

INTRODUCTION

[1] This is an application seeking to review and set aside the sanctions imposed on the applicants by the respondent as published on 11 July 2022, pursuant to an enquiry held by respondent on 7 July 2022.

[2] Respondent is a motorsport organization which has, according to its General Race Regulations (“GRRs”), the aim of administering, managing, promoting, developing and growing motorsport in all its facets in South Africa and internationally. On 9 March 2022 first and third applicants’ son (“M”) was issued with a karting licence to participate in race meetings held under the auspices of the respondent. The terms and conditions upon which the licence was issued were, and which were signed by M, were inter alia the following:

“I, hereby upon submission of this application accept all the regulations applicable to the rules and regulations governed by the category of motorsport I wish to compete in under the governance of WOMZA regulations. Furthermore I accept that WOMZA may take action against me as a competitor, or my legal guardian and/or parent if any information is incorrect on this application including the breach of the regulations. Additionally bringing the sport into disrepute in any form is an automatic ban of a 3-month period and may be extended, each case will be dealt with on merit based.” (sic)

[3] On 26 June 2022, during a race meeting held at Benoni, M was penalized with a six-point deduction from his 12 penalty points. If a competitor is penalized by the deduction of all 12 points, he/she is automatically banned from racing for 3 months. The nature of the

transgression for which M was penalized is not relevant to this judgment.

THE ENQUIRY

[4] On 30 June 2022 first applicant and M received a letter from the respondent, which had also been addressed to two other competitors and to 5 persons who officiated at the race meeting. Respondent advised that a 'Court of Enquiry' would be held on 7 July 2022. The purpose was to investigate all incidents that occurred at the race meeting to which I referred above, and all transgressions of the Standard Karting Regulations ("SKRs"). Significantly, no notice was sent to third applicant.

[5] The notice advised the addressees that 'court' members were instructed to investigate the incidents that happened on 26 June. Competitors and officials were invited to submit reports, video footage and any other material relating to the incident. Respondent also advised that it had appointed a legal representative to serve on the 'court', and that should any of the invitees wish to be represented by an attorney, they were to advise the respondent accordingly in advance.

[6] On 5 July 2022 applicants' attorney wrote to respondent disputing that respondent was entitled, in terms of its GRRs, to convene a 'court of enquiry'. Respondent replied on the same date. In its reply respondent said the following:

[6.1] That the phrase “court of enquiry” was a bad choice of words;

[6.2] That “by no stretch of the imagination would this be a court or judicial process where rights of individuals will be affected”;

[6.3] The purpose of the enquiry was to give all concerned an opportunity to present their version of the events, and to submit whatever evidence they wished;

[6.4] The panel of members would consider the evidence presented to it and would make a recommendation to respondent.

[7] Having taken legal advice, applicants chose not to attend the enquiry. On 11 July 2022 respondent advised all three applicants that the panel had considered the race incident, as well as the subsequent behaviour of competitors and their guardians, and had decided to sanction applicants as follows:

[7.1] M’s race licence was suspended until 31 July 2022;

[7.2] First applicant was banned from all race meeting until 31 December 2022;

[7.3] Third applicant was handed a ‘suspended sanction’ which meant that if she were to repeat her behaviour before 31

December 2022, M's racing licence would be suspended until that date.

[8] The regulation that is relevant to this matter is GRR 35.1 which reads as follows:

“35.1 The World of Motorsport shall be entitled to call for an enquiry into an event if it has become evident that promoters or officials or competitors have breached regulation, with these actions being detrimental towards the sport and in the absence of no action being taken by officials;”

[9] The GRRs do not provide for any sanction to be imposed if it were to be found that there had been a transgression of the regulations.

IS RESPONDENT'S CONDUCT REVIEWABLE UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 2000?

[10] Applicants have argued that the imposition of the sanctions stand to be reviewed under the provisions of The Promotion of Administrative Justice Act, 2000 (“PAJA”), alternatively under the common law. It has been acknowledged in some authorities that in certain situations a private body may be said to exercise a public function which is reviewable in terms of PAJA. In *Ndoro and Others v South African Football Association*¹ Unterhalter J said that “*it is the assumption of compulsory, coercive regulatory competence to secure public goods*

¹ 2018 (5) SA 630 (GJ)

that reach beyond mere private advancement that attract the supervisory disciplines of public law.”

[11] In *Ndoro* the learned Judge came to the conclusion that the South African Football Association, though a private body, enjoys regulatory powers that discharge public functions, which renders its actions reviewable under PAJA. I am asked to do the same in this case. As a result of the view that I take hereunder, it is not necessary for me to make a finding that the respondent's actions are reviewable under PAJA. In any event, I do not believe that I have sufficient information as to the scope and nature of the respondent's authority within the motorsport industry to do so.

