IN THE COURT OF APPEALS 04/08/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00978 COA

AMERIDATA INC.

APPELLANT

v.

COLUMBUS MUNICIPAL SCHOOL DISTRICT; REUBEN E. DILWORTH, INDIVIDUALLY AND AS SUPERINTENDENT OF THE COLUMBUS MUNICIPAL SCHOOL DISTRICT, JANNETTE ADAMS, ROBERT JENKINS, SARAH JONES AND JAN KLING, INDIVIDUALLY, AND IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF TRUSTEES OF THE COLUMBUS MUNICIPAL SCHOOL DISTRICT, AND UNITECH, INC. OF MISSISSIPPI

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DOROTHY WINSTON COLOM

COURT FROM WHICH APPEALED: LOWNDES COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT:

BARRETT BLAKE TELLER

M. JAMES CHANEY JR.

ATTORNEYS FOR APPELLEES:

W. DAVID DUNN

JOSEPH N. STUDDARD

NATURE OF THE CASE: CIVIL

TRIAL COURT DISPOSITION: COMPLAINT DISMISSED PURSUANT TO DOCTRINE OF LACHES

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

The matter now before the Court is an appeal by AmeriData, Inc. from a ruling of the Chancery Court of Lowndes County dismissing its complaint. The complaint, deemed by the chancellor to be an appeal from an action of the Columbus Municipal School District, sought judicial relief for what AmeriData perceived to be certain improprieties in the District's award of a contract for computer equipment. The chancellor, concluding that AmeriData had unreasonably delayed asserting its rights, dismissed the complaint as being barred by the equitable doctrine of laches. This Court concludes that the chancellor was in error in this ruling and we reverse and remand.

I.

Facts

AmeriData, in response to an advertisement seeking bids for a large computer acquisition project by the Columbus Municipal School District, submitted its bid. Unitech submitted the only competing bid. On May 23, 1995, the District formally accepted the Unitech bid.

AmeriData, within approximately one week, filed written notice with the District that it considered the District's action a violation of the state's public purchasing law. AmeriData also sought, without avail, the intervention of the State Auditor in the matter. The record indicates that, in the ensuing days, there were additional contacts made by AmeriData's attorneys with the District's legal representatives in an effort to persuade the District to re-bid the project. Realizing that its extra-judicial efforts were not proving productive, AmeriData commenced this action by complaint filed on June 23, 1995 -- thirty-one days after the bid award.

II.

The Applicability of the Equitable Bar of Laches

The District, at the trial level, disputed the authority of the chancellor to consider AmeriData's complaint. The District took the position that the case was an appeal of an action by the board which could only be accomplished under authority of section 11-51-75 of the Mississippi Code of 1972. This section deals with appeals from actions of county boards of supervisors and municipal authorities. The section provides that the appeal must be filed in the circuit court within ten days of the board's action. Miss. Code Ann. § 11-51-75 (1972). AmeriData argued that the case was not an appeal, but was an independent equitable action. The chancellor agreed in part with the school board when, in her opinion, she said that "whatever the label, this is, in legal reality, an appeal from a decision of the school district." She went on, however, to conclude that section 11-51-75 did not apply since it was limited on its face to specific governmental bodies that did not include school boards.

Having determined the action to be an appeal, the chancellor then correctly noted that there was no statutory provision for appellate review of an action of a school board and, thus, there was no statutory limit on the time to seek such review. Nevertheless, the chancellor analyzed a number of statutes regarding time limits on appeals from other governmental boards and concluded that public policy dictated a sharply limited period of time to seek such judicial review. Based upon this conclusion, coupled with a finding that more than one-third of the computers had been delivered and more than one million dollars had been paid on the contract at the time of the hearing, the chancellor "determined that the doctrine of laches bars this action by the plaintiff" and ordered the complaint dismissed.

While this Court is not unsympathetic to the very real public policy concerns articulated by the chancellor in her opinion, we have determined that the chancellor was in error in dismissing AmeriData's complaint.

A.

Whether the Complaint Was An Appeal

The issue of the applicable time bar to the filing of this action is critical to our decision. Since the bar could arguably be substantially different depending upon whether this action is an appeal or an independent action, our analysis must begin by determining the true nature of this suit.

