

**BETWEEN** **SAMARA (SAMMIE) MAXWELL**

**Appellant**

**AND** **CYCLING NEW ZEALAND**

**Respondent**

**AND** **NEW ZEALAND OLYMPIC COMMITTEE**

**Interested Party**

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**DECISION ON PUBLICATION OF REASONS AND COSTS**

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**Hearing** 20 September 2024

**Present** Ian Hunt, counsel for Appellant  
Sammie Maxwell, Appellant (remote attendance)  
Paul David KC and Qin Hao Zhu, counsel for Respondent  
Tara Pryor, NZOC

**Tribunal** John Macdonald. Chair  
Dr Helen Tobin  
Pippa Hayward

**Registrar** Helen Gould

1. On 21 June 2024, Sammie Maxwell (the appellant) filed an appeal to the Sports Tribunal (Tribunal) against the decision of the respondent, Cycling New Zealand (CNZ), not to nominate her for selection by the New Zealand Olympic Committee (NZOC) for the Women's Mountain Biking event.
2. On 4 July 2024, the Tribunal delivered a results decision in which it concluded that the grounds of appeal were made out. The appeal was allowed and the Tribunal took the unusual step of nominating her for selection by the NZOC
3. On 11 July 2024, the Tribunal released its reasons for its decision. In that decision the Tribunal stated at [70]: *The issue of costs has not been raised with the Tribunal so costs will lie as they fall.*
4. On 12 July 2024, counsel for Ms Maxwell, Mr Hunt, filed a memorandum with the Tribunal indicating that Ms Maxwell wanted to be heard on costs and requested a direction that costs be reserved pending the resolution of the costs between the parties or on application.
5. That memorandum also referred to the potential objection by CNZ. The Tribunal decided to wait to hear further from both parties on the matter of costs and did not make the requested direction.
6. It was not until 7 August 2024 that Mr David KC, counsel for CNZ, wrote to the Tribunal with its view on the matter of costs. This was prompted by Mr Hunt's email of 6 August 2024 following up on the costs proposal sent to CNZ on 31 July 2024 (to which there had been no response) and indicating that a costs application would be filed with the Tribunal.
7. CNZ's position was that the Tribunal did not have jurisdiction to hear Ms Maxwell on costs because it is *functus officio*.
8. Ms Maxwell followed this with a costs application to the Tribunal on 9 August 2024. Within the submissions on costs Ms Maxwell submitted that the Tribunal is not *functus officio* because there was still a live issue before it, that being Mr Hunt's release of the results decision to the media before the reasons decision was uploaded to the Tribunal website.
9. Ms Maxwell further argued that the actions of CNZ on 12 July 2024, following the release of the reasons decision, demonstrated that it did not consider the Tribunal to be *functus officio*. Indeed, the Tribunal issued a decision by email on 13 July 2024 in

respect of an application by CNZ under Rule 32 to have corrections made to the reasons decision.

10. Ms Maxwell further submitted that had it not been for the delay in CNZ addressing the issue of costs which had been raised by her, she would have applied for a rehearing under Rule 33. That rule says that such an application must be made within 21 days of the release of the decision. That period had expired prior to CNZ informing the Tribunal of its position on costs.
11. In a further memorandum filed with the Tribunal on 21 August 2024 Ms Maxwell submitted that it was open to the Tribunal to allow an application for a rehearing pursuant to Rule 33 if it invoked Rule 18(b) which permitted it, in its discretion, to extend the time for filing such an application, even if the application for an extension is made after the expiration of the time appointed.
12. Ms Maxwell seeks an extension of time to make an application for a rehearing on the issue of costs.
13. In response, CNZ maintained that the Tribunal does not have jurisdiction to hear the costs application because it is *functus officio*; and it was also submitted that there was no miscarriage of justice to justify the granting of a rehearing as required under Rule 33(a). Rule 33(c) refers to three circumstances which may amount to a miscarriage of justice but the Tribunal notes it is not limited to those.

