**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2009-CA-01787-COA**

**5K FARMS, INC.** **APPELLANT**

**v.**

**MISSISSIPPI STATE TAX COMMISSION** **APPELLEE**

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| DATE OF JUDGMENT: | 07/21/2009 |
| TRIAL JUDGE: | HON. WILLIAM H. SINGLETARY |
| COURT FROM WHICH APPEALED: | HINDS COUNTY CHANCERY COURT |
| ATTORNEYS FOR APPELLANT: | MICHAEL A. HEILMAN<br>JOHN WILLIAM NISBETT<br>CHRISTOPHER THOMAS GRAHAM |
| ATTORNEYS FOR APPELLEE: | STEPHANIE RUTLAND JONES<br>GARY WOOD STRINGER<br>STEPHANIE V. ROGERS |
| NATURE OF THE CASE: | CIVIL - OTHER |
| TRIAL COURT DISPOSITION: | DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION |
| DISPOSITION: | AFFIRMED - 03/15/2011 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**LEE, C.J., FOR THE COURT:**

FACTS AND PROCEDURAL HISTORY

¶1. On October 5, 2005, the Mississippi Department of Environmental Quality (MDEQ) granted emergency authorization to 5K Farms, Inc. to accept and dispose of vegetative debris, or non-hazardous solid waste, generated as a result of Hurricane Katrina. In a memorandum dated February 8, 2006, the MDEQ notified 5K Farms that all sites for which

emergency authorization was granted for the disposal of vegetative debris may be considered commercial disposal sites subject to reporting requirements on solid-waste-disposal activities. This memo stated that 5K Farms was required to file a report with the Mississippi State Tax Commission (MSTC)[1] showing the total amount of waste disposed of and ordering 5K to pay a fee in the amount of one dollar per ton.

¶2. 5K Farms sought instruction from the MSTC, which determined that 5K Farms was a commercial disposal site and, thus, subject to the fee. In June 2007, 5K Farms filed a solid-waste-fee annual report for the period between February 10, 2006, and May 4, 2006, reporting the disposal of 133,133 total tons of solid waste.

¶3. In March 2008, the MSTC notified 5K Farms that it had been assessed $157,096.94, a sum which included interest and penalties. 5K Farms appealed this assessment to the MSTC Board of Review arguing that it did not operate a disposal site but only used the debris to develop the land in order to plant blueberries. The Board found that 5K Farms was notified in February 2006 of the potential liability and upheld the assessment. 5K Farms then appealed to the full Commission.

¶4. The Commission determined that pursuant to statute, 5K Farms was a commercial non-hazardous solid-waste-management facility subject to the one-dollar-per-ton fee. The Commission further determined that there was no exemption in the law based on 5K Farms' argument that its use of the land was beneficial. 5K Farms had argued that the land used to develop the farm was part of a land reclamation project. The Commission upheld the

[1] Effective July 1, 2010, the State Tax Commission was reorganized and is now known as the Department of Revenue.

assessment of fees incurred during 2006, but it reduced the assessment to $133,133.

¶5. 5K Farms filed an appeal in the Hinds County Chancery Court. 5K Farms also filed a motion for supersedeas requesting the chancery court enter an order allowing 5K Farms to proceed without posting a bond as required and to prevent any collection proceedings against 5K Farms during the pendency of the case. 5K Farms attached a pauper's affidavit signed by its vice president, David Kittrell, asserting that 5K Farms did not have the money to pay the required bond or the assessment.

¶6. The MSTC filed a motion to dismiss the appeal and objected to 5K Farms' motion for supersedeas. After a hearing on the matter, the chancellor determined that 5K Farms could not proceed with the appeal as an indigent party; thus, 5K Farms was required to post the proper bond. The chancellor entered an order dismissing the case for lack of subject-matter jurisdiction.

