DECISION IN RESPECT OF NATIONAL COURT OF APPEAL NUMBER 171 LODGED BY A NEVELING IN CONNECTION WITH FINDINGS OF COE 1221

The NCA appeal was heard at the MSA Boardroom on Monday, 25 November 2019.

PRESENT:

Advocate Paul Carstensen SC	Court President
Mr Willie Venter	Court Member
Advocate George Avvakoumides	Court Member
Mr Arnold Neveling	Appellant
Mr Hector North	Legal Representative: Appellant
Mr Michael North	Legal Representative: Appellant
Mr Wayne Robertson	Technical Consultant
Mr Adrian Scholtz	MSA Chief Executive Officer
Ms Allison Atkinson	MSA Circuit Sporting Coordinator
Mr Vic Maharaj	MSA Sporting Services Manager

Observers: as per attendance register

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1. **INTRODUCTION**

1.1 The Court President introduced the court and welcomed everybody, who introduced themselves.

1.2 There were no preliminary matters or objections to the process or the constitution of the court.

1.3 All parties were ready to proceed with the appeal.

2. **APPEALS PROCEDURE**

2.1 The appeal hearing took place at 17h30 and after hearing the representations judgment was reserved.

2.2 Proceedings were mechanically recorded. For the purpose of this judgment, reference is only made to the material issues.

2.3 The appellant in these proceedings was represented by Hector North and assisted by Michael North. MSA was represented by its Sporting Coordinator, Ms Allison Atkinson, the CEO, Mr Adrian Scholtz and Mr Vic Maharaj, the MSA Sporting Services Manager.

2.4 The bundle of documents included the application by the appellant for leave to appeal against the findings of COE1221, the findings of NCA170, the appeal of the appellant to be heard as NCA171 and the NCA panel ruling on the leave to appeal application.

2.5 A written apology and submission was received from the event promoter Ed Murray. His apology was accepted but due to an objection by the appellant his submissions were not accepted into evidence.

3. **BACKGROUND**

3.1 This matter has a long, unfortunate history.

3.2 The appeal originally arose from the Court of Appeal 436 which dealt with events which transpired over a year ago, on 30 September 2018 at the National Rotax Karting Event at Zwartkops Raceway, Pretoria.

3.3 The material facts have never been in dispute.

3.4 The appellant competed in the fourth round of the South African National Championships and committed a technical infringement by using the incorrect spark plug.

3.5 The technical consultant (TC) issued a notice that a technical infringement had taken place. The notice of the steward meeting was then signed by the COC. The stewards, without holding a hearing, decided that no advantage was gained *"as per the promoter"* and issued a monetary fine of R1 000.00.

3.6 Vaughn Williams, the entrant of Bradley Liebenberg, filed an application for leave to appeal against the decision of the stewards on 3 October 2018.

3.7 The application for leave to appeal evidenced that the stewards had

failed to follow GCR175, which required a hearing prior to the imposition of any fine or penalty and Williams contended that the appellant should have been excluded from race one and started at the back of the grid for race two.

3.8 Leave to appeal was granted and the appeal was prosecuted in terms of GCR212 on 9 October 2018.[1]

3.9 The appellant then filed an application for leave to appeal to the National Court of Appeal in terms of GCR212 on 7 March 2019 and the panel granted leave on 25 March 2019.

3.10 The appellant's formulated appeal was filed on 31 March 2019.

3.11 The National Court of Appeal 170 was convened on 18 June 2019. The NCA found that:

3.11.1 the stewards had failed to conduct a hearing pursuant to the provisions of GCR175 on 30 September 2018;

3.11.2 the findings of Court of Appeal 436 against the appellant and the imposition of the penalty on the appellant was set aside in its entirety on the basis that there was no hearing conducted by the stewards;

3.11.3 MSA was directed to appoint a Court of Enquiry in terms of GCR211, read with GCR154, to investigate whether the technical infringement of the appellant during the event gained him an advantage or not, and to impose a suitable penalty to the provisions of GCRs, SSRs and SRs.

