REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: Electronic Reporting.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

..... .....

Case No. 48254/2011

In the matter between:

BRAD ANASSIS t/a BIKEFIN HONDA Applicant

and

THE PRESIDENT OF MSA NATIONAL COURT OF APPEAL NO. 151 1st Respondent
MOTORSPORT SOUTH AFRICA 2nd Respondent
GREG GELDENHUISE 3rd Respondent

---

JUDGMENT

---

MEYER, J

[1] The second respondent, Motorsport South Africa ('MSA'), is a body which governs motorsport in South Africa. It manages that sport *inter alia* in accordance with its 'General Competition Rules' and appendices ('GCR's'). The GCR's are contained in a

'Handbook' and constitute the terms of the contract between MSA and its licence holders. The applicant is one such licence holder. The exercise of the powers of MSA is thus described in GCR 66(i) and (ii):

> 'The sporting power delegated to MSA by the FIA, CIK and FIM shall cause MSA to constitute appropriate bodies to exercise the executive and judicial powers and functions under these rules in accordance with the MSA Articles of Association and in terms of the sporting codes of the FIA, CIK and FIM.
> Such judicial powers and functions (such as the hearing of appeals or the determination of the penalty to be inflicted for a breach of these rules) may be delegated to a tribunal or court consisting of not less than three persons appointed by MSA. The exercise of such judicial powers and functions shall be final and not subject to review except on appeal in accordance with these rules. Appeals shall be directed to MSA following the decision of a tribunal and to its National Court of Appeal against the decision of an MSA court finding.'

[2] The applicant was the appellant in appeal proceedings before MSA's National Court of Appeal (No 151). In addition to dismissing his appeal the National Court of Appeal found him guilty of a breach of GCR 206 – 'that he filed a protest in bad faith and with vexatiousness' - and issued an order in terms whereof he is precluded from participation in circuit motorcycle racing for a period of two years calculated from the date on which its findings were published by MSA, which preclusion was suspended for a period of three years on certain stringent conditions. The findings of the National Court of Appeal were published on 27 October 2011.

[3] The applicant seeks the review and setting aside of the finding that he breached GCR 206 and of the severe penalty imposed upon him as a result of that finding. The applicant does not seek to have reviewed and set aside the dismissal of his appeal. *In limine* MSA contends that the findings and orders of MSA's internal National Court of Appeal are not subject to judicial review and that the applicant has waived any right of review which he may have had.

[4] The first issue to be decided is accordingly whether the decision of MSA's National Court of Appeal is reviewable by this court in accordance with the common law principles of administrative law. Parties may incorporate the rules of natural justice expressly or by necessary implication into their contract. See: *Turner v Jockey Club of South Africa* 1974 (3) SA (A), at 646A-B; *Government of the Self-Governing Territory of Kwazulu v Mahlangu and Another* 1994 (1) SA 626 (T) at 634F – G; *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) at 1376C –F; *Klein v Dainfern College and Another* 2006 (3) SA 73 (T) para [25]; *National Horseracing Authority v Naidoo* 2010 (3) SA 182 (NPD) at 198E – 200F.

[5] It was held in *Turner*, at 646A-B, that

> '[t]he test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in *Mullin (Pty.) Ltd. v. Benade Ltd.,* 1952 (1) S.A. 211 (A.D.) at pp. 214 – 5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. *Marlin's* case, *supra* at pp. 125 – 130).'

See also: *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22(SCA), paras 28 – 29.

[6] Brand JA in *City of Cape Town (CMC Administration) v Bourbon-Leftleyh and Another NNO* 2006 (3) SA 488 (SCA), para 19, thus restated the test ordinarily applicable in the determination whether or not a proposed unexpressed term forms part of a contract:

> 'A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time.'

[7] Tindall JA in *Marlin v. Durban Turf Club and others,* 1942 A.D. 122, at 126, concluded that the expression fundamental principles of justice, when applied to the procedure of tribunals, is

> '… merely a compendious (but somewhat obscure) way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our system of law as well as the English law. Some of these principles were stated, in relation to tribunals created by statute, by Innes, C.J., in *Dabner v. South African railways,* 1920 A.D. 583, in these terms:
>
> > 'Certain elementary principles, speaking generally, they must observe: they must hear the parties concerned; these parties must have due and proper opportunity of producing their evidence and stating their contentions and the statutory duties must be honestly and impartially discharged.'

