IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 51/11

In the matter between:

COWIGAN (PTY) Ltd	**1st APPELLANT**
MANZINI CITY COUNCIL	**2ND APPELLANT**
THE ATTORNEY GENERAL	**3RD APPELLANT**

AND

SANDILE THWALA N.O.	**1ST RESPONDENT**
MESHACK DLAMINI	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**
THE MASTER OF THE HIGH COURT	**4TH RESPONDENT**

Neutral citation: Cowigan (Pty) Ltd & Others v Sandile Thwala & Others (51/2011) [2011] SZSC 25 (31 May 2012)

Coram: **A.M. EBRAHIM J.A., S.A. MOORE J.A., E.A. AGIM J.A.**

Heard: **18 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Appeal against judgment of the High Court - Constitutional question raised by trial judge *mero motu* - Constitutional question not pleaded - Interested parties not participating in the proceedings of the court *a quo* - Matter remitted to the High Court for hearing before a judge or judges other than those who presided over the case in the High Court - All parties may therefore be heard on the constitutionality of certain sections of the Rating Act 1995 - No order as to costs.**

MOORE J.A.

INTRODUCTION

[1] This case involved some seven parties all of whom pursued their individual interests with vigour and seriousness. They raised many issues which called for the mature consideration of this Court. As a result, I had prepared an elaborate judgment in which all of those issues were fully addressed and, in consideration with my brethren, provisional conclusions had been reached.

In the midst of the cogitations on all of these weighty matters, however, one theme seemed to repeat itself intermittently like the melody in a symphony. That theme involves the questions raised by the Attorney General whether:

i. it was absolutely necessary for the court below to pronounce itself on the constitutionality of the attached law; and

ii. the decision of invalidity with full retrospective effect was an appropriate order.

THE CONSTITUTIONAL QUESTION

[2] The starting point in the consideration of all constitutional questions is by reference to the constitution itself. Section 2 (1) gives effect to the fundamental principle of constitutional supremacy which underpins the legal system in the sovereign democratic Kingdom of Swaziland. That subsection reads:

> "This constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Counsel for the Attorney General Mr. Mndeni Vilakati in his heads of argument also queried the non joinder of parties who had a direct and substantial interest in the constitutionality of the impugned legislation.

[3] In **Marbury v Madison** 5 U.S. 137 (1803) the Supreme Court of the United States ruled that the federal courts have a duty to review the constitutionality of acts of congress and to declare them void when they are contrary to the Constitution. The United States Constitution is the oldest constitution of the modern era and certainly the best known written Constitution of the free world. Ever since **Marbury v Madison**, federal courts at every level have struck down legislation which violated the Constitution. This power of judicial review was not confined to the federal structure. Judges of state courts also exercised this power and struck down laws which violated state constitutions.

[4] Competent common law courts of original jurisdiction have repeatedly declared statutory provisions unconstitutional. The Attorney General's question as I understand it, is whether it was absolutely necessary for the court below to decide constitutional points. As Counsel put it in paragraph 10 of his heads of argument:

> "The salutary rule of constitutional litigation is: never decide a constitutional issue ahead of the necessity of deciding it. **Jerry Nhlapo and 24 Others v Lucky Howe N.O.** (in his capacity as liquidator of VIF Limited in Liquidation) Civ Apppeal No. 37/2007 (Unreported) is authority for this proposition."

In the **Nhlapo** case, Ramodibedi JA, as he then was, laid down the law authoritatively and lucidly at paragraphs [5] to [6] when he wrote:

> "[5] It is a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis. In general, a court will decide no more than what is absolutely necessary for an adjudication of the case. This is more so in constitutional litigation. The reason behind this approach is that constitutional jurisprudence must be developed in a cautious and orderly manner rather than haphazardly. Constitutional issues must therefore ordinarily be properly pleaded and

canvassed. See for example **Prince v The President, Cape Law Society and Others** 2002 (2) SA 794 (CC); **Kanesa v Minister of Home Affairs and Others** 1996 (4) SA 965 (NM SC). The remarks of Ngcobo J in **Prince's** case at paragraph [22] are singularly apposite, namely:-

> "[22] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can

> parties hope to supplement and make their case on appeal."
>
> [6] Furthermore, it requires to be stressed that in our jurisdiction litigants in constitutional litigation are ordinarily entitled to the benefit of decisions of two courts. Namely, the High Court and this Court. The raising of a constitutional point for the first time in this Court, disguised as a point of law, denies them that benefit. Each case must, however, be judged in the light of its own particular circumstances."

