IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

<u>DURBAN</u>

CASE NO 3156/00

DATE 2002/09/26

In the matter between:

ANIL SINGH

(1st Applicant

ANITHRA SINGH

(2nd Applicant)

and

DINERS CLUB (SA) (PTY) LIMITED

(Respondent)

BEFORE THE HONOURABLE MR JUSTICE LEVINSOHN

ON BEHALF OF APPLICANTS:

MR A K KISSOON SINGH SC WITH

MR M W COLLINS

ON BEHALF OF RESPONDENT:

MR P M M LANE SC WITH

MR K J TRISK

PROCEEDINGS
ON 26 SEPTEMBER 2002

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CASE NO: 3156/00

DATE: 26 SEPTEMBER 2002

PARTIES: DINERS CLUB v ANIL SINGH & ANOTHER

ALL APPEARANCES AS BEFORE

<u>LEVINSOHN J</u> Mr Lane.

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MR LANE Thank you, M'Lord. M'Lord, we have prepared heads of

argument. I hand these heads in to Your Lordship.

LEVINSOHN J Thank you.

MR LANE Sorry, M'Lord, may I also hand in - M'Lord, I'll wait for the adjournment and we've got both copies. M'Lord, in the introduction to our heads we state the history of the matter, that on the 27th August 2002, the defendant served a notice in terms of rule 36(6) on plaintiff, requiring that certain computers and software, which we are going to refer to in these heads as "the computer systems", lodged in the possession and the control of the Standard Bank of South Africa and Diners Club International, its associated companies or

In summary, M'Lord, the 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. The defendants suggest in their reply that the reasons for serving the notice as late as the 27th August 2002 were, *inter alia*, requests by the plaintiff to canvass whether the defendants will 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

subsidiaries, be made available for inspection and examination.

equipment ought to be requested for inspection during August 2002.

<u>LEVINSOHN J</u> Isn't that improper to raise this question of ...[inaudible] ...[intervention]

MR LANE Absolutely, M'Lord, absolutely.

LEVINSOHN J It's without prejudice.

MR LANE The whole suggestion, the entire conversation was without prejudice, M'Lord. In fact, it was an approach made by myself to my learned friend to make this information available and[intervention]

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<u>LEVINSOHN J</u> That should never go on record, Mr Lane.

MR LANE No, M'Lord. We entirely agree, M'Lord, and we make that point in the replying affidavit and we explain the circumstances under which it came because the whole inference that is drawn from it is that there was an approach inferentially by the plaintiff because there was a weakness in its case and we set out the facts behind that, M'Lord, and we make no further point of it. It should not have been there.

<u>LEVINSOHN J</u> Mr Lane, I just want to perhaps shorten the proceedings somewhat. Does anything turn on the fact that they gave this late?

MR LANE They were here, M'Lord.

LEVINSOHN J We hear - I had agreed to hear it. We have set the thing in motion. Shall we just get on and deal with the merits?

MR LANE Yes, M'Lord. Could we go to page 3, M'Lord,

LEVINSOHN J Yes.

paragraph 4, in that case?

MR LANE We are quoting paragraph 5 of our heads, rule 36. Your Lordship, is acquainted with it and I don't intend to read it out but what is significant in terms of rule 36(6) is that there are two criteria. There is the use of the word "or", and that word "or" we underline in the last line of that page to give it our emphasis. In other words, there are two elements of the rule.

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LEVINSOHN J Just slowly, Mr Lane. Let me just get that.

MR LANE The fifth line, the last line on page 3, paragraph 5 of our heads, we have underlined the word "or".

<u>LEVINSOHN J</u> Oh, yes, I see that, yes.

MR LANE To give it emphasis, M'Lord. Now, in paragraph 6 we break the rule down into its fundamental elements. First, we say:

"The state or condition of any property must be relevant to the decision of any matter at issue in the action."

Now, that is obviously a matter which Your Lordship will see that we concentrate considerably on as to whether the state or condition of these computers is relevant to the decision. Secondly, the notice may be given to the party relying upon the existence of such state or condition and then or, M'Lord, again we emphasise "or", the notice may be given to the party having such property in his possession or under his control. Fourthly, 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.

Now, M'Lord, let me immediately say we make no point of that ten-day period. We know it's elapsed but we believe that this is of such moment that is an irrelevant consideration; that what is important is what is to be done with the notice.

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Now it is difficult to discern what the difference is, if any, between state or condition of property. In terms of Webster's New 20th Century Dictionary, "state" is defined, inter alia, to mean condition, as well as physical structure, constitution, internal form, stage or phase of existence, etcetera, and condition of, 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 relevant to the decision of the matter. The very property in question must be relevant to the decision. In other words, it's not a question of you can go out and buy a piece of property and say that's a bad product, a bad design. It must be the very property which must be relevant to the decision. If, for instance, the property in question is merely a generic product, available in 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 is the produce per se sold in the market which is relevant. Now that's an important consideration, M'Lord. LEVINSOHN J Yes, let me just digest that. This is in your heads here in the middle of the page or just a quarter way down. Yes. MR LANE The importance, M'Lord, is this, is that one can conceive of two situations - the one which we have in this matter where the criticism is not that there is any inherent defect in any of the computers but that those computers which are sold in the market

have a potential, a possible defect in design. To assist ...[indistinct]... for example, M'Lord, one might say that if this was a sale - a dispute in relation to a sale, and there was an allegation that the product which is still extant has some form of inherent defect in it which was peculiar to the product, and that the one party who was still in possession of that product, now one could say that that product is[?] continued existence and any experiments to be performed that might be relevant. However, if that product is a product which I can go down to Spar or to a shop and simply purchase, then you don't need that product, you can take any product and you can perform your tests. We say that this is a fundamental aspect of this rule.

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A party is therefore not entitled, we continue our heads, M'Lord, 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 in 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.

This is again an important consideration, M'Lord, because as we pointed out, the rule contemplates two situations - reliance or possession. "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 the thing has possession of it and the management of it. These are words we take from His Lordship Mr Wessels out of the ...[inaudible]... v Harvey decision which is apposite, M'Lord, in terms of a definition only.

The right to control, however, would include the right to impose restrictions and prohibitions in relation to use or who might possess same. That's important, M'Lord, because here you have a situation where, it is common cause, the plaintiff is not in possession and has no control over any of these computer systems. It cannot itself impose restrictions or prohibitions ...[intervention]

LEVINSOHN J Slowly, Mr Lane. Mr Lane, let's just - I just want to understand that because I think we are dealing with the matters that are raised ...[inaudible]... to some extent because we are dealing with computers. Some similar concepts are quite elusive. We've got hardware, which is the actual machinery, the PC or whatever, the mainframe. That's the hardware. That's where the systems live in that hardware. So one can go and look at that and say, "Well, that's an IBM. Well, that's a whatever it is. That's the state or condition of that". But within that you've got your software which is the programmes which make the hardware run, which give the information, where the information is stored, etcetera, etcetera. What troubles me in this case is how can I allow the defendant to go in and access your systems? Assuming that you had the power to consent to them going in, wouldn't that be a fundamental breach of confidentiality? Because your systems contain all sorts of confidential information relating to thousands, perhaps even millions of customers

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around the world.

MR LANE Yes, M'Lord. In fact, we make this point and it is, in fact, common cause now, M'Lord. It's not challenged at all that the consequence of anybody, let alone Dr Anderson, being given authorised access to the computer system could result in billions of rands of loss, could affect billions of people all over the world and could have - I mean, we point, for the example to the - Your Lordship will be aware of the *Tournier*[?] decision, which was the leading case in England in the 'forties on a relationship between bankers and customers, on which the South African code of banking is largely based, and there we would be in breach of the confidentiality, the obligation of confidentiality in relation to each of those individuals utilising the system. It's actually a frightening concept, M'Lord. And furthermore, M'Lord, it goes even further ...[intervention]

LEVINSOHN J What he really wants to - let's just call a spade a spade. He wants to go into your systems and demonstrate that he can hack into it and he could achieve what he says an insider could have achieved in going into the ATMs and accessing the PIN numbers and so on.