¶7. 5K Farms now appeals, asserting the following issues: (1) the chancellor had jurisdiction to hear the appeal; (2) 5K Farms was entitled to appeal in forma pauperis; (3) the failure to post a bond or pay the tax as required by statute was a defect of form, so it was curable; and (4) the Legislature's imposition of a bond or prepayment of a contested tax assessment violates 5K Farms' due-process rights.

## STANDARD OF REVIEW

¶8. "Jurisdiction and statutory interpretation are matters of law; therefore, we review de novo a trial court's rulings on such matters." *Ameristar Casino Vicksburg, Inc. v. Duckworth*, 990 So. 2d 758, 759 (¶5) (Miss. 2008).

## DISCUSSION

### I. JURISDICTION

¶9. In regard to appeals from an order of the Commission, we look to Mississippi Code Annotated section 27-77-5 (Rev. 2005) and section 27-7-7 (Rev. 2005). Both sections were amended effective July 1, 2010; thus, we look to the prior versions in effect in 2008 at the time of 5K Farms' appeal to chancery court. Section 27-77-5(7) states the following:

> If in its order the commission orders a taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or properly appeal said order of the commission to chancery court as provided in Section 27-77-7. After the thirty-day period, if the tax determined by the commission to be due is not paid and an appeal from the commission order has not been properly filed, the agency shall proceed to collect the tax assessment as affirmed by the commission.

Section 27-77-7 states the following in pertinent part:

> (1) The findings and order of the commission entered under Section 27-77-5 shall be final unless the taxpayer shall, within thirty (30) days from the date of the order, file a petition in the chancery court appealing the order and pay the tax or post the bond as required in this chapter. The petition shall be filed against the State Tax Commission and shall contain a concise statement of the facts as contended by the taxpayer, identify the order from which the appeal is being taken and set out the type of relief sought.
>
> . . . .
>
> (3) A petition filed under subsection (1) of this section that appeals an order of the commission affirming a tax assessment, shall be accompanied by a surety bond approved by the clerk of the court in a sum double the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. As an alternative to the posting of bond, a taxpayer appealing an order of the commission affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.

¶10. The requirements of section 27-77-7 are clear. The taxpayer has thirty days to file an appeal in the chancery court. The taxpayer is also required to pay a bond or the amount of the tax under protest. A basic tenet of statutory construction is that "shall" is mandatory and "may" is discretionary. *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024, 1027 (Miss. 1990). There is no question that the language of the statute is plain and unambiguous. 5K Farms was required to post a bond or pay the amount of the tax under protest, and it did neither; thus, the chancellor did not err in dismissing the case. This issue is without merit. We must now determine whether 5K Farms should have been allowed to appeal in forma pauperis.

II. IN FORMA PAUPERIS

¶11. In its second issue on appeal, 5K Farms argues that it should have been allowed to appeal in forma pauperis. 5K Farms contends that the filing of the appeal alone confers jurisdiction regardless of payment of a bond or the amount of the tax. As previously stated, the statute requires a bond to be posted with the appeal. Mississippi Code Annotated section 11-53-17 (Rev. 2002) provides that persons who are indigent may proceed in civil actions as paupers. However, according to *Life and Casualty Insurance Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732, 733-34 (1941) and *Nelson v. Bank of Mississippi*, 498 So. 2d 365, 365-66 (Miss. 1986), the statute dealing with in-forma-pauperis actions applies only to courts of original jurisdiction and not to courts of appeal. *See also Ivy v. Merchant*, 666 So. 2d 445, 447 (Miss. 1995); *Moreno v. State*, 637 So. 2d 200, 202 (Miss. 1994); *Bessent v. Clark*, 974 So. 2d 928, 931-32 (¶¶11-12) (Miss. Ct. App. 2007); and *Nickens v. Melton*, 38 F.3d 183, 184 (5th Cir. 1994).

¶12. Based upon the foregoing, it is clear that 5K Farms was not entitled to proceed in forma pauperis when appealing the order of the Commission to the chancery court. This issue is without merit.

