REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 1051/10
ECD 2151/10

In the matter between

PETRUS CHRISTIAAN BIERMANN Applicant/Plaintiff

and

EASTERN CAPE DEVELOPMENT CORPORATION Respondent/Defendant

JUDGMENT

HARTLE J

1. The applicant seeks an order dismissing the respondent's defence and granting judgment in his favour as claimed in an action which he has instituted against the respondent for payment of various amounts alleged to

be due to him arising out of his erstwhile employment with the respondent as executive manager. The interlocutory application is the third in a series of applications to compel the respondent to make discovery.

2. In the action he seeks to recover an outstanding settling-in allowance and the reimbursement of transfer costs alleged to be payable in accordance with the respondent's staff policies on the one hand and, on the other, the balance of three short term performance rewards earned in the 2008 to 2010 financial years respectively.

3. In its plea the respondent denies that any expectation exists in terms of its policies to pay the settling-in allowance or the transfer cost reimbursement whereas the applicant asserts that the respondent agreed in correspondence that the policy was of application to his circumstances and gave the impression that payment would be forthcoming. Concerning the claims relating to the performance award it pleads (in respect of the 2008 and the 2009 financial years) that it properly discharged its obligations to the applicant in this regard for those two years. In respect of the 2010 claim, it pleads that it was precluded from determining the reward due to him for that year because he declined to have his performance assessed either prior to or after the termination of his employment. It offers to now do so and to pay him what is due to him in accordance with the "*relevant formula*" used by it in the determination of such rewards. It does not however, clarify how the limited payment of R9 003.27 - which is conceded was in fact paid to him as and for the short-term performance reward for the 2010 financial period, was in fact calculated or the basis for this payment. In a replication filed by the applicant he submits that the amounts which were paid to him as rewards for

the three periods in question were incorrectly calculated in accordance with his performance agreement.

4. The basis upon which the short-term performance rewards would be determined and the processes applicable towards this end are set out in a supplement to the applicant's employment contract styled "*Performance Agreement*" (annexure "POC 2"). In order to glean a picture of the document trail it may leave in its wake this process involves two formal assessments per year by the chief executive officer against the agreed targets on a pre-ordained scale of 0 – 5. The performance rate applicable to the bonus is the average of the two performance ratings for the two assessments conducted in the year. The performance reward takes the form of a monetary bonus ranging between 0 – 40% of the employee's total remuneration package at the time the performance assessment is done.

5. At the outset it needs to be noted that the respondent is cited as a juristic body created in terms of the Eastern Cape Development Corporation Act, No. 2 of 1997. This in itself presupposes certain statutory obligations concerning its record keeping. Section 19 of that Act provides that the Board of Directors, which in turn is responsible to manage and control the operations of the corporation,[1] "*shall cause proper accounting and related records to be kept in respect of all affairs and business of the corporation, as well as such other books and documents as may be necessary for the purpose of maintaining an adequate record of such affairs and to explain its transactions and financial position*".[2] The respondent is further obliged to

[1] Section 7(1) of Act No. 2 of 1997. See also sections 49(1) and 49(2)(a) of the Public Finance Management Act, No. 1 of 1999, (PFMA) which provides that the Board is the accounting authority for purposes of that Act.
[2] Section 19(1) of Act, No. 2 of 1997.

cause both internal audits to be conducted and to appoint external auditors as auditors of the corporation.[3] In addition the respondent and its Board of Directors are further obliged generally to cause to be kept minutes of all proceedings at all of its meetings.[4]

6. The present application had its prequel in the issue by the applicant on 24 April 2012 of a notice in terms of rule 35(3) which required the respondent to discover, *inter alia*, all documents exchanged between the respondent and its external auditors during the three years in question relative to the calculation of his performance bonuses, all documents relating to and utilized by the respondent's remuneration committee in the calculation or assessment of such bonuses and the applicant's performance assessments for the relevant periods stated in the notice. With regard to the applicant's claims concerning the settling-in allowance and reimbursement of the transfer costs, he requested the respondent to disclose all correspondence which had been exchanged between him and it in this connection, the latter no doubt to advance his case that a certain impression had been given thereby.