[8] Botha, JA in *Turner*, at 646D-H, said the following on the subject:

> 'What the fundamental principles of justice are which underlie our system of law, and which are to be read as tacitly included in the respondent's rules, have never been exhaustively defined and are not altogether clear. In *Russel v. Duke of Norfolk and Others,* (1949) 1 All E.R. 109, Lord Tucker said at p. 118 that -
> "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which I have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."
> The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him (*Marlin's* case, *supra* at p. 126; *Bekker v. Western Province Sports Club (Inc.),* 1972 (3) S.A. 803 (C) at p. 811). The tribunal is required to listen fairly to both sides and to observe "the principles of fair play" (*Marlin's* case, *supra* at pp. 126 and 128). In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially (*Dubner v. S.A. Railways and Harbours,* 1920 A.D. 583 at p. 589). They require also that the tribunal's finding of the facts on which its decision is to be based shall be "fair and *bona fide"* (*Jockey Club of S.A.*

> *v. Transvaal Racing Club, supra* at p. 450). It is, in other words, "under an obligation to act honestly and in good faith *(Maclean v. Workers' Union, supra* at p. 623)."

[9] The concept of the fundamental principles of justice as applicable to domestic tribunals is an elastic one and the courts have in certain circumstances introduced 'further ingredients' into it, such as the holding of a fair hearing - procedural fairness and substantive fairness - before disciplinary action is taken where a contracting party is not on equal bargaining par with the other (*per* CJ Claassen, J in *Klein v Dainfern College and Another* 2006 (3) SA 73 (T), paras 16 – 17), and rationality, which '… would particularly be apposite in a complex case where a reviewing court would be in exactly the same position to assess the objective evidence in the case and would be able to conclude that the decision made is rational in relation to the evidence laid before the tribunal' (*per* Levinsohn, DJP in *Naidoo*, paras 10 – 12).

[10] It is accordingly necessary to examine the applicable express terms of the contract and the relevant circumstances in order to ascertain whether the parties have expressly or by necessary implication included any or all of the fundamental principles of natural justice into their contract or whether they have excluded or modified any or all them.

[11] Prof Cora Hoexter *Administrative Law in South Africa* 2nd Ed, at 443 – 444, in my view correctly points out that our courts

> '… for well over a century … have been prepared to apply the requirements of fairness in disciplinary settings founded on contract, irrespective of the 'public' or 'private' nature of the body concerned. Because of the propensity of disciplinary and punitive decisions to cause harm to people's reputations and livelihoods, procedural fairness has been held applicable to the disciplinary proceedings of churches, unions, professional associations (such as the Jockey Club), privately owned schools and various other bodies. More

> recently there has been mention in disciplinary cases of the broader rationale of unequal bargaining power in the context of coercive action. The courts have also recognised that the contract between the parties may exclude procedural fairness.'

Footnotes omitted.

[12] In considering the question whether the disciplinary powers of major sporting bodies – in that instance the National Horseracing Authority - are to be classified as being the exercise of public powers and therefore administrative action under the umbrella of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), a question which I do not need to consider, Wallis J in in *Naidoo*, paras [22] and [23], *inter alia* said the following about sport and sporting bodies:

> 'Sport has a substantial influence in our society and can involve substantial sums of money as well as exercising control over who may earn their living from involvement in sporting activities. …'
> 'On the other hand larger sporting bodies operating in relation to major sports such as horseracing, football, cricket and rugby … exercise a virtually monopolistic control over all aspects of those sports from junior to national levels and are active in the international sphere. Public interest in those sports is massive and the amounts of money generated by these sporting activities are very considerable. A person excluded by one of these sporting bodies from participation in their sport is effectively deprived of their livelihood. …'

[13] MSA exercises control over motorsport in South Africa. It is stated in its answering affidavit that MSA '… is the sole sporting authority in South Africa which has been appointed by, and carries the authority of, the major international motor sporting bodies including the FIA, CIK and FIM. As such it is the sporting authority in South Africa under which all recognised motor sport falls.'