REVIEW UNDER THE COMMON LAW

[12] However, the actions of a private body may also be reviewable under the common law. The relationship between M and the respondent is governed by the agreement between them. The powers of the respondent to hold an enquiry, and generally to discipline members, is derived from the agreement. As was stated in *Turner v Jockey Association of South Africa*², the normal test applies for determining whether the fundamental principles of justice are to be implied as having been tacitly included in the agreement. If a court is satisfied that the parties would have agreed, at the time of concluding the contract, that

² 1074 (3) SA 633 (A)

such a term was necessarily included in the terms of the agreement, a tacit term can be considered to have been imported into the agreement.³

DID THE AGREEMENT INCORPORATE THE PRINCIPLES OF NATURAL JUSTICE?

[13] In this case the GRRs include a number of principles of natural justice. For instance, if there is an incident at a race meeting, the event director may hold a formal hearing, consider the evidence presented to him, and come to a finding. The event director may also hear protests and appeals against such findings. The event director may impose sanctions against an offender, such as a fine, reprimand or an exclusion. The event director is obliged to provide all involved an opportunity to state their case. The GRRs make extensive provision for competitors to lodge protests against various contraventions of the GRRs. The GRRs also make extensive provision for the procedure to be followed during a hearing, and emphasis is placed on those involved being entitled to hear all the evidence presented, and to state their case. The GRRs also make provision for a court to hear appeals against a finding made at a protest hearing.

[14] Although GRR 35.1 does not provide for the procedure to be followed at an enquiry, the notice sent to M and to first applicant made it clear that the respondent envisaged a process during which each participant could hear all the evidence, present its own evidence, make

³ City of Cape Town (CMC Administration) v Bourbon-Leftleyh and Another 2006 (3) SA 488 (SCA)

submissions to the panel, and any of the participants were entitled to be represented by a legal representative. I have no doubt that the respondent envisaged that the principles of natural justice were incorporated tacitly into the contractual relationship between it and M. I shall also assume for purposes of this judgment (although I am not convinced that it is so), that despite the clumsy wording of the terms and conditions, by signing the terms and conditions M also bound first and third applicants to the contract.

DID RESPONDENT APPLY THE PRINCIPLES OF NATURAL JUSTICE?

[15] In *Turner (supra)* Botha JA remarked⁴ that the principles of natural justice have never been exhaustively defined, nor are they clear. The Court continued to say:

“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.”

[16] In *Marlin v Durban Turf Club and others*⁵ the Court said that the expression fundamental principles of justice simply mean the

⁴ At 646 D-H

⁵ 1942 A.D. 122 at 126

observance of principles of fairness in each case, For that reason, each case must be considered on its own facts.

[17] In this case, a cursory consideration of the facts show that the respondent not only failed to provide the applicants an opportunity to hear the evidence against them and to state their case, the respondent in fact misled the applicants as to the nature of the enquiry and its purpose. Firstly, third applicant was never even advised that she would also be a subject of the enquiry. The fact that she might have known that about the enquiry is not sufficient. She should have been advised that the enquiry would also focus on her alleged transgressions.

[18] Secondly, applicants were misled when they were told that the enquiry was a mere fact-finding exercise and that nobody's rights would be affected. Obviously, the purpose of the enquiry, in hindsight, was to make recommendations to the respondent regarding disciplinary steps against applicants (and other competitors). Applicants should have been told in advance what transgressions of the GRRs were being investigated, and that there was a possibility that they might face sanctions. Thirdly, it appears that the respondent, having received the recommendations from the panel, decided on the sanctions without hearing applicants, or giving them the opportunity to make submissions after consideration of the panel's findings.

[19] In my view the procedural unfairness of the process offends against the principle of natural justice that a person facing a domestic

tribunal should know what case to meet, and should have the opportunity to face his accusers and state his case. The sanctions should be set aside.

[20] The respondent argued that the application was moot, as the sanctions against M had lapsed some time ago, and the suspension of first applicant, and the suspended sanction against third applicant is due to expire within days. In my view the sanctions imposed on applicants also have a reputational impact, over and above the practical impact of the disciplinary measures. I do not believe that the sanctions should be left in place.

[21] I make the following order:

[21.1] The sanctions imposed on applicants and published by respondent are reviewed and set aside.

[21.2] The respondent shall pay the costs of the application.

**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG**

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 December 2022.

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ATTORNEYS FOR RESPONDENT: De Lange & Van Kaam Inc.

DATE HEARD: 17 November 2022

DATE OF JUDGMENT: 6 December 2022