7. This court issued an order on 15 May 2012 (first interlocutory application) compelling the respondent to reply to the applicant's notice and

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[3] Section 19(2) and 19(3)(a) of Act No. 2 of 1997. See also the relevant provisions of the PFMA which obliges the respondent as a "*public entity*" (it is listed as a provincial government business enterprise under Part D of Schedule 4 to the Act) to keep full and proper records of its financial affairs (section 55(1)(a) of the PFMA), furnish financial statements to its internal auditors (section 55(1)(c)) and an annual report on its activities during the financial year to the Auditor-General (section 55(1)(d)). This should be read together with section 4(1)(g) of the Public Audit Act No, 25 of 2004 which provides for the Auditor-General's obligation to audit and report on the accounts, financial statements and financial management of, *inter alia*, entities such as the respondent. (See in turn section 2 of the Eastern Cape Development Corporation Act)

[4] See the respondent's Articles of Association which is a schedule to the 1997 Act.

allowing him, in the event of the respondent failing to comply, to approach it again on the same papers, suitably amended, for an order dismissing the respondent's defence and for judgment against it. The costs on that occasion were reserved.[5]

8. The respondent purported (after the issue of a second interlocutory application in which the applicant sought a dismissal of its defence and for default judgment to be granted in terms of the summons) to reply to the notice but the court made short shrift of such attempt when, on 4 September 2012, it issued yet another order in the following terms:

> "1. THAT the Respondent is hereby directed to file a further and comprehensive reply to the Applicant's notice in terms of Rule 35(3), served on 24th April 2012, within a period of 10 days from the date of the granting of this order.
> 2. THAT in the event of the Respondent failing to comply with the provisions of paragraph (1), the Applicant shall be entitled to approach court on the same application papers, suitabl(y) amplified where necessary, for an order dismissing the Respondent's defence to the Applicant's claim, and for judgment to be granted against the Respondent as claimed in the summons and particulars of claim.
> 3. THAT the Respondent is to pay the costs of this application on the party and party scale."

9. It appears from the judgment delivered by the court on this last occasion that at some stage after the second interlocutory application was brought the respondent's attorneys had realized that the reply to the applicant's Rule 35(3) notice was inadequate. They wrote to his attorneys on 10 August 2012 and "*while feebly asserting* (the respondent's) *stance that the notice did not adequately specify the documents which* (it) *was required*

[5] I was advised by Mr *Brooks* appearing for the applicant that at the hearing on 15 May 2012 the respondent had conceded that his client was entitled to the substantive relief claimed in the first interlocutory application, but had resisted the applicant's entitlement to costs, resulting in the decision that costs be reserved. The effect of the concession is that the respondent accepted that the documents listed by the applicant in his notice were properly identified with sufficient specificity.

to produce" (a contention which the court promptly dismissed) offered to file an amended notice before 17 August 2012 "… *in order to avoid the time, expense and inconvenience of arguing an opposed interlocutory application*". This notwithstanding, the offence (so the court considered) lay in the respondent's failure to provide a comprehensive reply to the notice, point by point and under oath, and stating in detail which of the requested documents it had in its possession, or their whereabouts, if known. The attempt which had hitherto been made, so the court reflected, amounted to "*token compliance*" with the 15 May 2012 order. Rather than replying as it ought in terms of rule 35 (3), the respondent had "*chosen instead to provide, in a rather lackadaisical manner, general and broad-sweeping replies*". The filing of a discovery affidavit "*in general terms*" without specific reference to the contents of the applicant's rule 35(3) notice which, according to the court's findings had been couched in sufficiently clear terms to enable the respondent to know exactly what documents it was required to discover, was not going to cut it. Apart from generally stating the *genus* of the documents required, the applicant had, according to the court, been at pains to describe particular categories of documents, both in terms of their nature and time periods when they would have been submitted to the auditors or remuneration committee of its Board.