[14] Hearings, including disciplinary and punitive hearings, are in the first instance conducted by MSA's Clerk of the Course, Stewards/Jury, tribunals or Courts of enquiry. They act as courts of first instance. The penalties imposed by them or their decisions

are generally subject to internal appeal. Appeals to be considered during an event against decisions of the Stewards on a protest are dealt with by tribunals. Internal appeals are otherwise dealt with first by a MSA Court of Appeal and in the final instance by a National Court of Appeal. 'A dispute may only be submitted to a MSA Court of Appeal after the matter has been considered by a tribunal, or in cases where an appeal is lodged against a decision of the Stewards, and such appeal is not heard at the time of the event by a tribunal in terms of GCR 214 A.' (GCR 208(iv)) 'Appeals which are not considered during the event and which are against decisions of the Stewards on a protest where such tribunals do not exist, are to be dealt with by MSA Courts of Appeal.' (GCR 208(vii)) 'MSA through its National Court of Appeal constitutes for its own licence holders a final court of judgment empowered to settle finally any dispute or appeal which occurs in its own territory. If any dispute occurs between a member, club or body bound to MSA, and MSA itself, which has not been resolved by an MSA Appeal Court, this must be treated as an appeal to this court, which will render the final decision.' (GCR 208(i)) 'Subject to the provisions of this GCR no dispute may be submitted to the National Court of Appeal unless such a matter has been considered by the MSA Court of Appeal. (GCR 208(iii))

[15] It is clear from a reading of the relevant GCR's that many of the principles of natural justice have expressly been included in the contract between MSA and its licence holders insofar as the proceedings before Stewards, an MSA Court of Appeal and a National Court of Appeal are concerned. The procedures adopted in respect of the proceedings before these administrative tribunals afford the persons concerned a proper hearing. Expressly provided for in the GCR's are *inter alia* prior notifications of the time

and place of a protest hearing and of the details of a protest (GCR 201(ii); prior (generally a minimum of 7 days) notice of hearings before the MSA Court of Appeal and the National Court of Appeal (GCR 220); prior written specification of the decision appealed against and of the grounds of appeal (GCR's 214E(ii) and 219(i)); representation by fellow competitors or club/association members in proceedings before Stewards and the MSA Court of Appeal and of legal representation in proceedings before the National Court of Appeal (GCR's 202 and 220); an opportunity of stating their cases, of producing evidence, and of calling witnesses (GCR's 202 and 220); an opportunity of correcting or contradicting prejudicial statements or allegations (GCR's 202 and 220); an opportunity of testing the veracity of evidence through cross-examination (GCR's 202 and 220); the appointment of members to preside in National Court of Appeal hearings who have not been involved with the competition in question, who have not participated in any earlier decision and who have no conflict of interest with the matter under consideration (GCR 209).

[16] In applying the officious bystander test I am of the view that the fundamental principles of justice that are not expressly included in the contract between MSA and its licence holders - including the ingredients of procedural fairness, of substantive fairness and of rationality – have by necessary implication also been included, particularly insofar as the proceedings before an MSA National Court of Appeal are concerned.

[17] I am accordingly of the view that derived from the express and implied terms of the contract between MSA and its licence holders is the obligation of MSA's National Court of Appeal to observe the elementary principles of justice. Its actions are subject to review on the basis of common law administrative principles. Insofar as Blieden J in

*Hare v The President of the National Court of Appeal & Motorsport South Africa* (unreported SGHC 09/2058) considered the same contract as the one presently under consideration, I respectfully disagree with his finding that it '… does not incorporate, as one of its terms, the application of any administrative law rules.'

[18] MSA contends that the applicant has expressly waived or renounced any right of review by virtue of the provisions of the GCR's in terms whereof the parties agreed that the exercise of the judicial powers and functions by its internal tribunals '… shall be final and not subject to review except on appeal in accordance with these rules' (GCR 66(ii)); that MSA, through its national court of appeal, constitutes for its own licence holders '… a final court of judgment empowered to settle finally any dispute or appeal which occurs in its own territory' (GCR 208(i)); and that the applicant expressly '… renounced, under pain of disqualification (see GCR186) the right to have recourse except with the written consent of MSA to any arbitrator or tribunal not provided for in these rules …' (GCR 122(iii)). There is in my view no merit in MSA's contention in this regard.

