IN THE HIGH COURT OF SOUTH AFRICA (DURBAN AND COAST LOCAL DIVISION)

Case No: 00/3156

In the matter between:

DINERS CLUB (SA) (PTY) LIMITED

Plaintiff

and

SINGH, ANIL

SINGH, VANITHA

First Defendant

Second Defendant

PLAINTIFF'S HEADS OF ARGUMENT

INTRODUCTION

On the 27th August 2002 Defendants served a Notice in terms of Rule 36(6) on Plaintiff requiring that certain computers and software (hereinafter referred to as "computer systems") largely in the possession and under the control of The Standard Bank of SA Ltd and Diners Club

International Ltd, its associated companies or subsidiaries be made available for inspection.

2 In summary Plaintiff contends that the Notice in terms of Rule 36(6) is irregular and/or constitutes an abuse of the process of this Honourable Court and/or should not be given effect to.

3

- 3.1. Defendants suggest in their reply that the reason for serving the Notice as late as the 27th August 2002 were *inter alia* a request by Plaintiff to "canvass" whether the Defendants "would be prepared to enter into negotiations for a settlement of the dispute" and that "Dr Anderson was only able to properly apply his mind to what Equipment ought to be requested for inspection during August 2002", (Answering Affidavit para 6.2 and 6.3, p49).
- 3.2. The discussions with the Defendants' counsel were in their entirety held without prejudice and it is improper for the Defendants even to have disclosed that they had taken place. Be that as it may, it called for a reply by the Plaintiff as they did not accurately or correctly portray what had transpired. An investigator from The Standard Bank of SA Ltd ("SBSA") had received evidence from an informant as to the manner in which fraud was perpetrated in relation to ATM transactions conducted overseas. An interview had

been recorded on video tape and was shown to the Plaintiff. Defendants' counsel were invited to view the video tape and did so. The Plaintiff's position was that, given the nature of the information, the Defendant ought to settle the matter (Replying Affidavit para 4.6, p92).

3.3. It is incorrect to suggest that Anderson was only able to apply his mind in August 2002 as, at latest by the 17th June 2002, Anderson had not only applied his mind but had advised the Defendants as to what equipment ought to be inspected (Replying Affidavit para 4.2, p90). He deposed to an affidavit in support of the application to take evidence on commission confirming this.

4

THE LEGAL PRINCIPLES APPLICABLE

5 Rule 36(6) provides

"If it appears that the state or condition of any property of any nature whatsoever whether moveable or immoveable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such

property in his possession or under his control to make it available for inspection or examination in terms of this sub-rule, and may in such notice require that such property or a fair sample thereof remain available for inspection or examination for a period of not more than 10 days from the date of receipt of the notice." (Our emphasis)

6 Therefore, in accordance with the Rule:

- 6.1. the state or condition of any property must be relevant to the decision of any matter at issue in the action;
- 6.2. the Notice may be given to the party relying upon the existence of such state or condition; or
- 6.3. the Notice may be given to the party having such property in his possession or under his control:
- 6.4. the property or a fair sample thereof must remain available for inspection or examination for a period of not more than ten days from the date of receipt of the Notice.
- It is difficult to discern what the difference is, if any, between the "state" or "condition" of property. In terms of Webster's New Twentieth Century Dictionary "state" is defined inter alia to mean "condition as regards

physical structure, constitution, internal form, stage or phase of existence, etc" and "condition" as inter alia "manner or state of being". It seems to us, therefore, that there is little purpose in attempting to establish whether in fact any difference can be attributed to the use of the words. What is clear, however, is that it is property which must be relevant to the decision of the matter. The very property in question must be relevant to the decision. If, for instance, the property in question is merely a generic product, available on the market, and the allegation is that the product per se has certain inherent defects, then the particular item of property is not itself relevant to the decision but it is the product per se sold on the market which is relevant. A party is, therefore, not entitled to seek to have the particular piece of property available for inspection and examination as, putting it differently, the state or condition of that particular piece of property is in fact irrelevant. All property available on the market suffers from the same shortcomings.

- Only a party who relies upon the state or condition of the property or is in possession thereof can be required to make same available. It is consequently important to discern who bears the onus in relation to any issue which will determine which party relies upon the state or condition of the property.
- Possession in the context of Rule 36(6) must mean physical detention of the corporeal thing, whether with or without any claim or right. "Control"

must be given a wider meaning although, in its ordinary sense, the person who has control of a thing has possession of it and the management of it (per Wessels J in **R v Harvey 1913 TPD 605**). The right to control, however, would include the right to impose restrictions and prohibitions in relation to its use or who might possess same. In the context of Rule 36(6) it would also mean that the party has the power to make the property available.

- 10 If the party giving the notice therefore establishes the criteria necessary to require the recipient of the notice to make the property available for inspection or examination then, save for the rights conferred upon such party in terms of Rule 36(7), he must make the property available. Rule 36(7) provides that a party called upon to submit the property for examination may require the party requesting it to specify the nature of the examination to which it is to be submitted and is not bound to submit same thereto if this would "materially prejudice such party by reason of the effect thereof upon such property." Any dispute in relation thereto is referable to a Judge who may make such order as to him seems meet.
- 11 Rule 36(6) contemplates that during and after the inspection or examination the property will remain in the possession and under the control of the party who originally had such possession and control i.e. that the words "to make available for inspection and examination" cannot be read to include the concept "hand over for analysis and destruction"

(see The Wellcome Foundation Ltd v Cape Industries (SA) (Pty)
Ltd 1976 BP 505 at 509 E-G). The party merely has to keep the article
available for inspection.

