

**MOTORSPORT SOUTH AFRICA
NATIONAL COURT OF APPEAL 168**

**APPELLANT
Dirt Oval 4 South Africa CC**

**IN RE
Appeal arising from the findings of
MSA Court of Appeal 435**

**DATE OF HEARING
27 March 2018**

Present (Officials):

**Advocate André P Bezuidenhout
Attorney Steve Harding
Wayne Riddell**

**Court President
Court Member
Sporting Services
Manager: MSA**

INTRODUCTION

1. On 27 March 2018, Motorsport South Africa (“MSA”) enrolled National Court of Appeal 168 (“the appeal”). The appeal was dealt with at the Killarney Raceway at the office of Motorsport South Africa (“MSA”). There was no objection to the constitution of the appeal panel and the appeal was properly constituted.
2. This is the written judgment of the National Court of Appeal (“NCA”) 168. The Appeal hearing took place on 27 March 2018 between 18h00 and 22h10. Judgment was reserved. Proceedings were mechanically recorded. For the purposes of this Judgment reference is only made to the material issues as the remainder of the proceedings are of record.
3. The Appellant in this matter is Dirt Oval 4 South Africa CC (“DO4SA”) (“the Appellant”). The Appellant is the *de facto* administrator and promoter of dirt oval racing in South Africa, appointed by Motorsport South Africa (“MSA”). For current purposes, it appears that the Appellant acted as both event organiser and series promoter.

*(see Dirt Oval Regulations for Motorsport in South Africa:
Handbook, 1 July 2016, paragraph 1)*

4. The Appellant was represented in these proceedings by a spokesman, Mr Wynand van Niekerk (“Mr Van Niekerk”). We thank Mr Van Niekerk for his effort in preparing and presenting the case of the Appellant in an able manner.
5. The Appeal Bundle initially comprised annexures “A” to “O”, individually marked. It was supplemented by annexure “P” comprising four double page printed documents which were initially submitted by the Appellant to MSA Court of Appeal 435 (“the COA”). They were handed to this NCA by Wayne Riddell (“Mr Riddell”).
6. This NCA acknowledges the able contribution and the attendance of all the participants at the hearing, their capacity which appears from the attendance register, a copy of which is attached hereto as annexure “A”.

DIRT OVAL RACING

7. Dirt oval racing started in the United States of America (“USA”) before World War I and rapidly spread during the 1920’s and the 1930’s. Race vehicles used are generally purpose built and are modified to varying degrees. It is so popular with the public that it is the single most common form of auto racing in the USA. Dirt oval racing rapidly grew and competitors now compete across the globe, which include events in Australia, New Zealand, the United Kingdom and South Africa.
8. In South Africa, dirt oval racing is a well-developed category of motorsport. It is one of the major categories of motorsport which is organised under the certification of MSA. There are currently 331 official oval racing licence holders throughout South Africa. They compete in events across approximately fifteen race circuits spread throughout South Africa. For the year 2017, there were 72 events held as such. Dirt oval racing clearly has a very substantial following, not only by competitors but also the public.
9. It is in the interest of all competitors, promoters, organisers and stakeholders in dirt oval racing, to ensure that competition takes place within the boundaries of fair play and within the ambit of the “*rules of the game*”. Any occurrence that will bring the status of the results into disrepute, must therefore be avoided at all cost.

THE INCIDENT REPORT AND EVENTS THAT FOLLOWED

10. The Appeal arises from the findings of COA 435 which dealt with events that transpired on 18 November 2017 at the second round of the Dirt Oval National Championship which was held at the Tygerberg Raceway, Cape Town (“the event”). At 23h07 on 18 November 2017, competitor Donald Theron (“Competitor Theron”) submitted an incident report to the Clerk of Course that an incident occurred (“the incident report”) during the final heat of the evening. During the incident, the race vehicle of Competitor Theron was damaged on the left rear, which resulted therein that he lost his second place. He fell back but kept on circulating until the race was completed.

(see Appeal Bundle, K11)

11. It was reported to us that the incident report initially incorrectly relied on a breach

of Regulation 29.5 of the Standing Regulations (“the Dirt Oval Regulations”, commonly referred to by all parties as “the OTR’s”). Shortly after the filing of the incident report, Competitor Theron, who is allegedly dyslexic, approached Mr Van Niekerk and indicated that his incident report should actually have referred to OTR 25.9 which deals with race damage caused by another competitor and the consequences thereof to be reinstated as if the competitor completed the heat in the position that he held at the time of the infringement. We accepted this explanation as a common cause fact as no attendee disagreed with the submission of Mr Van Niekerk in this regard.

(see *Appeal Bundle, K11 and OTR 25.9*)

12. At 00h45, the “*Steward*”, Neva van der Merwe (“Ms Van der Merwe”), reinstated Competitor Theron as can be seen from the manuscript note on annexure K11.