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[1] See Court of Appeal 436 which was constituted on 5 February 2019

4. **FINDINGS**

4.1 The court of enquiry was convened on 5 September 2019 under COE1221. The court recorded that its authority and mandate arose from NCA170 and was as follows:

> *"MSA is directed to appoint a Court of Enquiry in terms of GCR211, read with GCR154, to investigate whether the technical infringement of the appellant during the event gained him an advantage or not, and to impose a suitable penalty pursuant to the GCRs, SSRs and SRs."*

4.2 The court of enquiry found that the technical consultant for the event, Wayne Robertson, only indicated that the infringement was the use of an incorrect spark plug.

4.3 At the hearing the TC stated that he believed that the incorrect spark plug afforded the Appellant an advantage. However, the COE found that Mr Robertson was unable to provide any material evidence to support his view other than his opinion based on the years of experience in the sport.

4.4 During the hearing the COE heard evidence of the spark plug manufacturer to the effect that no advantage had been gained by the appellant.

4.5 During the hearing, the technical consultant conceded to COE1221 that he was unable to produce any measureable evidence that an advantage had been gained.

4.6 It is presumably for those reasons that the court found: *"The court is unable to make a conclusive finding as to whether the use of the incorrect spark plug afforded competitor Neveling an advantage or not."*

4.7 This is a remarkable finding in light of the fact that COE1221's mandate was expressly *"to investigate whether the technical infringement of the appellant during the event gained him an advantage or not"*.

4.8 The mandate was thus not fulfilled and, at best, the finding is that the court could not find that there was an advantage.

4.9 However, the COE then in its findings went on to rely on the 2018 National Karting Regulations and Specifications, Article 11(ii):

> *"Any contravention of the Karting technical regulations and specifications will generally result in automatic exclusion from the relevant race (where appropriate) or the entire event. The only exception will be in instances where no advantage has been gained, in accordance with the provisions of GCR176. Refer also to the provisions of article 22 of the MSA Karting Regulations. Notwithstanding there having been no advantage gained, a competitor found using any component which is not compliant with the relevant engine or chassis, example exhaust, air box, and radiator and/or carburetor specifications, will be liable for automatic exclusion.*

4.10 The court then, remarkably, went on to find that this article made the penalty of exclusion mandatory and excluded Neveling from the results of race one.

4.11 This finding is clearly wrong:

4.11.1 Firstly, this was clearly not within its mandate.

4.11.2 Secondly, the parties, including the appellant, had not been warned of the relevance or application, (in the eyes

of the members of the court) of article 11.

4.11.3 Thirdly, article 11 had not been discussed, debated, argued or even referred to during the hearing of COE1221.

4.11.4 The appellant and parties were thus not afforded an opportunity to address its relevance or appropriateness.

4.11.5 The first time that the parties were aware that the court intended referring to article 11 was when the ruling was published.

4.12 Such a finding is consequently a dramatic infringement of the appellant's rights, the principles of natural justice. COE1221 was not entitled to raise Article 11 and *mero-motu* and then to rely thereon without warning the parties or hearing their submissions thereon.

4.13 Such an approach runs contrary to the findings of the Supreme Court of Appeal in *Fischer and Another v Ramahlele and Others* it is "*for the parties to identify the dispute and for the court to determine that dispute and that dispute alone*".[2] "*[I]n our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues.*"

4.14 During the hearing of NCA171:

4.14.1 the technical consultant had nothing to add; and

[2] 2014 (4) SA 614 (SCA), para [13], affirmed by the Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para [210] and *Molusi & Others v Voges NO and Others* 2016 (3) SA 370 (CC) para [28]

4.14.2 the MSA representatives made no submissions.

4.15 We instead heard full argument by the appellant's legal representatives.

5. **RULING**

5.1 Consequently, the findings of COE1221 are set aside.

5.2 The finding of the stewards (of a monetary fine of R1000.00) is reinstated.

5.3 For clarity it is recorded that competitor A Neveling is not to be excluded from the results of race one at the event in question.

5.4 No finding as to costs is made in connection with the matter.

5.5 The appellant's appeal fees are to be refunded less the administrative fee of R1000.00.

DATED AT SANDTON ON THIS 11th DAY OF DECEMBER 2019.

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

PL Carstensen (signed electronically)
ADV P L CARSTENSEN SC

(msa.11.12.19a)