- 12 The inspection or examination is not confined to ocular inspections (see Caltex Oil Rhodesia (Private) Ltd v Perfecto Dry Cleaners (Private) Ltd 1970 (2) SA 44 at 47/48).
- 13 As stated by Harms in Civil Procedure in the Supreme Court B-264 "The party called upon to submit a thing for examination is not bound to submit the thing to an examination which will materially prejudice him by reason of the effect that the examination may have upon the thing. (See American Cyanamid Co v National Fermentation Pharmaceutical 1967 BP 392). The Rule does not contemplate the destruction of the object during inspection but the Court may, in an appropriate case and in the exercise of its inherent jurisdiction, permit such destruction. This would include the case where there are many of the product where a sample could serve the Plaintiff's purpose. The making available of property for inspection and examination is designed, at least in part, to preserve existing evidence that might be relevant (see MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (UST) 1999 (3) SA 500 at 510 H). The rule, however, cannot be used to launch a fishing expedition in relation to evidence which might become relevant. (See MV Urgup (supra) page 510 I)."

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14 Where a party seeks an examination which entails dismantling of or other experimentation with the article, he must show that the examination will not cause the destruction of, or cause damage to, or reduce the value of the article. (See Eimco (SA) Ltd v Magistrate Wynberg & Others 1967 (3) SA 715 (C) at p720 G; American Cynamid Co (supra).

15

in the interests of justice and the particular circumstance of each case. The following constitute material matters which would be taken into account in the exercise of that discretion and in this regard we refer to Jones and Buckle: The Civil Practise of the Magistrates Court in South Africa 9th Ed. Vol 2. Rule 24-7, "Where the objection is to the nature of the proposed inspection or examination, it is submitted that the Court will take the following into consideration, inter alia: whether the examination will lead to the destruction of, cause damage to, or reduce the value of the article; the qualifications and experience of the person who is to undertake the examination; whether the party seeking examination has offered to provide security against any possible damage which may result from the examination and the effectiveness of such security."

15.2. Where the objection is to the prejudice which will result from the examination then we submit that it is the prejudice that would be suffered by the party in possession and control and generally by any other person that must be considered.

RELIANCE UPON THE COMPUTER SYSTEMS

- 16 In terms of the contract between the Plaintiff and the Defendants, which is now not in dispute:-
 - 16.1. the liability of the Defendants is deemed to have arise whenever the card and/or account number, "PIN" or other number issued pursuant to the application by the Defendants to Plaintiff is used for any such transaction (Clause 4.1);
 - 16.2. the Defendants irrevocably authorised Plaintiff to pay any establishment in relation to a cash advance and to debit the Defendant's account (Clause 4.2);
 - 16.3. by use of the PIN by any person whatsoever, the Defendants are deemed to accept liability for all and any transactions so incurred (Clause 7.3);

- 16.4. upon presentation by or on behalf of Plaintiff in a Court of Law or otherwise, of a billing form, voucher, statements or any other document including computerised printouts and substitute document evidencing any use of the card then:
 - 16.4.1. the card is deemed to have been used in accordance with the terms and conditions;
 - 16.4.2. the billing form, voucher or other document is deemed to have been signed and/or used by the Defendants; and
 - 16.4.3. the payment of the debits therein reflected will be deemed to have been made by Plaintiff to the establishment concerned. (Clause 8)
- 16.5. a certificate under the signature of any manager of Plaintiff would upon its mere production by Plaintiff or its legal representative and without any evidence being required therefore, constitute *prima facie* proof of such indebtedness, the amount due and payable at date of signature of certificate. (Clause 8)
- 17 Accordingly, liability is incurred by the cardholder if the card or account number or PIN is used for any such transaction. It follows that liability does not arise only or necessarily when the cardholder himself uses the

card, account number or PIN for a transaction. If the requirements are met, the cardholder becomes liable to Plaintiff for, *inter alia*, cash advanced pursuant to the use of the card.

- 18 On presentation of the documents referred to in the deeming provision of paragraph 8.1 of the agreement, unless challenged, the card is deemed to have been used in accordance with the contract and the payments of the debits are deemed to have been paid by Plaintiff. These provisions are "back to back" with the provisions of Clause 4.1 (perhaps read with paragraphs 4.2 and 4.3) which place the liability upon the cardholder to pay Plaintiff.
- 19 In other words, actual use or "deemed" use of the card creates a liability on behalf of the cardholder to Plaintiff and the burden of proving the facts by Plaintiff are alleviated by the deeming provisions.
- 20 Clauses 8.2 and 8.3 provide for and contain an agreement as to the quantity of proof and the manner thereof which will required in order for Plaintiff to establish the indebtedness. It is to be emphasised that these are the procedural requirements which are agreed to by the parties to enable Plaintiff to prove, *prima facie*, that:
 - 20.1. the documents, whether they be in the form of microfilm, computer printouts or substitute documents, on presentation are "deemed to

be true copies of the original documents and are what they purport to be";

- 20.2. the card is "deemed" to have been used in accordance with the terms and conditions;
- 20.3. a certificate establishes *prima facie* proof of the indebtedness and the amount due and payable as at the date of the signature of the certificate i.e. a different method of proof without using the source documents or "deemed copies thereof" to prove the indebtedness.
- 21 Accordingly, such a certificate, "upon its mere production by Plaintiff or its legal representative" creates prima facie proof of "such indebtedness" and/or the "amount due and payable at date of signature of certificate".
- 22 The Defendants have admitted that the certificate handed in under the signature of Vitor Manuel Seixas Prospero was signed by him and that as at 6th February 2002 he was a manager of the Plaintiff. (Bundle B).
- 23 Gibson in his evidence has conceded that the documents variously annexed to the affidavits of Pretorius, Leckenby, Markham, Brett and Prospero constitute computer printouts evidencing the use of the First Defendant's card.