(see *Appeal Bundle, K11*)

13. In consequence of the incident report and the reinstatement finding made by Ms Van der Merwe, the Provisional Oval Track Result Sheet which was first posted at 23h55, was altered at 00h45 and the points scored by Competitor Theron were increased to a total of 130 (previously 110).

(see *Appeal Bundle, K16*)

14. Jodi van Zummerren (“Competitor Van Zummerren”) at 02h20, filed a protest against the decision of Ms Van der Merwe (“the protest”).

(see *Appeal Bundle, K12*)

15. The protest was only dealt with on 24 November 2017 by another panel of Stewards. Competitor Van Zummerren was not called to the protest meeting and he was informed by the panel that his protest failed.

(see *Appeal Bundle, K13*)

16. Competitor Van Zummerren requested leave to appeal against the decision of the Stewards. This was granted by MSA and COA 435, on 23 January 2018, dealt with the matter.

17. The following findings, *inter alia*, appear from the judgment of COA 435:

17.1 a fine of R10 000.00 was imposed on the organisers of the event;

(see Appeal Bundle, L1, paragraph 4.10)

17.2 the Clerk of the Course was sanctioned by withdrawing his official licence for three months, the withdrawal being suspended for three months;

(see Appeal Bundle, L1, paragraph 4.11)

17.3 Ms Van der Merwe was instructed to write the MSA Dirt Oval Examination within thirty days;

(see Appeal Bundle, L1, paragraph 4.12)

17.4 Mr Van Niekerk was severely reprimanded and likewise instructed to write the MSA Dirt Oval Examination within thirty days;

(see Appeal Bundle, L1, paragraph 4.13)

17.5 the reinstatement of Competitor Theron was set aside;

(see Appeal Bundle, L1, paragraph 4.14)

17.6 in consequence of OTR 35.4, Ricardo Davey ("Competitor Davey") was excluded from the results, and Competitor Theron was awarded the points that Competitor Davey would have scored;

(see Appeal Bundle, L1, paragraph 4.15)

17.7 the organisers were instructed to re-score the event, including the heat which was erroneously dropped;

(see Appeal Bundle, L1, paragraph 4.16)

17.8 fifty percent of the appeal fee was returned to Competitor Van Zummerren;

(see Appeal Bundle, L1, paragraph 4.17)

17.9 costs of R3 000.00 was awarded against the organisers.

(see Appeal Bundle, L1, paragraph 4.19)

18. Following the findings of COA 435, leave to appeal was requested by the Appellant. A panel of the National Court of Appeal on 22 February 2018 granted leave to appeal to this Court.

(see Appeal Bundle, O1)

PROCESS FOLLOWED DURING THE APPEAL

19. All hearings of appeals in terms of the GCR's are held *de novo*.
(see *GCR 208 viii*)
20. During the hearing:
 - 20.1 Mr Van Niekerk made an opening address;
 - 20.2 the following witnesses testified:
 - 20.2.1 Wade Grimbeek ("Mr Grimbeek");
 - 20.2.2 Leone Liebenberg ("Ms Liebenberg");
 - 20.2.3 Competitor Van Zummerren;
 - 20.2.4 Ms Van der Merwe;
 - 20.2.5 Phil Heroldt ("Mr Heroldt").
 - 20.3 a video recording of the incident was viewed.
 - 20.4 all interested parties were given an opportunity to address the NCA. Indeed, multiple opportunities were granted to several of the attendees to make submissions so that this Court would have the full benefit of the views of the interested parties and their submissions on the issues before us.

THE CONTROL OF MOTORSPORT, THE GCR'S AND THE SSR'S

21. The control of motorsport in South Africa is held by MSA, a Non-Profit Company in terms of the Companies Act 61 of 1973 and Act 71 of 2008. MSA holds the sporting authority to govern motorsport as it is the delegated authority by the

Federation Internationale de l'Automobile ("FIA"), *Commission Internationale de Karting* ("CIK") and *Federation Internationale de Motocyclisme* ("FIM"). MSA is structured with a Board of Directors, a Secretariat, a National Court of Appeal Specialist Panels, Sporting Commissions and Regional Committees. The Secretariat of MSA does not serve as bodies governing discipline of motorsport. It only attends to secretarial issues. Wayne Riddell ("Mr Riddell") represented MSA in this capacity. The exercise of the sporting powers by MSA is in terms of the sporting codes of the FIA, CIK and FIM. As such, MSA has the right to control and administer South African National Championship competitions for all motorsport events. The National Court of Appeal of MSA is the ultimate final Court of Judgment of MSA.