MR LANE Yes, M'Lord.

LEVINSOHN J That's what he wants to do.

MR LANE That's what he wants to do, M'Lord. But what is interesting, M'Lord, and we developed this, is that the concept is that he has taken - in essence he drives the argument against two pieces of equipment. Let's call them just systems, M'Lord. The first is the 47/53, 47/55. Now, the 47/53, M'Lord, and perhaps it's good at this

stage to get a picture of what one is dealing with in terms of the operation. Let's take Standard Bank, to begin with. First of all, the N[?] Division, Standard Bank, assuming he wants to prove his theory, has to break through a software product called "Top Secret". It's generic. It's available on the market. He then has to break through a second piece of software called "Soba[?]", which is not generic. It is particular to the security of the entire operation of the Standard Bank. Then this individual has to get access to the room where this ATSM, the high security module, is situated, and there's an interesting innuendo here because in the plaintiff's founding affidavit we say that, "Dr Anderson, you made a mistake. You say that the 47/58 which you successfully, or Mr Bond successfully attacked, had as its predecessor the 47/53 and that's easy to transport". Well, it isn't, because the 47/53 is an IBM product. It measures a substantial as big as this desk. It takes a number of people just to lift it up. It is the high security module which protects the adaptor card inside which is the 47/55. So the 47/55 was the precursor to the 47/58. Dr Anderson, in reply, says - doesn't address that, because this is a telephone call away. You phone IBM and say, "Look, I've got a query. Is the 47/58 related to the 47/55 or the 47/53?" He doesn't bother to do that but what he would have Your Lordship believe is that we have raised now an irrebuttable denial against his version, and so one's left in just picturing what we are dealing with but a doubt as to where Dr Anderson is coming from because if one goes to the next step in this scenario, having breached through Top Secret, having breached Soba, having got into the room which houses the 47/53,

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one then finds that, and Your Lordship will remember or perhaps not, M'Lord, because I, of course, had to refresh my memory, this process of the MNK. Now MNK is your local master key. It's a random encryption which protects access to the 47/53 and 47/55.

LEVINSOHN J Is that the one that requires two smart cards?

MR LANE Two smart cards or passwords held by different people and that is something which Mr Gibson conceded had never ever been broken. That's TDES and no one in the world has yet been able to break Tides.

LEVINSOHN J Is that in the software?

MR LANE No, TDES is the triple D, the encryption of process.

<u>LEVINSOHN J</u> So it's a software, it's a programme?

MR LANE Yes, it's a programme. And what it does, M'Lord, it works in hexadecimals and it multiplies the number at a random level and gives you a figure which nobody has actually managed to breach, and one sees even in Dr Anderson's criticism, for example, of Mr Bonfrere's summary that that's not challenged by him. Nobody has challenged and broken TDES but now what does - so this hypothetical individual ...[intervention]

LEVINSOHN J Yes, Mr Lane, I just want to say in passing that I think one of the decisions I made that was correct in this case was that Mr - that I should be present when Dr Anderson was cross-examined because it's all become manifest now that he's highly controversial and the case may well depend on my view of him as a witness and so on.

MR LANE M'Lord, we are grateful to Your Lordship, because it's

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quite clear, M'Lord, that you are not dealing with an independent objective expert.

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<u>LEVINSOHN J</u> Well, you'd better not say too much, Mr Lane, because ...[intervention]

MR LANE Well, M'Lord, I have to because it comes up in his affidavit.

LEVINSOHN J Yes. Because I don't want to prejudge that.

MR LANE No, no, M'Lord, I appreciate that.

<u>LEVINSOHN J</u> He's a witness in waiting and I think we must confine ourselves to the very issues that are ...[intervention]

MR LANE No, no, I appreciate that, M'Lord. I think one of the issues though that Your Lordship would have to consider in whether to give any relief to the defendants would be the identification of the person who is going to actually perform these tests. That is ...[indistinct]... cases where this has been a criterion. But, M'Lord, I'll leave that for the time being. M'Lord, going back to setting the scene, here is this ...[intervention]

<u>LEVINSOHN J</u> You mentioned TDES last when I interrupted you.

MR LANE Yes, TDES, M'Lord, which is the triple encryption standard. Now, M'Lord, this individual has to break that. He has to now breach that. Now, what Dr Anderson does not say to Your Lordship is that he wants to go through that entire system and can show Your Lordship that he can get through Top Secret and Soba, that he can break the LMK and thereby get authorised access to the 47/53, 47/55. What he wants, M'Lord, is even worse for the plaintiff. He wants to be given authority, end-to-end authority, to access the

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system up-stream and down-stream. He wants to have access to the mainframe, he wants access to the encryption engines. He wants entire access. What that means, M'Lord, is that somebody, in other words Standard Bank, would have to authorise that machine to allow him to do whatever he wanted to it, enter the mainframe and do what he wants. M'Lord, the witness cannot be ...[indistinct]... under rule 36.

LEVINSOHN J Let's assume Dr Anderson is a - well, we must assume he is a respected expert. Surely IBM would recognise that and give him further information in regard all their criteria if he asks for it? If he asks for, "I want to see the configuration of the 47/58. I want to see this", they would let him have it.

MR LANE Yes, M'Lord ...[intervention]

<u>LEVINSOHN J</u> From a theoretical point of view.

MR LANE There's a contradiction in Dr Anderson's affidavit. On the one hand he says, "Oh, no, these products are only sold to banks and companies dealing with this form of transaction. Yet, in the same breath he says that when he came to his testing of the 47/58 he first of all surreptitiously found a product, "which we tested. We then took our results to IBM and they said, 'Whoops', gave us the 47/58 so we could conduct our tests", and he says "Now we have an agreement with IBM when they make their products available to us under a condition that before we publish any of the results we give them three months' warning, in order for them to correct their product", and he says, "We don't mind if that sort of condition is applied to making your machines available to us". So Your Lordship,

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is absolutely right. IBM have already an agreement with the University of Cambridge to supply equipment.

LEVINSOHN J Yes.

MR LANE But knowingly, and what is extraordinary here, M'Lord, is it is common cause in this matter that it's not the mainframe, the 47/53, 55, the Racals at link TNS, Diners Club, etcetera, that are relevant to our ...[indistinct]..., it is any mainframe of that manufacture, any 47/53, 55 in Racals 7 000 or 7 100. It is not peculiar to the ones which are in operation at any of the institutions. LEVINSOHN J What you say is once you know what is being used

at the level of an academic exercise, you can do your research without actually going into the plaintiff's systems.

MR LANE Not at all. Absolutely, M'Lord, and what is beginning clear and one would anticipate it before you launch an application of this nature so that you could make a positive averment, is that you go to the manufacturers, like IBM, and you've got an agreement and a working relationship, you're coming as a university language[?], and you say, "IBM, can I have one of the 47/53, 55s to test?", and IBM says "Yes" or "No", and you come with an affidavit before Your Lordship and say, "IBM said 'Yes'" or they said "No". Instead of which they say, "No, normally this is the case but we haven't bothered to ask here", and that's not a proper basis for bringing or serving notice of this nature.

The other thing, M'Lord, is that - and this again becomes clear from Dr Anderson's affidavit - is that the prior attacks and this, we refer to M K Bond attack on the 47/58, and the attack on the Visa

ATSM module, precursor to the Racal, the Racal is, and again he doesn't mention this, is no longer developed by Racal, it's developed by a company called Trojan, and he certainly hasn't had contact with Trojan, and that again, M'Lord, is on the papers. It appears from the evidence of Bonfrere that that is the case.

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Now, in the affidavit which was brought to take the evidence on commission, what they said as one of the motivating reasons for going on commission was that the equipment utilised to attack the 47/58 is owned and controlled by the University of Cambridge. The University of Cambridge will not allow that equipment to leave its premises or be exported to South Africa. Therefore, whatever happens has got to be taken to that equipment in the laboratory.

LEVINSOHN J If I remember correctly, they said you'd need a licence from the Government and so on.

