IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Civ. App. Case No. 50/2018**

In the matter between:-

DUPS HOLDINGS (PTY) LTD	**1ST Appellant**
T1 PROPERTY (PTY) LTD	**2nd Appellant**
T2 PROPERTY (PTY) LTD	**3RD Appellant**
And	
WALTER BENNETT	**1ST Respondent**
ALAN ALEXANDER MCGREGOR N.O	**2ND Respondent**
SWAZILAND COMPETITION COMMISSION	**3RD Respondent**
THE REGISTRAR OF COMPANIES	**4TH Respondent**
THE MASTER OF THE HIGH COURT	**5TH Respondent**
THE REGISTRAR OF DEEDS	**6TH Respondent**
THE ATTORNEY GENERAL	**7TH Respondent**
THE SWAZILAND DEVELOPMENT AND SAVINGS BANK	**8TH Respondent**
SONIA MCGREGOR	**9TH Respondent**
PUBLIC SERVICE PENSION FUND	**10TH Respondent**
THE LAND MANAGEMENT BOARD	**11TH Respondent**

CHRISTOPHER CRABTREE	**12TH Respondent**
KATIE CRABTREE	**13TH Respondent**
EMILY CRABTREE	**14TH Respondent**

Neutral Citation: ***Dups Holdings (Pty) Ltd and Two Others vs Walter Bennett and Thirteen Others (50/2018) [2019] SZSC 27 (31 May 2019)***

Coram: **MJ Dlamini JA, SB Maphalala JA And JP Annandale JA**

Heard: **21 March 2019**

Delivered: **31 May 2019**

JUDGMENT

MJ Dlamini JA

[1] The appellants have appealed against the judgment of Her Ladyship M Dlamini J delivered on 15th June 2018 on the grounds that -

1. The Court *a quo* erred in law and in fact in presiding over application wherein she was implicated in the facts and was conflicted especially in respect of prayer 3 of the Notice of Motion;

2. The Court *a quo* erred in law and in fact in holding that the consolidation of the matters under High Court Civil Cases Number 2006/2016; 748/2017 and 299/2017 was done properly and lawfully.

3. The Court *a quo* erred in law and in fact in failing to find that the conduct of the proceedings under the consolidated cases (Cases number 2006/2016; 299/2017 and 748/2017) amounted to breach of the Applicant's right to a fair hearing.

4.The Court *a quo* erred in law and in fact in failing to order that the legal proceedings under Case Numbers 2006/2016; 299/2017 and 748/2017 be determined separately each on its own without consolidation and each before another Judge.

[2] It is evident that if the four grounds of appeal are pursued diligently, conflicting conclusions might be reached. But importantly, the grounds reflect the rather confused manner in which the proceedings *a quo* were conducted. The first ground indicates that the learned Judge had no jurisdiction to deal with the matter as she was implicated, in particular, in prayer 3 of the Notice of Motion. This prayer asserts that the learned Judge conducted the consolidated proceedings in breach of the appellants' right to a fair hearing. The implied assertion in this prayer is that the proceedings were of a constitutional character, which would have required it to have been conducted in terms of Section 35(1) of the Constitution, Act No 001 of 2005.

[3] However, the Notice of Motion was somehow confusing as it presented a mixed bag of issues instead of concentrating on the one issue of fair hearing if that was in fact the object of the application. The five substantive prayers on the Notice of Motion were as follows -

1. Dispensing with the normal Rules of this Court in relation to manner of service and time limits with respect to notice of process provided for by the Rules of this Honourable Court and dealing with this matter as one of urgency particularly in terms of any relief envisaged by Section 35(1) of the Constitution of the Kingdom of Swaziland Act number 1 of 2005;

2. Condoning the Applicants' non-compliance with the Rules of the Honourable Court pertaining to manner of service, and time limits with respect to notice of process provided for by the Rules of this Honourable Court and dealing with this matter as one of urgency;