(see *Articles 3 to 7 of the MSA Memorandum*)

(see *Article 35 of the MSA Memorandum*)

22. The participation of motorsport competitors in events managed by MSA is based on the law of contract. MSA has the sporting authority and is the ultimate authority to take all decisions concerning organizing, direction and management of motorsport in South Africa.

(see *GCR INTRODUCTION – CONTROL OF MOTORSPORT*)

23. MSA is an international and nationally recognised sporting body by the Government of South Africa. Its sporting platform is substantial. It has approximately ten thousand licence holders and it sanctions approximately six hundred sporting events every year in South Africa. The organisation of events under the control of MSA is a quality certification stamp which ensures that all participants can be assured that competition takes place within the boundaries of fair sporting events, with certainty as to good administration and results. For national events, national prizes and championships are awarded and organisers and promoters receive substantial accreditation for having the MSA stamp of approval for their events. The event under consideration was a National Championship.

24. All participants involved in MSA sanctioned motorsport events subscribe to this authority. As such, a contract is concluded based on the "*rules of the game*". There exists a ranking structure in the MSA Rules and Regulations. (General Competition Rules are referred to as "GCR's"). The "*rules of the game*" of motorsport are structured in main on the Memorandum of MSA and the GCR's. Any competitor

who enters a motorsport event subscribes to these “*rules of the game*”. (Reference in this judgment to “*rules and regulations*” intends to refer to the broad meaning of the “*rules of the game*”. Specific references to GCR’s are individually defined.)

(see GCR 1)

25. In addition to the GCR’s there are also Supplementary Regulations (“SR’s”) that an organiser and promoter of a competition is obliged to issue and Standard Supplementary Regulations (“SSR’s”) issued by MSA.

(see GCR 14 & GCR 16)

26. The GCR’s, SR’s and SSR’s thus constitute the “*rules of the game*” of motorsport.

27. The SSR’s were prepared for and on behalf of the Dirt Oval Racing Clubs, promoters, officials and competitors who are affiliated to the Appellant. Within dirt oval racing, these SSR’s are referred to as the OTR’s, as indicated in paragraph 11 above.

(see *DO4SA Dirt Oval Regulations for Motorsport in South Africa valid from 1 July 2016, paragraph 1*)

28. Oval racing is therefore administered by the rules and regulations contained in the GCR’s, SR’s and SSR’s. Where there is a contradiction between the GCR’s and the SSR’s, the SSR’s will take precedence. As it is stated in the DO4SA Dirt Oval Regulations: “*...in the first instance you apply the oval rule book. If the oval rule book does not deal with a particular issue, you refer to the GCR*”. It is further provided for in GCR 225 that:

“225.

Where there is a contradiction between the GCR’s and the SSR’s, the latter take precedence except where the category regulations provide otherwise. This does not apply to international events, which are run under the relevant International Sporting Codes.”

(see GCR 225)

(see *DO4SA Dirt Oval Regulations, page 2*)

29. It is expected of every entrant and competitor to acquaint themselves with the GCR’s and to conduct themselves within the purview thereof.

(see GCR 113 read with GCR 122)

LEGAL AND FACTUAL ISSUES WHICH ARISE IN THIS APPEAL

30. The Appellant is *dominus litus* in this appeal to the NCA and submitted a formulated appeal.

(see Appeal Bundle, C4)

31. The following aspects crystallised as to the legal and factual issues which require our consideration:

31.1 that Tygerberg Raceway was not called to the COA hearing;

31.2 whether there were one or two sets of SR's and if two sets, whether the amendment of the first set entitled the organisers to drop one of the heats from the championship regulations;

31.3 whether the appointed officials at the event met the requirements of an event classified as a National Championship event;

31.4 whether the decision by the Stewards to reinstate Competitor Theron following the incident report was correct.

THE MATERIAL GCR's and SSR's

32. The event was part of a National Championship calendar. A National Championship is defined as:

“A NATIONAL CHAMPIONSHIP means several events run in at least four different regions designated by MSA as motorsport regions, subject to there being suitable venues and infrastructure available. MSA may, at its sole discretion and if so warranted by circumstances in specific instances, reduce the number of regions in which events are required to be run to constitute a national championship.”

(see GCR 44)

33. Organisers and promoters must follow the GCR's and in particular, GCR's 70, 71

and 72 when they organise an event.