10. Despite this failure, however, the court was still not inclined of the view that the conduct of the respondent and its legal representatives justified the drastic measure of dismissing the respondent's defence. The following conclusion in the judgment bears repeating since – according to the applicant, it sets the standard against which the respondent's most recent purported compliance ought to be assessed:

> "Though ill-advised the Respondent's reply may have been, it has at least made some attempt to reply to the Applicant's Rule 35(3) notice. While the reply was totally inadequate, and at worst evasive, the Respondent did also file a further discovery affidavit in terms whereof further documents were discovered, ostensibly in compliance with the notice. Moreover, it seems that the Respondent's attorneys appeared to have realized their mistake and had made a half-hearted attempt to request an opportunity to file a proper reply. Under these circumstances I am not persuaded that there was any contumacy on the part of the Respondent or its attorneys, or that there are other circumstances which could justify the striking out of the defence. While the prejudice to the Respondent will be huge if its defence is struck out, I am of the view that any potential prejudice to the Applicant can be satisfactorily assuaged by an appropriate costs order."

11. On the last day by when the respondent was required to file a "*further and comprehensive reply*" to the applicant's notice in terms of the court's order, the respondent put up an affidavit deposed to by its chief executive officer, Mr *Sithembele Mase*, in which the deponent purported now to expound separately on each of the seven categories of documents which had been listed by the applicant in his notice.

12. In respect of items 1 and 2 (the exchange of documents with the external auditors), Mr *Mase* asserts that no relevant documents have been sent to or received from the respondent's external auditors, yet claims that all relevant material prepared by the respondent or on its behalf (presumably in the course of its audits) in relation to the matters in issue has been disclosed. He further invites the applicant to specify precisely which additional relevant correspondence or reports allegedly provided to or by its external auditors relevant to the dispute are required to be made available for inspection. In the absence of such particularity - so says the respondent, it is unable to produce any further documents for inspection.

13. Regarding item 3 (documentation of the respondent's remuneration committee relative to the calculation or assessment of the applicant's performance bonuses), Mr *Mase* likewise submits that all relevant matter on the subject has already been discovered. He adds that the respondent does not have in its possession or under its control any other relevant matter concerning the deliberations of the remuneration committee.

14. Concerning item 4 (the performance assessments of the applicant), Mr *Mase* offers that those in respect of the first two financial years have been discovered, but that no such instrument for production in respect of the 2010 financial year exists since the applicant failed to submit himself for assessment for that period. He claims that the respondent has no record of any other performance documents for the relevant period relevant to the parties' dispute.

15. Concerning item 5, which was listed by the applicant in his notice as "*the external audit report completed before the departure of the Chief Executive Officer, Mr Matshama and which audit report related to the calculation and payment of performance bonuses for the (*Applicant*) and/or the Chief Executive Officer*", Mr *Mase* alleges that the respondent is not in possession of this document. Later he clarifies that neither does the respondent have such a document under its control.

16. With regard to items 6 and 7 (which refers to the correspondence exchanged between the applicant himself and the respondent (or its agents) concerning the calculation and payment of the settling-in allowance and reimbursement of transfer fees), Mr *Mase* similarly declares that the respondent has already disclosed all relevant matter in this connection yet

again invites the applicant to specify precisely which additional relevant correspondence relevant to the parties' dispute is required to be made available for inspection.

17. It was under these circumstances that the applicant - still not satisfied that the respondent's further response complies with the express terms of the court order dated 4 September 2012, launched the present (third) interlocutory application in which he seeks an order that the respondent's defence be dismissed.

18. One of the complaints raised in the supplementary affidavit on the applicant's behalf by his legal representative, Mr *Runchman*, is that, by the qualification what ought to be discovered with reference to the word "*relevant*" in Mr *Mase's* affidavit, the respondent implies that other documentation exists which it does not feel itself duty bound to discover as such material has been deemed by it not to be relevant, a determination which is rather for the court to make. In justifying this prospect Mr *Runchman* denounces as illogical and improbable the assertion that no documents were exchanged with the Auditor-General whereas such flow of information between the office of the respondent and the external auditor is to be expected in order to enable that institution to perform its functions as external auditor.