24 The Plaintiff thereby discharged the onus resting upon it of adducing evidence in terms of Rule 39 and accordingly, after the Defendants have adduced evidence, has the opportunity of leading further evidence in rebuttal of the Defendants' evidence.

See Ex Parté Minister of Justice : re R V Jacobson & Levy 1931 AD 466 at 478 Merchandise Exchange (Pty) Ltd v Eagle Star Insurance 1962 (3) SA 113 (C) at 114 A-D Ocean Accident and Guarantee Corporation v Kock 1963 (4) SA 147 (A) at 159 B-D Trust Bank of SA Ltd v Senekal 1977 (2) SA 587 (W) Bank of Lisbon International Ltd v Venter en 'n Ander 1990 (4) SA 463 (A) Hlela v Commercial Union Assurance Co of SA Ltd 1991 (2) SA 503 (N) at p510 Wilson-Yverton v Sharman t/a Wanga Investments and Ano 1992 (1) SA 80 (T) Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd and Others 1993 (4) SA 206 (W) at 223 Jenkins v De Jager 1993 (4) SA 534 (N) Standard Bank of SA Ltd v Townsend & Others 1997 (3) SA 41 (W) Berlesell Edms Beperk v Lehae Development Corporation BK & Andere 1998 (3) SA 220 (0) Louw v Golden Arrow Bus Service (Pty) Ltd 2001 (1) SA 218 (LC) Rule 39.

25 The Defendants, however, deny that First Defendant's card was used or that First Defendant or a person authorised by him withdrew the money. First and Second Defendants, Naidoo and Gibson have given evidence on behalf of the Defendants with a view to rebutting the Plaintiff's *prima facie* case. They now intend leading the evidence of Anderson, Clayton and Bond to establish, on the probabilities, that unauthorised persons could have accessed information from the computer systems utilised by the various entities in the generation and issue of the PIN and transaction

chain (collectively referred to hereinafter as "the transaction chain") and thereby obtained the PAN and PIN of the First Defendant. If, therefore, the state or condition of the actual computer systems utilised by the various entities in the transaction chain are relevant to the outcome of the dispute, it is the Defendants that rely upon such state or condition. Consequently, insofar as the Defendants predicate their entitlement in terms of Rule 36(6) on the first requirement, namely that the party relying upon the existence of such state or condition must make the property available for inspection or examination, the Notice is irregular and for this reason ought to be struck out.

POSSESSION OF THE COMPUTER SYSTEMS

26 Having established that the Plaintiff does not rely upon the existence or the state or condition of the computer systems, it is incumbent on the Defendants to establish that the Plaintiff is in possession of the computers and software.

27 It is common cause that:

27.1. The only property which Plaintiff was in possession of is the IBM 2620 Cryptographic Processor (Founding Affidavit para 16, p13). The Plaintiff ceased operating same in November 2001 and is no longer in possession thereof (Founding Affidavit para 16, .3, p13).

- 27.2. The IBM 4753, the equipment used at the Standard Bank Auto E Centre, the host computer of The Standard Bank of SA Ltd, "*Top Secret*" and "*SOBR*" were under the control and in the possession of The Standard Bank of SA Ltd. Of that equipment only the IBM 4753 Cryptographic Processor is presently in use by The Standard Bank of SA Ltd and remains the same as it was in 2000.
- 27.3. The Racal RG Series Cryptographic Processors and the host computer systems using same, insofar as these might still be the same as were utilised in March 2000, are in the possession of Diners Club International Ltd., its subsidiaries and associated companies, Citibank International plc, TNS and LINK respectively. (Founding Affidavit par 22,23; pp23-29).

28

- 28.1. The Plaintiff has no control whatsoever over the computer systems in the possession of SBSA, Diners Club International Ltd, its subsidiaries and associated companies, Citibank International PLC, TNS or LINK. (Founding Affidavit par 26.2-26.7; pp33-35).
- 28.2. Dr Anderson argues that not only is it usual for banks to co-operate but that, when information is requested which is "likely to be destructive of its case, the Plaintiff hides behind technicalities" and

that the Plaintiff's statement that it is unable to compel such companies to make their documentation available to Defendants is "pure sophistry". (Answering Affidavit, par 25, p81).

- 28.3. If reference is restricted to "information" arising from documents it is difficult to see what the relevance is of this statement in the context of this application. In relation hereto, the argument is gratuitous and bald and entirely without substance. (Replying Affidavit, par 31, p118).
- 28.4. However, if Dr Anderson is suggesting that the co-operation between Banks extends to making their computer systems or software available to be tested he is wrong. Significantly he quotes no example of this actually happening in practice. (Replying Affidavit par 31.3, p118).
- 28.5. The fact that SBSA and the other organisations are not prepared to make their computer systems available for inspection is not disputed.
- 29 In the result, for this reason too, the Defendants' Notice is irregular and should be struck out.

