IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO: 3156/2000

IN the matter between:-

DINERS CLUB — Plaintiff

and

ANIL SINGH — First Defendant

VANITHRA SINGH — Second Defendant

DEFENDANTS' AFFIDAVIT

I, the undersigned, ANIL SINGH do hereby make oath and state that:-

1.

I am the First Defendant herein and depose to this Affidavit on my own behalf and on behalf of the Second Defendant.

2.

I have read the application in this matter.

3.

Both the Second Defendant and I oppose the relief claimed herein. We have accordingly been advised that it is necessary for an Affidavit to be delivered in which the bases of our opposition is set forth. I accordingly depose to this Affidavit.

4.

In the interests of brevity and also due to time constraints, I have been advised that it would be acceptable if I do not traverse each and every allegation made in the Affidavit of MR. BOND and in the supporting Affidavit of MR. KENNEDY. Suffice to say that my not doing so must not be construed as an admission by us of the correctness of each and every allegation therein contained. Where such allegations are in conflict with the contents of this Affidavit (or the tenor hereof) or in conflict with the allegations to be made in an Affidavit to be deposed to by DR. ROSS JOHN ANDERSON of Cambridge, United Kingdom, we deny the same.

5.

I take issue with the suggestion contained in the application to the effect that the Second Defendant and I are mala fide. As I understand it, such a suggestion is based on the fact that a Rule 36 (6) Notice was served on 27 August 2002 and no

response has been received to the demand contained in the Plaintiff's Attorney's letter dated 6 September 2002 (Annexure "CB 1").

6.

I respond as follows:

6.1. The allegation that we "threatened" to serve such a notice at the postponement of the matter on 24 June 2002 is, on what I have been advised by my Legal Representatives, incorrect. When the matter was last heard by this Honourable Court, I am advised that in the Chambers of His Lordship presiding, my Senior Counsel mentioned in passing, in the presence of the Plaintiff's Counsel, that:-

6.1.1. an extremely hurried trip had been made by us to the United Kingdom, to consult DR. ANDERSON and thereafter, expert notices were prepared and delivered under considerable time constraints;

6.1.2. an application for evidence to be heard on commission had also to be prepared (which was adjudicated upon by His Lordship presiding and an order thereon obtained, by consent);

(Both the aforegoing aspects appeared from or could have been concluded, in any event, from the application for evidence on commission and the expert notices delivered on our behalf.)

6.1.3. additional discussions would be taking place between my Legal Representatives and DR. ANDERSON, whereafter a notice in terms of Rule 36 (6) for inspection of the computer systems relied upon by the Plaintiff, a request for particulars for trial and a notice for additional discovery would be served. This was not in the form of a threat but was mentioned in passing;

6.1.4. the Plaintiff's Senior Counsel responded that the Plaintiff would not accede to any request for inspection of computer systems and at that point in time His Lordship presiding intervened and brought the discussion to an end indicating quite clearly that he would deal with the merits of any such matters if and when they were placed before him;

6.1.5. nothing further, in relation to such notices was then mentioned. The aforegoing, particularly because it

occurred in the presence of His Lordship presiding, could hardly be construed as a threat.

6.2. Subsequent to the matter being adjourned, certain without prejudice discussions ensued between the respective Counsel, in consequence of which we were requested to consider whether we would be prepared to enter into negotiations for a settlement of the dispute. This required consultations, careful consideration and additional input from DR. ANDERSON, before we could make a decision. Our decision was that we were not prepared to settle the matter and that we wished this Honourable Court to decide the same.

6.3. By the time all the aforegoing had occurred (DR. ANDERSON was also out of the United Kingdom until the first week of July 2002) some two to three weeks had elapsed. Thereafter, my Legal Representatives communicated with DR. ANDERSON on a few occasions and no doubt due to pressure of work on the part of my Legal Representatives and on the part of DR. ANDERSON, DR. ANDERSON was only able to properly apply his mind to what information ought to be requested, what additional documents ought to be discovered by the Plaintiff and what equipment ought to be requested for inspection during August 2002. In consequence, the notices and request for particulars referred to above, were only ready and served on 27 August 2002.

6.4. I do not understand why it is suggested that because His Lordship would be on leave from the beginning of October 2002 until the end of the year (or perhaps the end of January 2003) the service of the aforegoing on 27 August 2002 results in any mala fides on our part. It is quite clear, in my respectful submission, that approaches could have been made to His Lordship upon his return from leave, to entertain this matter at the beginning of February 2003. In any event, it was also possible (as indeed has happened) that arrangements could be made for His Lordship to hear this matter before His Lordship went on leave.

6.5 In any event, I was advised by my Legal Representatives (and if the advice I have received is incorrect, I sincerely apologise therefor) that having caused the Rule 36 (6) notice, the Rule 35 (3) notice and the request for particulars for trial to be served, we were, in respect of those notices and request, dominus litis, and a decision to take any of these matters any further would rest with us. Instead, the Plaintiff has sought to disregard this and has prepared an urgent application to be heard by this Honourable Court.

6.6. In addition, insofar as the request for particulars for trial is concerned, the Plaintiff is apparently adopting the attitude that it is not obliged to respond to the same due to the fact that Uniform Rule 21 provides for such a request to be served "before" trial and the request in the present

case has been served "during" the trial.

6.7. I annex hereto marked "VS 1", a notice in terms of Rule 30, dated 11 September 2002, received by our Attorneys from the Plaintiff's Attorneys, the contents whereof I respectfully submit are self explanatory.