34. No competition shall be held unless MSA approve the granting of an organising permit in terms of GCR 75.
35. The application for an organising permit takes place in terms of GCR 78, which provides as follows:

“78. APPLICATION FOR AN ORGANISING PERMIT (See also GCR 87)
Every application for an organising permit shall be made out in writing and accompanied (where applicable) by the appropriate fees (see Appendix "R") together with a draft of the proposed SRs and entry form. The application must be lodged with MSA at least six weeks before the date of the proposed competition and must state:

- i) the name and address of the applicant;*
- ii) the body on whose behalf the application is made and the official position held by the applicant;*
- iii) the nature of the competition for which the permit is required;*
- iv) the date and place of the proposed competition.*

*By applying for, and accepting, an event organising permit from Motorsport South Africa, **an event organiser is deemed to comply, and/or confirms having complied, with the Safety at Sport and Recreational Events Act 2 of 2010.***

*Application for waiver of permits shall be submitted in writing, giving adequate reasons for the application and full details of the competition or event concerned. Such application must be lodged with MSA **at least six weeks** before the date of the proposed competition / event.*

NOTE: SRs must not be issued to competitors in draft form but only after approval by MSA, reflecting the permit number issued for such event by MSA. Failure to comply with this requirement will result in MSA taking action against the club and/or promoter. Promoters / Organisers / race secretaries of a race meeting may not open entries prior to receiving the relevant permit for the event in question. Should it be found that entries have opened prior to the permit been issued will incur a penalty of not less than R 5000.

(see GCR 78)

(Underlining – Emphasis by the NCA)

36. It is clear from GCR 78 that the application for an organising permit must therefore be accompanied **by a draft of the proposed SR's**. The importance of the issue of SR's is emphasised in the special note of GCR 78 which states that **SR's must not be issued to the competitors in draft form, but only after approval thereof by MSA**. The sanction for organisers not following this, is that the organiser and promoter will incur a penalty of not less than R5 000.00. The reason for this is obvious: there must be certainty as to what the SR's provide so that all stakeholders would know the ambit of the "rules of the game" when the event takes place.

37. GCR 80 provides therefore that the organising permit, together with a copy of the SR's will be returned by MSA to the organising committee. It provides as follows:

"80. ISSUE OF AN ORGANISING PERMIT

The draft copy of the SRs (corrected if necessary) will be returned with the organising permit. Permits for International events will only be issued for events inscribed on an International calendar and only after the full inscription and permit fees have been paid."

(see GCR 80)

38. To ensure that there is certainty as to the "rules of the game" to entrants, GCR 84 provides that prior to the receipt of entries there **shall be published the MSA approved SR's**. The GCR provides as follows:

"84. OFFICIAL DOCUMENTS

The following shall be published prior to the receipt of entries:

- i) MSA approved SRs for the competition or various competitions forming part of a meeting. These shall conform to and not conflict with the relevant CSI's (where applicable), GCR's, SSR's and any official communications issued by MSA;*
- ii) a draft timetable;*
- iii) an entry form complying with GCR's 91, 92 and 93."*

(see GCR 84)

(Underlining – Emphasis by the NCA)

39. Any alteration to the SR's can only take place pursuant to the provisions of GCR

88, that provides as follows:

“88. ALTERATION TO THE SRs

No alteration or addition shall be made to the SRs (except if this relates to the race programme or the list of race officials) after the date listed for the closing of entries unless ALL competitors entered and MSA have agreed IN WRITING to such alteration or addition prior to the start of scrutineering or, after the beginning of documentation, ALL the competitors and the Stewards of the Meeting agree to such alteration or addition, IN WRITING.”

(see GCR 88)

(Underlining – Emphasis by the NCA)

40. GCR 122 demands that every person taking part in the organising of a competition and in taking part in the event, shall acquaint themselves with the GCR's. It provides as follows:

“122. ACQUAINTANCE WITH AND SUBMISSION TO THE RULES

Every person, group of persons, etc., organising a competition or taking part therein shall by doing so or by and upon applying for an organising permit, or by and upon applying for a licence from MSA or by and upon entering for a competition, be deemed to have and recognise that they have:

- i) made themselves acquainted with these rules;*
- ii) submitted themselves, without reserve, to the consequences resulting from these rules and any subsequent alteration thereof and agreed to pay as liquidated damages any fines or costs imposed upon them within the maxima set out in Appendix R;*
- iii) renounced, under pain of disqualification (see GCR 186) the right to **have recourse except with the written consent of MSA to any arbitrator or tribunal not provided for in these rules;***
- iv) agreed to exonerate and keep indemnified the promoters, MSA and its respective directors, employees, officials, their servants, agents and representatives from and against all liability whatsoever to any such person or body or group of persons respectively in respect of or in connection with any meeting, competition or event held under these rules from whatsoever cause arising or alleged to have arisen;*
- v) in the case of competitors (whether entrants, drivers or passengers)*

in competitions, agreed to exonerate and keep indemnified all other competitors, their servants or agents from and against all liability whatsoever to such entrants, vehicle owners or possessors, driver, co-drivers or passengers in connection with the driving of their vehicles or any other act, omission or occurrence during the course of a race or official practice therefor;

