

INTERNATIONAL COURT OF APPEAL (I.C.A.)

of the

FEDERATION INTERNATIONALE DE L'AUTOMOBILE

Appeal brought by

Automobile Competition Committee of the United States (ACCUS)

on behalf of the competitor Tanner Foust against:

- Decision N°1 taken by the Stewards of the Meeting on 14 August 2011 against Mr Tanner Foust on the occasion of the event run at Valkenswaard (Netherlands) and counting towards the 2011 FIA European Championship for Rallycross Drivers – SuperCars;**
- and the Decision handed down by the Court of Appeal of the *KNAC Nationale Autosport Federatie* (KNAF) on 26 August 2011.**

Case 1/2011

Hearing of Friday 4 November 2011 in Paris

The FIA INTERNATIONAL COURT OF APPEAL ("the Court"), made up of Mr Jan Šťovíček (Czech Republic), who was elected President, Mr Philippe Roberti de Winghe (Belgium), Mr Michael Grech (Malta) and Mr Rui Botica Santos (Portugal), met in Paris on Friday 4 November 2011 at the Fédération Internationale de l'Automobile, 8 place de la Concorde, 75008 Paris.

The Court, ruling on the appeal brought by *Automobile Competition Committee of the United States* (ACCUS) on behalf of the competitor Mr Tanner Foust (USA, licence n° R580-VR-11) (the "Appellant") against:

- on the one hand, Decision n°1 taken by the Stewards of the Meeting on 14 August 2011 against Mr Tanner Foust on the occasion of the event run at Valkenswaard (Netherlands) and counting towards the 2011 FIA European Championship for Rallycross Drivers – SuperCars (the "Event"), excluding him from the event for having ignored the black flag that had been imposed on him by the Clerk of the Course on the 3rd heat for pushing competitor n°86, continuing the race, and then striking another competitor (n°7);
- and on the other hand, against the Decision handed down by the Court of Appeal of the *KNAC Nationale Autosport Federatie* (KNAF) on 26 August 2011 declaring the appellant's appeal against the above-mentioned Stewards' Decision n°1 inadmissible.

The appeal to the Court is based on Article 180, paragraph 2, of the International Sporting Code (ISC), which states that "*for any dispute involving either a foreign licence-holder or one of the persons mentioned in the first paragraph of Article 152, of foreign nationality, the National Court of Appeal constitutes a court whose decisions may be appealed against before the International Court of Appeal*", and on Article 14-1-1)-c) of the FIA Judicial and Disciplinary Rules (the "Rules"), which states that the Court is competent to hear "*Appeals from National Sporting Authorities, organisers, competitors, drivers or other licence-holders who are addressees of decisions of national courts of appeal where such decisions have an international dimension, that is to say when organisers, competitors, drivers or other licence-holders that take place in, are registered in, or originate from, territories of National Sporting Authorities other than that of the national court of appeal*".

Attending the above-mentioned hearing were:

- on behalf of ACCUS:

Mr Tim Mayer (ACCUS Independent Director)
Mr Tanner Foust (driver)

- on behalf of the KNAF:

Mr Andre Slotboom (General Manager)

- on behalf of the FIA: Mr Pierre Ketterer (Jurist)

The parties presented written submissions and, during the hearing on 4 November 2011, set out their arguments orally and replied to the questions put to them by the Court. The Court watched the video recordings of the incidents several times. The hearing took place in accordance with the adversarial principle, with the aid of simultaneous translation; no objection to any element of the simultaneous translation or of the conducting of the hearing was raised by anyone.

At the request of ACCUS, the following witnesses were heard:

- Mr Andreas Eriksson (SWE), Team Manager (Mr Tanner Foust's car).
- Mr Wim Luijbregts (NL), Driver relations officer for the event.

These witnesses were able to be questioned by all the parties.

No objection was raised by the parties concerning the composition of the Court.

REMINDER OF THE FACTS

1. During the Event, an incident occurred in heat n°3 involving competitor n°11 (Mr Tanner Foust) and competitor n°86. Following that incident, the Clerk of the Course showed a black flag to competitor n°11 for having pushed competitor n°86. Mr Tanner Foust nevertheless carried on racing.
2. At the end of that heat n°3, Mr Tanner Foust protested against the decision to show him the black flag. Having heard Mr Tanner Foust, but also competitors n°86 and n°7, the Panel of Stewards took Decision n°1 dated 14 August 2011 at 15.00, excluding Mr Tanner Foust from the race for ignoring the black flag, continuing the race and subsequently striking competitor n°7.

4. Mr Tanner Foust immediately announced his intention to appeal against that decision, and subsequently confirmed the appeal before the Court of Appeal of the KNAF.
5. On 26 August 2011, the Court of Appeal of the KNAF declared Mr Tanner Foust's appeal inadmissible on the grounds that he had not paid the appeal fee of €975 within the statutory time limit.
6. The decision of the Court of Appeal of the KNAF was notified to Mr Tanner Foust on 29 August 2011.