III. DEFECT OF FORM

¶13. In its third issue on appeal, 5K Farms argues that dismissal was unwarranted because failure to pay the tax or post a bond was a form defect. However, this is not an instance where the bond was defective. In order to perfect its appeal, 5K Farms was ordered by statute to file a written notice and pay a bond or the amount of the tax under protest. 5K Farms failed to post a bond; thus, its appeal was not perfected. *See Riley v. Town of Lambert*, 856 So. 2d 721, 723 (¶9) (Miss. Ct. App. 2003) ("appeal is not perfected until two things occur: the filing of a written notice of appeal and a cost bond"). This issue is without merit.

IV. DUE-PROCESS CLAIM

¶14. In its final issue on appeal, 5K Farms briefly contends that the statute requiring payment of a disputed assessment or a bond securing the same is a violation of its due-process rights. However, this Court cannot review matters which were not ruled upon by the lower court. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 202-03 (¶9) (Miss. 1999). Furthermore, Rule 24(d) of the Mississippi Rules of Civil Procedure requires that proper notice be given to the Attorney General when the constitutionality of a statute is challenged "to afford him an opportunity to intervene and argue the question of constitutionality." Rule 44(a) of the Mississippi Rules of Appellate Procedure similarly requires service of any appellate brief challenging the validity of a statute "on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved." M.R.A.P. 44(a).

"Except by special order of the court to which the case is assigned, in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body." M.R.A.P. 44(c). 5K Farms' failure to raise the issue of the constitutionality of section 27-77-7 at trial or to notify the Attorney General of its constitutional challenge of the statute results in a procedural bar on this issue. *See Pickens v. Donaldson*, 748 So. 2d 684, 691 (¶31) (Miss. 1999).

¶15. **THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**GRIFFIS, P.J., MYERS, BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY IRVING, P.J.**

**CARLTON, J., DISSENTING:**

¶16. I respectfully dissent. I find that the excessive surety bond, amounting to double of the amount in controversy, required by Mississippi Code Annotated section 27-77-7(3) (Rev. 2005) in order to gain access to judicial review, constitutes an unreasonable legislative barrier to 5K Farms, Inc.'s right to due process and judicial review. Moreover, this unreasonable barrier to judicial review relates to a procedural matter interfering with the discharge of judicial functions.

¶17. Mississippi Rule of Civil Procedure 3(a) states: "A civil action is commenced by filing a complaint with the court." When a valid complaint is filed, the judiciary then governs the procedure surrounding the assertion of the legislatively created right to sue. *See Wimley v. Reid*, 991 So. 2d 135, 137-38 (¶¶9-16) (Miss. 2008). Once the court's jurisdiction

attaches, the Legislature lacks the authority to regulate judicial discretion or deprive the judiciary of its established jurisdiction. *See Jones v. City of Ridgeland*, 48 So. 3d 530, 536 (¶9) (Miss. 2010); *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1335-36 (Miss. 1983) (overruled on other grounds). In *Jones*, the Mississippi Supreme Court explained that: "'The rule is well settled that the judicial power cannot be taken away by legislative action. . . . [and] [a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.'" *Id*. (citing *City of Belmont v. Miss. State Tax Comm'n*, 860 So. 2d 289, 297 (¶16) (Miss. 2003)).

¶18. The unreasonably high surety bond in the case before us constitutes a procedural rule as defined by the Mississippi Supreme Court. The supreme court defined "procedure" as "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product." *Jones*, 48 So. 3d at 537 (¶15) (quoting Black's Law Dictionary 1203-04 (6th ed. 1990)). The supreme court further noted that when litigants appeal to an appellate court, the Mississippi Rules of Appellate Procedure provide the "'mode of proceeding' to ensure that the contested 'legal right is enforced.'"[2] *Id*.

¶19. In addressing the supreme court's authority to promulgate procedural rules, to include appellate procedural rules, the court fully explained that:

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[2] The Mississippi Supreme Court has also recognized that Mississippi Rule of Civil Procedure 8(f) requires that pleadings be construed to do substantial justice. *Wimley*, 991 So. 2d at 138 (¶15).

