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MSA NATIONAL COURT OF APPEAL 183

HEARING WAS HELD VIA ZOOM ON 14 AUGUST 2024 AT 17H30

Court:	Adv. Pierre De Waal SC	-	Court President
	Mr. Steve Harding	-	Court Member
	Mr. Steve Miller	-	Court Member
In Attendance:	Mrs. Jacky Billau	-	Appellant and Mother of Logan Billau
	Mr. Greg Billau	-	Appellant and Father of Logan Billau
	Mr. Tristan Marot	-	Legal Representative for the Appellant
	Mr. Mark Cronje	-	Respondent and Father of Noah Cronje
	Mr. Michael North	-	Legal Representative for the Respondent
	Mr. Luan Oelofse	-	Clerk of the Course
	Mr. Ian Richards	-	MSA Steward
	Mr. Craig Martin	-	Club Steward
	Mr. Vic Maharaj	-	MSA Sporting Services Manager
	Ms. Samantha Van Reenen	-	MSA Sporting Services Manager – Cars, Karting and Legal
	Mrs. Allison Vogelsang	-	MSA Circuit Sport Coordinator

JUDGEMENT

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1. This appeal was heard virtually.

2. There was no objection to the composition of the court. All applicable appeal fees have been paid and the appeal is not inadmissible.

3. Background:

3.1 This appeal relates to an incident between competitor no 68 and competitor no 24 in the second last lap of race 3 of the Kid Rok race at round two of the Rok Cup National Karting Championship ("the event") held at the Vereeniging Kart Club on 17 and 18 May 2024.

3.2 Competitor no 68 is Master Logan Billau ("Billau"), the son of the appellants, Mr and Ms Billau ("the appellants") who act in their representative capacity on his behalf. Competitor no 24 is Master Noah Cronje ("Cronje") who is represented herein by his father, Mr Mark Cronje ("the respondent").

3.3 The appellants and the respondent were represented by legal representatives. Mr T. Marot of Norton Rose Fulbright South Africa Inc appeared for the appellants. Mr M North of Hector North Inc appeared for the respondent. This court is indebted to both attorneys for their able assistance, and their diligent compliance with directives from the court. They also contributed greatly to an expedient resolution of the matter by agreeing to argue the matter before the court on the basis of the video footage. They were *ad idem* that any verbal testimony would probably be irrelevant and/or inadmissible given the very limited factual dispute.

3.4 On the approach to turn 14 Cronje was in the lead closely followed by Billau. As Cronje moved to his left to prepare his turn to the right into the corner, Billau moved to his inside to overtake. The two karts touched ("the first contact") but both succeeded in negotiating the turn onto the straight which followed. On the entry onto the straight the karts touched again ("the second contact") and became momentarily entangled causing both to leave the circuit and move onto the grass on the left. Cronje rejoined the circuit behind Billau and a third competitor, who passed both on the straight, probably as a result of the second touch and the entanglement. The third competitor fortuitously inherited the lead as a result of one or both contacts between the karts in front of him.

3.5 An incident report was submitted by Cronje. Mr Oelofse, the CoC, after a hearing attended by both drivers and their respective entrants, determined that Billau's driving fell foul of SSR 9 d) of the applicable MSA National ROK Karting Standard Supplementary Regulations 2024 (Version 2)("the SSRs") in that the second contact constituted a "push-out" by Billau with a disadvantage to Cronje attracting the prescribed 5 place penalty. That was the penalty he imposed on Billau.

3.6 Billau lodged a protest which was heard by the Stewards in the absence of Cronje and his entrant or parent. They, *inter alia*, upheld the protest and directed the results to be revised accordingly.

3.7 Cronje represented by the respondent lodged an appeal against the finding of the Stewards. MSA Court of Appeal 183 ("the COA") upheld the appeal and, *inter alia*, reinstated the 5-place penalty on Billau.

3.8 Leave to appeal against the upholding of the appeal and reinstatement of the 5-place penalty by the COA was granted by the National Court of Appeal ("the NCA") to the appellants on behalf of Billau. The appeal fees have been paid and that the appeal is properly before this court.

4. The extensive video material available was not disputed. It consisted of several video clips (including on-board footage from both karts involved) from different angles in real time and in slow-motion. The entire matter was argued and ultimately decided by this court on the basis of this footage.

5. The issue to be decided by this court:

   5.1. This appeal was a hearing *de novo* as required and prescribed by GCR 208 viii).

   5.2. The issue to be decided was whether the appellants' protest to the 5-place penalty imposed on Billau by the CoC for a "push-out" as defined in the SSRs, was well-founded and ought to have succeeded. This concerns the second contact during the incident. Put differently, was this decision of the CoC correct or not?

   5.3. It is apposite to mention that this court deems it unnecessary to decide whether the first contact during the incident constituted a contravention of SSR 9 d) being "edging-in". No adverse finding against either driver was made thereanent at the time. Its relevance to the overall incident and the role it played in the second contact is dealt with below. This too was an aspect which the attorneys agreed with.

6. The findings of this court:

   6.1. The facts in this matter are largely, if not completely, common cause given the video material which was available to the court. The differences between the parties relate to the interpretation of the video evidence, particularly on the actions of the two karts after the first contact.