MR LANE Yes, licences and Cambridge won't agree to it. Now, the tests were conducted in a laboratory. Now, what they are suggesting and they've suggested it all along is that the same attack on the 47/58 could work on the 47/55, i.e. under laboratory circumstances, which again gives credibility to the proposition that they want complete end-to-end authorization to the bank's software, hardware, the entire system they want available, and he says as a safeguard, he says, "Oh, but I'm an honourable fellow and I was in England covered by the Protection of Data Act and in South Africa, if His Lordship wants to put restrictions on me, that's fine, and this is the real ...[indistinct]". That's not good enough, M'Lord. First of all, how does Standard Bank protect itself? Must it then run off to him in

England to try and interdicts to prevent publication of this? What is[indistinct]... the English Production of Data Act not applicable to South Africa and there isn't an equivalent in South Africa, and here is a man who won't come and testify in South Africa and he's going to rely on Mr Gibson to be ...[inaudible] ...[intervention]

LEVINSOHN J [Inaudible].

MR LANE And obviously there will be an application to recall Mr Gibson, which is hardly a satisfactory way of doing things. So, M'Lord, then Mr Gibson is now privy and has access to all this information in South Africa. M'Lord, it's a very unsatisfactory state of affairs. And, M'Lord, this is all in relation to a relationship between Diners Club, of which there are no computers in the plaintiff's possession, none at all, which are relevant to this matter. Even the 26/20, IBM 26/20 is no longer in its possession. It's stopped using it. It is the system in the possession of Standard Bank Limited, a bank, an entirely different entity, corporation. Diners Club International, a different organization, a company in New York[inaudible] ...[intervention]

LEVINSOHN J Tell me something Mr Lane. Sorry to interrupt you.

Diners Card International, I think there's evidence on the papers that
the PIN numbers are actually stored in Germany.

MR LANE In Germany, M'Lord, yes.

LEVINSOHN J But not in the UK?

MR LANE Not in the UK, no.

<u>LEVINSOHN J</u> So in the UK it would also be a franchise, Diners Club's ...[intervention]

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MR LANE M'Lord, there are two entities in the United Kingdom. One

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is Diners Club UK Limited, which is ...[intervention]

<u>LEVINSOHN J</u> Like you are.

MR LANE ... the franchisee, who at one point in time controlled the CAFE operation, only the CAFE operation. Then you have Diners Club Service Centre, which we understand is a trading entity of Citibank, and then you have - and that is a trade name, M'Lord, because that controls the system in England. And then you have the German situation where the PINs are stored which is also, we understand, controlled by Citibank. Now, these are different institutions, and this is why when one gets to - and we developed the scenario, M'Lord, and that is when one comes to why he wants to look at the transaction chain, that starts off with Link - well, let's again paint a picture before we go further into the rule[?], M'Lord. Somebody arrives at an ATM in London on the morning of the 4th March. He presents a card and he punches in the PIN. The information is immediately encrypted as he punches it in in terms of the local working keys, IWKs as they are referred to. It is then transferred. The bank, the host bank, if it identifies that it is one of its own transactions, deals with it. It identifies that it's not one of its own transactions but it nevertheless recognises it as one of its contracting individuals, sends it through to Link. Now, Link is an independent organization. It runs and switches not just - it switches all - most of the banks in the United Kingdom send all their transactions, its ATM transactions, through Link. Then from Link it goes to TNS because Link identifies through its process of encryption, even if encrypted a

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little way, to TNS. TNS is another switch organization and it simply translates the transaction and sends it to the next source. The next source, which acts again as a translator, is Diners Club International Service Centre. It equally acts as a translator. It identifies it as either a transaction which must be routed straight to America or it's a phone transaction or it's a local transaction. The authorization, however, because the PIN is not stored in the United Kingdom, it moves from there straight through the relay system in Germany. Germany, it says, "Yes, I've verified the PIN, I've verified against the PAN and I say that - and then I authorize it and then it comes all the way back down the line to the ATM and gets paid out". Now, what will Dr Anderson have? He will have Your Lordship grant an order that first of all he can see all the Racals in the possession of Link and their mainframe computers. He wants the Racals and the mainframe computers, the ...[indistinct]... controlled and possessed by TNS. He wants the Racals and the mainframes in the Service Centre, and we say to him, "But, Dr Anderson, why do you need these? How can you demonstrate on the facts of this matter - forget about how you might theorise in any abstract matter - the facts of this matter. How do you think these are relevant?" Because the first time that information transports through that system is after someone has presented the card and the PIN. So logically, just a matter of logic, no employer of any of those organizations could have accessed that PIN in order to present the card. It's already happened. It's on its way through the system. He ignores that. He just totally ignores it.

LEVINSOHN J What you say, in fact there is an end-user. There's

a person at the end of this ATM that's presenting a card and presenting the PIN.

MR LANE So if he says an employee, for example, at Link was the guilty party, what's the relevance? How could that employee ever be the guilty party? Because he only sees that information and possibly he's able to access it if he can at all after the PIN and card had been presented to the ATM. So Link can't - some employee of Link can never have done that because it's already happened. The fraud has commenced. The transactions have started. We point that out to him. We say, "Dr Anderson, please explain the relevance - forget about losing possession, but please explain the relevancy. You want to see all these mainframes and Racals and what-have-you all the way down the transaction line". What does he do, M'Lord? He comes up with two theories, two hypotheses, which are so remote from the facts of this case to be almost verging on the absurd. He says, "No, no, someone sitting in the United Kingdom finds out ...", no, sorry, let's use his words, "... chooses an account which has been suspended. He accesses the PIN because they are stored in the United Kingdom. He waits a week and then he presents the card in the hope that Diners Club will pick up the loss". That's the first example. Now, let's just examine that example. Having ignored the actual facts of this matter, first of all, there's evidence before Your Lordship that the suspension of that card, the blocking of the card was restricted only to domestic ATMs on a 30-day ...[intervention] <u>LEVINSOHN J</u> It could have been used overseas.

MR LANE Nobody could have known overseas that that card was

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ر سرسمر blocked. So the first hypothesis that he knows and is able to choose a blocked card is just nonsense, on the evidence. Secondly, he can't access the PIN. It's not stored in the United Kingdom. It's in Germany. Thirdly, he doesn't know what the PAN is - the personal account number or details, because there was no way of taking the name, Mr Singh, and tracing it back to the account details. He can't do that in the United Kingdom. He then says he waits a week. He doesn't say why he has to wait a week, but even that is wrong, because the 30-day would have expired on about the - well, it commenced at about the 2nd or 3rd March, a day before the first Nedcor transactions took place, and then he supposes, "Well, Diners Club will pick up the consequences". M'Lord, why not just deal with the facts of the matter, instead of trying to put up this sort of skittle to try and justify getting access to a system which is, in fact, irrelevant?

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Let's take the second example. He says nobody - somebody at Standard Bank South Africa, when the request was coming from Europe for authorization, intercepted the request and changed it. Now, first of all, if he had read the evidence and he had read the expert summaries carefully of ...[indistinct]... on behalf of the plaintiff, no authorization takes place in South Africa. It happens in Germany, the relay. So it doesn't come via Standard Bank.

LEVINSOHN J It doesn't come near to South Africa?

MR LANE It doesn't come near Standard Bank. So again, M'Lord, one is left - and then to support that proposition he goes to an example in 1980 of a case which he knows about where someone

was able to fiddle the authorizations on a transaction.

<u>LEVINSOHN J</u> On a different system.

MR LANE Different system.

LEVINSOHN J Wasn't it the Visa or something?

MR LANE Yes. And you ask yourself, M'Lord, "Why is Dr Anderson avoiding the facts of this matter?" Why, when he wants to disrupt the entire European, international global network of these independent companies is he not prepared when it's pointed out to him and he's known since June at least what the facts of the matter were to address them, instead of putting up hypotheses which are untenable against the actual evidence, and persist in an affidavit and say, "I want those Racals"? It doesn't matter what the ...[indistinct]... "I want those Racals".

