

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON**

EL Case No: 1051/10
ECD Case no: 2151/10
Date Heard: 21/08/12
Date Delivered: 04/09/12

In the matter between:

PETRUS CHRISTIAN BIERMANN

APPLICANT

And

EASTERN CAPE DEVELOPMENT CORPORATION

RESPONDENT

JUDGMENT

SMITH J

[1] On 15 May 2012 I granted an order compelling the Respondent to reply to the Applicant's notice in terms of Rule 35(3), and allowing the Applicant, in the event of the Respondent failing to comply, to approach court on the same papers (suitably amplified) for an order dismissing the Respondent's defence, and for judgment against it.

[2] The Applicant contends that the Respondent's purported reply to the notice, filed on 21 May 2012, is inadequate, and in "token compliance" with the court order. He has now applied for the Respondent's defence to be struck out, and for default judgment to be granted in terms of his

summons.

[3] The Applicant has instituted action proceedings against the Respondent for various amounts allegedly due to him, and arising out the terms and conditions of his employment contract with the Respondent. These claims relate, *inter alia*, to: outstanding settling allowances; costs relating to the purchase of immovable property; and performance bonuses.

[4] Applicant's notice in terms of Rule 35(3) required the Respondent to discover, *inter alia*: all documents submitted by it to its external auditors, and relating to the calculation of Applicant's performance bonuses; all documents relating to, and utilised by the Respondent's Remuneration Committee in the calculation, or assessment of Applicant's bonuses; and Applicant's performance assessments for various periods stated in the notice.

[5] In its reply the Respondent has in essence contended that: first, the Applicant's notice did not specify precisely what documents were required, and it was therefore not possible to comply with it; and second, the Respondent had in any event discovered all documents relevant to the calculation of the Applicant's bonuses. The Respondent had at the same time also filed a further discovery affidavit in terms of which it had discovered 21 other documents.

[6] Mr *Benningfield*, who appeared for the Respondent, argued that the Applicant's notice was couched in unacceptably wide terms, did not adequately specify the documents which the Respondent was required to discover, and it was therefore not possible for the Respondent to reply thereto in any greater detail than it did. He submitted that in the event, the Respondent had filed a further discovery affidavit in terms of which it discovered further documents, and had stated in its reply that it was not in possession of any documents other than those that had already been discovered in terms of the original and further discovery affidavits.

[7] I however agree with Mr *Brooks*, who appeared for the Applicant, that the Respondent should have argued the lack of specificity at the hearing on 15 May 2012. When the matter was argued on that occasion, Mr *Benningfield*, who also on that occasion appeared for the Respondent, did not challenge the substance of the notice, but merely argued the question of costs. In the event I am satisfied that the notice had been couched in sufficiently clear terms to enable the Respondent to know exactly what documents it was required to discover. Apart from generally stating the *genus* of the documents required, the Applicant was also 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. The Respondent was therefore compelled to comprehensively 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.

[8] It does appear that at some stage after this application was brought, the Respondents' attorneys had realised that the reply was inadequate. They wrote to the Applicants' attorneys on the 10th August 2012 and, while feebly asserting its stance that the notice did not adequately specify the documents which the Respondent was required to produce, they did offer to file an amended notice before 17 August 2012, in order to avoid the "*time, expense and inconvenience of arguing an opposed interlocutory application.*"

[9] I agree with Mr *Brooks* that the Respondent's reply is wholly inadequate and amounted to token compliance with the court order. Instead of replying to each and every paragraph, and stating under oath which of these documents it had in its possession (and in the event that it did not, state their whereabouts, if known), the Respondent has chosen instead to provide, in a rather lackadaisical manner, general and broad-sweeping replies.

[10] The purpose of discovery is to ensure that parties are made aware of documentary evidence before the trial commences. It also ensures that issues are narrowed, and debates on incontrovertible issues are eliminated.

(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1083)

[11] Parties are therefore under a duty to discover 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."*

(Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T) at 316-317).

