

IN THE HIGH COURT OF SWAZILAND

SIBONGILE GLADYS MDLULI (BORN NKAMBULE)

v

Plaintiff LAURENCE MDLULI

Defendant

and

HON. PRIME MINISTER SIBUSISO BARNABAS DLAMINI

Third Party

CASE NO. 1149/97

Coram S.W. SAPIRE, CJ

For Plaintiff Mr. A. Lukhele

For Defendant Mr. B. Simelane

For Third Party Mr. D. Smith

JUDGMENT

(06/10/98)

This is the first of three days set aside for the hearing of a particular aspect of litigation between the parties. The litigation is basically a matrimonial action between the plaintiff who sues the defendant for dissolution of the marriage between them and

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certain ancillary relief. First defendant is defending and is counterclaiming similarly for the dissolution of the marriage also with ancillary relief. An issue between the plaintiff and the defendant, which is raised in the pleadings, is whether the plaintiff has committed adultery with a third party who happens to be the Honourable Prime Minister, Sibusiso Barnabas Dlamini.

He is so cited in the pleadings. This is incorrect, as it is unnecessary and most unusual to refer to a party's official rank and title in government, when the litigation is of a private nature unconnected with his official duties. Mr. Dlamini has been joined in this proceeding as a Third Party. It has been alleged that he is the person with whom the plaintiff has committed adultery, and damages in an enormous amount is claimed.

The action has been before the Court on a number of occasions even before the Third Party Notice was served. It was postponed from time to time according to the notes on the file at the instance of the Defendant.

Before the matter was set down again an application was made by the Third Party supported, by the plaintiff that this matter be dealt with in terms of rule 33 bis. Rule 33 bis is a new rule. There are reasons contemplated in the rule why a case may be promoted on the role and special directions given for its

hearing. This is in line with what is known as hands-on case management, which is a feature of many progressive jurisdictions. The defendant did not suggest that the proceeding was inappropriate. At the pre trial meeting it was recognised that because of the allegations of serious misconduct by the Prime Minister of the country, that it was best in the public interest, and for all concerned that the issues raised by the allegations and the denial thereof resolved forthwith. None of the parties raised any doubt that they would be hampered in preparation for trial by inadequate time within which to marshal their witnesses

A conference, in terms of the rule was held in my chambers. All the parties were present. It was then and there agreed that there would be a trial on the issue of the adultery only, to proceed on a date as soon as could be fixed by the Registrar in consultation with the parties. Today is the date so arranged.

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There is also a note in the file that the parties would, if necessary, seek directions in regard to preparation for a trial as may be necessary. This obviously covered matters such as discovery, inspection of documents and otherwise.

When the matter was called this morning Mr. Simelane who appears for the defendant raised a matter regarding certain Notices which he has filed purporting to be Notices in terms of Rule 35(4), Of concern only, is a Notice served on the 3rd Party. The Notice, required the third party within fourteen days, (presumably from service of the Notice i.e. 25th September at 3.45p.m.) to deliver at the "abovementioned address" a written statement on oath setting out what documents and tape recordings of the "following nature" the 3rd Party then had or had previously in his possession which were not discovered in the 3rd Party discovery affidavit of the 18th September 1998.

The relevant rule does not make provision for such relief at all. The Rule 35(4) says that:

"If any party believes that there are in addition to documents or taperecordings disclosed as required in sub-section 2 or other documents including or taperecordings which may be relevant to any matter in question in the possession of the parties thereto the former may give notice latter requiring him to make the same available for inspection in accordance with sub-rule 6 or to state on oath within fourteen days of the Notice that such documents or taperecordings are not in his possession in which event he shall state their whereabouts if known to him ".

There is no provision, which requires any party to litigation to do what the defendant in its Notice as asked of the Third Party. The rule does not require or allow him to ask for a schedule or a statement on oath setting out what documents and tape recording of a certain nature presently he has or previously he had in his possession which were not discovered in the Third Party Discovery affidavit. What the party can do is to say: "I believe you have in your possession certain documents which I want you to make available." It does not say within what period compliance is required. The specified items are to be made "available in accordance with sub-rule 6". Sub-rule 6 has no reference to this matter at all.

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It is difficult to see what exactly the party who was served with this notice is supposed to do. In any event according to the rule what is required is that certain documents have to be made available. The defendant has not asked for that. He has not asked for the documents to be made available. He has asked for a statement on oath from the Third Party specifying a large number of vaguely described documents. It is only if the party receiving the notice objects to the production of, or cannot produce, some or all of the specified documents that an affidavit has to be filed within a specified time. The notice served on the Third Party does not call upon the Third Party to make any document available within any particular period. In this respect the notice is bad. But the notice is further defective.

The list of documents to which the defendant wants to have access or which in terms of this notice he wants to be referred to in a statement under oath is extensive. He wants, for instance, to have specified "all air tickets bought by the Swaziland Government for the plaintiff to attend conferences, meetings, etc

abroad as from 1990 whilst the 3rd Party was still Minister of Finance and Prime Minister." It is difficult to see on what basis the defendant is entitled to see every air ticket which may have been used by the 3rd party from 1990 onwards. In the first place the acts of adultery which are relied upon and specified in the pleadings do not commence before 1996 and are said to have taken place in certain specified particular places and areas. If it was relevant to prove that the third party traveled at particular times to the places where allegedly adultery took place one could understand why the air tickets might be called for.