PROCEDURE AND DEMANDS OF THE PARTIES

7. On 5 September 2011, ACCUS, the parent national sporting authority of Mr Tanner Foust, brought an appeal against the decision of the Court of Appeal of the KNAF before the International Court of Appeal on behalf of the Appellant.
8. The fee for lodging an appeal with the Court (€12,000) was paid on 2 September 2011.
9. Initially scheduled for 27 October 2011, the hearing was postponed to 4 November 2011 at the request of the Appellant.
10. In his grounds for appeal, the Appellant asks the Court:
 - to quash the decision handed down by the Court of Appeal of the KNAF insofar as it considered his appeal inadmissible;
 - to revise the decision handed down against him by the Stewards by quashing the decision to exclude him from the Event, with the effect of re-establishing only the sanction of the black flag.
11. The KNAF, in its grounds in response dated 12 October 2011 and received in their entirety on 19 October 2011, asks the Court:
 - in the first place, to decree that its Court of Appeal rightly considered Mr Tanner Foust's appeal inadmissible and consequently to reject the present appeal brought before the Court;
 - in the second place, to confirm the decision taken by the Stewards of the Meeting against Mr Tanner Foust.

12. The FIA, in its submission dated 20 October 2011, asks the Court:

- to declare admissible the appeal brought by the competitor Tanner Foust against the Stewards' decision n°1 before the National Court of Appeal of the KNAF;
- to judge and declare that the Stewards' decision n°1 is confirmed in its entirety;
- to nonsuit the appellant of all its demands, purposes and submissions;
- and to reject the appeal as unfounded in any case, in accordance with the provisions of Article 17.9 of the FIA's Judicial and Disciplinary Rules.

ADMISSIBILITY

13. The Court acknowledges that the appeal now before it was brought in conformity with the Rules.
14. The Court also considers that it is competent to judge this matter.
15. Therefore, the Court declares the appeal before it to be admissible.

AS TO THE CONTENT

First ground – The appeal brought before the Court of Appeal of the KNAF was admissible

a) Arguments of the parties

16. The Appellant considers that the appeal fee (€975) was indeed paid in time.
17. The Appellant claims that, in accordance with Article 182 of the ISC, Mr Foust notified the Stewards of his intention to appeal within the hour following their decision, and then brought that appeal within the two-day window that followed, as provided for in Article 182.
18. In support of his argument, he provides proof of the payment of the said fee into the bank account of the KNAF on 16 August 2011, and specifies that this proof was included among the documents attached to the declaration of appeal sent to the KNAF, which admits having received it within the statutory two-day window since the declaration of appeal bears the KNAF's stamp and the signature of its representative attesting to its safe receipt.

19. The KNAF considers that its Court of Appeal was right to declare Mr Tanner Foust's appeal inadmissible insofar as the payment of the appeal fee of €975 was not effective until 18 August 2011, i.e. after the statutory two-day window.
20. In support of its argument, the KNAF provides a bank document ("Rekeningafschrift") certifying that the funds in question were not credited to its bank account until 18 August 2011.
21. The FIA considers that compliance with the statutory two-day window should be assessed in the light of Article 183 of the ISC, which states that the appeal fee must be paid within two days counting from the notification of the intention to appeal.
22. The FIA considers that fulfilment of this obligation must be understood to mean the handing over of a cheque or the presentation of a bank transfer order made out to the National Court of Appeal concerned. But Article 183 does not appear to oblige the appellant to provide proof of the effective payment of the appeal fee within the two-day window. The sanction for failing to respect effective payment is the automatic suspension of the appellant's licence.
23. Consequently, the FIA considers that the Court of Appeal of the KNAF wrongly declared Mr Tanner Foust's appeal to be inadmissible for failing to pay the appeal fee.

b) Conclusions of the Court

24. Article 183 of the ISC states that:

[...]

An appeal fee, the amount of which is specified annually by the ASN, becomes due from the moment the appellant notifies the stewards of the intention of appealing, as specified in Article 182, and remains payable even if the appellant does not follow up the declared intention to appeal.

This fee must be paid within two days counting from the moment the stewards are notified of the intention to appeal. If not, the appellant's licence will automatically be suspended until payment has been made.

[...]

