 minutes before the start of the first race. This is an issue which we will return to later in these findings.

11. The term "Controllers" (note-plural), is defined in Art 2.1 as the "*GTC Management Team, the membership of which will be advised by way of an MSA circular distributed before the first round of the 2023 championship*." It appears that this circular has never been issued, this notwithstanding, we as a court accept that Jannet Wood is in fact the representative of the Controllers.

12. Jannet Wood did not give any evidence at either the hearing of the clerk of the course or the protest hearing of the stewards. The members of this court were of the view that they could not reach a valid conclusion without hearing the evidence of Janett Wood, who was not present in the initial hearing of this appeal, and accordingly postponed the hearing to hear her evidence.

13. At the resumption of the hearing the court heard the evidence of Jannet Wood. It appears that she accepted that the WhatsApp exchange between herself and Mr Tim Bishop, (the father and natural guardian of Tate) constituted notice of a change of team to that of Lee Thompson Racing and that accordingly Zwartkops became the home circuit of the competitor in terms of the amended Art 20.1. This she described as a logical conclusion. She confirmed that no other formal written application or approval of the change beyond the WhatsApp exchange had taken place, she further confirmed that there was no written record of the information, despite the requirement in terms of Art 20.1 that she was to maintain and control the information. It seems that the only record is constituted by her memory.

14. This court was unanimous, before hearing the testimony of Jannet Wood, in agreeing that the WhatsApp exchange between her and Tim Bishop, constituted neither a notice of change of home circuit, which as observed previously is not foreseen by the regulations, nor a prior written application for the approval of alternative practice arrangements as contemplated in Art 20.4. In the absence of such evidence, we were inclined to agree with both the clerk of the course and the stewards and would have upheld their decisions. However, it was clear from the evidence of Jannet Wood that she accepted, albeit potentially erroneously, as a representative of the controllers, that Zwartkops would be the home circuit of the competitor going forward.

15. Jannet Wood potentially erred in that the WhatsApp cited did not contain the commonplace requirements of a prior written application. Jannet Wood was unable to fully articulate the expectation or process of what such a written application should look like. One then has to defer to the common, reasonable definition of a prior written application, being "*a formal and usually written request for something".*

16. That being said, on the basis that the controllers, via their authorised representative Jannet Wood, had accepted the defective written notice, it cannot be concluded that a contravention of Art 20.1 had taken place.

17. All appeals in terms of the GCR's of MSA are held de novo (refer GCR 208 iv), and it is the fact that this is a de novo hearing which allows us to take into account the evidence of Jannet Wood which was not presented to either the clerk of the course or the stewards and reach a contrary finding that the appellant was permitted alternative practice arrangements by way of a change of official test circuit in terms of Art 20.4. Tim Bishop in arguing the appeal on behalf of the appellant suggested that the clerk of the course and the stewards should have sought the evidence of Mrs Wood. We do not agree. He was *dominis litus* in relation to the protest and was free to call her to the hearing with the clerk of the course and as a witness at the protest hearing and should have done so given the fact that he relied on the exchange with her to establish that the appellant had not contravened the regulations.

18. Having reached the conclusion that the appeal should be upheld the court is then faced with the extremely difficult question of the remedy sought. It was suggested on behalf of the appellant that the results of race one of the Supacup race at Zwartkops on 20 May 2023 should be rendered null and void, with the consequence that no competitor should score any points from race one of the Supacup race at the said race meeting. The appellant sought to rely on the judgement of MSA's National Court of Appeal in case NCA 1078 for the suggestion that this was an appropriate remedy. NCA 1078 is clearly distinguishable from the facts in this instance because there was in that instance "wide-ranging non-compliance by a wide variety of stakeholders in the event", competitors in the event in question were blamed for their blatant disregard of a bulletin prohibiting short cutting, and there was a widespread disregard of the prescribed route by competitors resulting in a competition which was not fair. It cannot be said in this instance that "the results do not have integrity to the extent that the fibre of fair competition has been undermined". The court believes that notwithstanding the shortcomings in organisation which are dealt with later in this judgement, on the part of the stewards, the controllers of the championship, and the widespread failure of competitors to notify their official test circuit, before the commencement of the season as required in terms of Art 20.1, these are not sufficient to merit the implementation of such a far-reaching and draconian

remedy, as to deprive all competitors in the event of the result which they have rightfully earned.

19. As previously observed this court would have, in the absence of the explicit evidence of Jannet Wood at the Appeal, reached the same conclusion as the stewards. The right and obligation to have Mrs Wood testify before the stewards lay with the appellant, and the failure to call her must be laid at the door of the appellant. Accordingly, we are not inclined to make any order that MSA refund the protest fee. It is after all only the fact that this appeal is considered de novo which leads us to an alternate conclusion.