3. Declaring that the conduct of the proceedings by the Honourable Judge of the High Court, Justice M. Dlamini, presiding over High Court Civil Case Numbers 2006/2016; 299/2017 and 748/17 (as consolidated) amounts to breach of the Applicants' right to a fair hearing;

4. Directing that the legal proceedings under High Court Civil Case Numbers 2006/2016; 299/2017 and 748/17 (as consolidated) be determined *de novo*, separately, each case on its own, without consolidation, and each before another Judge;

5. Alternative to 4 above, directing, in conformity with the Directive of the Chief Justice dated the 6th June 2017 that the legal proceedings under High Court Civil Case Numbers 2006/2016; 299/2017 and 748/17 be assigned to the respective Justices before whom they were initially allocated for.

[4] With respect, these prayers pointed in more than one direction in the proceedings. Relevantly, there were the issues of recusal and fair hearing. Furthermore, the application proceeded before a single Judge. Clearly the proceedings in the High Court were not well directed and focused in terms of the issue for determination in the application. Proceedings in terms of Section 35(1) should not ordinarily be mixed with other civil matters of a non-constitutional nature. Section 35(1) is a special vehicle which provides for a speedy vindication of an alleged breach of fundamental rights. As it is, the only relevant grounds of appeal are the first and third grounds. The mixing of fair hearing and recusal is

understandable. Leyland and Woods [1]write: *"There are in fact two basic rules of natural justice which have been developed over the centuries. The first is the right to a fair hearing* ***(audi alteram partem)*** *which is the broader of the two rules, covering in some detail issues of fair procedure and due process. The second is the rule against bias* ***(nemo judex in causa sua)****."*

[5] Looking at the first ground of appeal one will realise that it is not self-contained. This ground compels the Judge to go and read the notice of motion which as indicated above is itself not very well focused. The ground does not in simple terms complain that the Judge *a quo* should not have dealt with the matter since it was a Section 35(1) application and as such due to be heard by a full bench. This is of course beside the point that it is the Judge's own conduct that is alleged to be in breach of the right of fair hearing. Reading the first ground and the other grounds of appeal, the court may be forgiven for assuming that the application was a normal civil procedure proceeding as the learned Judge had presumed and presided over it on the basis that it was a recusal application.

[6] Even though at the hearing before this Court Mr. Mdladla for the appellants addressed the Court on the issue of fair hearing and section 35(1), the proceedings mainly centered around what happened in the court below which caused unhappiness to the appellants, in particular on the issue of the hearing of 11th December 2017 in the absence of counsel for the 1st appellant. It was not quite appreciated that it was a mistake for the court *a quo* to have dealt with the application as one of recusal. It was argued that as a constitutional issue the learned Judge should not have sat alone or even as part of a full bench. The application was new but was not perceived and dealt with as such. This Court

[1] ***Textbook on*** **Administrative Law,** 4th edition, p. 353

understood that a full bench had not been insisted upon since the application was one of recusal as the Judge *a quo* had adjudicated it.

[7] Mr. Mdladla further argued that the application spoke for itself as it referred to Section 35(1). But there was no explanation why the proceedings were allowed to go on as they did before a single Judge below and as a normal bench of this Court. There was an intimation that the matter could be referred back to a full bench of the High Court if the proceedings had been improper. But on the record, there was no transcript indicating how Section 35(1) was dealt with at the High Court. The view that the matter was a Section 35(1) proceeding was, however, not shared by the respondents who were of the opinion that the learned Judge *a quo* did not misdirect herself as to the character of the application and proceeding.