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So, M'Lord, ultimately in this matter one comes down to the single proposition, it's the 47/53 which might be relevant. Not is. Might be relevant. Even then, M'Lord, he's not prepared to go to IBM and say, "Look, I might be confused about this product. Is it the 47/53 I'm talking about or are they right, is it the 47/55 they're talking about?" How do they function one to the other? Because his theory, M'Lord, is that they can mount the same attack. Now, the 47/58 is the next model up in the IBM chain but that is an adaptor card which has it's own SMN embodied in the card itself. In other words, it prevents access itself on a physical ...[indistinct]... and that's why in his affidavit he talks about that that card is designed to be loaded into PCs, because it's a card which has as part of its design a security mechanism. The precursor didn't have that. It has this

huge box with sensor lights and all kinds of mechanisms which guards the 47/55. So why, when this was pointed out to him, did he not come back to Your Lordship and say, "I was wrong. I actually got it wrong. But I still believe that, although it will have to be different because 47/55 we now know is a different product that we can attack"? He doesn't bother to say so. But nevertheless says that justice will not prevail unless he's given actual authorised access to the mainframe and computer system end-to-end of the Standard Bank ...[indistinct].

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LEVINSOHN J Mr Lane, you know what I don't have in these paginated papers is the actual rule 36 notice. I know that I must have seen it at some stage. I wonder if you've got a spare copy for me so that I can just see what they're actually asking for.

MR LANE Let me give you my copy, M'Lord. [Inaudible].

MR KISSOON SINGH M'Lord, may I be of assistance? I have a clean copy.

<u>LEVINSOHN J</u> Thank you, Mr Singh. Thanks very much.

MR LANE M'Lord, if I can start at page 2, paragraph 1. That's the IBM 26/20. Just very briefly, M'Lord, that is no longer in existence. It's a cryptographic process which was discontinued but, M'Lord, that is another point on the 26/20 which again Dr Anderson doesn't address, and that is what is in issue in this matter is how someone accessed PINs and the 26/20 cryptographic process has got nothing to do with PINs. It's quite correct that if you ...[indistinct]... information, if there's no map[?] control of it that it makes copying of cards easier but it's got nothing to do with the issue of PINs, so that's

not going to come into an issue in this matter. In fact, it doesn't exist.

Item 2, the IBM PCF cryptographic software, again, that no

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longer exists. That was utilised and discontinued and it was substituted by the 47/53, 55. And item 3 is the IBM 47/53.

LEVINSOHN J Well, here you've pointed out that this is wrong because the PINs are not verified in South Africa by Standard Bank.

MR LANE Correct, M'Lord. But that was in issue. That was in the generation of the PINs and the issue of the PINs. But, in fact, the generation could not issue the PINS, the generation of the PINs. And, again, M'Lord, ...[indistinct]... could knock that on the head immediately.

The plaintiff in his affidavit points out that of course there could be theorising about Dr Anderson, that someone back in 1997, February 1997, at Diners Club International Service Centre, where this encrypted tape is sent through on its journey to Germany, they could suggest that somebody had accessed that tape and managed to extract a single PIN of Mr Singh, kept it for three years until just perchance Mr Singh got it issued to him, knew that Mr Singh had got it issued to him and managed within a week or two thereafter to perpetrate a fraud.

LEVINSOHN J It's a bit fanciful. It's half-hitched.

MR LANE Ja. Well, fortunately, Dr Anderson didn't adopt the suggestion that we made, so we can rule out of this case any relevance of the PCF in generating that ...[indistinct]. There's no suggestion by Dr Anderson or anybody else that the generation was

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insecure. So again the PCF that one's looking for becomes irrelevant.

LEVINSOHN J So there's no suggestion in this case that when the PINs were generated by that printer and all this evidence

MR LANE No, no, M'Lord. The process is that when a card is issue to you as a Diners Card, immediately on the issue the system generates a PIN which is stored. You at any time while you are a cardholder go to a Standard Bank and have it issued to you and there are two different processes of issue and generation. In this case the generation took place in February 1997 and the issue took place in February 2000.

LEVINSOHN J And there are millions of these that have been generated.

MR LANE It's a huge amount. I mean it takes - it's full. Then item 3, this is the IBM 47/53 computer processor. Now, 47/53 is the only the housing. It's just a housing. It's an HESM housing. It does nothing more than that. They haven't asked for the 47/55. But, M'Lord, we are not going to take technicalities on it because the 47/53 houses the 55, and that's the one the Standard Bank - M'Lord, look what they say, "Used by South African Standard Bank to verify PINs for the defendant's Diners Club card". In this case that didn't happen. There is no verification in this case by Standard Bank, not any of the transactions.

LEVINSOHN J So you say that's a defect in Anderson's reasoning because he leaves out of account the fact that Diners Card PINs are stored in Germany?

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MR LANE Yes, M'Lord. In fact, when it's brought to his attention, in fact, it is a source. We know he's read the record because he says as much. In my cross-examination, I think at about page 390 of the record, I actually put to Mr Gibson by saying, "Of course this is the transaction and the PINs are stored in Germany". Put to him as a fact. That fact is then confirmed in the founding affidavit. Dr Anderson says, in order to sustain his theories, in the UK or Germany, and it tends to draw some form of inference from a statement by Bonfrere in relation to Diners Club International Service and he deliberately, I would suggest, M'Lord, ignores the information that is at his disposal.

Then, M'Lord, paragraph 4, the Standard Bank Auto-e Centre. Now, this is - you will recollect that the PIN was issued because - now, you will again, M'Lord, recollect the circumstances under which that happened, which again, it's on the evidence ...[intervention] LEVINSOHN J Yes, well, you called the persons from Standard Bank and Chatsworth and so on.

MR LANE Yes. What happened on that particular day is that normally Auto-e is not utilised. The system just perchance - nobody could have known about it - went down on that day. Mr Singh came in and was told that the main system was down. Now, the Auto-e can be utilised and after some discussions, there's a dispute as to what happened around the circumstances, Auto-e was utilised. Now, let's have a look at that point in time, the ...[indistinct]... now somebody now between the time when they know suddenly that the Auto-e[?] is down within ten minutes - because we've got the print-

outs. We've seen the print-outs there. They are discovered. They are part of the bundles. It's a matter of minutes. Somebody would have to have now said, "Right, we've got him", and have to plug in the system somehow to capture this information as it flooded down the line to the Auto-e centre. That's the evidence Dr Anderson has got available to him. What does he want to do? He says, "I want to see this whole set-up".

LEVINSOHN J It's irrelevant.

MR LANE Unfortunately, it doesn't exist any more but that's just to the extent which he even goes to suggest, M'Lord, that even someone at Telkom might have accessed the information. Plugged in in those few minutes, he knows to get on that line and plug in that information, and for that he wants to bring the whole Auto-e centre to a standstill while he experiments with it all, but he doesn't pursue that interest and he gives no reason or justification what he intends to do with that when it comes to his affidavit.

Then we have the Host computer system or systems used to trial[?] items 2, 3, 4 above ...[inaudible]... transaction, interpreting the results ...[indistinct]. That's the mainframe computers which control the entire banking operations, network operations of the Standard Bank. He wants access to ...[inaudible]... says, and we say to him, "Why do you want access to those computer systems?" He doesn't give us an explanation. Nowhere in his affidavit do you find any explanation, saying, "Oh, I want it because I have to have it". He doesn't dispute though that a bank will never give end-to-end access to any individual. It just doesn't happen, not even employees of the

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bank have end-to-end access. They have a team working here, a team working there, a team working somewhere else, but nobody gets complete security access to all those computers. That's what he's asking for. And the net effect of that, M'Lord, is not just restricted to the Standard Bank, as Your Lordship pointed out. It's everybody who utilises. For example, if you go to, as a Nedcor cardholder, to a Standard Bank ATM, your transaction can't be processed if someone's got that computer ...[indistinct]. There are forex transactions coming in from abroad and clearance of cheques. It all stops, and that is not disputed anywhere on these papers. And all other computer systems that are used or able to be misused to grant incoming authorization requests from overseas ...[intervention]

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LEVINSOHN J What's that mean, "misused"?