   6.2. Mr Marot for the appellants contended in essence that Billau had executed a fair and safe overtake of Cronje into corner 14. He was entitled to proceed on the "racing line" and he had left Cronje sufficient berth in order for both to have continued along the straight. But for Cronje's failure to give way to the left and his active movement to his right, the second contact would not have happened. Billau, so he argued, did not fall foul of the prohibition of "push-out" as defined in the relevant SSRs. The second contact was entirely to be blamed on Cronje.

   6.3. Mr North for the respondent contended in essence that the overtaking maneuver by Billau on the inside, apart from also constituting "edge-into" as defined in the SSRs, put him on an inevitable collision course with Cronje evidenced by the movement of Billau's kart diagonally across the circuit to the point where the second contact and entanglement occurred.

   6.4. The totality of the video evidence, which all the members of the court studied carefully and repeatedly, and particularly the video depicting the karts entering and exiting corner 14 cannot be any clearer.

   6.5. On exiting the corner Billau clearly moved substantially across the circuit towards the outside of the short straight, probably forced by the speed at which and the line on which he chose to enter the corner (and which led to the first contact). Cronje stayed on the outside and was forced to straighten his kart to continue down the straight.

The left wheels of his kart were almost on the painted kerb to his left when he entered the straight as the second contact occurred.

6.6. It is abundantly clear that Billau's actions into corner 14 placed him on the horns of a dilemma unless he significantly reduced speed, which would have defeated the purpose of his intent to overtake Cronje into the corner. There was nothing which Cronje could do to avoid the second contact other than to have lifted off completely well before the point of the second contact. This implies that he ought to have predicted in the seconds leading up to the second contact that Billau would be moving across the circuit to the extent that he ultimately did.

6.7. Cognisant of the fact that this was a race where the person overtaking bears the primary duty to ensure that it could be executed safely and without contact (either whilst overtaking or thereafter), Cronje is not to blame for not having slowed down prior to the second contact. He had taken a wide line with ample space on the inside for Billau after the first contact. Avoidance of the second contact was entirely in the hands of Billau. He elected to take full advantage of the entry speed of his kart on a line into and out of the corner which did not leave any space for Cronje without contact being a predictable probability.

6.8. The CoC's decision that Billau's actions on the exit of corner 14 constituted a prohibited "push-out" in terms of SSR 9 d) cannot be faulted. The protest to the Stewards by Billau ought to have been dismissed with forfeiture of all fees paid. The 5-place penalty would and should accordingly have remained in place.

6.9. Another aspect needs to be dealt with. This court deems it appropriate to remind all MSA courts that a *de novo* hearing as required by GCR 208 viii) means exactly that: a new hearing where it steps into the shoes of the officials whose findings, rulings or decisions are appealed. It requires a consideration of and pronouncement on all the evidence relating to the incident as if it was in the position of the Stewards but with the advantage of less, more or the same evidence which was available to the Stewards. The Stewards were tasked to consider the decision and penalty imposed by the CoC based on a factual inquiry into the incident. That is what the COA was obliged to do. This is subject to the additional jurisdiction in terms of and as envisaged in GCR 210 iii), GCR 211 iii) and GCR 221 to consider and impose a penalty notwithstanding that no penalty was imposed by any other court.

6.10. In this instance the COA seems to have conducted a *de novo* hearing but then purposely elected to ignore the evidence regarding the incident in favour of the infringement of Cronje's right to be heard by the Stewards. It effectively found that the infringement of Cronje's rights took precedence over a consideration of the facts relating to the incident. No court of appeal, including the NCA, has the luxury of ignoring the obligation to conduct a hearing *de novo* and to make findings thereanent.

6.11. It ought to have made a finding on the evidence presented on the incident regardless of the Stewards' clear failure to comply with the GCRs to afford all interested parties to be heard. It was this failure to consider and come to a decision on the incident itself which formed the basis of leave to appeal having been granted. The members of this court served as the NCA which considered the application for leave to appeal. Absent any specific *de novo* findings on the incident, it was impossible for this court to determine whether there was any merit in the application.

6.12. The injustice which this caused to the parties is apparent. This court would probably have called for the application for leave to appeal to be supplemented with the video evidence which was or would have been available. It is probable, given that the facts which were available is now known, that leave to appeal would have been refused based on the absence of a reasonable prospect of success. Because leave was granted, the appellants were probably bolstered in their view that there was a reasonable prospect of success causing them to pay the prescribed appeal fees and to incur legal expenses to be represented. The respondent too was prejudiced in this regard. This court is convinced that these were unintended consequences not considered by the COA. Hopefully it will serve to illustrate why this should be avoided in future. It should be noted that this is not a common occurrence.

6.13. This court deemed it inappropriate in this matter to consider the appellants to pay any further costs in terms of GCR 196. Neither the appellants nor the respondent raised the issue of costs.

7. In the result the appeal is dismissed with forfeiture of all prescribed fees (protest fees and appeal fees) paid by the appellants. It is directed in terms of Appendix R that in respect of the appeal fees paid by the respondent relating to this matter which served before the COA, no more than the minimum of 10% should be deducted in respect of administrative costs, insofar as it has not already been refunded.

The date of this judgement is the 20 August 2024