#### *Position of interested party*

14. Although not directly involved in the application for costs the NZOC, as an interested party, filed a memorandum. It expressed concern that the sports sector needed to be confident that the Tribunal's processes were robust and consistent and that hearing Ms Maxwell on costs once the final decision had been published could set a precedent that may have an impact, given the majority of selection cases are decided in favour of NSOs.
15. It also expressed concern that Mr Hunt in his costs invoice had included the time he had spent in contact with the NZOC after Ms Maxwell had been nominated for selection. However, the memorandum it filed went beyond that, with the NZOC fully supporting the position adopted by CNZ in relation to whether the Tribunal had the

jurisdiction to hear a costs application, whether a rehearing should be granted, whether the hearing application should be held in public and whether the reasons decision should have been released by Mr Hunt to the media on 11 July 2024.

16. Given that the Tribunal had concluded in unequivocal terms that Ms Maxwell had been the victim of an unfair and unreasonable selection process the Tribunal is surprised that rather than maintaining a neutral position the NZOC has elected to become involved in the costs application and to side with CNZ.

#### *Public hearing*

17. In a memorandum dated 21 August 2024, Ms Maxwell had sought a direction that any rehearing of the costs issue should be conducted in public. This was in reliance on Rule 25(b) where the Tribunal has an absolute discretion to hold a hearing in public “if it considers there are exceptional circumstances to make a public hearing appropriate or if the parties so agree”. The Tribunal Chair declined to order that a hearing be held in public in an email dated 28 August 2024.
18. While accepting that there might be considerable public interest in the costs application the Tribunal did not consider that that alone amounted to exceptional circumstances.
19. Furthermore, the fact that the hearing of the appeal itself was not held in public weighed against holding a public hearing on a costs application, which could be viewed as an ancillary matter.
20. The Tribunal also considered that there were practical considerations involved which would make a public hearing difficult or less than ideal, given that the hearing was to be via Teams.
21. In any event, the Tribunal’s decision on the application would be made public when placed on its website and there was also likely to be a media release.

#### *Matters to be heard*

22. The Tribunal Chair set down a hearing for 20 September 2024 to hear the parties on the following:

22.1.1. Can the Tribunal hear the costs application?

22.1.2. If it can, should the application be granted and what costs, if any, should be awarded to Ms Maxwell?; and

22.1.3. Was it wrong in law for Mr Hunt to release the reasons decision to the media before the Tribunal had published it on its website?

*Can the Tribunal hear the costs application?*

23. Two issues arise here. First, is the Tribunal prevented from doing so because it is *functus officio* and therefore has no jurisdiction to hear the application. Second, provided that time is extended for filing such an application, can the Tribunal grant a rehearing on the issue?
24. As a matter of convenience, the Tribunal has decided to consider the second issue first. That is because even if the first issue was determined in favour of CNZ the rehearing application will still need to be considered. The existence of Rule 33 provides the Tribunal with the ability to consider a rehearing application whether it is *functus officio* or not.
25. As mentioned before, although no application for costs had been made before the release of the reasons decision, the Tribunal at paragraph 70 of its decision said: *The issue of costs has not been raised with the Tribunal so costs will lie as they fall.*
26. The reasons decision was released at a time when the Tribunal was under considerable pressure to deal with several other selection appeals. In hindsight, the Tribunal accepts that it should have anticipated that an application for costs might well have been made in the present case and therefore costs should either have been reserved or not mentioned at all.
27. The Tribunal also acknowledges that any decision as to whether an application for costs might be a viable option can only be properly made once the outcome of an appeal is known, which in this case meant once Ms Maxwell had received the reasons decision.
28. If CNZ is correct that the Tribunal is *functus officio* once its decision was released, then the Tribunal further acknowledges that, by adopting what was often a fall-back position

that costs should lie where they fall, it meant that the Tribunal had prevented the appellant from ever being able to be heard on the issue of costs. Regrettably that would appear to be in breach of Rule 17 of its own rules which states that the Tribunal *shall in all matters observe the principles of natural justice*.