RELEVANCE OF THE STATE OR CONDITION OF THE COMPUTER SYSTEMS

- 30 We submit, having regard to the aforegoing, that it is not necessary to examine whether this Honourable Court should exercise its discretion in terms of Rule 36(7). We address this aspect only on the basis that this Honourable Court is against us and for the sake of completeness.
- 31 Nowhere in the summaries filed on behalf of Anderson, Bond or Clayton, is it contended that the state or condition of the actual computer systems used in the transaction chain is relevant with regard to the decision of any matter at issue in the action. On the contrary, the platform for the attack on the computer systems is that the proprietary products sold by companies such as IBM and used in the transaction chain are not secure and that individuals in the employ of any of the companies in the transaction chain could easily have accessed the information and thereby committed a fraud by utilising the PIN and PAN of the First Defendant to withdraw the cash from the ATMs. In the alternative it is contended by these experts that there could have been mismanagement of the computer systems. This approach is confirmed by Dr Anderson in his affidavit in this application (Answering Affidavit, paras 10, 12 and 19, pp 71, 31 and 76).
- 32 In the result it is not the actual computer systems then used by the various entities in the transaction chain that is of any significance or

relevance to the issue but whether the products sold by such companies as IBM are capable of sustaining an attack by an employee to access the PAN and the encrypted PIN. (Founding Affidavit par 6-10, pp6-9). The fact that the Defendants do not need the actual computers also appears in paragraph 8.3 of the affidavit deposed to by Anderson in support of the application to take his evidence on commission.

- 33 The state and condition of the equipment presently in possession of SBSA and Diners Club International Ltd., its subsidiaries or associated companies cannot be relevant to the state and condition, even of the same equipment, during the period 1997 to 6 March 2000 as, even had there been a defect, such defect would have manifested itself during that period and subjecting the current computer systems presently in operation to an examination, even had they been the same, today, will not contribute to the outcome of this matter.
- 34 The Notice does not serve to ensure that evidence is preserved but is a disguised attempt to obtain a sample of the proprietary products in order to perform tests so as to prove a theory yet unestablished by the experts. In other words the Defendants want to go on a fishing expedition.
- 35 The intention is highlighted, not only with reference to the expert summaries filed on behalf of Anderson, Bond and Clayton, (Founding Affidavit, para 13.2, p11), but by the fact that Gibson has already given

evidence and has conceded that the computer systems were properly operational. (Founding Affidavit par 13.1, pp1-11). The Defendants' experts base their views on tests conducted by MK Bond on the IBM 4758 and tests conducted by others on the VISA Security Model.

- 36 Indeed, as emerges from Anderson's article annexed to his expert summary, annexure 4.1, most security failures are due to implementation or management failures.
- 37 If one has regard to the expert summaries in relation to each of the items of equipment to which the Defendants want to have access, the following emerges:
 - 37.1. Nothing whatsoever turns on the IBM 2620 Cryptographic Processor and the criticism is levelled at Bonfrer rather than the processor itself. (Founding Affidavit par 16, p13); Dr Anderson suggests to the contrary, although not having said so before, on the basis that an "inappropriate disclosure" will facilitate the forgery of credit cards (Answering Affidavit, para 27, p82) which is not disputed but the pertinent issue relating to the issue of PINs (Replying Affidavit, para 33.2, p119).
 - 37.2. In relation to the IBM PCF Cryptographic Software the only criticism is that it fell "seriously short of industry standards" (par 17.3, p14).

- 37.3. Anderson, Clayton and Bond are confused when they come to deal with the IBM 4753 Cryptographic Processor but even if one was to read their criticism as levelled at the IBM 4755 i.e. the Cryptographic Adaptor, there is no criticism of the actual 4753/4755 utilised by The Standard Bank of SA Ltd and it is restricted to the supposition that the same attack mounted by Bond on the IBM 4758 would also be effective on the IBM 4755. (Founding Affidavit par 18, pp15-19). It is extraordinary that having pointed out the mistake that Dr Anderson did not bother to check the accuracy of his statement but speculates that the difference will lead to a situation which Defendants, will not be able to rebut (Answering Affidavit para 10, p71). The suggestion is absurd as the criticism by Plaintiff was that the IBM 4755 was the predecessor of the IBM 4758 and that the IBM 4753 is the HSM housing which protects the IBM 4755. A simple telephone call to IBM would have clarified this.
- 37.4. The only criticism of the equipment used by SBSA its Auto E Centre is that it is not state of the art. (Founding Affidavit par 19, pp. 19-21).
- 37.5. None of the experts comment on the functioning of the host computer of SBSA and one assumes that the only relevance in seeking to examine same is that information has passed between

the IBM 4753/4755 and the mainframe. (Founding Affidavit par 20, pp21-23). Notwithstanding this challenge Dr Anderson does not given any information as to what experiments he wants to conduct in relation thereto.

- 37.6. The attack on the Racals is predicated on an attack being made on the VISA Security Module and that such attack might be successful against the Racals then in use by Citibank International PLC, TNS and LINK. There is a difference between MK Bond and Dr Anderson in this regard. The former qualifies his opinion on the basis that it depends which software was being used whereas Dr Anderson expresses the firm opinion that the RACAL RG 7000 is vulnerable per se. (Answering Affidavit p10, p71).
- 37.7. As with the host computer systems operated by The Standard Bank of SA Ltd., no reference or criticism is levelled at the host computer systems which make use of the Racal Cryptographic Processors and one must assume that the only reason for seeking inspection and examination thereof is similarly that information is passed between the two. Again Dr Anderson does not state in his affidavit what examination he wishes to subject the mainframe computers to.
 - 37.8. The request for inspection and examination of the Building Entry Control Systems is equally not predicated on the very systems

themselves but rather that the proprietary software "*Top Secret*" is not sufficient to prove that there has been no unauthorised access to a mainframe application. (Founding Affidavit par 24, pp29-32). This is not disputed by Dr Anderson in his affidavit.