As a part of the relief it sought, AmeriData asked the chancellor to rescind the bid award to Unitech based on a claim that AmeriData's bid was actually the lowest and best. Though not specifically articulated in the complaint, this claim raises the issue that the board's decision was arbitrary and capricious or otherwise contrary to the law. Such a finding is, historically, a necessary prerequisite to judicial intervention in the operation of another branch of government. *See e.g. Board of Law Enforcement Officers Standards and Training v. Butler,* 672 So. 2d 1196, 1199 (Miss. 1996); *Montalvo v. Mississippi State Bd. of Medical Licensure,* 671 So. 2d 53, 55-56 (Miss. 1996); *Mississippi State Bd. of Nursing v. Wilson,* 624 So. 2d 485, 489 (Miss. 1993). The vehicle normally used to bring the issue before the judicial tribunal is an appeal pursuant to a statute that specifies the proper court to conduct the review and usually (but not always) the time limit within which the review must be sought.

Unfortunately, this State's patchwork system of creating statutory appeal procedures from actions of non-judicial governmental bodies is not all-inclusive. This Court has, in an investigation not claimed to be exhaustive, determined that there are no less than 170 statutory provisions defining procedures for judicial review of the actions of such bodies. There is, for example, a statutory scheme for judicial review of a decision to deny a vanity license plate application on the ground that the proposed wording is obscene. Miss. Code Ann. § 27-19-48 (1972) and Miss. Code Ann. § 27-19-337 (1972). Another statute establishes an appeals process for one whose permit to furnish correspondence courses has been revoked. *See* Miss. Code Ann. § 75-59-5 (1972).

Nowhere may one find a statutory procedure for judicial review of an action of a school board, except in limited circumstances relating primarily to personnel actions which have no application in this case. *See* Miss. Code Ann. § 37-9-113 (1972) (Any employee aggrieved of the final decision of a

school board is entitled to judicial review.). Neither do the general public bidding statutes provide, as one might have hoped, a method to obtain judicial resolution of charges of impropriety in the bidding process, except to create a procedure to impose personal liability on the officials who voted in favor of the improper expenditure. Such liability, even if established, runs in favor of the governmental body and not the aggrieved bidder, and, thus, has no application in this case. *See* Miss. Code Ann. § 31-7-57 (1972).

The supreme court, in cases relating to actions of state-wide agencies for which there is no statutory appeal procedure, has judicially vested the chancery court with appellate jurisdiction to test the reasonableness of the agency's action. *Charter Medical Corp. v. Miss. Health Planning and Development Agency*, 362 So. 2d 180, 181 (Miss. 1978); *Board of Veterinary Examiners v. Sistrunk*, 218 Miss. 342, 347, 67 So. 2d 378, 380-81 (1953). While we find no case specifically applying this notion to boards of governmental subdivisions, we find it logical that the principle originally announced in *Sistrunk* would extend to governmental bodies of less than state-wide jurisdiction such as this school district, and we so hold.

Thus, if we conclude that the issues presented to this Court for resolution could only be brought by appeal, it would appear that the action was brought in the proper court, contrary to the Board's assertion. Ameridata argues that this action is not an appeal, but is an independent action cognizable in chancery under that court's inherent equitable jurisdiction. There is support for that position, and AmeriData astutely cites us to it. In *Canton Farm Equipment Inc. v. Richardson*, 501 So. 2d 1098, 1103 (Miss. 1987), the supreme court dealt with a claim by a disgruntled bidder that the Madison County Board of Supervisors had improperly accepted a competitor's bid. The action was originally brought in chancery court but was subsequently transferred to circuit court by the chancellor on the conclusion that the suit was, in reality, an appeal of the board's action under section 11-51-75 of the Mississippi Code of 1972. The supreme court, however, indicated that since "[t]he complaint . . . seeks restitution as well as a personal judgment against the Supervisors directing that they rescind one contract and make a new one" the chancery court had original jurisdiction of the action. *Id.* at 1103. Since an appeal from the board of supervisors lies in circuit court, a finding that the chancery court has jurisdiction to grant relief means that the judiciary may interfere in a board's conduct of its business by proceedings other than an appeal.

This Court admits to some difficulty in understanding the logic of the *Canton* decision on this score. A claim that a board has acted arbitrarily and capriciously or contrary to law is the classic subject matter for an appeal to the judiciary. If the court determines that the board has acted improperly, the appropriate relief is to judicially undo what the board has administratively done. If the board action was to improperly enter into a purchase contract, then the court would have the jurisdiction to order the contract rescinded. It is difficult to see how this relief varies from that pursued in *Canton,* where the plaintiff sought an injunction to compel the supervisors to personally rescind the contract, an action which a court exercising appellate jurisdiction could accomplish by its own order. Since the right of appeal -- a remedy existing at law -- permits the same relief sought in the chancery action, it would seem that a dissatisfied bidder has an adequate remedy at law. This conclusion, in turn, ought to render equitable relief inappropriate since, normally, a prerequisite to equitable relief is a finding that the plaintiff does not have an adequate remedy at law. *Broadhead v. Terpening,* 611 So. 2d 949, 954 (Miss. 1992).