[8] The proceedings in the court *a quo* in this matter were unfortunate from a variety of angles not necessary to specify here. If the proceedings *a quo* were in fact in terms of Section 35(1) of the Constitution, then one would expect that they would have been before a Full Bench of the High Court. This was not the case and it is not explained why that procedure was not insisted upon. Even if the issue arose in the course of the proceedings then still in terms of Section 35(1), the aggrieved party should have asked for an adjournment of the proceeding so that he could bring the application before a properly constituted bench for the determination of the alleged breach of the constitutional right of that party. Section 35(1) is an *enforcement* provision and in part reads: ***"(1). Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be contravened in relation to that person ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (...) may apply to the High Court for redress".*** And

and set aside if need be that judgment and have the matter commenced afresh. As it turned out, at the hearing of the appeal, the appeal was a normal appeal not raising the constitutional issues as above adumbrated. In other words, the real question calling for the employment of Section 35(1) was not dealt with and determined by the court below nor by this Court.

[12] In his certificate of urgency preambling the application below, Mr. Nkomondze, the attorney for the 1st appellant, wrote, *inter alia:*

> *"2...Although one of the parties has filed an application for recusal of Her Ladyship M Dlamini from hearing the matters, this matter remains urgent in that, should the recusal application be determined negatively, applicants herein will be compelled to proceed with the matter before her Ladyship, in spite of their protest against her conduct of depriving them a fair hearing.*
>
> *3. It is also of necessary importance that this Court sitting with its jurisdiction conferred by Section 35 of the Constitution of the Kingdom of Swaziland must, at this stage, intervene as requested, in order to curtail the ever-growing legal costs in this matter. What ought to have been a straight forward hearing of three (3) distinct applications has turned out to be a twisted and overdrawn court battle that serves no justice to the parties but to visit them with huge expenses in legal costs.*
>
> *4. Should the matter not be enrolled as one of urgency by the time this matter is heard, applicants' rights to a fair and speedy hearing would have been wasted away".*

[13] During the hearing before this Court, Advocate Kuny insisted that the application below was not one under Section 35(1) but a recusal application brought through the backdoor. The appellants on the other hand argued that this matter was never one for recusal. From Mr. Nkomondze's certificate it is clear that his emphasis on the matter was urgency and for the matter to be enrolled (and

heard) before the other matter that was then pending before Justice M Dlamini continued to the alleged prejudice of the appellants. The certificate does not squarely say that the matter was a Section 35(1) application and as such should be referred to a full bench. This should have been the prominent part of the certificate, not just urgency to circumvent the proceedings then before the trial court. Incidentally, the certificate intimates that there was also a recusal application before the trial judge; whether heard or pending, it is not clear.

[14] It is also evident from the certificate that the underlying recusal of the trial Judge was also concerned with the trial Judge's "conduct of depriving them (appellants) a fair hearing". The reference to Section 35(1) in the certificate seems to be only in passing and not the main concern of the proposed proceedings. In the result, Section 35(1) and recusal applications were mixed up before her ladyship Dlamini J. Mr. Kuny may be forgiven for arguing that the purported section 35(1) application was an indirect application for recusal. There is certainly something for that view from the record.

[15] The Notice of Motion to the alleged Section 35(1) application was itself liable to cause confusion in the manner it was framed. Prayer 1 on the Notice reads in part: *"1. Dispensing with the normal Rules of this Court in relation to manner of service, and time limits....and dealing with this matter as one of urgency, particularly in terms of any relief envisaged by Section 35 of the Constitution...."* This paragraph mixes procedure and substance in a manner that results in ambiguity as to the character of the application. As the certificate of urgency reflects, the Notice also refers to Section 35(1) in passing and not as the anchor and central focus of the application. It is only in paragraph 3 of the Notice of Motion which provides: *"3 Declaring that the conduct of the proceedings by the Honourable Judge of the High Court, Justice M Dlamini, presiding over High*

Court Civil Case Numbers 2006/2016; 299/2017 and 748/17 (as consolidated) amounts to a breach of the applicants' right to a fair hearing", that there is a sense of invocation of Section 35. Paragraphs 4 and 5 of the Notice prayed for the various consolidated matters to be assigned to different Judges and be started *de novo.*

[16] If this proceeding was being meant to be a Section 35(1) application and as such a constitutional application, how did it find itself before Justice M Dlamini alone. Part of the problem, in our view, lay in the drafting of the prayers in the notice of motion, and the litigants apparent lack of resolve as to what they wanted to achieve or the procedure for achieving that goal. In any case, the appellants knowing the application to be one under Section 35 and required to be heard by a full bench, counsel for the appellants should have stood up to point out at the deviation from practice. Paragraphs 3 and 4 in the founding affidavit could have been effectively relied upon in this plea for the usual procedure of enrolling and hearing constitutional matters.