MR LANE Well, I imagine what he's saying is abused or attacked. Now, M'Lord, one again stops there and says, "What's this about? There was no authorization that took place in South Africa. Why is this relevant?"

Then one gets to item No 7. Now they want the Racal at Diners Club International Service Centre in Farnborough, and as I pointed out to Your Lordship, that is irrelevant. He cannot show relevance.

Then in paragraph 8 he wants the Host computer systems which make use of the Racal series cryptographic processes, are used to process authorizations or other transactions normally processed by them including DCI CAFES, DCI CHAMS, ...[indistinct]... Bridge, ...[indistinct]... and Intercheck[?]. So he wants access to the whole of the Diners Club International, the Citibank process, all the Racals.

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But let's have a look at that. CAFES, that's a transport system.

CHAMS, again a transport and accounting package. Bridge, an accounting advice package, a relay.

LEVINSOHN J Not a card game.

MR LANE Is the authorization. Now, M'Lord, one says, "You're not even discerning what you want to have a look at but you want to have a look at every Racal somewhere along the way, and you want to look at the Host systems". [Inaudible]... wow. So again, let's just bring it all to a close.

Then, M'Lord, look at the generic status of paragraph 9. Now we want the building entry control systems. What does that mean? We know, and - you know, is he saying that this individual ...[intervention]

LEVINSOHN J It's a rogue member of your staff, either here in South Africa or in the UK that can get access to secure areas. That is very far-fetched and fanciful too, Mr Lane.

MR LANE Then he wants attendance sheets, sign-in books, access control logs, staff access to the aforegoing cryptographic facilities ...[inaudible]... relevant. Wow, M'Lord, it's - as you say, we need to take that one no further in that context. Very fanciful.

So, M'Lord, we say that this is not a proper request. It was never a proper request. It ought never to have been given. And we say, M'Lord, we develop in our heads the very three lines of reasoning. One, M'Lord, we say that for them to succeed, just clinically, they must show that we're in possession of this computer equipment. Why do we say they must be in possession? Because

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that all divides the lines and possession. We don't, as plaintiffs, rely on the computer system because we rely on a certificate, and what we quote in our heads, M'Lord, is a series of authorities that deal with this question of a certificate, the evidential *onus*, and what the position is that they are able to put sufficient evidence to rebut the ...[indistinct]... case, what the position is that the plaintiff had then an election whether to lead evidence which then deals with the rebuttal evidence.

LEVINSOHN J Can I just refresh my memory as to what this case is about, because it may be relevant to this issue? You rely on a contract between yourselves and Mr Singh. A certificate is signed which indicates that there is indebtedness. You rely on your contract which says that if a PIN is used and a card is used, that's a proof. So you close your case on the basis that you'd established that prima facie evidence. Now the defendant says, "No, no, I didn't go near London. I didn't engage in any of these transactions whatsoever. I am an innocent person. I have the card and the PIN in my head. I had the card in my possession, the PIN in my head. Nobody could have accessed it". And it must be a part of his case that if it is shown on a balance of probability that somebody who is connected with your client, Diners Card, or with Standard Bank, has wrongly and illegally accessed the ATMs using his PIN, then it's monstrous and against public policy for that contract which you rely on to be enforced. But, to that extent, the onus would be on the defendant.

LEVINSOHN J And that is an issue in the case, the public policy

MR LANE That is so, M'Lord.

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aspect, but it would have to be shown that there is some sort of implied term in your contract that provided, however, that if it is shown that Diners Card staff have hacked into the system and wrongly abused the PIN, it would be monstrous for the defendant to have to pay. So this is a very live issue in the case, and I know there's going to be some argument about whether you're entitled to lead rebuttal evidence. Manifestly, you would - manifestly, it seems to me, on this scenario that I've painted on what I think the issues in the case are, you would clearly be entitled to lead evidence on the issues where the *onus* is on you, which you've done, and then the defendant would lead his evidence and you would be entitled to rebut this issue of whether there's a balance of probability that shows some outsider has hacked into the system and has now made this man liable to pay R1 million plus interest when he is totally innocent.

MR LANE That's so, M'Lord. In fact, we quote heads directly in point at page 13 ...[inaudible]... heads on that point and the merchandise exchange matter is directly ...[inaudible]... we submit Your Lordship's ...[inaudible].

<u>LEVINSOHN J</u> Yes, well, that's why I analyze the issues in this case.

<u>MR LANE</u> That's so, M'Lord.

LEVINSOHN J So this is a very large issue in the case but at the end of the day the *onus* will be on the defendant to prove on a balance of probability that he is innocent, somebody else did it.

MR LANE That is so, M'Lord. Now, M'Lord, that then comes back to rule 36(6). 36(6) says you can serve notice on the party who relies upon - the words "relies upon" - the product as an issue in the matter

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or the parties in possession and control. Now, we say, M'Lord, very simply, we do not rely upon the state and condition of the computer systems. The defendant does because he must discharge that *onus*. So what the defendant must do, it must do then, fall into the second category, the "all" category, and that is it must establish that we are in control that we are in possession and control of that computer system. Common cause, we're not. *Cadit quaestio* end of the notice. Simply, it is irregular and should be dismissed. So that's the first point we make, M'Lord. We do deal quite extensively ...[intervention] LEVINSOHN J Is there any basis for an argument that you have the means in which to compel compliance with an order? I don't believe that you have. I can't imagine Standard Bank entertaining with any sympathy a request from Diners South Africa to have unbridled access to its computer systems.

MR LANE M'Lord, I can tell you on personal experience when we have been attempting simply to get information, let alone access to any sensitive information, that we, Diners Club International, bang our heads against stone walls. They will not allow any of that information to go into the public domain. Now, beyond information, it's suggested by Dr Anderson that really we are being sophists in suggesting that we won't get the co-operation from the banks. Absolute nonsense, absolute absurdity.

LEVINSOHN J I should imagine that when the request of this nature is made to somebody high up in Standard Bank, the blood pressure would simply go up because - it's scary.

MR LANE M'Lord, I had to break the news and I was one of the

unfortunate bearers of news that we had received this rule 36(6) notice. I need not describe the response I got in relation to it. It is borne out by what is said, very mildly, I must say, in the affidavits before Your Lordship.

So, having said that, M'Lord, we set out then the legal principles on which it's based, and perhaps I should take them through but I just sketch what our argument is. We then deal with reliance on the computer systems. We show Your Lordship that, in fact, the defendant relies upon them. Then we deal with the possession of the computer systems and we point that it is simple common cause we are not in possession and have no control over them, and then at page 17 we deal with the relevance of the state or condition of the computer systems. And then we've developed a concept which is really two-fold, M'Lord. Firstly, this is the question of whether the computer system itself is relevant, i.e. the generic product, the proprietary product in the IBM and, secondly, the probabilities which we address, M'Lord, and that is whether on the probabilities Dr Anderson or the defendants have made out any case for the type of access which they are seeking to in this equipment. We show Your Lordship, and we've brought it down to the 47/53 and 55, we point out the justification which I dealt with and that is the banks - it's only supplied to banks ...[inaudible]... pounds. This is interesting, one of the concepts that we are bringing, M'Lord, is that the justification for compelling the plaintiff is that this type of equipment that they want to access and play around with costs billions of pounds, and how can you expect defendants to do so, and

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to buy this equipment? Well, M'Lord, it's a remarkable proposition that now the plaintiff must go out and spend billions of pounds if they can't force Standard Bank or Diners Club, they must actually go and spend billions, so that Dr Anderson can perform his experiments.