25. The Court notes that the Appellant has produced a document that certifies that a transfer order in the amount of €975 was effectively made in favour of the KNAF on 16 August 2011, i.e. within the statutory two-day window.
26. The Court considers that an *in concreto* interpretation of Article 183 of the ISC implies that the obligation incumbent upon the Appellant is that he takes the necessary measures for the payment of the fee within the two-day window, and not that the sum is effectively credited within the same window to the bank account of the authority to which the Court belongs. Indeed, to accept the contrary would in practice make it very difficult to respect that rule on account of certain bank transaction times that cannot be shortened and that are beyond the control of the Appellant.
27. Consequently, the Court considers that the appeal before the Court of Appeal of the KNAF was admissible and that the decision of the said Court of Appeal having pronounced the inadmissibility of the appeal must therefore be quashed.
28. Article 17.9 of the Rules states that "*The ICA has all of the decision-making powers as the authority that took the contested decision*". Consequently, the Court recognises its competence to examine the Appellant's grounds of appeal concerning the Stewards' decision initially referred to the Court of Appeal of the KNAF.

Second ground – The sanction of exclusion from the Event is disproportionate

1) On the incident that led the Clerk of the Course to impose a black flag on Mr Tanner Foust

a) Arguments of the parties

29. The Appellant states in preamble that although he does not agree with the Clerk of the Course's decision concerning the black flag, he does not contest it insofar as Article 152 of the ISC stipulates that such decisions are not susceptible to appeal, which he accepts.
30. He therefore does not dispute the validity of that black flag insofar as, probably, this subsequently led to the decision of exclusion which, on the contrary, is susceptible to appeal and which is being contested here.
31. Concerning this decision, the Appellant claims that the Clerk of the Course's decision was hasty and that an examination of all the evidence, in particular the video evidence, shows that:

- i. Mr Foust, who had no negative intentions, made reasonable efforts to avoid pushing competitor n°86, who himself contributed to the occurrence of the incident;
 - ii. the weather conditions (rain) contributed to the occurrence of the incident by making the cars more difficult to control;
 - iii. this type of sanction is unusual, and that it is also unusual to show a black flag when the cars involved in an incident carry on racing;
 - iv. other, far more important incidents, did not lead to black flags;
 - v. black flags are normally imposed when there is an intentional fault;
 - vi. the decision to impose a black flag was unduly influenced both by the events of the 2008 edition and by the overall content of the 2011 edition.
32. In support of his argument, the Appellant produces video recordings of the race as well as the testimony of Mr Foust (driver), Mr Eriksson (team manager) and Mr Luijbregts (driver relations officer), who were heard by the Court.
33. The KNAF considers that this decision is justified, in particular as the video analysis of the incident shows that at no point did Mr Tanner Foust brake in order to avoid the collision with car n°86 since his brake lights are not seen to come on, which would have indicated that he was braking.
34. The FIA reminds the Court that it is up to the Stewards to take any decision relating to incidents arising during the races, as the sole judges empowered to assess the responsibilities and the sanctions that must result therefrom, concerning the application and respect of the sporting and technical regulations.
35. In this case, according to the FIA, the Stewards, with sovereign power, assessed and identified the facts with which Mr Foust is charged.

b) Conclusions of the Court

36. The Court first formally acknowledges to the Appellant his decision not to request the cancellation of the black flag that was imposed on him, and states that its decision thus concerns only the Stewards' Decision n°1 to exclude Mr Tanner Foust.
37. That being the case, the Court considers, in view of the evidence produced and the testimony heard during the hearing, that there was no proof that Mr Tanner Foust intentionally breached the provisions of the ISC concerning the Code of Driving Conduct on Circuits (Chapter IV of Appendix L) and that the collision

between his car and that of competitor n°86 was a simple racing incident, such incidents also being very frequent in Rallycross races.

2) On the incident that led the Panel of Stewards to exclude Mr Tanner Foust from the Event

a) Arguments of the parties

38. Concerning this decision, the Appellant claims that Mr Foust did not see the black flag and that therefore there was no reason to impose the sanction of exclusion for not respecting the black flag.
39. The Appellant indicates that the weather conditions and the way in which the black flag was shown to Mr Foust were such that he had not been in a position to see it, which makes the decision of exclusion that was imposed upon him unfair.
40. In particular, he states that the format and colour of the board shown with the black flag were not in conformity with the Rallycross regulations, and that the flag was shown for only one lap, whereas the regulations (Appendix H to the ISC) say that it must be shown for 4 laps.
41. Lastly, the Appellant considers that the Stewards could not, according to the regulations, base their decision on the fact that Mr Foust had ignored the black flag to impose on him, after the race, a sanction of exclusion, insofar as the regulations of that championship do not say how to deal with black flags after the race.
42. Also, the Appellant considers that Mr Foust's collision with competitor n°7 in the last lap of the race was merely a racing incident which Mr Foust tried to avoid, and besides, Mr Foust did not push competitor n°7 into the mud, contrary to the latter's claims.
43. He considers that the charge of having "struck" competitor n°7 necessarily implies a deliberate act, which was clearly not the case here.
44. He states that the overtaking manoeuvre attempted on competitor n°7 was perfectly in accordance with the racing rules.
45. Further, the Appellant blames the poor track conditions as well as the behaviour of competitor n°7.
46. Also, the Appellant considers that his hearing after the race, following his protest and that of competitor n°7, was conducted in breach of his rights and in ignorance of the applicable regulations.