[17] It is not clear how the consolidation *per se* amounted to a breach of the applicants' right to fair hearing as para 3 of the Notice of Motion states. It is only para 4 of the founding affidavit that somewhat clarifies the situation in that it was the manner in which the hearing was conducted of the matters as consolidated that allegedly resulted in appellants' right to fair hearing being negatively affected. That some parties may have been opposed to consolidation that alone cannot violate their right to fair hearing or if hearing proceeded in the absence of some legal representatives then the breach of fair hearing must be proved and not merely alleged. Following the consolidation: *"23 The net result was that applicants herein were compelled to partake in legal proceedings in which they*

had no legal interest. Applicants were unjustifiably burdened with legal fees from their attorneys who had to consider voluminous pleadings... "

[18] It is only in terms of para 29 of the founding affidavit that specific breach of fair hearing is set out. This is the incident where Mr. Nkomondze was not present in court on the 11th December 2017. Even here the mere absence of Mr. Nkomondze during proceedings, in light of the manner in which the consolidation was done and proceeded with, it must be shown in what way his absence resulted in an unfair hearing: what prejudice exactly did the appellants suffer. Appellants must show what they suffered as a result of the hearing in the absence of their legal representative. This is not demonstrated save for the bare allegation. The reference to annexure DH9, being a transcript recording what went on in the absence of Mr. Nkomondze, does not show what it is that the appellants lost as a result of the absence of their legal representative or how any prejudice occurred.

[19]. If Mr. Nkomondze was 'ordered' not to attend the 11th December proceedings because only proceedings involving case number 748/2017 would be heard, as Mr. de Souza averred in the founding affidavit, one would expect that there would be an allegation in this application to the effect that notwithstanding the earlier information, the proceedings on the 11th also covered the matter in which Mr. Nkomondze was directly involved. Instead, Mr. de Souza states: *"29. The continuation of the matter in the absence of our attorney, when the matters were consolidated, and in the circumstance where our attorney was not in court not of his own doing but as a result of a Judge's Directive that he must not attend court, amounts to a deprivation of a fair hearing. The Honourable Judge deemed it appropriate albeit without any grounds to consolidate the matters ... It follows therefore that owing to the said consolidation of the matters, she ought to have proceeded with the hearing when all the parties' legal representatives were in attendance."* Surely, by the same token, Mr. Nkomondze,

knowing that the matters had been consolidated (and to be proceeded with as such) should also have known that his presence would be required on every day of the hearing. Knowing his case to have been consolidated with others and that a hearing of the consolidated matters would be in progress even on 11th December, Mr. Nkomondze should not have acceded to the 'instruction' or 'directive' from whatever source to be absent on the 11th. Mr. Nkomondze is an officer of this Court, but he also owes a duty to represent his clients so long as he is his clients' attorney of record.

[20] With respect to the disputed consolidation, it ought to be noted that when the issue of who was present or absent in court on the 11th December hearing, attorney M. Magagula patiently explained to the learned Judge where it was pointed out that Mr. Nkomondze and Mr. Mdladla, *inter alios*, were not present. Mr. Magagula went on to say: "... *Upon hearing the application the court then granted an order for the consolidation of the matters and then there were time-frames"* (See pp 110 – 112, Record). It is not clear then how the consolidation was an imposition by the bench as the appellants implicitly assert.