Nevertheless, this Court is obligated to follow supreme court precedent, and we would seem bound, as AmeriData urges, by the *Canton* opinion were it the last word on the subject. It is not. Within a few years of deciding *Canton*, the supreme court dealt once again with a claim by a disgruntled bidder in the case of *South Central Turf, Inc. v. City of Jackson*, 526 So. 2d 558 (Miss. 1988). In that case, the City of Jackson had solicited bids for a leasing contract for golf carts to be used on municipal golf courses. South Central Turf submitted one of three competing bids, and the City awarded the bid to a competitor in early April, 1986. South Central Turf formally asked the City Council to reconsider the award. The Council permitted the company to make an oral presentation on the matter in late April; however, the Council refused to take any action to modify its earlier award. As a result, South Central Turf filed suit in chancery court in early May. The chancellor originally dismissed the action on reaching a conclusion that there was no jurisdiction, but later signed an order transferring the case to circuit court. The court faced two questions: (a) whether the action was an appeal and, (b) if so, was it timely perfected. The supreme court, in addressing the first issue, said:

> We are of the opinion that the action brought by appellant was in form and substance, and for all purposes, an appeal from a decision of the City of Jackson and that exclusive jurisdiction was in the circuit court pursuant to § 11-51-75. Therefore, the chancery court did not err in finding lack of jurisdiction on the complaint requesting injunctive relief.

South Central Turf, Inc., 526 So. 2d at 561.

The court distinguished its earlier *Canton* decision by noting that, in *Canton*, the plaintiff had filed its suit

> as a civil suit for damages against the county supervisors *individually and personally* under Mississippi Code Annotated §§ 19-13-37 and 31-7-57 (1972). The plaintiff had standing to sue as a taxpayer. The successful bidder was also named as a defendant in the suit, and the scope of the action was much broader than a simple appeal from a Board of Supervisors' decision.

Id. at 561.

While it is true that AmeriData named the individual board members as defendants, the complaint seeks no relief against them individually. The *Canton* decision makes clear that such relief, even if available, would not inure to the benefit of AmeriData in any event. Rather, any recovery from board members individually under section 31-7-57 is for the benefit of the governmental body itself, and the plaintiff is said to be acting as a private attorney general. *Canton*, 501 So. 2d at 1106. The only claim that AmeriData asserts is that the decision of the board to accept Unitech's bid was arbitrary and capricious or contrary to law and should be set aside on that basis. On the strength of the *South Central Turf* case, we find that action to be in the nature of an appeal, as the school district argues, and not an independent chancery action for equitable relief mentioned in the earlier *Canton* decision. Therefore, we agree with the chancellor's findings as to the true nature of this proceeding.

Such a conclusion, however, does not resolve the case. It simply raises the question of whether this appellate proceeding was timely commenced. It is to this subject that we must now turn our attention.

B.

Was the Appeal Timely Filed?

The question of the timeliness of this appeal presents some difficulty. As we have previously observed, most statutorily-defined appeals set a definite time limit. These limits generally range from ten days to thirty days, though some statutes permit appeal periods of forty-five and sixty days. We can discover no principle of law that would permit this Court to select and apply one of these statutory limits where the right of appeal is of judicial and not legislative origin. Even were we predisposed to do so by a process of analogizing this appeal to a comparable legislatively-created appeal (a process relied upon, in part, by the chancellor in reaching her decision), it would be impossible not to ultimately resort to the most arbitrary reasons in selecting one period over another.

Prior supreme court precedent offers no guidance. In previous supreme court opinions where appellate jurisdiction was of judicial rather than legislative origin, the issue of the timeliness of the appeal did not arise.

Our review of applicable procedural rules promulgated by the supreme court under its inherent rule-making authority has not uncovered anything that would assist us in resolving this matter. There is authority that, in appeals from *county court* to chancery court, the rules of appellate procedure apply in the absence of guidance from some other source. *Allen v. Mayer*, 587 So. 2d 255, 261 (Miss. 1991). If *Allen v. Mayer* could be extended by analogy to appeals from *non-judicial governmental bodies* to chancery court, then Mississippi Rule of Appellate Procedure 4(a), providing a thirty-day appeal period arguably could control this situation. However, it is the opinion of this Court that extending the rationale of *Allen v. Mayer* to this case would be perilously close to judicial rule-making rather than judicial interpretation. Since the authority to promulgate rules for the courts of this State is vested in the supreme court, we decline to engage in this bit of expansion of the scope of the appellate procedural rules. *See Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975). Thus, we conclude that the limit on the time to pursue this action must be found elsewhere.