29. The Tribunal also notes section 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides that every person has the right to the observance of the principles of natural justice.
30. The principles of natural justice include a right to be heard.
31. In the circumstances the Tribunal considers that in closing off the issue of costs at [70] of its reasons decision, by adopting its default position of letting costs lie where they fall, it has failed to adhere to Rule 17 and s 27(1) NZBORA by not allowing Ms Maxwell to be heard.
32. The Tribunal is, therefore satisfied, pursuant to Rule 33(a), that there has been a miscarriage of justice by it unwittingly breaching the principles of natural justice which in turn justifies a rehearing on the issue of costs.
33. Rule 33(d) provides that a rehearing may be ordered on any question in the proceeding without interfering with the decision on any other question. In this case, the Tribunal considers that the miscarriage of justice relates only to the issue of costs and that a rehearing on that issue does not disturb the final appeal decision.
34. Since the release of the reasons decision and the issue of costs arising in the present case the Tribunal has revised its rules to ensure that a denial of natural justice in this way is not repeated. The revised rule will allow a party to raise the issue of costs within 14 days of the release of a final decision.
35. As to extending the time to apply for a rehearing the Tribunal is satisfied that such an extension should be granted because it seems that but for the delay by CNZ in notifying its position on costs the application could have been made within time. The delay involved is short and, in the Tribunal's view, the merits of the costs application are also in favour of the time being extended.
36. The Tribunal grants a rehearing on the issue of costs.
37. The Tribunal accepts that CNZ is perfectly entitled to resist the application for costs on the basis that as a matter of law the Tribunal has no jurisdiction to revisit the issue of

costs and, in terms of its rules, there is no basis upon which a re-hearing on that issue can be granted. It is also entitled to take the position that Ms Maxwell should meet her own costs. Whether such an approach is appropriate or reasonable is a matter for CNZ.

38. In that regard the Tribunal simply observes that Ms Maxwell successfully appealed against CNZ's non-nomination decision, with the Tribunal nominating her instead. Before the Tribunal she succeeded in emphatic terms. Having then been selected by the NZOC she finished eighth at the Olympics, an excellent result. She also has an ongoing relationship with CNZ - she is one of their athletes. The Tribunal notes too that it was always open to CNZ to consent to the costs application being heard, as was the approach taken in *DFSNZ v Anon*<sup>1</sup>.

#### *Costs application*

39. In their submissions, both parties referred to the Tribunal case of *Curr*<sup>2</sup> which sets out the relevant principles when considering costs applications; those principles have subsequently been considered by the Tribunal and applied in its decision-making relating to the awarding of costs.
40. In *Curr* it was observed that cost awards are generally only made in exceptional cases. The Tribunal notes that the dictionary definition of 'exceptional' is 'unusual or out of the ordinary'. Where costs have been awarded, the awards have been 'modest' and have not been made to reimburse legal costs.
41. Further, in *Curr* at [57], it is noted that the Tribunal has taken into account whether the appellant was completely successful, the conduct of the parties and the merits of the appeal, including deficiencies in NSO processes and/or breaches of natural justice.
42. Mr Hunt submitted that all those elements were present in this case and so costs should be awarded. As for the costs claimed, Mr Hunt made the point that there had been no challenge from CNZ that they were in any way unreasonable.
43. In response, CNZ submitted that this is a case where costs should lie where they fall as it is not an exceptional case. CNZ acted properly, responsibly and in good faith

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<sup>1</sup> *DFSNZ v Anon* ST 1/23 19 October 2024

<sup>2</sup> *Curr v Motor Cycling New Zealand Inc* ST 1/08 14 October 2009.

throughout the proceedings by making information available. It was further submitted that the Nomination Panel of CNZ had considered the medical reports which had, until mid-May, been the basis on which Ms Maxwell was being treated, and that it had considered these in good faith with the requirements of the criteria and the physical and mental health of Ms Maxwell in mind.