[21] To show that notwithstanding the allegation as recorded above, the appellants in fact lost nothing important during the hearing of 11 [and 12] December 2017, their founding affidavit further records: *"33. The entire conduct of the proceedings before Her Ladyship M Dlamini fortifies our fear that we will not be afforded a fair hearing in this matter going forward. It is unclear why the honourable Judge M Dlamini decided that all the matters be brought before her much against Practice Directive...."* In para 35 of the founding affidavit it is stated: *"The net resultant effect of the conduct of the proceedings by Her Ladyship M Dlamini in the manner outlined herein is that such resulted in prejudice to the applicants and the derogation of their right to a fair hearing"*.

Still, there is nothing specific beyond the proceedings going on in the absence of their attorney that seems to be the gist of the complaint. In our opinion, a cursory look at the record shows that the issue was never so much one of unfair hearing, but more of consolidation and rejection of the application for rescission of the consolidation and that Justice M Dlamini should herself preside over the hearing of the consolidated matters. It is noted that there was no oral evidence led during these proceedings *a quo* and the proceedings were recorded; any information of what went on in a party's absence could be retrieved by way of a transcript.

[22] In paragraphs 38 and 39 of the founding affidavit the appellants allege that it was unfair for the trial Judge who strongly felt that Mr. Nkomondze should have been present on the 11th December hearing, as the deponent avers, it was *"...according to the mind of the Judge, important because, in her assessment, one of the applicants had been accused of collusion with the executor"*. Accordingly, it was not the appellants' attorneys' assessment, it seems, that his absence had caused his clients prejudice. It was not even the Judge's assessment. How the absence of Mr. Nkomondze translated to prejudice to the appellants is not clear.

[23] Even though there is allusion to the consolidation having been applied for and granted it is clear that it was bound to be fraught with some procedural difficulties with the parties not *ad idem* to it. This is so, in part, as Mr. Magagula explained that if the executor were removed – as was the aim of some of the applications in the consolidation - there could be complication since he is also involved in other pending proceedings which are not part of the consolidated matters. The issue of whether Mr. Nkomondze was *instructed* not to attend the 11th December 2017 hearing or that he was merely *advised* that it might not be necessary for him to attend, so capitalized upon by the appellants in this case, that

they were then deliberately denied a fair hearing, but the allegation seemingly denied by the trial Judge, is equally a vexed one. Vexed because the main aspect of the alleged failure of fair hearing is by Nkomondze's client who in para 31 of their founding affidavit allege that for two days the proceedings continued in the absence of their attorney as 'a result of the Judge's directive', whilst the Judge seems to have been of the view that Mr. Nkomondze was absent of his own volition. Even then nothing specific is indicated as having passed by default as a result of the absence allegedly caused by the learned trial Judge.

[24] From the Heads of Argument, one is not sure why what is raised here was not raised in the High Court. For instance, that the matter was a Section 35 application which must be heard by a full bench. Surely had the application been properly and clearly presented the "misconception that the application [was] one which entails civil procedure" as the fly note to the trial court judgment reflects would probably have been avoided. In that fly note or case summary it is clear that the Judge was indeed concerned with recusal of herself from the matter and as such she was fully entitled and obliged to sit and hear that application.

[25] From the outset of the proceedings *a quo,* it must have been obvious that the proceedings were ordinary civil and not constitutional proceedings. In the summary to her judgement the trial Judge states: *"The applicants by means of a certificate of urgency seek for a declaratory order over an order by this court for consolidation of three cases as a breach of their rights to a fair hearing and that the consolidated matters commence de novo as separate. The applicants' application is tenaciously opposed on the ground that it is without any merits".* Evidently, the learned trial Judge was not dealing with a Section 35(1) application. Appellants' counsel allowed this to happen and continue to the end.