[19] The MSA rules or GCR's provide for the exercise of 'judicial' powers and functions, such as the determination of the penalty to be imposed for a breach of the rules and the hearing of appeals, internally by MSA tribunals in accordance with the GCR's. A party's recourse is internal – following the decision of a tribunal, which is a 'court of first instance' to a MSA Court of Appeal and against the decision of a MSA Court of Appeal finding to the National Court of appeal – and not by way of external review or recourse 'to any arbitrator or tribunal' not provided for in the rules or GCR's. The GCR's do not contemplate the exercise of an unfettered discretion by MSA's internal National Court of Appeal or for it to disregard or to act in breach of the provisions of the

MSA rules or GCR's in the exercise of its 'judicial' powers. The GCR's upon which MSA relies in support of its contention of a waiver or renunciation of any right of judicial review by this court do not preclude nor do they even limit the review jurisdiction of this court in circumstances where the complaints are that the action of its internal court of final instance is in violation of the principles of natural justice which governed its proceedings and that it disregarded or acted in breach of the provisions of the GCR's in the exercise of its 'judicial' powers.

[20] The history of the relevant events which preceded the applicant's appeal before the MSA National Court of Appeal is essentially not contentious. MSA *inter alia* oversees the circuit motorcycle racing series known as the 'South African Superbike Championship Series'. It is described in MSA's answering affidavit as '…a particularly competitive and technologically advanced racing series.' The applicant and the third respondent are both experienced entrants in Superbike racing. The applicant represents and enters Honda motorcycles in the series and the third respondent BMW motorcycles. They participated in the 2010 series which consisted of a number of races that were held at different venues from February to November 2010.

[21] One of the motorcycle racing events took place in East London at the weekend of 29 and 30 October 2010. On 29 October 2010 the applicant lodged a protest against the third respondent's BMW motorcycle no 34 that participated in that race. I interpolate to refer to certain GCR's that are applicable to protests.

[22] 'The right to protest lies solely with any competitor or official who may consider himself/herself aggrieved by any decision, act or omission of an organiser, official,

competitor, driver or other person connected with any competition in which he/she is or has been taking part/officiated in.' (GCR 197) 'A protest to be considered by the Stewards/Jury must be lodged directly with the Stewards/Jury or the Clerk of the Course, his deputy or the Secretary of the Meeting.' (GCR 198(i)) 'Every protest shall be in writing, stating the name and address of the protestor, the grounds for the protest, be signed by the competitor or driver making the protest, be accompanied by the fee laid down in Appendix R, and be lodged within the appropriate time limit as specified below.' (GCR 198(ii)) The time limits for protests are set out in GCR 200. The Stewards or Jury '… shall consider all protests as urgent. They shall take steps as soon as possible to convene a hearing.' (GCR 201(i)) 'They shall personally or through the Clerk of the Course, notify the protestor and the party(ies) protested against of the time and place of such hearing and the details of the protest.' (GCR 201(ii))

[23] 'The merits of, or grounds for a protest, may not be heard before they have established that the protest is in writing, is accompanied by the correct fee and has been timeously lodged. They may not however, give a finding in this regard without first giving the protestor an opportunity to state why the protest appears to have been incorrectly lodged in terms of GCR 198 or appears inadmissible in terms of GCR 203.' A protest shall, in terms of GCR 203, be inadmissible *inter alia* 'if it is late'. 'The protestor shall also be given an opportunity to call witnesses in support of his argument. The finding shall be given solely on the admissibility of hearing the protest. A protestor dissatisfied with the findings of the Stewards of the Meeting or Jury as the case may be, may appeal to a higher court. Only where a finding in favour of the protestor/appellant has been given, may the grounds of the protest be dealt with. The Appeal Court, if finding that in

the circumstances prevailing at the time, the protest was correctly lodged, shall refer the grounds of the protest to the Stewards of the Meeting for hearing.' (GCR 201(iv)).

[24] 'If a protest fails or is judged by the Stewards of the Meeting to be in bad faith, frivolous or vexatious, the protest fee shall be retained and forwarded to MSA where it will be used for the promotion of its championships or prize-givings. It shall not be treated as revenue (see GCR 181).' (GCR 205) 'If it is proved to the satisfaction of the Stewards of the Meeting that a protest is in bad faith, frivolous or vexatious, the protestor shall be deemed guilty of a breach of these rules and may be penalized accordingly. Such penalty shall be over and above the forfeiture of the protest fee referred to in GCR 205.' (GCR 206)

[25] The applicant's protest concerned 'homologation and validation' of the 'CDI unit' of BMW motorcycle no 34 and its alleged technical non-compliance in certain respects. The findings of the Stewards were that BMW motorcycle no 34 was '… found not to be compliant as per the technical requirements in the Circuit Racing Handbook and relevant GCR's.' They excluded BMW motorcycle no 34 from that day's racing event … ' and they required BMW to be compliant by the next race meeting on the 27th November 2010. The applicant's protest fee was returned.

