

DECISION IN RESPECT OF NATIONAL COURT OF APPEAL NO. 167

The NCA appeal was heard in the MSA Boardroom on the 28th November of November 2017

PRESENT:

Advocate P Carstensen SC	Court President
Willie Venter	Court Member
Janine Geysler	Court Member
Mike Clingman	Court Member
Wayne Riddell	MSA Sporting Services Manager
Paulo Gouveia	Appellant
Michael North	Appellant's Representative
Hector North	Appellant's Representative
Karin Britton	MSA Sporting Coordinator
Observers as per attendance register	

1. INTRODUCTION

- 1.1. The Court President introduced the court and welcomed everybody.
- 1.2. There were no preliminary matters or objections to the constitution of the court.
- 1.3. The ruling set out in paragraph 7.1 below was pronounced at the hearing. The full reasons and ruling is set out herein.

2. APPEALS PROCEDURE

- 2.1. This appeal emanates from MSA Court of Enquiry 1199.
- 2.2. The application for leave having been granted on the 16th of October 2017.
- 2.3. The appeal has been lodged against the decision of the MSA Court of Enquiry by Paulo Gouveia.

3. BACKGROUND

- 3.1. On the 21st August 2017 a Court of Enquiry was convened in respect of competitors who participate in drifting. Jean Mare, Luke Maher and David Rae were cited as defendants in the notice convening the Court of Enquiry, in terms of

GCR 211.

- 3.2. Both the notice convening the Court of Enquiry and the judgement clearly set out that the purpose of the Court of Enquiry was to investigate:
- 3.2.1. whether Jean Mare had breached GCR 172 (iv);
 - 3.2.2. whether the mechanic or family member (known as Francois) of competitor Mare had breached GCR 113(xiv) and GCR 172(iv);
 - 3.2.3. whether Luke Maher had breached GCR 172(iv); and
 - 3.2.4. whether David Rae had breached GCR 172(iv).
- 3.3. The evidence related to an exchange on a WhatsApp group, a public social media forum, which included other competitors, mechanics and Mr Reece Williamson, an organiser.

4. FACTS FORMING BASIS OF GROUNDS OF APPEAL

- 4.1. Paulo Gouveia was called to the hearing and attended the hearing as a witness and not as a defendant.
- 4.2. In terms of the purpose of the Court of Enquiry, it was not stated that the Court of Enquiry was convened for the purpose of investigating whether Paulo Gouveia had breached any of the GCRs.
- 4.3. It was also common cause that Paulo Gouveia had *“refrained from joining the WhatsApp conversation”*.
- 4.4. Jean Mare gave evidence that:
- 4.4.1. there had been an altercation at the Wild Coast, (no details were given of this altercation), and that there had been a continuation of this at Richards Bay in March although the only evidence in this regard was that Francois Mare had told him that Gouveia told them that he was *“going to bring all the Porra’s from Johannesburg to F**** them up”*. There was no confirmation of this evidence and Francois Mare did not confirm

it during his evidence;

- 4.4.2. (it seems that the tension rose when the Kimberley event was cancelled, incorrectly in the view of the competitors who gave evidence. This had nothing, apparently, to do with Paulo Gouveia);
 - 4.4.3. he was upset due to the cancellation of the event and that he hadn't been warned about his seatbelts expiring;
 - 4.4.4. he had been told that the Gouveia group were mocking him behind his back at Port Shepstone and that there were discussions in Cape Town. (This is all hearsay evidence and no names are mentioned of persons involved);
 - 4.4.5. he was also told that Paulo Gouveia had *"opened a case against him"* and had unfriended him on Facebook. (There are no details of this and this certainly was not investigated by the Court of Enquiry, neither was there any evidence in this regard as to exactly what case is being referred to).
- 4.5. Jean Mare apparently presented the Court two *"posts"* from another public forum that had been posted by Paulo Gouveia. These were not part of the Record of the hearing and obviously had not been presented to Paulo Gouveia or to any other persons prior to the hearing. It appears from the record that Paulo Gouveia confirmed that he had made these and they were inappropriate.
- 4.6. Francois Mare gave no evidence to implicate Paulo Gouveia, in any way, neither did David Rae.
- 4.7. Paulo Gouveia gave evidence, as a witness, and stated:
- 4.7.1. *"everything that had been brought up was new to him"*;
 - 4.7.2. that he *"did not know that there were issues"*;
 - 4.7.3. that he had *"heard a lot of allegations with no"*

proof and wondered what had gone wrong to cause all of this”.