- 38 We submit that it is not the purpose of Rule 36(6) to allow a party to litigation to go on a fishing expedition in the hope that they are able to prove a theory which theory could be proved, if at all, having regard to any of the proprietary products utilised by the various entities in the transaction chain.
- 39 The justification for the Notice appears from Dr Anderson's affidavit that many of the items are only sold to "Banks and other companies involved in the transaction chain" (Answering Affidavit para 16, p75) and that a mainframe computer will "typically cost millions of pounds" (Anderson Affidavit para 17, p76). It is, however, clear that IBM make their products available to Dr Anderson (Answering Affidavit para 16, p75). No attempt whatsoever has been made to obtain the computers and it would seen that the Defendants expect the Plaintiff to be able to compel the entities in control of the computers to make them available or, if not, to acquire them itself so that Dr Anderson and his associates can experiment thereon in the hope that they will prove their theories and furthermore in the absence of any adequate explanation as to why, for instance, the mainframe computers or RACALs are required.

- 40 The irrelevance of much of the equipment sought to be inspected and examined emerges from the common cause facts. The earliest opportunity in 2000 at which LINK, TNS or Diners Club International Ltd, its subsidiaries or associated companies could have gained access to the First Defendant's PIN and PAN was after the first transaction had taken place on the 4th March 2000. Consequently the request to examine the computer systems of LINK, TNS and Diners Club International Ltd, its subsidiaries or associated companies through which the transactions passed has no foundation whatsoever.
- 41 The Plaintiff pertinently brought these facts to the attention of the Defendants and Anderson had another opportunity of considering the facts of this matter (Founding Affidavit para 28, p36). The Defendants do not dispute the facts but Anderson ignores them altogether. To sustain the Notice in relation to the computer system in the possession of LINK, TNS and Diners Club International Ltd, its subsidiaries and associated companies he poses two possibilities (Answering Affidavit paras 5 and 6) which are as untenable as those stated in his summary:
 - 41.1. he does not explain who "Diners Club UK" is notwithstanding the explanation given in the Founding Affidavit (para 28.4, p36);

- 41.2. the PINs are not stored in the UK but in Germany and an employee of either Diners Club UK Ltd or Diners Club International Service Centre would have no access to the PIN Master Key (PMK) which is not transported outside SBSA and accordingly could not print out a mailer or access the PIN. (Replying Affidavit, para 14, p101);
- 41.3. Similarly, an employee of the Companies in the UK would not have any account details in relation to the First Defendant;
- 41.4. the account was not "stopped" a week before the transactions but only a matter of days and nobody in the UK could have known this as it only related to domestic ATM transactions;
- 41.5. transactions do not pass through SBSA from Diners Club UK for authorisation in South Africa;
- 41.6. the First Defendant's card was not stolen.
- 42 He has had since June 2002 to "consider" his theories and, nevertheless, puts forward theories that bear no resemblance to the facts of this matter and even when pointed out to him, prefers to ignore same. It is significant that he is unable to come up with any concrete examples in relation to LINK or TNS but persists in seeking access to their computer systems.

- 43 Another startling omission from Dr Anderson's affidavit is any reference to the RACALs or IBM 4753/4755 being attacked, whilst in operation, by a criminal leading to unauthorised withdrawals of funds from ATMs.
- 44 It would seem that the experts do not, understandably, contend that an individual in the employ of Diners Club International Service Centre might have accessed only the First Defendant's PIN and PAN in 1997, withheld same until 2000 and then on the 4th and 5th March 2000, but only after First Defendant had had the PIN issued to him, utilised same as it would not be the computer equipment that is relevant, but the ability of someone to have had access to the tape which passed through the Service Centre and to have been able, by whatever means, to decrypt the information thereon. Consequently no equipment in the possession and control of the Service Centre is relevant thereto.
- 45 Consequently the issue is restricted to the computer systems in the possession and control of SBSA. In this regard it is the PCF software which was utilised to generate the encrypted PIN which was recorded on the tapes and the IBM 4753/4755 which issued the PIN on the 16th February 2000 to the Auto E computer system. Consequently to request any access whatsoever to the computer systems in the United Kingdom can never be relevant to the outcome of any issue in this matter. Even then, as indicated above, the actual equipment is not relevant.

- 46 It is significant that Anderson postulates that employees of Nedbank and SASWITCH attract a greater suspicion than the Defendants themselves but no request has been made to inspect and examine those computer The position of Nedbank and SASWITCH in relation to the systems. Plaintiff is no different than the Plaintiff enjoys in relation to SBSA, TNS, LINK or Diners Club International Ltd, its subsidiaries and associated companies insofar as it is able to facilitate an inspection and examination of the equipment. One can only assume that the Defendants' expert witnesses did not consider their equipment relevant to the outcome of this Inferentially, therefore, if the experts are able to test their matter. theories in order to back their allegations in relation to Nedbank and SASWITCH without having an inspection or examination of their computer systems, one asks the rhetorical question, why it is not possible to have done the same in relation to the balance of the computer systems?
- 47 Dr Anderson makes reference to being advised that "the current case is not an isolated matter" (Answering Affidavit, para 10, p72) to support his contention that an employee of one of the entities identified by him committed the fraud. This is redolent of the threats made by the Defendants to adduce evidence in this regard which have not eventuated. The Plaintiff in a separate matter has obtained a confession in relation to a fraud on it. The significance is that the PIN in that matter was issued shortly before the transactions and the same ATMs were used in London.