We make the point, M'Lord, that he's on a fishing expedition, that this is all based upon a hypothesis that an attack against one will work against another, and there is a very interesting contradiction, M'Lord, between what Mr Bond says and what Dr Anderson says. Dr Anderson persists in his affidavit. He says, "No, I want to see I am going to give evidence that the Racals are these Racals. vulnerable. Racal RT75 is vulnerable". Says Mr ...[inaudible]..., he says, "No, some years ago I know there was an attack on the Racal". However, Racal changed their software. So what it really hinges on is not the Racal but what software was operating in the Racal at the time, and yet Dr Anderson persists in saying, "No, no, no, I am going to give evidence that it is vulnerable". So really you are getting into diversity in the defendant's expert ... [inaudible]... on that. We deal with his examples which he gives in paragraphs 5 and 6, and one of the points we are making in paragraph 51 of our heads is that whilst we accept public policy, M'Lord, I mean there is going to be a large argument of public policy, one of the issues which will be involved in the public policy consideration is whether a party is entitled to contract and apportion the risk in relation to theft or fraud in the use of credit cards and whether that is against public policy. Nobody referred to, for example there are standard cases under Keys v Martins. In other words, vicarious liability about the affairs of your

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master and so on and whether to develop that would be to say, "Well, in common law Diners Club South Africa cannot be responsible vicariously for an employee of Standard Bank, an employee of Diners Club or any of these other institutions". There's no vicarious link. The next jump from that, and this is why we quote those cases, is to say, "Well, we will argue it to Your Lordship", but in the ...[indistinct]... of contract Diners Club are entitled to apportion risk. In the same way it has deeming provisions. Once they have a deeming provision, so it doesn't bear the risk of that form of ...[indistinct]. It's a commercial risk that a cardholder takes if he wants to use his card and it will develop in argument as to on that genesis of the public policy...[intervention]

<u>LEVINSOHN J</u> Yes, public policy will feature, loom large in this case, Mr Lane.

MR LANE Indeed. And that's why I say, M'Lord, and we quote those. Then, M'Lord, we deal at page 29 of our heads with material prejudice, which, M'Lord, the point we make is that nowhere is there material prejudice that is set out fully and supported by affidavits by Standard Bank challenged by the defendants. And, M'Lord, at page 35, paragraph 61, we make reference to Dr Anderson's affidavit and we have referred to two Burroughs[?] judgments on 36.6. The Burroughs Patton judgments. I don't know whether they are freely available to Your Lordship, but I have made copies. The Burroughs Patton law reports. M'Lord, could I hand them up?

<u>LEVINSOHN J</u> Yes, thank you, Mr Lane. That will be helpful.

<u>MR LANE</u> All the other judgments, M'Lord, are ...[inaudible]. One of

the considerations, M'Lord, you will find in the authorities is the identification of the person who is going to conduct the examination and whether he is appropriate or not. They are referred to in the heads, M'Lord, and I can take you to those cases where they are but they deal with the proposition of whether it's an ocular, to what extent can there be destruction of the unit, under what circumstances. It also deals with provisions of rule 36(6).

I heed Your Lordship's warning and I do not ask Your Lordship to make a finding because ultimately Your Lordship is going to hear the evidence of Dr Anderson but we are alarmed by the manner in which Dr Anderson is going to conduct his experiments and it is another reason why we say that this should not - this form of access, end-to-end access, should never be granted to a man who, in fact, has adopted this approach. He accuses, for example, the plaintiffs of having destroyed ...[indistinct]. He says, "That equipment which the plaintiff hasn't destroyed I want to see" That is remarkable that the plaintiff went out of its way to destroy equipment. No foundation. He then says that some of the banks are controlled by criminals. [Indistinct]. Remarkable. Now I want this man who accuses the banks of being controlled by criminals to have access. He says, "Denying security risks such as access to ...[indistinct]... information does not assist security. It is surely aimed at limiting liability". I'm just reading extracts from his affidavit. "The statement that plaintiff cannot make documentation available to the defendants which are in the possession of other banks is pure sophistry and the plaintiff hides behind technicalities because the information is likely to be destructive 5

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of its case."

<u>LEVINSOHN J</u> It's not technicalities at all.

MR LANE M'Lord, but he's already formed a view that we're hiding behind technicalities not to divulge information which is likely to destructive to our case. Then we have ...[indistinct]... "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". Well, independent expert now wants access not to our equipment, Standard Bank, Link, TNS, Diners Club, saying, you're mala fides. Now, M'Lord, this is not the job of an independent expert. An independent expert comes to Your Lordship because he is able to assist where Your Lordship cannot technically assist in the matter. Your Lordship will ultimately have to decide on the probabilities whether there is an individual in one of these organizations somewhere in the world who could have been, on the probabilities, guilty of a fraud. It's not ...[indistinct].

LEVINSOHN J It's not speculation. It's got to be actually proved on a balance of probability that that happened.

MR LANE But through destroying evidence, to banks controlled by criminals, to accusing the plaintiff of *mala fides*, Dr Anderson would ask Your Lordship to give him, his associates and Mr Gibson end-to-end access in all these organizations. And in paragraph 61.8 we set out the fact that the consequences of the examinations are not disputed. We refer to the *Tournier*[?] decision. It was a 1924 ...[indistinct]... decision.

And we conclude, M'Lord, that this is a matter in which

attorney and own client costs, not because we've been ...[indistinct]..., M'Lord, but because of the very basis upon which this application has been brought to be granted, including the costs of ...[indistinct].

Now, M'Lord, I don't know whether you want me to take you through in detail each of these submissions in our heads because...[intervention]

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<u>LEVINSOHN J</u> No, I don't think so, Mr Lane.

MR LANE ... they are an elaboration pretty much of what we have already presented to Your Lordship.

<u>LEVINSOHN J</u> No, thank you, Mr Lane.

MR LANE If there is ...[indistinct]... question, M'Lord, and perhaps I should wait for my learned friend and just preempt it to our attitude, M'Lord, and this is - we are not certain but we understand that they are asking Your Lordship to condone the late filing of a request for particulars in the trial on the 27th August.

<u>LEVINSOHN J</u> Can you ask for further particulars for purposes of trial after the trial has commenced?

MR LANE No, M'Lord. Our point is very simple. We said that rule 13 - we take a different point - is that the request for further particulars for trial has to be served 20 days before the commencement of the trial, at least 20 days before the commencement of the trial. The trial in this matter commenced, and it's not good enough to come along and say half way through the trial, "Well, we've now chatted to Dr Anderson and Dr Anderson says we need some information", so...[intervention]

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LEVINSOHN J Well, what they are likely to say is this, "Dr Anderson came into our team at a late stage. We originally had Gibson. Gibson went into the witness box and perhaps Gibson fell short in certain respects, so we got a new expert in, who is Dr Anderson. Now we've now reconsidered the matter and we need certain information for purposes of preparing for trial". Does the Court not have an inherent power to direct further particulars or am I bound by the rules which say...[intervention]

MR LANE M'Lord, Your Lordship, has obviously a certain inherent power to direct if Your Lordship is persuaded that there is a real basis and a real need for it, but I've never ever heard, M'Lord, of further particulars when you are half way through someone's case, where you've already cross-examined witnesses. That a creation of a new rule which say you can, in fact, address cross-examination to your opponent by way of a series of interrogatories.

LEVINSOHN J I think that's right, Mr Lane. I think, *prima facie* that makes sense because the rule presupposes that all this would be pretrial, that it's a pre-trial preparation and you can't expose your opponent to interrogatories or questions as the trial unfolds. As you say, after there's been cross-examination of witnesses in detail and so on.

MR LANE You see, M'Lord, I mean - Your Lordship will recollect we called Mrs du Preez...[intervention]

LEVINSOHN J I suppose discovery is different. If something emerges about a document the Court presiding at the trial has power to direct that you...[intervention]

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MR LANE M'Lord, rule 35(3) again isn't expressed in terms of time relative to the commencement of the trial. There is a very good reason why you request particulars in preparation for the trial and why you cross-examine after the trial commences to obtain such information you want from the witnesses. You can't have it both ways.

<u>LEVINSOHN J</u> In any event, I think I am not seized of that matter because it's not before me.

MR LANE Yes.

<u>LEVINSOHN J</u> What is before me is your rule 30 application today, Mr Lane.