We find ourselves left with the proposition that, absent a definite time period set by statute or rule, the only means to test the timeliness of this action is, as the chancellor concluded, the doctrine of laches.

> The doctrine of laches, although resembling limitations, is not based upon, nor bound by, any express statute of limitations. It is a rule peculiar to and inherent in courts of equity; and it applies where it would be practically unjust to give a remedy, either because the applicant has by his conduct done that which might be fairly regarded as equivalent to a waiver of his remedy, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted.

V.A. Griffith, Mississippi Chancery Practice § 33 (2d edition 1950).

Laches, being in the nature of an affirmative defense, is one for which the proponent has the burden.

Allgood v. Allgood, 473 So. 2d 416, 422 (Miss. 1985). The supreme court has said that a party asserting laches must satisfy the court on three separate counts. First, the court must conclude that there has been a delay in asserting the claim. Secondly, the delay must not be excusable. Thirdly, the party against whom the claim is asserted must be unduly prejudiced by the delay. *Merchants and Farmers Bank v. State ex rel. Moore,* 651 So. 2d 1060, 1063 (Miss. 1995).

It appears doubtful to this Court that the District even met its burden on the first question. Admittedly, this case involves an appeal, not an independent action. Fundamental concepts of judicial procedure suggest that the time to seek an appeal may be dramatically shorter than the time to judicially assert some other claim; the former being measured in days, while the latter is measured in years. Nevertheless, a review of the various deadlines provided by the legislature for appeals from non-judicial governmental bodies leads one to the necessary conclusion that appeal periods up to forty-five days or even sixty days are not inherently offensive to ideas of timeliness. In our case, the time elapsing between action and appeal was thirty-one days. To hold that time period to be a "delay" for purposes of laches would require this Court to find that there was a compelling reason to expect AmeriData to act in some lesser time. We cannot discover such a reason on the facts of this case. The District insists on its right to rely on the ten-day bar of section 11-51-75, but we are not convinced that such reliance was reasonable. That statute plainly limits its applicability to "the board of supervisors or municipal authorities of a city, town, or village . . . ." Miss. Code Ann. § 11-51-75 (1972). A municipal separate school district cannot, by any logical argument, be brought within the scope of that statute. Neither can we discern any rational basis for the District to conclude that a thirty-day bar would unequivocally apply. Thus, we are inclined toward the idea that a thirty-one day lapse in seeking judicial review, in the absence of a clear authority that a shorter period applied, did not amount to a delay at all.

However, assuming for sake of argument, that the thirty-one day period was a "delay" within the meaning of the *Merchants and Farmers State Bank* case, we must consider the second aspect, *i.e.*, whether or not the delay was excusable. Again, this presents a close question. AmeriData claims its delay was excusable because it was proceeding in the interim with a good faith attempt to persuade the District to see the error of its ways and rescind the Unitech award. We conclude, however, that this argument is not persuasive. The *South Central Turf, Inc. v. City of Jackson* case makes clear that post-award efforts to persuade a government board to change its collective mind, no matter how vigorously pursued, do not toll the period to seek judicial relief. *South Central Turf, Inc.,* 526 So. 2d at 562. It thus appears that, as to this criterion, AmeriData's delay, such as it was, was not excusable. This brings our analysis to the third consideration.

In finding that the District had been unduly prejudiced by AmeriData's thirty-one day delay in filing suit, the chancellor made certain findings regarding the extent to which Unitech had already begun performance of the contract. As we have observed, she found that over one-third of the computers had already been installed and over $1,000,000 paid on the contract "*at the time of the hearing."* AmeriData takes strong issue with that finding as not being based upon substantial evidence in the record. This Court concludes that the flaw in the finding is more fundamental. The true measure of undue prejudice must be based upon delays in asserting a right, not prejudice based upon delays in getting the matter to trial. The date of the initiation of the action is crucial, and not the date of trial. Once a party has commenced a judicial proceeding, he becomes, to a certain extent, a captive of the system -- a system that is often unable to bring the case on for hearing with the alacrity that the

litigant might ardently desire. Prejudice arising from such delays, absent a showing that the party has been less than diligent in pressing his claim, cannot be held against the party. Though not precisely on point, the following comment by the supreme court speaks to the same general consideration: "A litigant should not be allowed to take advantage of the delay inevitably and lamentably attendant upon the appellate process to render moot what would otherwise be a live and justiciable controversy." *Durant v. Humphreys County Memorial Hosp./ Extended Care Facility,* 587 So. 2d 244, 249 (Miss. 1991).

