CASE NO.: (P) I 654/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALUGODHI PAULUS KANYAMA	**PLAINTIFF (RESPONDENT)**
and	
GORDON CUPIDO	**DEFENDANT (APPLICANT)**

CORAM: **SILUNGWE, AJ**

Heard on: 2007.03.06

Delivered on: 2007.03.14

JUDGMENT:

SILUNGWE, AJ: [1] This is an interlocutory application brought pursuant to Rule 35(7) of the rules of the Court in which the defendant/applicant seeks an order in the following terms:

> "1. Directing that the plaintiff (respondent) comply with defendant's notice in terms of Rule 35(3) dated 08 February 2007 in respect of items 19 and 21 and to provide discovery and produce in respect of the items in the second schedule to the plaintiff's further discovery affidavit (items 4, 5, 6, 7, 15, 16, 16.1, 17 and 18 of Rule 35(3) notice), on or before a date to be recommended by this Honourable Court and, failing such compliance, that plaintiff's claim be dismissed with costs upon these papers duly amplified if need be;

2. Directing the plaintiff (respondent) pay the costs of this application;

3. Granting such further and for alternative relief as this Honourable Court deems fit."

[2] For ease of reference, the documents that the plaintiff/respondent is required to make available to the defendant/applicant are these (reflecting the numbering in paragraph 1 of the Notice of Motion):

4. all receipt books in respect of all professional attendances to private patients for the years 2004, 2005 and 2006;

5. all invoices in respect of all professional attendances to private patients for the years 2004, 2005, and 2006;

6. all documentation relating to and/or records of claims to medical aid funds made by the plaintiff in respect of services rendered by him to private patients during the years 2004, 2005 and 2006;

7. records of all payments made by medical aid funds to the plaintiff;

15. the plaintiff's income statement for the tax year ending 28 February 2006;

16. the plaintiff's income statement for the tax year ending 28 February 2006;

16.1 the plaintiff's bank statements in respect of accounts held relating to his private practice for the years 2004, 2005 and 2006;

17. plaintiff's tax return in respect of the year ending February 2005;

18. plaintiff's tax return in respect of the year ending February 2006;

19. the plaintiff's diaries in respect of 2004, 2005 and 2006; and

21. a copy of the “faked document” referred to in the plaintiff’s letter to the Minister of Health and Social Services dated 1st October 2005.

[3] The plaintiff/respondent and the defendant/applicant will hereinafter conveniently be referred to as plaintiff and defendant, respectively. The plaintiff Is represented by Ms Bassingthwait, while the defendant is represented by Mr. Smuts, S.C.

[4] The plaintiff and the defendant are both adult male medical practitioners in the Public Service within the Ministry of Health and Social Services and are based in Windhoek. The plaintiff – a specialist physician - has a contract with the State which permits him limited private practice (in the afternoons).

[5] In March 2006, the plaintiff instituted an action for defamation against the defendant in respect of statements and a complaint allegedly made by the defendant during about May and June 2005 concerning the plaintiff. In his particulars of claim, the plaintiff refers to three specific incidents of the alleged defamation which are set out in paragraphs (paras) 4.1. 4.2 and 4.3, respectively.

(1) In para. 4.1, it is alleged that the defendant stated at a meeting with the Medical Superintendent of the Katutura Hospital, Windhoek, that the plaintiff was corrupt and incompetent.

(2) In para. 4.2, it is contended that the defendant stated of and concerning the plaintiff that he was guilty of using State facilities to treat his private patients without authority to do so.

(3) In para. 4.3, it is alleged that the defendant laid a complaint with the Office of the Ombudsman in which he stated that the plaintiff: was corrupt and guilty of corrupt practices; failed to adhere to the rule that he must render services to the State during stipulated hours, but attended to private patients; used State equipment to attend to his

> private patients, in contravention of the applicable rules; and fraudulently claimed subsistence and traveling allowances from the Ministry of Health and Social Services when he travelled to the north of Namibia to treat his private patients.