The separation-of-powers doctrine outlined in Article 1, Sections 1 and 2, of our Constitution prescribes the limitations on the power of each branch of government. This doctrine ensures that the coequal branches do not encroach on the power of the others. *Alexander v. State By and Through Allain*, 441 So. 2d 1329, 1335-36 (Miss. 1983). Further, this Court has held that "[t]he rule is well settled that the judicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional." *City of Belmont v. Miss. State Tax Comm'n*, 860 So. 2d 289, 297 [(¶16)] (Miss. 2003) (citing 16A Am. Jur. 2d *Constitutional Law* § 286, at 209-10 (1998)).

We also must be cautious not to encroach on the constitutional powers belonging to the Legislature. *See Finn v. State*, 978 So. 2d 1270, 1273 (Miss. 2008) (citing *Miss. Ethics Comm'n v. Grisham*, 957 So. 2d 997, 1003 (Miss. 2007)). Our appellate jurisdiction is granted by both the Constitution and the Legislature "by general law." Miss. Const. art. 6, § 146. Further, we have consistently held that a litigant's right to an appeal is statutory and "not based on any inherent common law or constitutional right." *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1990); *Fleming v. State*, 553 So. 2d 505, 506 (Miss. 1989) (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983)).

While the Legislature has the constitutional power to determine our appellate jurisdiction, the Constitution also grants the judiciary the power to establish its own rules of practice and procedure. Article 6, Section 144, states that "[t]he judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." Miss. Const. art. 6, § 144. "The phrase 'judicial power' in Section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business." *S. Pac. Lumber Co. v. Reynolds*, 206 So. 2d 334, 335 (Miss. 1968) (citations omitted). The "fundamental constitutional concept of separation of powers" gives this Court the "inherent power . . . to promulgate procedural rules." *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975) (citing *Matthews v. State*, 288 So. 2d 714, 715 (Miss. 1974); *Gulf Coast Drilling & Exploration Co. v. Permenter*, 214 So. 2d 601, 603 (Miss. 1968); and *S. Pac. Lumber Co.*, 206 So. 2d at 335 (Miss. 1968)).

The issue before us is whether the Legislature may allow some litigants to appeal to this Court, while placing the restrictions of a constitutional question and approval from a circuit judge or Supreme Court justice on others.

More specifically, does the "three-court rule" in Section 11-51-81 infringe on this Court's constitutional "power to make rules of practice and procedure[?]" *S. Pac. Lumber Co.*, 206 So. 2d at 335. In addressing this issue, "we are unable to ignore the constitutional imperative that the Legislature refrain from promulgating procedural statutes . . . ." *Wimley v. Reid*, 991 So. 2d 135, 138 [(¶15)] (Miss. 2008). "We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the Constitution and the legislative enactment, the latter must yield." *Newell*, 308 So. 2d at 77. "The rule is well settled that the judicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested in the courts." 16A Am. Jur. 2d *Constitutional Law* § 286, at 209-10 (1998).

In 1975, we first exercised our constitutional right to promulgate procedural rules in *Newell*. *Newell*, 308 So. 2d at 76. Based on this authority, we adopted the Rules of Civil Procedure in 1981, the Rules of Evidence in 1985, and the Rules of Appellate Procedure in 1995. This power is also supported by statute. Mississippi Code Section 9-3-61 states in part:

> As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the form of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.

Miss. Code Ann. § 9-3-61 (Rev. 2002).

The Mississippi Rules of Appellate Procedure begin by stating "[t]hese rules govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi . . . ." M.R.A.P 1. The comment to Rule 1 explains that the rules "are not to be construed to extend or limit jurisdiction of the Supreme Court." Keeping in mind this Court's constitutional rule-making authority and the Legislature's constitutional authority to establish our appellate jurisdiction, the essential inquiry then becomes whether Section 11-51-81 is a legislative grant of jurisdiction or an infringement on our power to promulgate rules of procedure.