19. The applicant further takes issue with the respondent's failure, at least in dealing with items 1 and 2 (and assuming the documents in question are not in its possession or under its control) to deal with the issue of their whereabouts.

20. Concerning item 3 Mr *Runchman* points to the improbability that the documents disclosed constitute a complete collection of documentation pertaining to the respondent's remuneration committee's role in the assessment of the applicant's performance bonuses and again balks at the invitation to specify precisely additional relevant matter, the respondent having expressly declared that all relevant documentation relating to or utilized by its remuneration committee including submissions and minutes of the meetings of deliberations, correspondence, reports and the like have been exhaustively provided.

21. Regarding the external audit report listed as item 5 in the applicant's notice in terms of rule 35(3), he notes that the respondent has not unequivocally declared that it does not exist, neither has it stated under oath that it was never in its possession or under its control.

22. Mr *Mase* in reply purported to deal with some of the shortcomings highlighted by Mr *Runchman* in his affidavit, adding that he had personally conducted a search for the additional documentation referred to under items 1 and 2 in the notice and was able to confirm conclusively that they do not exist. In the same breath, however, and after musing as to why the applicant has not approached the Auditor-General for such documents, he reiterates that they "*are not in the respondent's possession*", leaving open the suggestion (in the applicant's perception) that the Auditor-General might be in possession of relevant material which resorts under the "*control*" of the respondent as envisaged by the provisions of Rule 35(1). With regard to the complaint that the respondent had not stated under oath that the documents listed under items 1 and 2 of the applicant's notice were not in its possession

or under its control, or dealt with the issue of where they might be sourced if not in its possession, Mr *Mase* hastened to declare that they are not in the respondent's possession, yet added that the respondent "*does not know their whereabouts*", again lending itself to an interpretation (in the applicant's estimation) that the documents which he asserts so emphatically do not exist may indeed at least exist, but be for the Auditor-General to account for. Mr *Mase* in his reply also astutely avoids any discussion around the applicant's submission that it is improbable that there would not be any exchange of documentation between the respondent and its auditors on the issue. Concerning the issue of relevancy he dismisses Mr *Runchman's* concern that a subjective view has been formed by the respondent in this regard but hastily adds that despite the respondent's obligation to only discover what is relevant to the issues on the pleadings this does not mean that it *has* relevant documents which are in its possession.

23. Regarding the submission that it is improbable that the documents under the third category do not constitute a complete set, Mr *Mase* simply denies this and adverts to the applicant's failure to have responded to the respondent's invitation to sufficiently specify the documents which he believes ought to be discovered.

24. Concerning the external audit report, Mr *Mase's* retort is that the respondent has strictly complied with its obligation to state that it is not in possession of the report. He follows this up with the statement that "*the whereabouts of the external audit report, which is not in the respondent's possession, are unknown*" (again confirming the applicant's suspicion that such a document may well exist and be in the external auditor's possession).

25. The purpose of discovery is to ensure that parties are made aware of all the documentary evidence which is available before the trial commences. This presupposes that a party in possession or custody of documents is supposed to know the nature thereof and the value which the material will play in conducing toward a just determination of the case. Discovery plays an important role to ensure that issues are narrowed, and debates on incontrovertible issues are eliminated.[6] It also provides important procedural rights.[7]

26. Discovery imposes upon the parties to an action an obligation to discover documents relating to any matter in question in the action which are or have at any time been in the possession or control of such other party.[8]

27. The objective is to disclose all documents which may "*either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary*".[9]

28. The phrase "*relating to any matter in question*" is given a wide interpretation and introduces the requirement of relevance, the principle of which has been expounded upon as follows in *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd*.[10]

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[6] *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083.

[7] *Quintessence Co-Ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (Tk).

[8] Rule 35(1).

[9] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of Republic of South Africa and others* 1999 (2) SA 279 (T) at 316 – 317.

[10] 1968 (3) SA 381 (W).

> "It seems to me that every document relates to the matter in question in the action 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 or her 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."