Consequently, any support which Dr Anderson wishes to rely on from "other cases" is ill founded, to say the least.

- 48 Another important feature of Dr Anderson's approach is that, for the first time, he indicates broadly what the examination of the HSMs will involve. (Answering Affidavit paras 13 and 14, pp 73,74). The examination is irrelevant to the outcome of this matter as, even if he could establish that a similar vulnerability exists in relation to the IBM 4753/4755 as it does to the IBM 4758 and that the RACALs are also vulnerable, the examination will not demonstrate how the LMK (Local Master Keys) could be breached (Replying Affidavit para 21).
- 49 Nobody has successfully broken LMKs which are TDES encrypted. (Gibson conceded this). What Dr Anderson is suggesting is that the HSMs are given to him in an authorised state or that they are shut down and taken off line. In either case the examination does not emulate what had to have occurred and does not establish that an employee of one of the organisations could access the information. (Replying Affidavit para 21, p108).
- 50 There is another fundamental flaw in Dr Anderson's approach and that is that he attacks individual components and ignores the operation of the whole computer system in its particular environment. He does not, for

example, suggest that he is able to demonstrate that an employee could even have gained access to the HSMs let alone accessed same.

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- 51.1. Furthermore, in order for Defendants to establish that there is any relevance at all in relation to the state or condition of the computer systems, they would have to show, and plead, that those persons identified by Anderson rendered the Plaintiff vicariously liable. It must be borne in mind in this regard that, in terms of the conditions of contract, the use of First Defendant's PIN "by any person whatsoever" renders the First Defendant liable.
- 51.2. The Plaintiff would only be liable for the wrongs of an employee of such organisations as identified by Anderson if it had authorised same or that those employees were about the affairs of Plaintiff, as distinct from the affairs of their employers.

See Mkize v Martens 1914 AD 382 at 390;
Broodryk v Smuts NO 1942 TPD 47;
Randbank Beperk v Santam Versekeringsmaatskappy Beperk 1965 (2) SA 456 (W);
State v Bannur Investments (Pty) Ltd 1969 (1) SA
231 (T);
Ensor NO v Syfretts Trust and Executive Company
(Natal) Ltd 1976 (3) SA 762 (T) at page 763.

51.3. It is inconceivable that an employee of "Diners Club in the UK", The Standard Bank of SA Ltd, LINK or TNS could conceivably render the Plaintiff vicariously liable for an act of fraud as suggested by

Anderson. Accordingly, even if Anderson's evidence was accepted, such evidence would remain irrelevant to the outcome of the matter.

52 The Defendants have not, therefore, established that the state or condition of the computer products which they wish to inspect and examine are relevant with regard to the decision of any matter or issue in this action and consequently, for this reason as well, we submit that Plaintiff is entitled to the relief sought.

MATERIAL PREJUDICE

Defendants' attorneys of record (annexure CB1, p41) in which letter the Defendants were invited to specify the nature of the examination to which each of the items listed in the Rule 36(6) Notice were required to be subjected. They were urged to provide full details of the examination in relation to each item and were advised that should they fail to provide same, the Plaintiff would ask this Honourable Court to draw an inference that the Defendants were *mala fide* in giving the Notice. The Defendants did not reply thereto but attempts in its answer to explain that there was insufficient time. This cannot be correct in the light of the fact that Dr Anderson had already identified what he wanted to do, at the latest, by the 17th June 2002.

- The nature of the examination to which the Defendants wish the various computer products to be subjected is material. In this regard, as previously indicated, one need only have reference to the IBM 4753/4755 presently in the control and possession of The Standard Bank of SA Ltd and the "Top Secret" and "SOBR" software packages utilised by them. The Racals and mainframe computers of TNS, LINK and Diners Club International Ltd, its subsidiaries and associated companies will only be relevant if the Defendants are able to demonstrate, on the facts, that information could have been accessed from these systems by employees of those organisations prior to the 4th March 2000.
- 55 As stated earlier it is clear that "examination", on the authorities, might entitle a party, in this case the Defendants, to experiment with the equipment. If this is indeed their intention, as it would appear to be in this case, then it is incumbent upon the Defendants to satisfy this Honourable Court that such examination will not result in the destruction, in whole or in part, of the products, the information retained thereon and is not unduly prejudicial. In this sense regard would have to be had not only to the prejudice which the Plaintiff might sustain but the extended prejudice to the various organisations in the transaction chain, the banks and customers utilising the various systems who are not parties to the action. Furthermore, if it is the Defendants' intention to remove the equipment to a laboratory, it is not entitled to do so.