5. FINDINGS OF COURT OF ENQUIRY

- 5.1. Remarkably the Court of Enquiry, apart from finding the defendants had contravened GCR 172(iv), also found that Paulo Gouveia had contravened GCR 172(iv).
- 5.2. The court was however (and correctly in our view) appalled by the content of the posts on social media and quoted a number of them. However, none of those were attributed to Paulo Gouveia.
- 5.3. The Court of Enquiry then, *inter alia*:
 - 5.3.1. withdrew the competition licence of Paulo Gouveia for a period of 5 years, which withdrawal was suspended for 5 years from date of the publication;
 - 5.3.2. fined Gouveia R20 000.00, R15 000.00 of which was suspended for 5 years;
 - 5.3.3. levied Gouveia with an amount of R2000.00 in respect of costs.

6. RULING OF THE COURT OF ENQUIRY

- 6.1. In our view, this was a gross miscarriage of justice for the following reasons:
 - 6.1.1. Gouveia had not been cited as a defendant;
 - 6.1.2. Gouveia had not been warned that there was to be an enquiry or investigation into his conduct or any of his posts;
 - 6.1.3. Gouveia was specifically called as a witness to assist the court in its enquiry;
 - 6.1.4. there was no allegation in the notice of the enquiry, the notice convening the enquiry or the notice appointing the court that there had been any wrong-doing, breach of the GCRs or contravention at all by Paulo Gouveia;

- 6.1.5. consequently there would have been no need for him to obtain legal assistance, to prepare a defence, to obtain witnesses, to present the court with any documentation in denial of any incident or in mitigation of any incident. In fact, no incident was even mentioned in the documents in respect of which he took part.
- 6.2. The findings of the Court of Enquiry contravene:
- 6.2.1. Gouveia's Constitutional right to a fair hearing alternatively, in terms of Section 34;
 - 6.2.2. Gouveia's common law right of *audi alteram partem*;
 - 6.2.3. the GCRs.
- 6.3. The Court of Enquiry failed to meet the pre-emptory requirements of GCR 175:
- 6.3.1. this includes the necessity for a hearing prior to the imposition of any penalties;
 - 6.3.2. the summoning of parties concerned to appear at the hearing;
 - 6.3.3. the delivery of the summons to the defendants personally;
 - 6.3.4. the fact that notice summoning an individual shall state their capacity (e.g. defendant, witness etc.) in which he / she is required to attend;
 - 6.3.5. importantly, that a competitor (defendant) is deemed to have committed the offences alleged and the onus is on the defendant competitor to prove that he is not guilty of having committed the offence alleged. Of course, in this instance, there was no allegation that Paulo Gouveia had committed any offence in the notice of summons.
- 6.4. In addition, and on the same basis, the Court of Enquiry failed to comply with GCR 210(vii): *“every notice summoning an individual to a hearing shall state their*

capacity (e.g. defendant, witness, etc.) in terms of which he is being required to attend”.

- 6.5. Despite the fact that, in terms of GCR 208, Courts of Enquiry are obliged to act as Courts of First Instance, none of the requirements, parameters or rights of a defendant in a Court of First Instance were afforded to Gouveia.
- 6.6. The result has been that in terms of GCR 208(ix)(a), a gross miscarriage of justice has occurred.
- 6.7. If the Court of Enquiry had uncovered evidence of a breach of the GCR's by Gouveia a further Court ought to have been convened.

7. RULING:

- 7.1. Consequently, the appeal of Gouveia is upheld and the decision of the Court of Enquiry set aside in its entirety in respect of the finding and sanctions as they relate to Paulo Gouveia. This ruling was announced at the hearing of 28 November 2017.
- 7.2. There is of course no need to find Gouveia not guilty as he had not been charged with any offence, breach or contravention of the GCRs.
- 7.3. The withdrawal of his competition license is set aside;
- 7.4. It would be inappropriate, in these circumstances for Gouveia to forfeit any fees paid to MSA and thus MSA is ordered to repay all and any amounts paid by Gouveia to MSA as a result of the finding of the Court of Enquiry, the Leave to Appeal and the Appeal, including:
 - 7.4.1. The fee in terms of GCR 212B of R5000.00
 - 7.4.2. the balance of the appeal fee of R15 000.00;
 - 7.4.3. the costs of R2 000.00; and
 - 7.4.4. the fine of R5 000.00.
- 7.5. Submissions were addressed to this court that MSA ought to compensate Gouveia for his costs and expenses incurred in perusing this appeal. This court believes such

an order would not be appropriate for the following reasons:

- 7.5.1. The GCR's do not clothe the NCA with the authority to make such an order;
- 7.5.2. Gouveia's legal representative did not refer the court to any provision of the GCR's or any other authority which would allow an order of this nature;
- 7.5.3. The fact that an appeal has been upheld does not justify such an order against MSA.

DATED SANDTON ON THIS 30TH DAY OF NOVEMBER 2017

I confirm that this is the unanimous decision of the National Court of Appeal.

Paul Carstensen

**COURT PRESIDENT
ADV. P L CARSTENSEN SC**

(msa.167.30.11.17)