29. The "*matter in question*" is determined on the pleadings, which means that the documentation must be relevant or lead to a train of enquiry in relation to a matter raised by the pleadings.[11] Relevance is a matter for the court, having regard to the pleadings and does not depend upon the litigant's own views (or those of its representatives) on the matter.[12]

30. Courts are reluctant to go behind a discovery affidavit, which is generally regarded as *prima facie* conclusive, save where it can be shown from the discovery affidavit itself, the documents referred to in the discovery affidavit, the pleadings in the action, or any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or had other relevant documents in his possession or under his control, or has misconceived the principles upon which the affidavit should be made.[13]

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[11] *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W)***;*** *Lentz Township Co (Pty) Ltd v Munnik* 1959 (2) SA 640 (W); *Lenz Township Co (Pty) Ltd v Munnik* 1959 (4) SA 567 (T).

[12] *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) 404.

[13] *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) 749; *Sandy's Construction Co v Pillai* 1965 (1) SA 427 (N); *Continental Ore Corporation v Highveld Steel and Vanadium Corp Ltd* 1971 (4) SA 589 (W); *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (T) 363; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N); *Swissborough Diamond Mines (Pty) Ltd supra* at 321.

31. A quick glance at the two affidavits exchanged by Mr *Mase* in the latest salvo reflects in my view a complete misunderstanding of what the respondent's obligations are to make proper discovery, perhaps best demonstrated by the inconsistent or contradictory assertions made by him. Against the express assertion that discovery is conclusive he leaves open the side door of relevance (in a round about way) and complains of a lack of specificity in the description of the documents which the applicant is asking it to disclose. Concepts such as possession and control (in the context of who the respondent is) appear to have gone over the deponent's head and there is perhaps a sense in which he justifies the position personally rather than appreciating that he is deposing on behalf of a public accountable corporate entity. He is further misguided as to issues of relevancy and has ostensibly failed to grasp the significance and import of the court's prior order which spelt out clearly the extent to which the respondent was failing in its obligation and how it expected these shortcomings to be rectified. Two further affidavits were required to purport to explain the respondent's position after the filing of the formal response to the notice, this after three roundly doomed attempts at putting forward what it considered itself conclusively obliged to discover in the first instance. Although an attempt (again) has been made at least to delineate broadly the seven different categories of documents required by the applicant, the response remains vague, unhelpful and at worst evasive as described before by this court. Indeed nothing much has been achieved by this latest round of affidavits filed to and fro. Mr *Mase* has failed in my view to deal with the essence of the applicant's requirements and the latter seemingly remains in the same invidious position he was in to start off with. Contrariwise the respondent is

adamant that it has done what the court's prior order contemplated and that that is sufficient compliance with the rule.

32. Mr *Mase* has deposed to the various affidavits in his capacity as chief executive officer. *Ex officio* he is a member of the Board of Directors of the respondent which in turn is responsible for the management of the respondent's affairs, more particularly the payment of such expenditure as is the subject matter of the parties' dispute. He is also the functionary responsible for the short term performance awards assessment. He would also, *via* the Board, have been privy to any meetings concerning these determinations. Even if not personally involved at the time, it is evident from the numerous provisions of the Eastern Cape Development Corporation Act and the Public Finance Management Act that the record keeping envisaged by the applicant is statutorily mandated and can hardly be dismissed by the respondent as unavailable or not under its control whatever stage has been reached in the audit process. Its obligation to give account for its financial affairs persists even beyond the report of an external auditor. The same applies to the minutes of all meetings. Independently of Mr. *Mase* the respondent should be able to account for all payments and calculations made by it down to the minutest detail; all meetings held in this connection over a period of 3 years ought to be reflected in composite statutorily mandated minutes and this historical reflection of its financial affairs is likely to have been the subject of auditors' oversight so that even if obliquely touched upon in the reporting function it would constitute an exchange between the respondent and it concerning these contentious payments. It could hardly be contended that it is unreasonable to suppose that the source and related documents outlined by the applicant in his notice do not contain

information which "*may – not must – either directly or indirectly enable the party requiring the affidavit either to advance his case or to damage the case of his adversary*" or lead him "*to a train of enquiry*" having either of these two consequences.