- Anderson, Bond and Clayton on commission, the First Defendant attested that "they will demonstrate the insecurity of hardware security modules to this Honourable Court with equipment which is available at the computer laboratory at Cambridge University in the United Kingdom, but which equipment cannot be exported from the United Kingdom without a license which is unlikely to be granted quickly, or indeed at all, on terms that the said University would find acceptable." Furthermore, in paragraph 20.2 it appears, contrary to the notice itself, that Anderson had only suggested that a request be delivered to the Plaintiff in relation to the Racal RG 7000 and IBM 4753 Hardware Security Modules which were in the United Kingdom.
- 57 In the affidavit attested to by Anderson in support of the application he recorded in paragraph 8.3 that he "anticipates that Bond and Clayton can effect a rapid and concrete demonstration to this Honourable Court of the insecurity of the IBM 4753 and Racal RG 7000 Hardware Security Modules. However, the equipment they will use to do this, and which is available at the computer laboratory, could not be exported from the United Kingdom without a license that is unlikely to be granted quickly or indeed at all..."
- 58 Anderson foresaw that problems might well exist insofar as Plaintiff was not in possession and control of the equipment as in paragraph 8.4 he

deposed to the following: "there is a possibility of the Plaintiff failing to comply with the said request, or alternatively, contending that the materials to which access is sought are outside its control and in control of entities in the United Kingdom" and thereafter makes the fundamental mistake, predicated on the assumption that entities in the United Kingdom are obliged to make the equipment available, that "It would be far more convenient for access to the necessary equipment to be ordered in the UK".

- 59 It is clear from these excerpts that, as we have submitted earlier in relation to the state or condition of the actual equipment not being relevant, our submissions are correct. Anderson has made it abundantly clear that what he seeks is a sample of the proprietary product in order to subject it to an examination. However, it is also clear, that the examination, apparently, is unnecessary as the equipment already in the possession and control of Bond and Clayton can adequately be utilised.
- 60 Some indication is given of the examination which Dr Anderson wishes to conduct in relation to the IBM 4753/4755 and the RACALs but no details are given of the nature of the examination which they wish to conduct on any of the other items to which access is sought.
- 61 Balancing then the considerations of justice and prejudice the following facts, we would submit, are relevant:

- 61.1. It is common cause that the Plaintiff is not in control and possession of any of the computer products and has no ability or power to compel any of the parties to allow an inspection or examination of the systems. Other than a few items, the equipment and software presently in use by those entities is not the same as it was at the relevant times in relation to this case.
- 61.2. On the facts, an inspection of the equipment in the United Kingdom is of no relevance as not only are the PINs not stored in the United Kingdom but no employee could have accessed the information prior to the 4th March 2000 save from the tape as indicated earlier which would not require, of itself, inspection and examination of computer products in the UK.
- 61.3. The actual state of the particular computers presently in the possession and control of the various entities cannot be relevant to computers, even if they were the same, which were operating during the period February 1997 to 6 March 2000.
- 61.4. The Defendants' expert witnesses would not be prejudiced insofar as the products are proprietary and can be acquired on the market so as to facilitate any examination to which they wish to subject same; this only applies to the IBM 4753/4755 and Dr Anderson has

- a working relationship with IBM which facilitates this type of testing (Answering Affidavit para 22, p79).
- 61.5. The Defendants have failed and refused to give precise details as to the nature and extent of the examination to which they wish to subject the various products which could lead to the destruction of such products, and/or information stored therein; some information is given in relation to the HSMs.
- 61.6. It is common cause that any examination will result in the serious disruption of SBSA's entire banking and card operation as well as that of Diners Club International Ltd's card operations for the whole of Europe and other countries which utilise Diners Club International Service Centre to verify and switch their international transactions. (Founding Affidavit paras 10, 24 and 26).
- 61.7. An examination of the computers will result in the disclosure of highly confidential information proprietary to third parties as well as trade secrets peculiar and business processes confidential to the owners of the computer systems. The mere fact that Dr Anderson says that he is honourable, subject English Legislation and quite content that this Honourable Court should order him to keep the information confidential is of no comfort. English Statutory Law is of little relevance and the aggrieved party could not adequately

execute the order against a party who even refuses to give his evidence in South Africa. Furthermore, Dr Anderson has demonstrated a palpable bias. He states for instance that:

- 61.7.1. equipment has been "destroyed" by the Plaintiff or its associates (Answering Affidavit, para 15, p74);
- 61.7.2. "Some of the Banks are controlled by criminals" (Answering Affidavit para 21, p78);
- 61.7.3. "Denying security researchers access to product information
 does not assist security; it is surely aimed at limiting
 liability. (Answering Affidavit para 21, p78).
- 61.7.4. The statement that Plaintiff cannot make documentation available to Defendants which are in the possession of other banks is "pure sophistry" and that the Plaintiff hides behind "technicalities" because the information is "likely to be destructive to its case" (Answering Affidavit para 23, p80);
- 61.7.5. "Any bad faith in this matter lies on the side of the Plaintiff, in view of the lengths to which they have gone to deny the defence access to the information needed for a fair trial:

 (Answering Affidavit para 32, p85).

- 61.8. It is not disputed by Defendants that:
 - 61.8.1. Local and international financial chaos could ensue and there would also be a serious breach of the very security which the computer systems are designed to protect.
 - 61.8.2. The Standard Bank of SA Ltd would be in breach of the Code of Banking Practise.

See: Tournier v National Provincial & Union Bank of England [1924] KB 461

- 61.8.3. The Plaintiff would not be able to compel the entities in question to make their computers available for inspection and examination and consequently would be in danger of having its case dismissed.
- 61.8.4. Allowing unrestricted "end to end" access by Anderson,

 Clayton and Bond would be in breach of the fundamental

 controls established by the entities. In essence it would

 amount to taking all the control away and jeopardising the

 existence of the bank, the rights of its customers and could

 detrimentally affect the entire banking industry.