[26] The third respondent noted an appeal to an MSA Court of Appeal (COA378) against the findings of and penalty imposed by the Stewards. The MSA Court of Appeal heard the third respondent's appeal on 9 November 2010. It *inter alia* found that the applicant's protest relating to 'homologation and validation' was 'time-barred'. It overturned the exclusion of BMW motorcycle no 34 and the points scored by the

competitor on the day were reinstated. The MSA Court of Appeal found BMW motorcycle no 34 to have been in technical non-compliance in one respect. It, however, found that no performance benefit had been derived as a result thereof and it imposed a fine of R500.00.

[27] The applicant then submitted an appeal to MSA's National Court of Appeal against the findings of and penalty imposed by the MSA Court of Appeal. The hearing of the applicant's appeal by the National Court of Appeal (No. 151) was scheduled for 30 May 2011. Counsel for the applicant applied orally for an amendment of the applicant's notice of appeal to include a ground of appeal that the MSA Court of Appeal erred in finding that the protest relating to homologation was time-barred, and such amendment was granted. The President of the National Court of Appeal raised the issue of 'time-barring' and a question whether the original protest was not a vexatious one in terms of GCR 206, which question did not form part of the applicant's grounds of appeal, with the legal representatives of the applicant and of the third respondent as matters that ought to be heard first. The applicant's counsel applied for and was granted a postponement of the appeal hearing.

[28] The hearing of the applicant's appeal by the National Court of Appeal was subsequently scheduled for hearing on 20 July 2011. At the commencement of the hearing the applicant's counsel moved the applicant's formal application for the recusal of two of the three presiding members of the National Court of Appeal. The application was argued and dismissed. The applicant's counsel applied for another postponement of the appeal hearing to afford the applicant an opportunity to consider his position in the light of the dismissal of the recusal application. The legal representatives of both the

applicant and of the third respondent addressed the National Court of Appeal on the issue of a postponement and it was refused. At that stage of the proceedings the applicant's counsel advised the presiding members of the National Court of Appeal of the applicant's election to terminate his further participation in the appeal. His legal representatives excused themselves from further attendance and they did not participate further in the hearing. MSA's contention in its answering affidavit '…that in the circumstances the applicant abandoned his appeal by walking out of the hearing on 20 July 2011' is undisputed. The presiding members of the National Court of Appeal deliberated on and considered the matter in the absence of the applicant. It dismissed the appeal and reserved '…all other outstanding issues.'

[29] The written findings and orders of the National Court of Appeal and its reasons therefor were published on 27 October 2011. Its findings were recorded as follows:

> '1. The appellant's appeal is dismissed.
> 2. The appellant is found to be guilty of a breach of GCR 206 in that it filed a protest in bad faith and with vexatiousness.
> 3. The appellant as an entrant is precluded from participation in circuit motorcycle racing for a period of 2 years calculated from the date on which these findings are published by MSA.
> 4. The preclusion referred to in paragraph 3 is suspended for a period of3 years on condition that:
>  4.1 the applicant is not again found guilty of a breach of GCR 206 or any other breach of the rules where it is found that it acted in bad faith or with vexatiousness or pursued frivolous issues;
>  4.2 the appellant pays an amount of R147 060-00 in respect of the respondent's costs, such payment to be made within 48 hours (from the date and time of publishing these findings by MSA as set out in paragraph 3 above) as stipulated and contemplated in GCR's 196 and 222;
>  4.3 payment of the amount of R147 060-00 is made directly to Marais Attorneys, First National Bank – Table View, account number 62025273252, branch code 203809;

4.4 proof of payment (whether by cash, cheque or EFT), be furnished by fax or e-mail to MSA and Marais Attorneys;

4.5 any and all other amounts payable by the appellant be paid within the time period permitted in terms of these findings.

5. The appellant's appeal fee of R15 000.00 is forfeited in terms of paragraph iii) of the "Notes" to article 13 of Appendix R.