[26] The central question which has been allowed to pass unattended is whether this proceeding must be dealt with as an ordinary civil proceeding as the High Court did or as a constitutional proceeding which is not what the High Court had before it. In other words, the trial court dealt with a recusal case and yet before this Court is presented a constitutional appeal alleging breach of Section 21. It is true that for some inexplicable reason the learned trial Judge records applicants' prayers only from 3 to 5. Paragraph [5] of her judgment reads: *"Respondents contend that the application is nothing but a recusal application through the backdoor...."* It is probable then that the learned Judge was persuaded by the respondents' argument led by Advocate Kuny. It is the duty of counsel to guide the court come to a correct decision at all stages of proceedings. This of course does not exonerate the Judge from arriving at a correct decision.

[27] Now, if the court *a quo* did not deal with the matter that is now before this Court what should this Court do? There cannot be an appeal before this Court of a matter which was not heard by a lower court or tribunal. Can this Court constituted by a bench of three Judges hear a constitutional appeal, especially when no constitutional issue has been heard and determined in the court *a quo*? So far this has not happened. The correct conclusion must then be that this appeal is not constitutional. Rightly or wrongly, that is how this Court dealt with it. In the light of the divergent opinions and intentions, it is also doubtful if this is even an appeal strictly speaking. It is a comedy of errors. If the trial proceedings erroneously proceeded to conclusion as a civil recusal, then before this Court ought to have been an application to impeach those trial proceedings. Such an application could have been brought in terms of Section 148(1) for this Court to exercise its supervisory powers.

[28] In their heads of argument, the appellants refer among others to the case of **DPP v Sipho Shongwe,** Civ. Case No 12/2018 but they did not make any application under Section 148(1). They argue that the application was in terms of Section 35(1) but was 'mischaracterised' by the trial Judge and dealt with as a recusal application. However, in their unpaginated and unnumbered heads it is stated: *"The fact that the Honourable Court a quo was quite aware that the application before it is a section 35 application is beyond doubt...."* Question is: why was it then allowed to proceed otherwise. The Court is then referred to p.70 of the Book of Pleadings at para 18. This Book of Pleadings is however not part of the documents before this Court. It is therefore not clear how it is argued that the trial Judge was fully aware that a Section 35(1) application was before her.

[29] In our opinion, a proper application in terms of Section 35 (1) should have included the trial Judge as a party so she could answer for herself. She was after all being accused of violating the rights of the appellants. Her citation would have put it beyond cavil that she could not go on to hear the application. Since she was not cited there could be uncertainty as to the true character of the proceedings. In particular as there was no immediate insistence that the trial Judge adjourn the proceedings pending a determination of the application. Whether Section 35(1) application or not, in our opinion, there is no proper appeal before this Court. The specific question in terms of Section 35(1) read with Section 21 whether the rights of the appellants to a fair hearing were breached was not decided by the court *a quo.*

[30] Mr. Phillip de Souza in para 5 of his founding affidavit avers: *"All the parties to this, and the main application are engaged in acrimonious legal proceedings involving the sale of an immovable property which belonged to a*

deceased estate." Unfortunately, the impression created from the factual issues giving rise to the legal proceedings is that of a pack of wolves congregated over a carcass, tearing it from all directions. And needless to say, that this is to the dire prejudice of the legitimate beneficiaries. Were it not for the apparently poisoned atmosphere in which the proceedings were conducted below, we would have favoured an order remitting the matter to the High Court for hearing a Section 35(1) application. However, we see no benefit in doing so. That would only prolong the end of the winding up of the deceased estate.

[31] Rather, relying on Rule 34 of this Court, I would set aside the judgment *a quo*; unbundle the impugned consolidation and have the various cases reassigned as the Chief Justice may deem proper. I would make no order as to costs. It is so ordered.

MJ Dlamini JA

I Agree

SB Maphalala JA

I Agree

JP Annandale JA

For Appellant: Mr. S.V. Mdladla
(S.V. Mdladla and Associates)

For Respondent: Advocate I Kuny S.C

(Instructed by Makhosi Vilakati Attorneys)