- 61.8.5. A similar consideration applies to Diners Club International Ltd, it's subsidiaries and associated companies.
- 61.8.6. Accessing the mainframe computers, or any system or computer which is capable of accessing the information thereon, would result in a great deal of confidential information being accessed, be that in relation to SBSA or indeed Diners Club International Ltd, its associated companies and subsidiaries, LINK or TNS.
- In the event of the examination of the computer systems 61.8.7. resulting in the systems being taken out of operation, contaminated or otherwise damaged, the consequences would be extremely harmful and in relation to The Standard Bank of SA Ltd, for example, could impact on, amongst other things, its branch systems and networks, accounting systems, online systems, internal controls, internet banking, telephone banking and ATM transactions. Considerable business could be lost. Forex transactions could not be processed and payments between it and other banks might not be settled. This in itself could involve billions of Rands. The customers of The Standard Bank of SA Ltd and one of the Banks or persons using or wanting to use the Bank's facilities could be affected, for example, in making

withdrawals, accounting, ATM transactions and general services.

- 61.9. The opinions expressed by Anderson, Bond and Clayton are arbitrary and demonstrate that they have not applied their minds to the facts of the matter and to the probabilities.
- 61.10. The whole basis upon which the Defendants brought the applications to take their evidence on commission was that they were not willing to come to South Africa to give evidence. It would seem therefore, in relation to the equipment in South Africa, that it is now the intention to ask to recall Mr Gribson as he will conduct the inspection and examination although he will not prepare the report or draw conclusions from the experiment which is unacceptable.
- 61.11. Having regard to the fact that no case is made out that the Plaintiff would be vicariously liable for the fraud of employees of "Diners Club in the UK", SBSA, LINK or TNS, the relevance of any inspection to the outcome of this matter is dubious, to say the least.
- 61.12. It does not assist the Defendants to suggest that the organisations have back-up computers because such computers form an integral

part of their operating systems. All that the request does is highlight the fact that it is not the "state" or "condition" of the particular computers that is in issue.

ATTORNEY AND OWN CLIENT COSTS

- 62 In terms of clause 6.5 of the agreement between Plaintiff and Defendants, the Defendants are liable, in the event of the application being dismissed, to make payment of attorney and own client costs.
- 63 In addition thereto, it is quite clear that the notice in terms of Rule 36(6) has been served *in terrorem* with a view to gaining an undue advantage and constitutes an abuse of the Rules of this Honourable Court. We submit in this regard:
 - 63.1. The Notice was served on the 27th August 2002 at a time when the Defendants knew that the Honourable Judge seized of the matter was taking sabbatical at the end of September 2002 and might not be able to hear the matter until his return in February 2003.
 - 63.2. If the matter had stood to February 2003, the commission as well as the continuance of the Trial would have been jeopardised and in all probability, a further postponement would have ensued.

- 63.3. Anderson had already deposed to his affidavit on the 17th June 2002 in which, as indicated earlier, the whole question of seeking inspection and examination had been discussed and a course of action decided upon.
- 63.4. Notwithstanding Anderson's view as to which equipment should be inspected and examined as expressed in his affidavit, the Defendants, without having regard to any of the facts or probabilities, appear simply to have gone through the various expert summaries filed on behalf of the Plaintiff to extract any reference to the computers and to have incorporated them in a notice.
- 63.5. More than two years have elapsed since the transactions in question and more than five years have elapsed since the First Defendant's PIN was generated.
- 63.6. No basis has been established by the Defendants for wanting to examine the computer products at this late stage which gives credibility to the submission that in fact it is not the actual computer products themselves which were used in the various stages of the transaction chain at the times which are relevant but that all Anderson, Clayton and Bond are seeking are models on which they can experiment.

- 63.7. As emerges from the affidavit of Patel filed in support of the application to take evidence on commission, the Defendants had already consulted with one Meer, a computer systems analyst, during January 2002 and consequently must have been aware, even at that date, that the services of a systems analyst would be required.
- 63.8. Defendants employed the services of Gibson who ultimately gave evidence and conceded that he had no criticism of the state and condition of the actual computers used in the transactions and accepted that the computer printouts were what they purport to be and evidenced the use of the First Defendant's PIN and PAN.
- 63.9. Anderson's approach to the inspection and examination appears, strangely, to be restricted to the institutions making same available to him in the United Kingdom and yet it is those very computers which are, on the facts, irrelevant to the outcome of this matter.
- 63.10. Anderson, Bond and Clayton are not prepared to come to South Africa to give evidence and consequently the suggestion that it is necessary for them to inspect and examine computers in the possession and control of The Standard Bank of SA Ltd., is equally spurious.

- 63.11. Anderson, Clayton and Bond appear to have had no difficulty in expressing firm opinions in relation to the computers utilised in the transaction chain and have not predicated their views on the basis that they were subject to such inspection or examination.
- 63.12. The Defendants are well aware that Plaintiff is an independent persona and has no power to compel any of the other entities to make the computers available and that, if an order was granted by this Honourable Court, Plaintiff could not give effect thereto.
- 63.13. In the result the Notice was in fact *mala fide* and delivered with a view, not to progressing the proper determination of the issues in dispute, but for the purpose of prejudicing the Plaintiff.

CONCLUSION

64 In the result we submit that the Defendants' Notice in terms of Rule 36(6) dated 27th August 2002 should be declared to be irregular alternatively that Plaintiff be declared to be under no obligation to make available the property, or fair samples thereof, and that the Defendants be ordered to pay the costs of the Notice and the opposition thereto and of this