

# IN THE HIGH COURT OF SWAZILAND

CASE NO. 66/06

**THEMBA MSIBI**

**PLAINTIFF**

and

**THE TIMES OF SWAZILAND (PTY) LTD  
AND 2 OTHERS**

**1<sup>ST</sup> DEFENDANT**

**MARTIN DLAMINI**

**2<sup>ND</sup> DEFENDANT**

**AFRICAN ECHO (PTY) LIMITED**

**3<sup>RD</sup> DEFENDANT**

CORAM: Q.M. MABUZA-AJ

FOR PLAINTIFF: B.S. DLAMINI

FOR DEFENDANT: P.R. DUNSEITH

## **RULING 23/6/06**

[1] This is an application by the defendants for an order:

- (a) Compelling the Plaintiff to comply with the Defendant's Notice in terms of Rule 35 (4) within seven (7) days.
- (b) Costs
- (c) Further and/alternative relief.

[2] The background to the matter is that the Defendants published an article of and concerning the Plaintiff's salary deductions and his debts. Indeed counsel for

the Defendants drew my attention to the contents of this publication during his submissions.

[3] The Plaintiff has sued the Defendants for defamation and seeks damages in the amount of E750,000.00

[4] The Defendants have submitted that they rely upon a defense of justification (i.e. truth and public benefit). In his submission Counsel for the Defendants revealed that the defendants required certain documents which were directly relevant to the issues in dispute and are required to establish the Defendants defence.

[5] The Defendants issued a notice to discover and the Plaintiff filed a discovery affidavit in which they did not make discovery of any documents in his possession with regard to his salary, the deductions from his salary and his debts.

[6] The defendants thereupon delivered notice to the Plaintiff's in terms of Rule 35 (4). The Plaintiff failed to respond to this notice of application to compel compliance with the notice.

[7] In his submissions Plaintiff's Counsel referred the court to a letter he wrote on behalf of his client dated the 22<sup>nd</sup> March 2006 relevant portions read:

*2. Our client is not aware of the documents referred to in your correspondence and as such is unable to produce the same.*

*3. In any event, it is your client which has made the allegations regarding our clients financial position and therefore your clients must prove those allegations.*

I have included the contents herein as they have a bearing on the issue of costs.

[8] It is only after delivery of the notice of set down of this application that the Plaintiff filed an affidavit in response to the Defendants notice in terms of Rule 35 (4). The relevant portion of the affidavit states:

*"I. I am the Plaintiff in the above matter and do hereby solemnly declare that I **do not have in my possession and have no knowledge** as to the whereabouts of all the items listed here under;"*

This is my emphasis because this too has a bearing on the issue of costs as the items referred to in the Plaintiffs affidavit can be found if the Plaintiff desired to look for them.

[9] At the very least the Plaintiff should have responded that save for items (h) and (i) the rest were not necessary to advance the Defendants' defence which is based on the "truth" of its publication.

Item (h) are	<i>"Copies of the Plaintiffs salary advices for the period of January - December 2005"</i>
Item (i) is a	<i>"Copy of Applicant's written disclosure of assets and liabilities submitted to Swaziland Government on his appointment as a Cabinet Minister."</i>

[10] The Plaintiffs claim is stated in paragraph 5 of his particulars of claim which states "

*"On the 11<sup>th</sup> December 2005 the 1<sup>st</sup> Defendant published an article in its newspaper 'The Sunday Times' of and concerning the Plaintiff titled "The Minister's take home salary is E0.00". The said article reads as follows; "A Cabinet Minister is taking home E0.00 at the end of each month, despite being paid his monthly salary. Under normal circumstances. Themba Msibi earns E20,856.92 as a basic salary. But he has created a huge debt*

*amounting to E374,659.64. Among his mountain of debts, he is paying back a salary advance and to this end, for the month of October, he paid E3,333.34".*

[11] It is my considered view that the Defendants only need the Plaintiff's salary advice for the month of December 2005 and a copy of the Plaintiff's written disclosure of assets and liabilities submitted to the Swaziland Government on his appointment as a Cabinet Minister, the latter being a public document in order to respond to the particulars of the summons that I have set out above.

[12] The Plaintiff ought to have responded timeously to the Defendants request. The letter dated 22<sup>nd</sup> March 2006 is totally unnecessary in view of the Plaintiffs cause of action and the Defendants defence based on the "truth" of that cause of action.

[13] The Plaintiffs response to the notice in terms of Rule 35 (4) shows an intention to evade production and to mislead the court which is an abuse of the court process.

[14] In the event I order as follows:

(a) The application compelling the Plaintiff to comply with the Defendants notice in terms of Rule 35 (4) succeeds in part.

(b )The Plaintiff is ordered to discover:

(i) Copies of the Plaintiffs salary advice for the month of December 2005.

(ii) A copy of his written disclosure of assets and liabilities submitted to the Swaziland Government on his appointment as a Cabinet Minister.

(c) The aforesaid documents are to be discovered within seven days hereof.

(c) The Plaintiff is ordered to pay the costs of this application.

**Q.M. MABUZA -AJ**