[12] Mr *Benningfield* has submitted that the Respondent's further discovery affidavit is conclusive, both as to the possession of documents mentioned therein, and the relevance of its contents. He argued that the onus was therefore on the Applicant to establish facts which raise the possibility that there are other relevant documents which the Respondent has not discovered. He submitted that it has failed to do so, and the application must therefore fail for this reason alone.

[13] It is so that our courts will usually regard discovery affidavits as conclusive, unless there are reasons to suspect that a party has not made full and proper discovery. In **Federal Wine & Brandy Co Ltd v Kantor 1958 (4) SA 735 (E) at 749G**, the court held that:

"An affidavit of discovery is conclusive, save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon

which the affidavit should be made.”

The facts of this case are however distinguishable. Here the Respondent was required to discover specified categories of documents which had been described in detail in the Applicant’s Rule 35(3) notice. The order of 15 May 2012 has compelled the Respondent to reply to that notice. In terms of Rule 35(3) the Respondent was therefore required to file a comprehensive reply to the notice, and either discover the documents, or state under oath that they are not in its possession and disclose therein their whereabouts, if known. The Respondent was therefore not entitled to simply file a discovery affidavit in general terms without any reference to the contents of the Applicants’ Rule 35(3) notice.

[14] The relief which the Applicant seeks is however drastic in its nature. If granted, it means that the matter will be undefended and the Applicant will be entitled to default judgment. In terms of Rule 35(7) the court is empowered to dismiss a claim, or strike out a defence, if a party fails to give discovery in compliance with the Rules. This however remains a drastic remedy, and the court has a discretion which should be exercised judicially.

[15] While contumacy - that is wilful refusal to comply - is a good reason for ordering the striking out of a defence, it is not the only reason. In **The Wanson Company of South Africa (Pty) Ltd v Etablissements Wanson Construction De Material Thermique Societe Anonyme 1976 (1) SA 275 (T)**) Cillie J.P. held that there may be other

considerations short of contumacy “*which may weigh so heavily as to persuade the court to resort to such a drastic remedy*” (at p. 280B-C). (Cf **Wilson v Die Afrikaanse Pers Publikasies (EDMS) BPK 1971 (3) SA 455 (T)**)

[16] The circumstances which confronted Plasket J in **Tertuis Leask v East Cape Forest(Pty) Ltd** (unreported case no: 1285/2007 ECD, Grahamstown; delivered on 20 August 2008) justified such drastic relief. In that matter the learned judge granted an order striking out the defendant’s defence in consequence of its failure to reply to the plaintiff’s request for particulars for trial.

[17] Plasket J was justifiably scathing regarding the conduct of the defendant’s legal representative, and described it variously as; without contrition; arrogantly disdainful of the plaintiff, and concluded that the defendant was prepared “*to do anything to delay the trial*”. He found that contumacy existed, and that, in the event, “*the conduct of the defendant was of such an egregious nature that the striking out of the defendant’s defence is warranted.*”

[18] In this case however the conduct of the Respondent and its legal representatives, in my view, do not justify such a drastic measure. 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 realised 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. Counsel have informed me that the civil action has not yet been set down for trial. There is therefore still sufficient opportunity to ensure proper compliance with the court order, and failing that, for the Applicant to apply for the Respondent's defence to be struck out.

[19] In the result the following order shall issue:

- a) 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 24 April 2012, within a period of 10 days from the date of the granting of this order.
- b) That in the event of the Respondent failing to comply with the

provisions of paragraph (a), the Applicant shall be entitled to approach court on the same application papers, suitable 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.

- c) The Respondent is ordered to pay the costs of this application on the party and party scale.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Brooks
Attorneys for the Applicant	:	Wylde & Runchman Inc. Motorland Building Cnr Oxford & Fleet Street EAST LONDON Ref: Mr Runchman/roenel/G11129
Counsel for the Respondent	:	Advocate Benningfield
Attorneys for the Respondent	:	Wesley Pretorius & Attorneys Ground Floor, Pilot Mill House The Quarry, Selborne EAST LONDON Ref: Mr W Pretorius/fc/E128
Date Heard	:	21 August 2012
Date Delivered	:	4 September 2012