- vi) agreed as set out in sub-paragraph iv) and v) of this rule with each and all the persons and bodies referred to in those sub-paragraphs so that each and any of these persons and bodies shall be entitled to the benefit of such agreements;*
- vii) agreed to be examined by a Doping Control/Alcohol Control Officer prior, to, during or following a motor sporting event, meeting or competition, further agreed to allow a sample of blood and/or urine to be taken for laboratory analysis by the Doping Control/Alcohol Control Officer concerned, to determine the presence or otherwise of alcohol or prohibited drugs as listed in the MSA Anti- Doping Code in accordance with the procedures for testing as prescribed by WADA and contained in the MSA Anti-Doping Code;*
- viii) fully accepted that, should the analysis of the samples taken reveal the presence of alcohol or drugs, or the refusal to allow samples of blood and/or urine to be taken, will result in MSA taking disciplinary action as envisaged in its Anti-Doping Code - as prescribed by WADA.”*

(see GCR 122)

41. Organisers and promoters clearly play a major role in the success of motorsport events. They have very specific powers as detailed in GCR 140. The responsibilities extend over numerous criteria, but most importantly, they must ensure that the SR's and the final instructions are not in conflict with the GCR's, SSR's or any instruction issued by MSA.

(see GCR 141 and in particular GCR 144.i) and GCR 144.ii))

42. The success of motorsport events is largely determined through the attendance of qualified officials who apply the “*rules of the game*”. The involvement of officials at an event is regulated by Part VII of the GCR's. The list of officials is identified in GCR 143 and the obligations of the different officials are detailed in the GCR's.

43. The role that the Stewards play is defined in GCR's 151 and 152. The duties and authorities of the Clerk of the Course is specifically dealt with in GCR 156 and it appears therefrom that the Clerk of the Course is the supreme authority for the conduct of the meeting. The Clerk of the Course acts on behalf of the organisers and promoters.
44. Once an event is completed, there is a classification of the vehicles in terms of GCR 274 which is followed by the posting of results which are at first posted as provisional and thereafter becomes final. GCR 276 provides as follows:

"274. CLASSIFICATION

- i) The vehicles shall be classified with the one placed first which has covered the required distance in the shortest time or completed the longest distance in the allowed time, with all penalties taken into account.*
- ii) Unless the regulations provide otherwise, the sole method used for the absolute overall classification will be as follows:
To be classified as a finisher, a motor vehicle/motorcycle must have completed not less than two- thirds of the distance of the race under its own power. For lap events, the two thirds shall be calculated by rounding off to the nearest lap.*
- iii) When a race is run in more than one part, the winner is the driver and/or vehicle who/which:*
- a) completes the total prescribed distance in the least total time, or*
- b) completes the greatest total distance in the prescribed total time. In the case of a tie the classification achieved in the various facets will be considered to determine the overall classification."*

(see GCR 274)

45. An alteration to provisional results is regulated in terms of GCR 278 which provides as follows:

"278. ALTERATION OF PROVISIONAL RESULTS

Any alterations to provisional results shall be formally notified to all competitors, normally electronically. Where a competitor is excluded from the results of an event, all other competitors who finished the event behind him/her move up in the results, as though the excluded competitor had

never taken part in the event.”

(see GCR 278)

46. If no protest is filed against provisional results, they become final. In this regard, GCR 279 provides as follows:

“279. PROTESTS AGAINST PROVISIONAL RESULTS (Refer GCR 200)

If no valid protest is received after the publication of the provisional results for a competition, and after any amendments thereto, the results shall become final subject to the power held by MSA in terms of GCR 154. When results are republished the time limit for protest will be 7 (seven) working days from date of re-publication of the results. Where the results of a competition are amended by an MSA Court of Appeal/Enquiry, such amended results shall not be subject to protest. An aggrieved party’s only recourse shall be via an appeal to the MSA National Court of Appeal in accordance with GCR 212.”

(see GCR 279)

47. It is against the backdrop of these GCR’s, the SSR’s and the SR’s, that the merits must be considered.

THE MERITS

48. It is at the outset apposite to make some general observations as to the approach of parties to hearings before the NCA:

48.1 an Appellant is *dominus litus* and can present its case as it deems fit. The NCA, in granting leave to appeal on specific grounds, does not limit the NCA’s ability to look at the matter *de novo*. It is not open for a party to therefore claim that it came to the NCA unprepared. The grounds of appeal are always informed by the framework of the factual events which gave rise to a dispute and its ultimate elevation to the NCA;

48.2 GCR 208 viii) provides that all hearings and appeals are held *de novo*. That being said, there is a body of evidential material that is built up during the proceedings since an event / race incident, which are placed

before the NCA through the appeal bundle. These documents, if not particularly challenged and placed in dispute, serve before a NCA informing it of the factual events which gave rise to the dispute. It is always open for a party to challenge any specific document or part thereof. In this instance, there was no material challenge to most of the factual events. A NCA is not a court of law and whilst a certain decorum is followed;