[6] Disputing the alleged instances of defamation, the defendant gave notice of his intention to defend the action. In his plea, he raised the defences of truth and public interest as well as fair comment based on true facts. An unopposed notice of intention to amend the defendant's plea was filed on February 08th, 2007, and the defence of qualified privilege was added to the amended plea.

[7] When the defendant filed the Rule 35(3) notice requiring the plaintiff to make available twenty three documents, the plaintiff responded by filing an affidavit wherein he, *inter alia*, admitted (in paragraph 2) that he had in his "possession or power the documents in question" but he (in paragraphs 3 and 4) objected to make discovery thereof "for the reason that same are privileged and irrelevant as they do not relate to any matter in question in this matter." It was this response that sparked off the current application.

[8] In argument, on the merits of the application, Mr. Smuts, S.C., contends that, plainly, the plaintiff's discovery in his initial discovery affidavit was hopelessly inadequate as is acknowledged by the further discovery provided by the plaintiff, following the Rule 35(3) notice. The documentation sought, so submits Mr. Smuts, S.C., relates to the defences of truth and fair comment which were raised in mid-2006. The amendment to the defendant's plea, continues Mr. Smuts, S.C., has no bearing at all upon the plaintiff's failure to make a full discovery. He adds that the Rule 35(3) notice was necessitated by the plaintiff's initial inadequate discovery when this was examined by the defendant's newly appointed legal representatives, about a month before the trial date. He impresses upon the Court that the documentation in question is relevant as it has a direct bearing upon the extent of the plaintiff's practice and the extent to which he (allegedly) conducted his private practice during hours he was required to render services to the State. It is submitted that, once it is correctly acknowledged that the appointment books

must be produced, then, the receipt books in respect of professional attendances represented by those appointments for private patients during the period in question, must equally be relevant as they clearly relate to the self-same matter in dispute.

[9] It is further submitted that similar considerations arise with respect to invoices pertaining to professional attendances as well as to the rest of the documentation sought.

[10] Privilege, though it features prominently in the defendant's heads of argument, is sparingly canvassed in oral argument. This is obviously so because of Ms Bassingthwait's intimation that she would not pursue the ground of privilege as her basic ground for objection is that all the documents in issue are irrelevant.

[11] Ms Bassingthwait quite properly acknowledges that documents that are relevant, directly or indirectly, must be produced. It is for the defendant, she submits, to satisfy the Court that the documents he requires to be discovered are relevant. She claims, however, that the defendant has failed to show that the said documents are relevant to the matter. Hence, she implores the Court to rule that all the documents the defendant seeks to be discovered are irrelevant for the reason that they do not (allegedly) contain any information that can be of assistance to the Court.

[12] The learned counsel for the plaintiff contends that it is not the extent of the plaintiff's private practice that matters; what matters is: to what extent did his private practice encroach on the State's business. As previously shown, the submission by Mr. Smuts, S.C., in this regard, is quite the contrary.

[13] I now turn to consider what is clearly the core issue *in casu*, namely: the relevance or otherwise of the documents that the defendant requires the plaintiff to disclose.

[14] It is trite law that relevancy is determined from the pleadings and not extraneously therefrom. Hence, a party may only obtain inspection of documents relevant to the issues on the pleadings: *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 311A. The meaning of relevance is circumscribed by the requirement in sub-rules (1) and (3) of Rule 35 that the document (or tape recording) relates to, or may be relevant to, "*any matter in question*." The "*matter in question*" is determined from the pleadings. In *Swissborough Diamond Mines, supra*, at 316D-G, Joffe, J., made reference to the test for relevance in these terms:

> *"The test for relevance, as laid down by Brett LJ in Compagnie Financiere et Commerciale du Pacifique v Pervivian Guano Co. 1882 11 QBD 55, has often been accepted and applied. See, for example, the Full Bench judgment in Rellams (Pty) Ltd. James Brown & Hamer Ltd. 1983 (1) SA 556 (N) at 564A, where it was held that:*
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> *'After remarking that it was desirable to give a wide interpretation to the words: 'a document relating to any matter in question in the action', Brett LJ stated the principle as follows:*
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> *'It seems to me that every document relates to the matter in question in the action in which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.' "*
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> See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd.* 1971 (4) SA 589 (W) at 596H; and *Carpede v Choene NO and Another* 1986 (3) SA 445 (O) at 452C-J.