20. In summary, the results of the event stand, the finding of the stewards is overturned, however, this is an instance where we are not going to allow "hard cases to make bad law". The results of the event cannot be changed, nor can it be ordered that the race be rerun. The appellant, being *dominus litis*, bears the onus of defence. The appellant failed to call Jannet Wood to testify at the protest hearing, hence the conclusion of the Stewards with the information they had at the time reflects as sound. Had the appellant called Jannet Wood to testify, the protest findings may have yielded a different result. Accordingly, in the circumstances the relief sought by the appellant is denied and no alternative relief was sought or is available or ordered.

OTHER MATTERS – THE STEWARDS

21. Unfortunately, that is not the end of the matter for this court, and there are issues which arise in which we feel we must comment.

22. As we have observed, the clerk of the course dealt with this issue promptly at the start of the race meeting and communicated her finding to the competitor at 10:05 on the Friday morning, which was promptly followed by a protest on behalf of the competitor. On receipt of the protest she took the same to the race secretariat on the assumption that the race secretary would pass the same onto the stewards for attention. The clerk of the course in question was the category clerk of the course and not the overall clerk of the course for the meeting. She testified that she was unaware that the stewards were not present at the circuit.

23. The court learnt that neither steward was present at the circuit on the Friday. We are of the view that this is entirely unacceptable in respect of a national championship race meeting particularly given the role of the stewards in providing oversight of the safety of the event. Both stewards offered the reason that they were unable to get off work on the day in question. In our view in circumstances when neither steward is able to attend on the Friday they should decline appointment. While we are fully appreciative of the fact that volunteer officials are in short supply, the appointed stewards should have in the first instance, disclosed their nonavailability to each other, and if neither was available brought this fact to the attention of MSA. In the 2nd instance, they should at the very least have maintained contact with the race secretariat and the overall clerk of the course to ascertain whether there were any issues which required their attention, and explored alternative ways of dealing with the protest timeously, whether by way of some form of hybrid hearing, or by convening a time on Friday evening or sufficiently early on Saturday morning to ensure that the protest was timeously heard. It is unfair on the competitor who filed a protest at approximately 10:30 on Friday morning to wait a period of over 24 hours before receiving a finding and then receive it with less than 45 minutes to go before the commencement of the race in question.

24. Given our conclusion that the conduct of the stewards was not acceptable, the question then arises as to an appropriate sanction for their failure to attend adequately to their duties. We are of the view that a reprimand coupled with an order that both stewards are suspended from officiating in that capacity at any race meeting incorporating a national championship category until they have rewritten and passed the appropriate MSA officials' examination, is appropriate and it is so ordered.

25. GCR 201 i provides that the stewards are obliged to consider all protests as urgent and to convene a hearing as soon as possible. The race secretariat, should notwithstanding the fact that neither steward was present at the circuit, have brought to the attention of the stewards the fact that a protest had been received, and the stewards should have made arrangements, to hear the protest at the latest on Friday evening or on Saturday morning before racing activities.

26. Had the stewards heard the protest timeously the appellant may have been in a position to properly consider his position and to take whatever action he may have considered appropriate. It is noted that GCR 217, read with GCR 218, only allows participation "under appeal" in cases where a competitor is precluded from taking part in the event and has lost a protest in this regard. It does not permit racing "under appeal" in the case of a grid penalty. The International Sporting Code of the FIA as well as the regulations of many categories of the sport expressly do not permit appeals against grid penalties. This may indeed be the intention of MSA behind GCR 217 but MSA should perhaps consider the rectification of this lacuna by expressly, either allowing or disallowing racing under appeal in these circumstances.

THE GTC MANAGEMENT TEAM

27. We find it disappointing that the management of a premier national racing championship appears to be, at least in regard to the issues which arise from this appeal, somewhat haphazard. The GTC management team should have ensured the timeous issue of the required circular to identify their membership as required in Art 2.1.

28. The administration of Article 20.1 appears to be unacceptably poor. Going forward the controllers of the series should ensure proper compliance by way of written communication of the nomination of official test tracks by all competitors before they are permitted to race in the first event of the year. These nominations should be properly recorded and controlled formally and an accessible record maintained. Instances of WhatsApp messages such as that dealt with in this appeal should be met with a polite request for a formal written application as contemplated by article 20.4.

APPEAL FEE

29. Court directs that the appeal fee be refunded to the appellant, less 25% administrative costs.

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

These findings were issued and handed down on 25 July 2023