MR LANE As Your Lordship pleases. I will not address it further.

LEVINSOHN J If there has to be some further proceedings, well, it'll have to come before another Judge, I think.

MR LANE As Your Lordship pleases.

LEVINSOHN J Mr Kissoon Singh.

MR KISSOON SINGH Thank you, M'Lord. M'Lord, the submissions that we make are very simple. My learned friend has taken Your Lordship to various facts of the matter and what he alleges are the facts of the matter but we submit very simply, M'Lord, as far as the 36(6) notice is concerned that, of necessity in this matter, the plaintiff is relying upon the accuracy and the correct functioning of various computer systems, be these computer systems those which transmit a PIN number...[intervention]

LEVINSOHN J Well, Mr Kissoon Singh, I think that submission is wrong, as I understand it. It is not that it is relying on the accuracy of the computer system. That's not its case. Its case is based on the

contract. It is your case that there is a problem with those computer systems. I don't think it's correct to put it that high. You're relying on the fact that there's some inherent defect in those systems. Because the plaintiff's case is based on contract. I have a contract with you. You've got a card. You use your PIN. That's it. Isn't that correct, Mr Kissoon Singh?

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MR KISSOON SINGH M'Lord, we submit not. M'Lord, we submit that if Your Lordship has cognisance of the facts of the matter, what the plaintiff has done is handed up a certificate and, relying on the certificate, closed its case, saying "You owe me X rand".

LEVINSOHN J Yes. Is there anything wrong with that?

MR KISSOON SINGH I'm not suggesting there is, M'Lord.

LEVINSOHN J So that's my case and I've led my evidence to the extent that the *onus* is on me. I've proved my case as set out in the pleadings. Now your case is inherently based on the fact that somebody else accessed those transactions on that day and that the system of the plaintiff is such that there are certain inherent defects therein which would have permitted that situation to come about.

MR KISSOON SINGH M'Lord, can I make the following submissions?

The plaintiff hasn't proven its case. All it's done is led *prima facie* evidence before Your Lordship.

<u>LEVINSOHN J</u> Yes, yes.

MR KISSOON SINGH We then have to lead evidence. Your Lordship then at the end of the day has to balance up whether the evidence that we have led is sufficient for the plaintiff to be held on a balance of probabilities to have discharged the *onus* in theirs. Now, M'Lord,

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if we lead evidence...[intervention]

LEVINSOHN J No, I don't think that's right, Mr Kissoon Singh. I think that you've got to look at the *onus*. The *onus* is piecemeal here. It's a *Krishna v Pillay* type of situation. The *onus* is on the plaintiff and there is an *onus* on you. You have the *onus* to show that there are some inherent defects in the system which permitted this to happen and thereafter it would then be open for you to introduce the public policy argument. Although there's a contract, this contract can be broken because of the facts of the case. That's your case.

MR KISSOON SINGH M'Lord, I accept that if there's a public policy argument I will bear the *onus* in the public policy argument.

LEVINSOHN J You'd bear the *onus*. You would bear the *onus* on showing that this situation arose because of an inherent defect in the plaintiff's system which gave rise to a stranger or a fraudster committing these offences and it is monstrous and against public policy that you should be held liable and therefore you would be released from the terms of this contract that says that if the PIN is used you're liable. So you've got to go the links of showing, first of all, the problem with the computer and then you've got to persuade me on the public policy argument. So the *onus* on those aspects is on you, Mr Kissoon Singh.

MR KISSOON SINGH M'Lord, as far as my submission is, the second of the proposition put by Your Lordship I accept, that if I have to go to prove the public policy I would bear the *onus* on that but as far as the first, M'Lord, I respectfully disagree with what Your Lordship has indicated. It's my submission that the certificate creates

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no more than a *prima facie* case. Once evidence is led by the defendants Your Lordship would have to weigh that evidence before entering into a discussion on public policy and whether we are nonetheless bound by the terms of the contract. M'Lord, that is what the Appellate Division said in the matter of *Senekal* on the question of *onus*, M'Lord, and the certificate. *Senekal* is reported at 1978 (3) SA 375 and in particular, M'Lord, at page 376.

LEVINSOHN J But, Mr Kissoon Singh, let's assume now, let's assume they made out their *prima facie* case. You get into the witness box or your client does, gets into the witness box and says, "I wasn't there. I was in Durban. In fact, I've got a watertight alibi. I've got a video that shows I was at a wedding. I had the card in my back pocket and the PIN in my head. I didn't use it". Assuming that was just the evidence that he led, would you succeed in that case? Assuming I believed him, would you succeed? What would my finding be on the *onus*? Wouldn't I find that the plaintiff has proved its case? Because you would have to go very, very much further.

MR KISSOON SINGH M'Lord, in all probability Your Lordship would find in favour of the plaintiff.

LEVINSOHN J Exactly.

MR KISSOON SINGH I'm not going to prejudge what Your Lordship would eventually come to the conclusion of.

<u>LEVINSOHN J</u> No, no, I'm just looking at your client's evidence, which has already been led to that effect.

MR KISSOON SINGH And, M'Lord, an admission which will be...[intervention]

LEVINSOHN J And you close your case. You don't call any other evidence. You would lose. You would lose hands down, I should imagine.

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MR KISSOON SINGH Well, M'Lord, presumably so.

LEVINSOHN J Now, what you've got to do now is you've got to build a case to discharge an *onus* that this contractual provision that the plaintiff relies on is against public policy. It's against public policy if it is shown there's like a proviso now put into their contract that one of their agents or officials or members of the staff had actually hacked into this computer system and accessed the PIN numbers. It would be monstrous for me to have to be bound by a contract in those terms. That's your case.

MR KISSOON SINGH M'Lord, with respect, it isn't my case up to the end because if I produce sufficient evidence, not simply my client's say-so and any admission which the plaintiff would make that we were in South Africa and we didn't give the PIN to anybody else. Your Lordship would have to weigh the additional evidence that we produce to come to a conclusion as to whether that *prima facie* certificate, *prima facie* proof becomes proof on a balance of probabilities.

<u>LEVINSOHN J</u> So at the end of the day it's not the plaintiff that's relying on the computer systems, it's you.

MR KISSOON SINGH M'Lord, the plaintiff is relying on the computer system because the plaintiff draws its certificate based on the computer system and the information given to it by the computer systems. That is how the plaintiff is able to give out the

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certificate...[intervention]

LEVINSOHN J But that certificate - sorry, Mr Kissoon Singh. But the certificate is correct because it shows that those transactions went through. There is no doubt that those transactions went through. The PIN number was used. But what you're saying is that that PIN number was used by a rogue. There is some rogue out there that used those PIN numbers and now the plaintiff is saying, "Well, there's a contract, you're liable, that's it".

MR KISSOON SINGH M'Lord, plaintiff's contract does not say that.

All it says is that, "Once we've produced a certificate, that's *prima*facie proof". It doesn't say that therefore...[intervention]

LEVINSOHN J Once you use the PIN you haven't - once the PIN has been accessed, well, that's it.

MR KISSOON SINGH Well, M'Lord, it's first got to be proven to Your Lordship's satisfaction that the PIN was used. That is a matter which is still going to have to be decided by Your Lordship when Dr Anderson and his team give evidence. Dr Anderson says so in his affidavit before Your Lordship in this very application that he is still not satisfied that the PIN has been used and that's a matter we will take issue on.

LEVINSOHN J How then were these transactions accessed in the ATM then? Somebody must have used a PIN.

MR KISSOON SINGH M'Lord, the PIN allocated to the defendant or any PIN which has been given to any other person which can be doctored, which can be abused, which can then be used to jinx the system.

LEVINSOHN J Okay. What are you saying, Mr Kissoon Singh?

MR KISSOON SINGH M'Lord, I'm saying that on the contract Your Lordship will have to come to the conclusion that by use of the word "PIN" it has to be the defendant's PIN which has been used, and not any other PIN which could be used to jinx the system.