#### *Discussion*

44. As already noted, Ms Maxwell was wholly successful in her appeal which included persuading the Tribunal to take the unusual (and therefore exceptional) step of nominating her for selection by the NZOC.
45. The Tribunal further notes, as was made clear in the reasons decision released on 11 July 2024, that there were deficiencies in CNZ's processes and there had been serious breaches of natural justice.
46. Although the Tribunal commended CNZ for its concerns about Ms Maxwell's health, that was not an excuse for carrying out a selection process that was flawed in several respects.
47. That started with the failure to provide Ms Maxwell with a copy of a report that CNZ had obtained from Dr Snyman who had previously treated her in respect of an eating disorder. The report, which was obtained with Ms Maxwell's consent, became the basis upon which CNZ concluded that she had not met the eligibility criteria. Ms Maxwell was neither shown the report nor given the opportunity to comment. This was made worse by the fact that the onus had been on Ms Maxwell to demonstrate that she did not have any mental or physical impairment that would prevent her from competing to the highest possible standard.
48. Dr Snyman did not give evidence at the appeal hearing but cross-examination of another doctor, Dr Ogilvie, who was called as a witness by CNZ, persuaded the Tribunal that the medical information which CNZ relied upon about Ms Maxwell was inaccurate and out of date.
49. There was the failure by CNZ to consider a medical report from Ms Maxwell's doctor in France which provided up to date information on her health. The report, which was in French, was not even translated into English with Mr Hollows, the High Performance Director at CNZ, dismissing the report as he did not trust French doctors.



50. Furthermore, relying on Ms Maxwell's statement of 26 June 2024, CNZ failed to provide her with a copy of a memorandum that Mr Hollows had prepared for its Olympic Nomination Panel, which the Tribunal found had unduly influenced the selection process.
51. In terms of the eligibility criteria the Tribunal concluded that CNZ had failed to properly identify the mental or physical impairment supposedly suffered by Ms Maxwell or to consider the extent to which it might prevent her from competing to the highest possible standard at the Olympics.
52. As it was Ms Maxwell's excellent performances in Europe during the time of the selection process appeared to indicate that she did not suffer from any mental or physical impairment at all.
53. For these reasons the Tribunal concludes that this is an exceptional case.

*Decision on whether costs will be awarded*

54. The Tribunal determines that this is a case where costs should be awarded to Ms Maxwell as the successful party. She faces legal costs of just over \$31,000 which has been the cost to her to overturn a decision which the Tribunal has found was flawed in the ways just discussed. As previously mentioned, CNZ has not submitted that those costs are unreasonable.

*Quantum*

55. Rule 29(a) of the Tribunal's rules provide it with a wide discretion to award costs as it sees fit.
56. The Tribunal acknowledges that cost awards made by the Tribunal are usually modest. The Tribunal, reflected in its mission, is concerned with ensuring that resolving disputes through the Tribunal, as well as being fair, objective, just and timely and efficient, should be affordable. This is the basis on which awards of costs are generally not made and why they are modest when they are. The Tribunal does not wish to deter athletes

(or sporting organisations) from bringing their matters to the Tribunal. It is always mindful of the limited resources most athletes have available to them. That does not mean, though, that in exceptional cases the Tribunal should shy away from awarding costs and at an appropriate level.

57. *Curr*, at [55] and [56], refers to 'substantial awards' stating that, despite the wide discretion, the Tribunal has not, in practice, departed from the intent of the original rule of the Tribunal which provided:

The Tribunal shall usually make an order that requires each party to bear their own costs or an order imposing on a party the payment of costs limited to a symbolic amount. In exceptional circumstances, the Tribunal may make orders for payment of more substantial amounts, taking into account the outcome of the Proceeding; whether the Proceeding was without merit; the way in which the parties conducted themselves in the Proceeding; and such other factors as the Tribunal considers just

58. As has already been noted, Ms Maxwell was wholly successful, and the proceedings had merit. CNZ submitted that it had acted properly throughout the proceedings, ensuring that the information was made available. The Tribunal accepts that the respondent conducted itself in a manner to be expected and did so responsibly and in good faith. The Tribunal notes, however, the submission from Ms Maxwell that the decision of CNZ not to nominate her was demonstrably in error and that this should have been recognised by CNZ before the appeal was brought. The Tribunal accepts there may well be merit in that submission.
59. CNZ submitted that it had Ms Maxwell's health and welfare in mind when it made the decision not to nominate her; it is not lost on the Tribunal that putting Ms Maxwell through not one but two hearings could have been detrimental to her health and wellbeing. It is also noted that Mr David KC has requested the Tribunal to reserve costs on this costs application (which was subsequently sought by Mr Hunt also), presumably so that CNZ can make a costs application of its own if successful, something that would put Ms Maxwell through a further process.
60. Ms Maxwell submitted 'equality of arms' should be considered by the Tribunal. The submission is that CNZ has considerable resources compared to Ms Maxwell and this is relevant to the issue of the quantum of any award of costs. Against such opposition Ms Maxwell was forced to expend more resources than she could reasonably afford, but to achieve her Olympic goal she had no choice.