[15] On the basis of the principle enunciated by Brett, LJ, in *Compagnie Financiere et Commerciale du Pacific, supra*, it would appear reasonable to suppose that each of the documents in issue *prima facie* contains information that may, either directly or indirectly, enable the defendant either to advance his own case or to damage the case of his adversary, to wit, the plaintiff.

[16] The oath of a party impugning the relevance of a document or documents is *prima facie* conclusive, unless it is shown, on one or other of the grounds that will be referred to in a little while, that the Court ought to go behind that oath.

[17] The test of discoverability and the basis upon which the Court ought to go behind the oath, as set out in *Continental Ore Construction, Supra*, at 598D-E and 597H – 598A, respectively, were quoted (seemingly with approval) in *South African Sugar Association, supra*, at 244I – 245C, in these terms:

> *"The test of discoverability or liability to produce for inspection where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still prima facie conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the onus of proving relevance, where such is denied, still rests on the party seeking discovery or inspection… Rule 35(3) could never have been intended to mean that mere subjective belief (or even that a mere statement as to the existence of such belief) by the party seeking further discovery, as to the relevance of additional documents, is by itself enough to require the other party on notice to make available for inspection such of those documents as are in his possession.*
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> *'The bases on which the Court ought to go behind the oath were set out as follows at 597H – 598A:'*
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> *'The Court will go behind the affidavit only if it is satisfied:*
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> *(i) from the discovery affidavit itself; or*
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> *(ii) from the documents referred to in the discovery affidavit; or*
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> *(iii) from the pleadings in the action; or*

(iv) from any admissions made by the party making the discovery affidavit; or

(v) from the nature of the case or the documents is issue, that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made.' "

[18] With reference to ground (v) above, I am satisfied that, from the nature of this case and of the documents in issue, the plaintiff has, or should have, relevant documents in his possession or power to make available to the defendant. I am further satisfied that he has misconceived the principles upon which the affidavit should be made in the matter. In any event, it seems to me that it is reasonable to suppose, in the context of this case, that the documents sought contain information which may – not which must – either directly or indirectly enable the defendant either to advance his own case or to damage the plaintiff's case. It is thus evident that the defendant has discharged the onus respecting the issue of relevance.

[19] Before arriving at my conclusion in the matter, I deem it necessary to comment on the plaintiff's approach to discovery. In my view, he has given short shrift to this important point in question, as is evidenced, not only by his initial failure to give full discovery, but also thereafter. The whole object of discovery is to ensure that, before trial, both parties are made aware of all the pertinent documentary evidence that is available. By this means, the issues between the parties are narrowed and the debate on points, which are incontrovertible, is eliminated. See: *Durbach Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083. Hence, discovery affidavits are very important in any civil trial, and the party requesting discovery is entitled to full discovery on oath. See: *Natal Vermiculite (Pty) Ltd. V Clark* 1957 (2) SA 431 (D) at 431F-432A; *Ferreira v Endley* 1966 (3) SA 618 at 621C-D); *Waltraut Fritzche t/a Reit Safari v Telecom Namibia Ltd* 2000 NR 201 at 205H-I. A party should, therefore, always be mindful of serious consequences that can flow from an improper discovery of documents or tape recordings. See: *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D) at 531C-D.

[20] With regard to costs, although the initial submission by the learned counsel for the defendant is that a special order in this regard would be warranted, on reflection, however, he does not press the issue as he reckons it is unclear whether the plaintiff or his legal representatives should be the object of censure. In any event, the defendant in paragraph 2 of the Notice of Motion simply prays that the plaintiff be ordered to "pay the costs of this application."

[21] In conclusion, the defendant's application succeeds and I accordingly grant the relief set out in paragraphs 1 and 2 of the Notice of Motion. Further, the plaintiff shall provide discovery within ten days from the date of this order.

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SILUNGWE, AJ

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COUNSEL ON BEHALF OF THE DEFENDANTS: Adv. D. F. Smuts, SC

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