There is nothing in the record that would convince this Court that the District met its burden to show that, when AmeriData commenced this litigation on June 23, 1995, the District was so irretrievably enmeshed in the Unitech contract that it would offend basic principles of equity to permit AmeriData to judicially pursue its grievance.

There is, in any judicial proceeding, an inevitable element of delay in accomplishing things that could otherwise be completed with dispatch. The delay involved in a judicial review of the District's action in this case may have delayed implementation of a project of fundamental importance to the school children of the District. To say that a delay in carrying out vitally-needed programs is regrettable is an understatement. However, under the present state of our law, delay is unavoidable if we are to permit the actions of a governmental body to be subjected to judicial scrutiny.

We can, from this record, detect no prejudice suffered by the District from a thirty-one day delay in filing suit that would not have accrued had AmeriData commenced its action within ten

days -- or within any other arguably relevant period between the tenth day and the day of actual filing. Without such a finding of prejudice, the doctrine of laches could not be applied.

Since the District appears to have failed to carry its burden on both the first and third aspects of the laches defense, we conclude that the chancellor was manifestly in error in applying the doctrine to deny Ameridata a decision on the merits of its claim.

It would be possible to devise a system that would avoid the difficulty we address today -- a system that would permit completion of a public contract awarded under doubtful circumstances while preserving the offended bidder's right of redress through an action for damages against the governmental entity, the individual board members, or both. There is some logical appeal to such a system that would avoid uncertainty and delay in implementing projects of important public interest while preserving a remedy for those injured by any ultimately-adjudicated impropriety in the process. However, such a system would be a legislative and not a judicial construct. For now, we must work with the tools we have, and those tools do not seem to include authority to fashion such relief.

III.

Alternative Basis for Affirming

The District, in its reply brief, spends the bulk of its argument in attempting to convince the Court that, without regard to the procedural bar applied by the chancellor, the District was entitled to prevail on the merits. The District, therefore, urges the Court that, in the event we determine laches does not apply, we should review the record on the merits and affirm the chancellor on the

proposition that an appellate court may affirm when the trial court has reached the right result though assigning the wrong reason for that result. *See, e.g. Love v. Barnett*, 611 So. 2d 205, 207 (Miss. 1992).

While we concede the existence of such authority, we conclude that its application in this case is inappropriate. Had the chancellor decided this case on the merits, this Court would have had the benefit of her findings of fact, including her assessment of the credibility of witnesses on key contested issues, together with her conclusions of law. In such a case, it might be appropriate for this Court, in the face of a conclusion that the chancellor had erred, to assess whether the right result had, nevertheless, been reached. Without these findings to assist our review, we would be essentially conducting a trial *de novo* at the appellate level using the transcribed testimony and the exhibits. We do not perceive that to be a proper application of the doctrine cited by the District.

IV.

Consideration of the Merits on Remand

Because the action we have taken today suggests the strong possibility that the Chancery Court of Lowndes County will have to resolve this dispute on the merits, we express our concern about the chancellor's statement in her opinion that "[a]pplying the doctrine of laches . . . is disturbing since the court views the claim of the plaintiff as otherwise meritorious, and could only be defeated by such a time restriction."

In actually deciding a case of this importance on the merits, we are confident that this chancellor, as would be expected of any chancellor of this State, would subject the evidence to rigorous scrutiny and would supplement counsels' arguments on the law with her own research and analysis. Only after having done so, would it be appropriate to announce a decision on the merits that would bind the litigants.

Because we are remanding for a trial on the merits, this Court is concerned that it may appear that the result on remand may seem foreordained by the chancellor's comments. That would be regrettable. Our decision that the procedural basis to dismiss this action was improper does not suggest that we have concluded that AmeriData's claim has merit. That question was not before us.

We do not direct that this chancellor recuse herself on remand. We only urge that, before proceeding to resolve this case on the merits, the chancellor must determine that she can dispel any perception that she might be predisposed toward a particular result.

THE JUDGMENT OF THE CHANCERY COURT OF LOWNDES COUNTY DISMISSING AMERIDATA'S COMPLAINT IS REVERSED. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO THE COLUMBUS MUNICIPAL SCHOOL DISTRICT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.