61. Having concluded that this is an exceptional case the Tribunal is satisfied that a substantial award of costs is justified. Bearing in mind what the Tribunal assumes to be an imbalance in financial resources as between Ms Maxwell and CNZ the Tribunal makes a costs award of \$15,000 to be paid by CNZ to Ms Maxwell.
62. The Tribunal makes it clear that this decision should not be viewed as a precedent or as an opening of the floodgates for successful parties to make applications for substantial awards of costs.
63. This decision is based on the exceptional circumstances of this particular case. It might, however, serve as a reminder to NSOs to ensure that nomination and selection processes are fair and reasonable. As mentioned before, successful appeals against non-selection are uncommon. This is because decisions are usually based on the nomination criteria rather than on eligibility criteria and they tend to be made by selectors who are experts in their sport. In this instance the decision not to nominate the athlete was not based on the nomination criteria but on the eligibility criteria.
64. The Tribunal also emphasises that costs awards, let alone substantial awards, against individual athletes who unsuccessfully appeal against non-selection will continue to remain most unlikely.

*Was it wrong in law for the applicant to release the reasons decision to the media before the Tribunal had published it on its website?*

65. On 11 July 2024 the Tribunal released its reasons decision in this matter to the parties. The decision was accompanied by an email saying *Please note this will be uploaded to the Tribunal's website tomorrow afternoon and there will be a media release sent out also*. This is the Tribunal's usual practice. The purpose of informing the parties of when the decision will go on the website is to give the parties time to digest the decision before the Tribunal distributes it more widely. Parties have usually respected this convention and have not released the decision more widely themselves until the decision is published on the Tribunal website.
66. On 11 July 2024 Mr Hunt released the reasons decision to a television journalist. Consequently, the story appeared on TVNZ One News at 6pm that day. This took the Tribunal and CNZ by surprise. Mr David KC submitted that it had not had the

opportunity to brief the respondent on the reasons for the nomination decision before it became public knowledge and further submitted that Mr Hunt breached an embargo.

67. CNZ has asked the Tribunal to determine that the release of the reasons decision before it was published on the Tribunal website was 'wrong in law' and to make such orders that it sees fit.
68. The Tribunal has sympathy for CNZ as it agrees that the usual order of events in relation to publication of decisions is for the Tribunal to be the first to publish the decision. However, this is just a convention and there is nothing in the Tribunal Rules that says parties are not to release the decision prior to it being uploaded to the Tribunal website. Further, the decision was not formally embargoed.
69. Consequently, the Tribunal cannot conclude that Mr Hunt did anything that he should not have done. The release of the decision to the media was unexpected and to that extent was regrettable but it was not wrong in law. The Tribunal therefore declines to make any declaration or orders.
70. As a footnote to this issue, the Tribunal has recently redrafted its rules to reflect the legislative changes that came into effect on 1 July 2024. It has also written into the updated rules a provision that a decision of the Tribunal will be released, in the first instance to counsel and the parties only, and shall not be further published until 24 hours after the release of a decision.

## **Decision**

71. The Tribunal has decided the following:
  - 71.1. Ms Maxwell is granted an extension of time for the filing of her rehearing application;
  - 71.2. The rehearing application is granted with the Tribunal being satisfied that denying her the opportunity to be heard on the issue of costs (such costs being substantial) would amount to a miscarriage of justice;
  - 71.3. Her application for costs is successful with costs of \$15,000 awarded to Ms Maxwell with CNZ being required to make the payment pursuant to Rule 29(b);
  - 71.4. The release of the reasons decision to the media prior to it being published on the Tribunal website was not wrong in law;

71.5. The Tribunal was asked to reserve costs but declines to do so and hopes that the release of this decision will bring this matter to a close; and  
71.6. This decision is confidential for 24 hours after release to the parties.

## Orders

72. Costs of \$15,000 are ordered in favour of Ms Maxwell.

Dated: 26 September 2024



**John Macdonald**  
Chair



**Dr Helen Tobin**



**Pippa Hayward**