- 48.3 the onus is on the Appellant to advance evidence / admissions as to why his appeal should succeed. To this end, the Appellant is in total control of its appeal and interested parties can raise issues which are relevant to the appeal grounds.
49. It is convenient to first deal with the incident and what followed immediately thereafter, relevant to the grounds of appeal:
- 49.1 the video footage was viewed and it was clear therefrom that the incident fall in the category of a race incident. Stated otherwise, there is no evidence that Competitor Davey intentionally collided with Competitor Theron. A split-second after contact was made between Competitor Davey and Competitor Theron, one could clearly see that Competitor Davey backed down from touching the leading vehicle again. Once the vehicle of Competitor Theron slowed down, he was passed by most of the other competitors;
- 49.2 nobody in the hearing before this NCA, contradicted the statement by Mr Van Niekerk that Competitor Theron continued to circulate for safety purposes and he was no longer competing in the race. It was explained during the hearing that slow-moving cars on the track will tend to drive on the outside of the track, affording race vehicles at speed, the opportunity to race on the inside line. In our view, the COA was accordingly wrong in finding that Competitor Theron continued to complete the race (i.e. racing).
50. The incident report was filed at 23h07. The enquiry that followed the incident report was not dealt with by the Clerk of the Course as would normally be expected. According to Mr Heroldt, he did not know about the incident report and he did not

participate in the finding. The evidence of Ms Van der Merwe is that she took the decision which constituted a single decision by a “Steward”. It is common cause that Ms Van der Merwe who was not a registered MSA Steward **for a national event**, conducted such duties during the event. There is a reason why events being part of a national championship, must be overseen by registered officials for that category. GCR 151 provides in the note that:

“151. STEWARDS

*Note: No Steward can carry out his duties in a satisfactory manner unless he has at the very least; a working knowledge of the GCR's and allied Regulations. **For National Championship events, it is compulsory for at least the MSA appointed Steward to hold a Clerk of the Course Licence, valid for that specific sport.**”*

(see GCR 151)

51. The regulations which were submitted to MSA on which basis the permit was issued, included Ian Long (“Mr Long”) as the MSA Steward, together with Ms Van der Merwe. Mr Long at the time held a Clerk of the Course licence for dirt oval racing, as is required in GCR 151. Mr Long became unavailable and was subsequently replaced by Ms Van der Merwe who, whilst she was appropriately licenced to act as Club Steward, did not hold a Clerk of the Course licence for the dirt oval racing category and was therefore not qualified to act as MSA Steward at a National Championship event.
52. The incident report, properly considered, did not take the form of a protest which would normally receive the attention of the Stewards. It was rather akin to a query to the Clerk of the Course as provided for in terms of OTR 42.1.1. It should therefore have been dealt with by the Clerk of the Course in terms of OTR 42.2 and not by either a panel of Stewards or the senior Steward acting on her own.
53. National events result in national titles and the awarding of such titles are amongst the highest categories of recognition in motorsport. MSA therefore ensures that the standard of officials at these events are met through registered officials for that category. Whilst nobody can deny the years of experience of Ms Van der Merwe as a Club Steward, she was simply not a MSA national event Steward appointed for that evening. Her decision to reinstate Competitor Theron was therefore of no force and effect.

54. The protest of Competitor Van Zummerren, called upon the Stewards to adjudicate on several aspects, including the fact that the points were posted by 23h00 and the points amendment took place at 02h00. That protest was dealt with some days later on 24 November 2017 by a panel of Stewards (Mr Long and Mr Grimbeek who was designated to assist). The protest was considered in the absence of Competitor Van Zummerren. The Stewards appointed to replace Mr Long were correctly considered to have already involved themselves in the matter and on that basis, could not properly hear the protest of Competitor Van Zummerren. GCR's 201 and 202 require that the protestor and the party protested against should be notified of the time and place of the hearings and the details of the protest. This was not followed. Indeed, no hearing took place in which Competitor Van Zummerren was afforded an opportunity to present his case.

(see GCR 201.ii) and GCR 202)

55. The decision of the Stewards dismissing the protest was therefore equally invalid.

56. All competitors and stakeholders have an entitlement to adjudication of disputes according to the "*rules of the game*". It has been suggested to us during the hearing that competitors should be excluded from involvement if there are disputes regarding organisational matters. It was moreover suggested that in view thereof that competitors signed on at the drivers briefing, they by implication accepted whatever the "*rules of the game*" were, even if amended by the organisers and promoters without express notification to competitors. It is patently obvious why the last two suggestions will bring the sport of dirt oval racing into disrepute. In the absence of a very specific recording in the sign-on sheet of an amendment to the original regulations, the sign-on sheet could never constitute compliance with GCR 88, which is further dealt with below. It should also be borne in mind that as the amendments to the regulations were made prior to the start of the scrutineering or the commencement of documentation, the amendments themselves also required the written consent of MSA.