We view the statute to be procedural in nature rather than jurisdictional. Procedure is defined as "[t]he mode of proceeding by which a legal right is

> enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product." Black's Law Dictionary 1203-04 (6th ed. 1990). When appealing to this Court, litigants use our Rules of Appellate Procedure as their "mode of proceeding" to ensure that the contested "legal right is enforced." The "three-court rule" in Section 11-51-81 essentially turns off this Court's "machinery" in the appeals process.

*Id*. at 536-37 (¶¶9-15) (footnote omitted). Thus, I respectfully submit that the statute at issue before us constitutes a procedural matter rather than a jurisdictional matter. Since the bond requirement herein fails to constitute a part of the substantive law defining or giving the rights to be adjudicated by the court, then such requirement relates to a matter of form or procedure.

¶20. I cannot turn a blind eye to this matter in controversy before us. The unreasonable legislative barrier to judicial review stands tall before the taxpayer in the form of an excessive bond requirement in the sum of double the amount in controversy[3] and also in 5K

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[3] A review of section 27-77-7(3) and its history reflects that the legislature amended this statute effective July 1, 2010, to lower the amount of the surety bond to the sum of half of the amount in controversy, and it also allows the court to exercise discretion to waive the bond in appropriate cases. The statute now provides that:

> A petition filed by a taxpayer under subsection (1) of this section that appeals an order of the Board of Tax Appeals affirming a tax assessment shall be accompanied by a surety bond approved by the clerk of the court in a sum half the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. Notwithstanding the above bond requirement, the chancellor retains jurisdiction, after motion, notice and hearing, to reduce the amount of the bond provided herein or to forego the bond in its entirety if he finds that the interest of the state to obtain payment of the taxes, penalties and interest in issue in the appeal are otherwise protected. As an alternative to the posting of bond, a taxpayer appealing an order of the Board of Tax Appeals affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by

Farms' request to the chancery court waive this bond. 5K Farms unsuccessfully filed a motion requesting that the chancellor allow their appeal to proceed without posting bond, which the chancellor dismissed for lack of subject matter jurisdiction[4] due to lack of proper bond payment. However, I agree with 5K Farms in its argument that the requirement and subsequent failure to post the excessive surety bond constitutes a defect as to a procedural matter. *See* M.R.C.P. 3. *See also Wimley*, 991 So. 2d at 137-38 (¶¶9-16). I also agree with 5K Farms' assertion that the Legislature's infringement upon the discretion of the chancellor and the imposition of an excessively high bond or payment of a contested tax assessment violates 5K Farms' due-process rights. The surety bond herein served to protect the interests of the Mississippi State Tax Commission (MSTC) as payment in the event the taxpayer lost on appeal. However, neither the bond at issue, nor its amount, relates to an element of proof or the assertion of the right to be adjudicated by the chancellor.

¶21. I also submit that such infringement upon the chancellor's discretion violates the separation of powers clause. The language of section 27-77-7(3) applicable to this case allows the chancellor no discretion to reduce or waive the bond in appropriate cases. The amended statute, effective July 1, 2010, however, does recognize the discretion of the chancellor to reduce the bond or to forego the bond entirely upon finding sufficient

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> the Board of Tax Appeals to be paid and seek a refund of such taxes, plus interest thereon, in the appeal.

Miss. Code Ann. § 27-77-7(3) (Rev. 2010).

[4] On appeal, this Court reviews jurisdictional issues de novo. *Harrison v. Boyd Miss.*, Inc., 700 So. 2d 247, 248 (Miss. 1997) (citing *McDaniel v. Ritter*, 556 So. 2d 303, 308 (Miss. 1989)).

protection for the interests of the state to obtain payment of the taxes, interest, and penalties. I find that the surety bond, required herein to obtain judicial review, represented a purely procedural protection for the MSTC. The bond constituted an unreasonable barrier to access judicial review and to the substantive rights of the taxpayer once jurisdiction attached via a validly filed complaint. Therefore, I must dissent.

**IRVING, P.J., JOINS THIS OPINION IN PART.**