6.8. In the aforesaid notice my Legal Representatives have been informed that the Plaintiff intends, unless we withdraw such request for particulars for trial, to move an application in terms of Rule 30, to set such request for particulars aside as being an irregular step. The Plaintiff will no doubt prepare and move such an application immediately upon the expiry of the notice period in the aforesaid notice. As this matter has been brought before this Honourable Court, we now take this opportunity of humbly requesting this Honourable Court to grant an order in favour of the Second Defendant and I either authorising/condoning the delivery of the said request for particulars for trial, or alternatively, granting us permission to deliver such a request for particulars for trial, in which event we will cause the request already delivered to be withdrawn and an identical request to be served.

6.9. Our request is based on the fact that (as this Honourable Court is also aware, having acceded to a request by us for an adjournment of the

matter in March 2002) we were not in the position of being able to obtain the services/opinion of a suitable expert and consequently, neither the Second Defendant nor I (nor our Legal Representatives for that matter) were aware of the additional information/documents/access to equipment, which would be necessary to properly and adequately put forward our defence and refute the Plaintiff's contentions.

6.10. After the matter was adjourned, to enable us to obtain the services of such an expert, we have indeed done so. Acting on his advice, we now realise that we require additional information, which is encompassed in the request for particulars for trial (a copy of which will be before this Honourable Court in the Court file in this matter) and as the trial of the matter is still more than five months away from being recommenced, we submit that the Plaintiff will suffer no prejudice in responding to the same. On the other hand, if we are not allowed to request pertinent information, we will be severely prejudiced in this matter.

6.11. In requesting as aforesaid, we do not wish it to be thought by this Honourable Court that we suggest it should consider the request for particulars itself, on 26 September 2002 and direct the Plaintiff to respond to any or all of the questions therein. It has been agreed between the respective Senior Counsel that this Honourable Court will not be requested to decide upon the same, at this stage. Should we

receive permission to deliver such request and should the Plaintiff decline to furnish the information sought or not furnish the same adequately, an appropriate application can then be considered and launched (if necessary) to be heard by this Honourable Court in February 2003, when His Lordship returns from leave.

6.12. Insofar as not adhering to the demand contained in the letter of the Plaintiff's Attorneys dated 6 September 2002 is concerned, we respectfully submit the following:

6.12.1. Uniform Rule 36 (7) affords to the Plaintiff an opportunity of requesting us to specify the nature of the examinations to which it is proposed that the items be subjected.

6.12.2. Adequate opportunity must be afforded to the recipient of such a request to furnish the information sought.

6.12.3. Just after the said letter was received by our Attorneys, the Plaintiff's Senior Counsel communicated with our Senior Counsel with a view to ascertaining whether we would be agreeable to this matter being heard by this Honourable Court before the end of September 2002,

which consent was supplied forthwith. Accordingly, the Plaintiff had already, at that stage, made up its mind that it was bringing such an application, unless we withdrew the notice.

6.12.4. In any event, in the said letter the Plaintiff's Attorneys record that the state or condition of the items listed in the said notice are not relied upon by the Plaintiff. They furthermore record that such property was not in their Client's control and possession. Notwithstanding this, they proceed to "demand" that the nature of the examination be specified and record that if we did not adhere to that demand, this Honourable Court would be asked at the hearing of the application to draw an inference that we are mala fide. Furthermore, the service of the Rule 36 (6) notice cannot, in my respectful submission, be construed as being "in terrorem" as all the Plaintiff had to do was to decline to submit the items requested to the inspections, whereafter, in terms of Rule 36 (7), a Judge in Chambers would have had to decide the matter, if we elected to proceed further with this matter.

6.12.5. As His Lordship presiding is already familiar with various aspects of this case, we too would have preferred that an adjudication on the Rule 36 (6) notice be undertaken by him and had the Plaintiff allowed the matter to proceed in terms of the Uniform Rules, we would have suggested as much to it, if we decided to proceed further. In any event, the Plaintiff could always have requested that the matter be placed before His Lordship presiding when it refused the inspections sought.

6.13. Far be it from the Second Defendant and I being mala fide and acting in terrorem, the tenor of the letter itself in my respectful submission shows who is attempting to intimidate whom.

6.14. We do not accept the correctness of the Plaintiff's contentions, namely that the items we seek to have inspected must be in the Plaintiff's possession or under its control for us to request an examination of the same. We also do not accept that the Plaintiff does not (or will not) rely upon the said items in this case. This was demonstrated, in my respectful submission, by the Plaintiff's Counsel putting the content of the various expert notices of the Plaintiff's experts to our witness MR. GIBSON and asking him whether he took issue with any of the

same.

6.15. It is our further respectful submission that a reasonable opportunity must be afforded to a litigant to furnish details requested by the other side. The service of the letter on 6 September 2002 and the demand contained therein, the aforesaid communication by the Plaintiff's Senior Counsel with our Senior Counsel shortly thereafter (to obtain consent for the matter to be heard before the end of September 2002), the request to His Lordship for the matter to be enrolled on a suitable date before the end of September 2002 and the actual bringing of the application (the notice of motion is dated 14 September 2002 and it was served on 16 September 2002) resulted in the Second Defendant and I having, effectively, five working days to adhere to the demand, and furnish the information sought (and even if we had the Plaintiff would still have launched this application). It will also be noted that the letter, served on 6 September 2002, demanded that we comply on the next working day (9 September 2002). The Plaintiff was well aware that we rely upon the expertise of expert witnesses in the United Kingdom.

6.16. The result of this application being enrolled for hearing is that we and our expert DR. ANDERSON have been prejudiced with shortage of time within which to properly deal with each and every allegation made in the affidavits under reply.