33. The formula proposed by Rule 35(3) as to how the response should be formulated is further not just rhetoric for the sake of it. The affidavit (and particularly the further affidavit mandated by the court under the present circumstances by its prior order) should comprise a meaningful response, one which gives the assurance that nothing has been kept in reserve which the pleadings require the respondent to disclose as having a bearing on the action. It supposes thereby that the respondent is (at least by now) mindful of the principles upon which discovery is to be made, the express objective of the exercise and the deficiencies complained of. The comprehensive reply envisaged by the order of 4 September 2012 should seek to explain away these concerns in a convincing manner and not simply offer up a mantra which fails to advance the matter meaningfully. In my view the purported reply is again woefully inadequate and misses the mark.

34. Concerning items 1 and 2, the documents sought to be disclosed (well at least such of the documents pertaining to the calculation of the applicant's performance bonuses as would have been exchanged in the course of the Auditor-General exercising his oversight) should form part of a natural audit trail and would obviously still be under the respondent's control regardless of the stage of the audit.

35. With regard to the remuneration committee's deliberations and the other specific documents listed under 3 (a) – (g) of the applicant's notice, the

respondent's generic dealing with the matter as a category cannot suffice especially when each sub-paragraph calls for a different document straddling three financial years and requiring a separate explanation as directed by the order of 4 September 2012.

36. Concerning minutes of the meeting of the remuneration committee either discussing or approving the performance bonuses of the applicant, the documents which have already been disclosed certainly set the pattern for the range of input to be expected in this regard. These minutes must of necessity exist given that they are statutorily mandated. For example, despite the applicant not having submitted himself for assessment in the 2010 year, the respondent has pleaded that a payment was made to him in the sum of R9 003.27. No doubt such payment would have followed on the recommendation of the remuneration committee and minutes and resolutions, or submissions concerning these, should be available. So too if minutes exist for the 2007/2008 financial year, there ought to be minutes in respect of the following two periods of assessment as well. The fact that a resolution was passed on 22 January 2009 by the respondent's remuneration committee suggests a meeting which preceded that and, *ergo*, minutes. If calculations and performance scores exist for the 2007/2008 period then it follows that they should exist in respect of the ensuing years under question as well. A document disclosed by the respondent styled "*Performance Bonus Calculations Post Moderation for period 2008/2009*" suggests an event of "*moderation*" which must be a matter of record which, according to the applicant has not been disclosed by the respondent. Also apparently absent from the list of hitherto disclosed documents under this category are the instruments according to which the method and means of calculation of

the awards actually paid to the applicant are indicated. The respondent's calculations are vital to advance the applicant's case (that they are incorrect) or to damage the respondent's case (that they were correctly calculated).

37. The comments above apply equally to items 4 and 5 referred to in the applicant's notice in terms of rule 35(3).

38. With regard to items 6 and 7 the deponent submits that such documents relating to the dispute have already been discovered, but there is no evidence of such discovery in the respondent's supplementary discovery affidavits. Mr *Runchman* confirms that no such disclosure has been made.

39. There are therefore in my view reasonable grounds for supposing that the respondent has other relevant documents in his possession, or under its control (being those particularized by the applicant) which it has failed to discover per its obligation and as spelt out in the express terms directed by the order of 4 September 2012.

40. What to do about it is the question. Whilst the applicant submits that the respondent has acted contumaciously, I am not necessarily persuaded on a balance of probabilities that the respondent has been deliberately obstructive or obtuse in making discovery of the documents requested by him, or again that the dismissal of its defence is warranted in the circumstances. At worst for the respondent it appears to hold certain misguided views on the issue of what it is obliged to discover in the circumstances. Perhaps there is also an extent to which Mr *Mase* has taken on a personal tone in the matter rather than appreciating that he must declare in a representative capacity that the respondent has not in its possession,

custody or power of its attorney or other agent or any other person on its behalf, the specified documents (which this court has ruled are sufficiently described) relating to the action.