47. Lastly, the Appellant claims that in view of precedents, the sanction of exclusion appears disproportionate.
48. The KNAF reminds the Court that a hearing took place following Mr Foust's protest concerning the black flag and another protest by competitor n°7 that Mr Foust deliberately struck him on the last lap. During that hearing, the Stewards asked Mr Foust if he was aware of the meaning of a black flag. Mr Foust replied that he was, but said that he knew that on previous races, the black flag had subsequently been withdrawn, which was why he had carried on racing. On this point, the KNAF concludes that Mr Foust had therefore implicitly admitted that he had been aware of receiving a black flag.
49. The KNAF also points out that the black flag was shown to Mr Foust during 2 laps and that his team, which was in radio contact with him, was also aware that Mr Foust had received a black flag in view of the means of information deployed on the circuit.
50. Lastly, the KNAF considers that Mr Foust's responsibility for the incident which, in the final lap and while continuing to race despite the black flag, led him to strike competitor n°7 and send him into the gravel trap is proven.
51. The FIA reminds the Court that it is up to the Stewards to take any decision relating to incidents arising during the races, as the sole judges empowered to assess the responsibilities and the sanctions that must result therefrom, concerning the application and respect of the sporting and technical regulations.
52. It refers in particular to Article 141 of the ISC which states that the Stewards may "*exclude from any one competition or for the duration of the meeting any entrant or driver whom they consider as, or who is reported to them by the clerk of the course or by the organising committee as being ineligible to take part, or whom they consider as being guilty of improper conduct or unfair practice.*"
53. It states that, contrary to what the appellant claims, the Stewards, having absolute power to judge any incident arising during an event and to pronounce any sanction they may consider necessary to respect the Code, could absolutely pronounce a decision of exclusion in consideration of the facts at their disposal.
54. According to the FIA, in striking car n°7 while already under the black flag for having previously pushed car n°86, car n°11 repeatedly displayed particularly improper conduct.
55. In this case, according to the FIA, the Stewards, with sovereign power, assessed and identified the facts with which Mr Foust was charged, and in a just and fair manner.

b) Conclusions of the Court

56. The Court first recalls the Appellant's decision not to request the cancellation of the black flag that was imposed on him following the incident involving competitor n°86, and the consequences that the Court has drawn above (points 36 and 37).
57. That being the case, the Court notes, in view of the explanations provided by the Parties to the hearing and the evidence produced, and in particular the video recordings, that the conditions in which the black flag was shown to Mr Tanner Foust did not meet the statutory requirements, and in particular the provisions of Article 16.6 of the Regulations of the 2011 FIA European Championship for Rallycross Drivers – SuperCars.
58. Also, the contradictory statements of the KNAF and of Mr Tanner Foust as to whether or not, during his hearing after the heat, he admitted having seen the black flag should be borne in mind.
59. According to the Court, the combination of the facts referred to above does not enable it to assert with reasonable certainty that Mr Tanner Foust had effectively seen the black flag that the Clerk of the Course had imposed on him.
60. Therefore, it does not appear to the Court that Mr Tanner Foust can be blamed for having carried on racing in spite of having been black flagged.
61. Lastly, concerning the incident between Mr Tanner Foust and competitor n°7 in the last lap of the race, the Court considers, for the same reasons as those set out above concerning the collision with competitor n°86, that this again was merely a blameless racing incident.

On the costs

62. In application of Article 18.2 of the Rules, the Court having entirely admitted the Appellant's appeal, the appeal fee will be refunded to him in full and the costs of the hearing are charged entirely to the KNAF.

ON THESE GROUNDS,

THE FIA INTERNATIONAL COURT OF APPEAL:

- 1. declares the appeal admissible;**
- 2. quashes the decision of the Court of Appeal of the KNAF in that it declared Mr Tanner Foust's appeal before it to be inadmissible;**
- 3. quashes Decision N°1 taken by the Stewards of the Meeting on 14 August 2011 excluding Mr Tanner Foust from heat n°3 of the event run at Valkenswaard (Netherlands) and counting towards the 2011 FIA European Championship for Rallycross Drivers – SuperCars;**
- 4. leaves it to the sporting authority to draw the consequences of the present decision;**
- 5. and orders the appeal fee to be refunded to the Appellant in its entirety and the KNAF to pay all the costs and expenses of the hearing.**

Paris, 4 November 2011

The President

Jan Šťovíček