[5] It is true that the constitutional question was considered and decided upon by the court *a quo.* But the complaint is that that court's deciding the issue at all was improper and unsustainable for the following reasons:

i. The constitutionality of section 32 of the Rating Act No. 4 of 1995 and its inconsistency with the provisions of sections 21 (1) and 10, 33 (1), 138, 139 (1) and (2) as well as section 140 of the constitution of the Kingdom of Swaziland Act, No. 1 of 2005 was never pleaded by any of the parties to High Court Case No. 3210/10 and was therefore not an issue on the papers between the parties before the commencement of the trial.

ii. The constitutional issue was raised *mero motu* by the judge *a quo* just before Meshack Dlamini was to argue in reply on points of law.

iii. The Minister of Housing and Urban Government, who is responsible for the administration of the Act, had not had sufficient notice of the constitutional point to enable her to adopt a position on the matter.

iv. The Attorney General was cited as a party in his capacity of the legal representative of the Registrar of Deeds and the Master of the High Court. His clients were constitutionally not competent to speak to the constitutionality of the Act.

v. In the absence of papers it was unclear whether the whole Act or which of its several parts were being impugned.

vi. All local Authorities in the country had a special interest in the constitutionality of the Rating Act which had to do with, for them, the all important matter of the Assessment and Collection of Rates.

[6] Counsel for the Attorney General submitted that:

> "In the case at hand the relief sought by MD was not consequential upon an order of constitutional invalidity of the attacked law. We submit that if paragraph (h) of the order is taken away, the rest of the orders do not fall along with it; they remain. Therefore it was not absolutely necessary for the court below to pronounce itself on the constitutional issue."

Counsel is correct to say that there was no prayer in Meshack Dlamini's Notice of Motion for an order declaring that section 32 of the Rating Act was null and void for inconsistency with the constitutional provisions referred to by the trial judge. He is also correct in pointing out that the judge's orders at (a) - (g), (i) and (j) are capable of standing without being bolstered by the order at (h) which deals with the constitutional question. That said, however, the court *a quo mero motu* declared that "the Rating Act does not supersede the Constitution as well as the Rules of Natural Justice."

[7] His Lordship then examined critically several sections of the Rating Act. He concluded that:

> "[68] The procedure for the recovery of rates as laid down in section 32 of the Rating Act is inconsistent with sections 138,

139 (1) (a) and (b) as well as section 140 of the Constitution in so far as it empowers a Clerk of Court to exercise judicial power."

[8] At paragraph [75] of his judgment M.C.B. Maphalala J found that:

> "Since the Court Order of the 4th December 2006 was invalid for non-compliance with the *"Audi Alteram Partem*" as well as being in contravention of section 138, 139 (1) (a) and (b) as well as 140 of the Constitution, it follows that everything that followed including the court order of the 12th April 2010 as well as the auction sale and the purported transfer of the property cannot stand."

[9] From a perusal of the record as a whole and particularly of the judgment of the court a quo, and taking account of the forceful submissions of counsel for the appellants, we are satisfied that the question of the constitutionality of sections of the Rating Act now looms large and is amendable to judicial resolution in the High Court in an atmosphere where all interested parties are able to present ample arguments for or against the constitutionality of the impugned statute or parts thereof.

[10] As is to be imagined, we have read the submissions contained in the heads of argument of all the parties to the existing controversy. In the light of our decision to remit this matter to the High Court for ventilation in that forum, we refrain at this stage from expressing any view concerning the validity of the arguments which have been advanced on both sides by the parties.

ORDER

It is the order of this Court that:

i. The matter be remitted to the High Court to retry the case so that all of the issues, including the constitutional questions raised by the trial judge and by the parties, could be fully ventilated and adjudicated upon.

ii. The matter be heard expeditiously by a different judge or judges from those who have presided in hearings in the court *a quo*.

iii. That the status quo as ordered in the interim rule of the 20th August 2010 be preserved until a full hearing and final determination of this matter.

iv. No order as to costs.

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S.A. MOORE
JUSTICE OF APPEAL

I agree

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A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

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E.A. AGIM
JUSTICE OF APPEAL

For the 1st Appellant : Mr. B. Sigwane
For the 2nd Appellant : Mr. T. Ndlovu
For the 3rd Appellant : Mr. M. Vilakati

For the 1st Respondent : In Person
For the 2nd Respondent : Mr. S. Dlamini
For the 3rd Respondent : Mr. M. Vilakati
For the 4th Respondent : Mr. M. Vilakati