41. Apart from the obvious prejudice to the respondent in dismissing its defence (which it seemingly asserts to protect the public purse), I mention that the applicant may well also be disadvantaged by the lack of proper discovery in proving his claims, even on a default basis. It appears to me to be necessary, therefore, to put the ball back into the respondent's court and to allow its functionaries an opportunity once again, and cautious of the comments above, to get to grips with the applicant's demand and to respond meaningfully thereto. Having so declared, it follows in my view that the respondent who has unreasonably protracted the matter should be held liable for the costs of the application, including the costs which were previously reserved.

42. In this regard I mention that the respondent submitted that it had been given insufficient notice of the present application and had not been placed on terms before the launch of the application. [14] Indeed it had particularly requested the applicant's attorneys to advise in what respects it had failed to comply with the order of court after Mr *Runchman* had written to the respondent's attorneys to inform them that he was of the opinion (after receipt of the respondent's "*further response*" on 18 September 2012), that it had yet again failed to comply with the order of court. The request for clarification was, under the circumstances, a reasonable and appropriate one

[14]The applicant served the notice of set down on 19 October for hearing on 30 October 2012. The matter did not proceed on this day but was postponed, by agreement, with the costs reserved.

yet the letter elicited no reply. The applicant's response had been to set down the applicant's application for the respondent's defence to be struck out.

43. Mr *Bloem*, who appeared on behalf of the respondent, argued that such conduct is inconsistent with responsible litigation. In this regard he relied on the authority in *Szedlacsek v Szedlacsek; Van der Walt v Van der Walt, Warner v Warner*[15] for the proposition that it was inappropriate to issue out the application without the applicant giving notice of his intention to bring it. In the collection of matters which are referred to in the reported judgment however the court was of the view that the interlocutory applications had been launched by rote after the expiry of the *dies* afforded to the litigants to comply with the separate requests and almost as a complete surprise to them. In this instance however the applicant has over a lengthy period and in no mistaken terms sought to exact compliance from the respondent of its obligation to discover. The situation was not in the slightest bit ameliorated by the order of 4 September 2012. Indeed no advance has been made concerning pertinent discovery. Even after Mr *Runchman* explained the deficiencies in a supplementary affidavit the respondent failed to grasp what was expected of it. I accept that there is no sense of urgency in that the action has yet to be set down for hearing, but I cannot criticize the applicant for enrolling the matter on ten days' notice to the respondent which was more than sufficient time in my view to explain itself. It is after all an interlocutory application which is brought "*on notice*" as opposed to "*on notice of motion*". The requirements of rule 6(5)(d) need

[15] 2000 (4) SA 147 (E).

therefore not be strictly complied with in such an instance.[16] The applicant was also authorized by the order of 4 September 2012 to approach the court in the manner in which it did.

44. In the result I issue the following order:

1. The respondent is directed within ten (10) days of this order to file a comprehensive response to the applicant's notice in terms of rule 35(3) dated 24 April 2012;

2. In deposing to the affidavit furnished in compliance with the provisions of rule 35(3), the respondent shall deal separately with each paragraph and sub-paragraph listed in the applicant's notice;

3. In the event of the respondent failing to comply with the provisions of paragraphs (1) and (2) above, the applicant shall be entitled to approach this court on the same application papers, suitably amplified where necessary, for an order dismissing the respondent's defence to the applicant's claim, and for judgment to be granted against the respondent as claimed in the summons and particulars of claim;

4. The Respondent is to pay the costs of this application on the party and party scale including the reserved costs of 15 May and 19 October 2012.

[16] See my unreported judgment in *Farrington Farming (Pty) Ltd & Others v VolcanoAgrosciences (Pty) Ltd : Frikton CC v Chris Hani District Municipality* (ECG 75/2008 : 3245/2009).

HARTLE B C
JUDGE OF THE HIGH COURT

DATE OF HEARING : 25 June 2013

DATE OF JUDGMENT: 7 August 2013

APPEARANCES:

FOR APPLICANT/PLAINTIFF :	***Mr R W N Brooks instructed by Wylde Runchman Inc., East London.***
FOR RESPONDENT/DEFENDANT:	***MrG H Bloem S.C instructed byWesley Pretorius & Associates, East London.***