57. Competitor Van Zummerren, in his application for leave to appeal, advanced numerous grounds to seek such leave. He, *inter alia*, advanced that:

57.1 first, that GCR 276 provided that provisional results, once they have been announced, may only be amended following a protest or be allowed for in

terms of GCR 156.x);

(see Appeal Bundle, C12)

57.2 second, that GCR 88 did not provide for the alteration of SR's and that the organisers and promoters changed the SR's by not counting all heats towards the championship, but by dropping one.

(see Appeal Bundle, C12 and C13)

58. As to the posting of results, the Result Sheet indicates that it was signed off at 23h55. It was signed by Mr Heroldt.

59. There is no evidence that a protest was filed during the provisional results period provided for in GCR 279 read with GCR 200 (thirty minutes) and the provisional results therefore became final. We have reached this conclusion, based on the following:

(see GCR 279 & GCR 200.xiii)

59.1 in the race report to MSA, which is required in terms of the GCR's, it was reported that the racing (for all categories) finished at 23h45;

59.2 the race incident which Competitor Theron complained of, was signed at 23h07;

(see Appeal Bundle, K11)

59.3 the reinstatement which was ordered by Ms Van der Merwe, was noted at 00h45;

(see Appeal Bundle, K11)

59.4 it is not probable that the amendments to the Result Sheet took place before 00h45, as the decision was only taken at that point in time. In all probability, the changes were made after 00h45;

59.5 the protest of Competitor Van Zummerren was completed by him at 02h11 and it was received by the Stewards at 02h20;

(see Appeal Bundle, K12)

59.6 it is the case of Competitor Van Zummerren that the provisional results

were inspected, signed and posted at 23h55. That coincides with the Result Sheet as previously indicated.

60. As to the second issue of the appeal, listed in paragraph 31 supra, it is common cause that the organising permit was issued to the Applicant on 17 October 2017 to hold the national event. The MSA Steward was identified as Mr Long and permit number 15179 was issued.

(see Appeal Bundle, E1)

61. After much debate, it was conceded by the Appellant that the SR's that appear on annexures "F1" to "F4" of the Appeal Bundle, were the SR's forwarded from Ms Liebenberg, the race secretary, to MSA. MSA, in turn, entered the permit number at paragraph 1.4 of annexure "F1". Mr Long was identified therein as the MSA Steward.

62. It is common cause that Ms Liebenberg was not only the race secretary of the event, but also the contact person for the Appellant and she is moreover the daughter of the owner of Tygerberg Raceway, Mr Liebenberg. Mr Liebenberg was not present during the hearing but he asked an observer, Steyn Wepener ("Mr Wepener"), to attend the hearing.

(see Appeal Bundle, F1 to F4)

63. In this appeal, the Appellant promoted its appeal and traversed all the arguments on behalf of itself and for that matter, Tygerberg Raceway. During the appeal, Mr Van Niekerk indicated that in COA 435, they were taken by surprise that that Court, dealt with the non-compliance by Tygerberg Raceway. In this appeal, it was not pursued by the Appellant that Tygerberg Raceway was not properly represented during the appeal to this Court. In view of the undisputed status of the Appellant in dirt oval racing, we find it unnecessary to deal with Tygerberg Raceway.

64. It is important to note that in paragraph 9.4 of the SR's as submitted to MSA, there was no mention of the dropping of a heat.

65. During the hearing, statements were made that there was a real risk that the event would not go ahead as a result of the lack of entries. Accordingly, the Appellant, through Ms Liebenberg, approached the clubs to solicit further interest, in the

event that a heat could be dropped. This obviously could solicit entries from competitors who may not have done well at the first event, to still stand a chance to win the National Championship. In that process, it appears that SR's which differ from annexures "F1" to "F4" were generated and distributed:

65.1 annexures "C18" to "C21" reflect SR's with no permit number on and where Ms Van der Merwe is reflected as the MSA Steward;

65.2 moreover, in paragraph 9.4, there is a material change from the earlier SR's stating "*you can throw away your weakest heat of 5 heats, cannot throw away your final heat of Tygerberg*";

65.3 paragraph 9.4 in the SR's contained in annexures "P1" and further, is materially different from paragraph 9.4 in the SR's contained in annexures "F1" to "F4".

(see Appeal Bundle, P1 to P4)

66. During the hearing, Mr Grimbeek contended that MSA staff may have "*changed*" the SR's (annexure "F"). Mr Riddell took serious issue with this and following an enquiry and consideration of the e-mails, Mr Grimbeek conceded that there was no change to the SR's by MSA's staff members.