6. It is confirmed, for the sake of clarity, that the appellant's protest fee of R5 000-00 is forfeited and payable to MSA (in so far as it has not been paid) as if it is an order for payment in respect of costs, which is to be made within the period as contemplated in GCR's 196 and 222.'

[30] GCR 208(viii) provides that all hearings and appeals in terms of MSA's handbook '… are held *de novo*.' I accept that the applicant's appeal before the National Court of Appeal is an appeal in the wide sense of a rehearing with or without additional information or evidence. See: *Tikly v Johannes NO* 1963 (2) SA 588 (T), at 590F – 591A. GCR 214E(i) requires *inter alia* that a 'formulated appeal' be lodged within seven days of the written announcement of the MSA Court of Appeal where an appeal arises from its decision. GCR 214E(ii) requires that every notice of intention to appeal, application for leave to appeal or appeal be in writing. GCR 219(i) requires that all appeals specify '…the decision appealed against and the grounds of appeal …'. An appeal submission which fails to comply with the conditions that prescribe the form, content and lodging procedures is, in terms of GCR 216(v), inadmissible. The specification by an appellant of the decision appealed against and the grounds of its appeal defines the ambit of the appeal, which is a rehearing relating to the issue whether an appellant should succeed for the reasons it has advanced. See: *Groenewald NO v M5 Developments (Cape) Pty Ltd* 2010 (5) SA 82 (SCA), para 24.

[31] There is no suggestion that it was proved to the satisfaction of the Stewards that the applicant's protest was in bad faith, frivolous or vexatious or that it was judged by the Stewards to have been such. The applicant was also not penalised for any such breach of the GCR's. The third respondent's appeal to the MSA Court of appeal did not concern any such finding or any failure by the Stewards to have made such a finding or to have imposed a penalty upon the applicant as a result of his breach of GCR 206. The MSA Court of Appeal also did not find that the appellant's protest was in bad faith, frivolous or vexatious nor did it impose a penalty upon the applicant for any such breach of the GCR's. The applicant's formulated appeal to the National Court of Appeal, which arose from the decision of the MSA Court of Appeal, did not concern any such finding or the imposition of any such penalty by the MSA Court of Appeal. The issue of a breach by the applicant of the provisions of GCR 206 was never submitted to any of the MSA courts of first instance or to its appeal tribunals.

[32] MSA through its National Court of Appeal has disregarded the provisions of its own GCR's in *mero motu* finding the applicant to be '… guilty of a breach of GCR 206 in that it filed a protest in bad faith and with vexatiousness' and in imposing a severe penalty upon the applicant as a result thereof. The applicant is obviously prejudiced by this disregard of the rules. Compare: *Rowles v Jockey Club of S.A. and Others* 1954 (1) SA 363 (A), at 369E. The National Court of Appeal, as a creature of the MSA rules or GCR's, had no power to make such finding and to impose such penalty. It also violated the fundamental principles of procedural and substantive fairness. Its finding and penalty imposed are furthermore not rational in relation to the dispute between the

applicant and the third respondent as formulated in the applicant's notice of appeal which it was enjoined to 'settle finally'.

[33] The finding of MSA's National Court of Appeal that the applicant breached GCR 206 and the severe penalty imposed upon him as a result of that finding must accordingly be set aside. It is not necessary for me to consider the applicant's other grounds for review.

[34] In the result the following order is made:

1. The finding in paragraph 2 and the penalty imposed upon the applicant in paragraphs 3 and 4 of the order/findings of the second respondent's National Court of Appeal No 151 published on 27 October 2011, a copy of which is annexed to the founding affidavit marked 'C', is reviewed and set aside.

2. The second respondent is ordered to pay to the applicant the costs of the application.

P.A. MEYER
JUDGE OF THE HIGH COURT

22 March 2013

| | |
|---|---|
| Date of hearing: | 11 March 2013 |
| Date of judgment: | 22 March 2013 |
| Applicant's counsel: | Adv ARG Mundell SC |
| Applicant's attorneys: | Schwarz-North Inc.<br>Dunkeld West<br>Ref: Messrs H North and M North |
| Respondent's counsel: | Adv J Both SC |
| Respondent's attorneys: | Moodie & Robertson<br>Johannesburg<br>Ref: Mr C Beckenstrater |