There is an authority in Natal to the effect that the call for further discovery in terms of Rule 35(3) does not only cover specific documents on specific points. Discovery of documents, which form a bundle of a specified nature, properly identified, can be obtained. But these are documents which must be of a specified bundle and identified and which most important of all must be shown to be relevant to the case. This is the effect of the judgment in *Rellams (Pty) Ltd. vs James Brown & Hamer Ltd 1983(1) SA 556*. The head note reads

"Rule of Court 35 (3) was not intended to cover only "specific" documents on specific points. Rule 35 (1) contemplates the discovery of all relevant documents, specific or otherwise, and indeed provides that a document shall be deemed to be sufficiently specified if

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it is described as being one of a bundle of documents of a specified nature which have been initialed and consecutively numbered by the deponent. If such a bundle of documents existed but were not discovered, there could be no valid reason why it should not be permissible to obtain their production under Rule 35 (3) which is certainly couched widely enough to allow the production of "a vast number of documents covering a long period".

The documents referred to in the notice in the present instance, are not said to be part of a bundle, nor have their relevance been indicated

A further category of document is "all hotel bills for the 3rd party overseas trip". Apart from anything else this is not English and is difficult if not impossible to understand. The Defendant does not specify which hotel bills relevant to the case are required to be produced, nor is there any indication how such hotel bills can be said to be relevant. The notice does not mention to which hotels and to which countries it is intended to refer. There is not the slightest indication of how the documents are said to be relevant.

The third category of documents in schedule "C" is "all tickets purchased by the Swaziland Government for attendances of conferences, seminars, meetings and courses for African Development Bank Common Monetary Area (CMA), Exchange Control quarterly meetings, Commonwealth Finance Ministers World Bank meeting; Economic Commission for Africa (ECA); Conference of the African Ministers of Finance." How these tickets purchased by the Swaziland Government can have anything to do with this case is beyond comprehension.

Then the defendant further calls for "all telephone bills in possession of the 3rd Party from 1990 to date, including telephone bills of the 3rd party when he was seconded to the World Bank" Are these the telephone bills relating to the Prime Minister's offices here on Hospital Hill? Are they his private telephone bills? Are they telephone bills relating to the Bank. There could be many telephone accounts relating to telephone used by the 3rd party. Of what possible relevance could any of these documents be even if it were possible to fathom what specific items are those to which the Defendant wishes access.

The Defendant also wants the names of the hotels where the 3rd party resided when he attended conferences. That information cannot in any way to be described

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as a document or a tape recording contemplated in the rule. Specific information is being requested which may or may not be available by way of particulars of a trial but is certainly not under this notice.

A basic and insuperable obstacle to granting an order compelling the Third party to comply with the notice, (which, together with a postponement of this trial is what Mr. Simelane seeks) is that the notice is defective not only in the respects I have pointed out. The time accorded the Third Party in the notice to file an affidavit indicating his objection to giving, or inability to give, access to the documents mentioned in the notice has not yet elapsed. Mr. Simelane recognised that having regard to the agreed period available for the preparation the notice is not appropriate because if and when the information comes to him the trial will be over. At this moment it cannot be said that the 3rd Party is in default with compliance with a valid notice requiring the production of the documents in question. There is no evidence or nothing to suggest that these documents are in any way relevant to what is the subject matter of this particular enquiry and I cannot accede to Mr. Simelane's application for an order compelling the 3rd party to comply with the provisions of the notice.

That should not affect the conduct of this trial. If there are any such documents in the possession of the Third Party he may be questioned in regard thereto and called upon if necessary and possible to produce them. If they do exist and are relevant they can be produced during the course of this trial. The Third Party has made discovery and his discovery affidavit as to the possession of discoverable documents is conclusive until the contrary is demonstrated. The Defendant has made the allegations of adultery in the absence of, and without access or reference to the documents listed in the notice. Presumably he has some evidence on which the allegations have been made. It is late in the day to commence investigations on the basis of these documents

If these documents are intended to indicate that the 3rd party was at a particular place in a particular time or that he had a telephone conversation with a particular party there is nothing that the defendant would have achieved by getting access thereto even if it had been complied with. In my view the Notice has the earmarking of a fishing expedition of hoping to find some material damaging to the 3rd party's

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case and that also that of the plaintiff which at present is unknown certain to the 3rd party and cannot be specified by the defendant.

There is ample authority that once the plaintiff or other party to litigation has made a discovery on oath of all documents which are in his possession relevant to the case the Court will not go behind this affidavit unless there is very good reason for doing so. In this case such good reasons have not been advanced and the application for an order compelling the 3rd Party to comply with this order is dismissed with costs

I have refused an application made by the defendant for a further postponement of this hearing. The application was made on the basis that without the compliance with the notice in terms of the rule 35(4) the defendant's attorney has not been able to prepare for trial and is therefore not in a position to lead any evidence today. As I have indicated I cannot accept this invalid reason for postponement and I understand that the defendant's attorney is not leading any evidence today. Whether he uses the word "formally closes his case" or not does not take the matter any further. The fact is his opportunity for leading evidence has come and he has declined to lead evidence. It is as if he was not here. In those circumstances I must accede to the application which is made by Mr. Smith on behalf of the 3rd party. There being no evidence of adultery produced and this hearing having been devoted solely to that issue the claim against the 3rd party must be dismissed. This is in effect a judgment for absolution from the instance. In view of the circumstances of this case I am also inclined to award the 3rd party the costs of today's hearing. I make an Order that it shall include the cost of counsel as provided for in the rule. 68. The costs are to be taxed by the scale applicable between Attorney and Client. As far as the plaintiff is concerned there are wider issues and I am not satisfied that it would be proper to make an order in her case. The costs of today as far as the plaintiff is concerned will be reserved for the determination of the trial judge.

S.W. SAPIRE

CHIEF JUSTICE