67. GCR 88 is unequivocal as to the process to be followed in the instance of an alteration to the SR's: **ALL COMPETITORS AND THE STEWARDS OF THE MEETING, MUST AGREE TO AN ALTERATION IN WRITING**. This did not happen. The Appellant could not produce proof of such an alteration. The high-mark of Mr Van Niekerk's argument in this regard was that one should make an inference from the facts that the competitors accepted the SR's as they were on the day as they attended the driver's briefing and signed on. This argument cannot be sustained:

67.1 a national championship requires certainty as to the "*rules of the game*";

67.2 all stakeholders sign on for a national championship and obtain a licence based on the "*rules of the game*";

67.3 once the SR's are accepted by MSA and they are published under

authority of an organising permit, they cannot be altered, but for the manner described in GCR 88;

- 67.4 there is no basis to resort to inferential reasoning as to making inferences from the conduct of competitors to meet the strict requirement of GCR 88.
68. The motivation by the race secretary, organisers and promoters, to solicit interest and to change the SR's may have been well intended, but they fundamentally changed the rules of engagement which were laid down by the organisers and promoters themselves.
69. Accordingly, the dropping of a heat cannot be implemented based on an alteration of a SR that did not comply with the rules. The changes to the SR's were never submitted to MSA or signed off by them.

FINDINGS

70. The NCA finds that:

- 70.1 Tygerberg Raceway was sufficiently represented at this NCA through the attendance of the race secretary Ms Liebenberg and the observer, Mr Wepener. There was no application from them for a postponement. On all the evidence, they were fully aware that this hearing was taking place. COA 435 did not hand down any sanction against Tygerberg Raceway and there is no necessity to make any further finding in this regard;
- 70.2 the organising permit and SR's which were returned to the organisers and promoters are those included in the Appeal Bundle as annexures "F1" to "F4" and no amendment entitled the organisers and promoters to drop one of the heats;
- 70.3 the Appellant contravened GCR 78 and GCR 88. The appeal fails on this ground. Whilst the conduct of the organisers and promoters of the event may be criticised for not being in strict compliance with the "*rules of the game*", there is no evidence that they acted maliciously or in flagrant disregard of these rules. The fine of R10 000.00 which was imposed on

the Appellant by the COA was unnecessarily harsh and the sentence is suspended for a period of three years on condition that the Appellant is not again held to be in breach of GCR 78 and GCR 88, within the period of suspension. This Court finds it unnecessary to deal with Tygerberg Raceway notwithstanding that it was referred to as the “*organising club / promoter*”;

- 70.4 the penalty imposed on the Clerk of the Course is set aside. The evidence of Mr Heroldt was that he did not know of the incident report until he was called to meet with Ms Van der Merwe. By that point the reinstatement decision was made. The COA criticised Mr Heroldt that he erred in the application of his duties. This finding is too general and non-specific and the sanction against him cannot be sustained;
- 70.5 as to Mr Van Niekerk’s conduct, we are of the view that there is likewise no specific evidence against him as to why he should be singled out to write the oval examination or be sanctioned. The directive is therefore set aside. Insofar as he will continue to act as an official, we have no doubt that he will take note of the consequences of the events that followed the incident and how the matter was dealt with. The training of officials and a thorough knowledge of the “*rules of the game*”, will ensure a high standard of motorsport administration which must be pursued by all stakeholders;
- 70.6 Ms Van der Merwe was not a registered national official for dirt oval racing, at the time when she executed duties and reinstated Competitor Theron. The appeal fails on this ground but no order is made to compel Ms Van der Merwe to submit to examination;
- 70.7 the reinstatement of Competitor Theron and the exclusion of Competitor Davey therefore cannot be sustained. The appeal fails in this regard;
- 70.8 the organisers are instructed to score the 2.1 class of the event which featured in this appeal, based on the SR’s contained in the Appeal Bundle as annexures “F1” to “F4”;
- 70.9 the order that 50% of the appeal fee be returned to Competitor Van

Zummerren is confirmed as he was partially succesful in his appeal to COA 435;

70.10 the award of costs of R3 000.00 against DO4SA in COA 435, is confirmed;

70.11 further costs of R5 000.00 of this NCA is awarded against the Appellant, DO4SA.

RECOMMENDATION

71. It is recommended to MSA that all permits be issued with reference to specific attached SR's and that the permit and SR's be numbered numerically and consecutively, when issued by MSA.

GENERAL

72. All parties and attendees are thanked for the courteous manner in which they engaged with each other during the appeal hearing before this NCA.

HANDED DOWN AT CAPE TOWN ON THIS THE 04TH DAY OF APRIL 2018.

Electronically Signed

**Adv André P Bezuidenhout
Court President**

Electronically Signed

**Mr Steve Harding
Court Member**