<u>LEVINSOHN J</u> Right. Shall we take the short adjournment? <u>COURT ADJOURNS</u>

ON RESUMPTION

LEVINSOHN J Yes, Mr Kissoon Singh.

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MR KISSOON SINGH As Your Lordship pleases. M'Lord, the submission that we make are very simple. Irrespective, and I'm not asking Your Lordship to make a definitive finding at this stage on onus and who bears it but, M'Lord, it's very simple. If there is a certificate which has been put up and we bear an onus, if we bear an onus, M'Lord, and we have to show that the plaintiff's systems are inaccurate and therefore their recording of what is in their books which they rely upon in the certificate as being a transcription of what the account shows, we must be allowed access to their systems in order for us to have a fair trial and in order for us to be able to show it. Failing which, M'Lord, there is no way that I can imagine that any defendant would be able to succeed when you come up against a corporate organization which simply says, "Because of matters of confidentiality, I am not prepared to let you have access to my computer systems. I say it is inviolate. I say it is infallible."

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LEVINSOHN J Can I - do I have the power just on the basis that the

plaintiff does not have control over the systems that you want to have access to?

MR KISSOON SINGH M'Lord, if Your Lordship comes to the conclusion that the plaintiff relies on those systems then Your Lordship does have the power.

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<u>LEVINSOHN J</u> I do have the power?

MR KISSOON SINGH If - yes, M'Lord.

LEVINSOHN J That's a startling proposition, Mr Kissoon Singh.

MR KISSOON SINGH M'Lord, if Your Lordship considers...[intervention]

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EVINSOHN J Can I grant an order in this case against Standard Bank, who are not even before me? Standard Bank South Africa are not even before me. They're not even represented. And say, "Right, tomorrow morning you allow Mr Gibson in and give him *carte blanche* in your mainframes, your systems, everything. He wants to see them.

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Thank you very much"?

MR KISSOON SINGH M'Lord, that's not what we're asking for.

LEVINSOHN J It's scary, Mr Singh.

MR KISSOON SINGH M'Lord, that's not what we're asking for. We are saying that the systems upon which the plaintiff relies we must be given access to. If the plaintiff doesn't rely on any of the systems or if it will not rely upon any of the systems in this case then naturally we are not entitled to access to it.

<u>LEVINSOHN J</u> You say the plaintiff relies on the systems.

MR KISSOON SINGH That is correct, M'Lord, and we say that even when it comes to the evidence which they propose to call in rebuttal

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which, as Your Lordship has remarked, they would appear to be manifestly entitled to, M'Lord, at that stage we would be prejudiced because we would not be able to put to their various experts, and there are some 16 of them, I think, in this case where the problems in the matter lie, for them to comment on it fairly.

At this stage, M'Lord, we submit to Your Lordship that what Your Lordship has before him in this particular application is various facts which are set forth by a person who does not even qualify himself as being an expert or a person who has knowledge of the computer systems and of the technology and of software or hardware or the like. M'Lord, we raised that in our papers on two occasions, both in the defence affidavit and Dr Anderson's affidavit. We remarked that Mr Bond did not appear to have any of his qualifications. He put up the replying affidavit and, as yet, there are no affidavits by any computer expert.

Mr Bond, in his papers, M'Lord, criticises Dr Anderson. He doesn't tell Your Lordship that he had any expertise in doing so. He sets out all sorts of information in the replying affidavit. Dr Anderson, in his affidavit, on several aspects says to Your Lordship why Mr Bond is wrong in his founding papers. For example, M'Lord, my learned friend made something of the IBM processors 47/53, 47/55. M'Lord, if I can perhaps just refer Your Lordship to page 82, paragraph 28, where Dr Anderson's response to that is. M'Lord, he says quite clearly that Mr Bond has misunderstood the situation. He is the computer expert, M'Lord. His expertise in this field has never been challenged by the plaintiff, not in this application. Paragraph 28 at

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page 82.

LEVINSOHN J 28?

MR KISSOON SINGH Yes, M'Lord, at page 82. He says, M'Lord, that there has been a misunderstanding of what he has said. Well, he says there is a misunderstanding of what Mr Bond says in his papers. And, M'Lord, over the page at page 83 he goes on to amplify what he says.

LEVINSOHN J Well, this does show that Dr Anderson is perfectly familiar with the workings of the 47/58 and he seems to know about the 47/55 as well.

MR KISSOON SINGH M'Lord, he knows about how some of these things operate but, as Your Lordship remarked right at the very beginning when my learned friend addressed Your Lordship, this is a complex matter. It is raised nova as far as we understand. I am not sure if my learned friend has any authority which shows that any application such as this has ever been decided but we have looked long and hard and we haven't been able to find any.

LEVINSOHN J Yes.

MR KISSOON SINGH So, M'Lord, what is very important in our submission is the following, it is not just the hardware or just a software programme, it is how that programme is configured to operate. It how the plaintiff or any of the persons on whose systems are relied use a programme which they purchase from a programme developer in their system, as to whether that system is infallible. And by the plaintiff simply shutting up shop and saying we can't have access to any of these system, how would we ever be in a position

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to even start discharging the *onus* if Your Lordship comes to the conclusion that we bear an *onus*?

LEVINSOHN J What is Dr Anderson's theory? What does he say actually happened here? Because we've got the facts of the case. We know what the facts are, the primary facts in the case.

MR KISSOON SINGH Yes, what Dr...[intervention]

LEVINSOHN J We know that those ATMs were accessed in London.

100 and what?

MR KISSOON SINGH 199 times. 194 were successful.

<u>LEVINSOHN J</u> And there are documents from the various banks in the UK which indicate that those transactions went through on the ATMs.

MR KISSOON SINGH
Yes, but what Dr Anderson says,
M'Lord...[intervention]

LEVINSOHN J And do you say a PIN number was used or a PIN number wasn't used or that somebody - some cardholder arrived there and was able to access ATMs using another PIN?

MR KISSOON SINGH M'Lord, can I...[intervention]

<u>LEVINSOHN J</u> Is that his case?

MR KISSOON SINGH M'Lord, page 69, paragraph 6, is what he says. The last four lines of paragraph 6 on page 69, he says quite clearly there, M'Lord,

"The three[?] simply could use stolen cards to empty the ATM if, in fact, a PIN was required in the present case, of which I am not convinced. And SBSA inside is where

the culprits and it might have been obtained by abusing SBSA's cryptographic facilities."

He says so, M'Lord.

LEVINSOHN J SBSA - sorry, that's Standard Bank.

MR KISSOON SINGH Of South Africa.

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<u>LEVINSOHN J</u> Somebody in London abused the Standard Bank's cryptographic facilities. Is that his theory?

MR KISSOON SINGH M'Lord, he's saying that is one of the theories, not the only theory. But, M'Lord, perhaps at that very point perhaps I can clear up - Your Lordship was addressed by my learned friend on the fact that these transactions were all in London and therefore the request to examine things with Standard Bank is unacceptable and so on and so forth, M'Lord. M'Lord will remember at the very outset in this matter Mr Anil Singh's card was used twice in South Africa. It was used at Stanger and it was used at the Durban International Airport.

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LEVINSOHN J That was the Nedcor ATM, was it?

MR KISSOON SINGH Correct, M'Lord, and that went through for verification in South Africa and it is not beyond the realms of possibility that the PINs were then obtained when those failed transactions were used and PINs were utilised then in London. It doesn't automatically follow that because the transactions which are disputed occurred in London that there was no usage and therefore there could have been no access.

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<u>LEVINSOHN J</u> So somebody hacked into the PINs as a result of those two transactions?

MR KISSOON SINGH Quite possible, M'Lord. It's something...[intervention]

LEVINSOHN J Does Anderson say that's a usual possibility?

MR KISSOON SINGH He said it's a possibility. Yes, M'Lord, because what he is saying is that's why he needs access to find out whether the programmes that have been operated by the bank, by Standard Bank, is capable or whether it is - whether it is infallible or whether it is fallible and capable of having some outside or a crooked insider obtaining the equipment.

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LEVINSOHN J But hasn't he seen the expert statements of the plaintiff?

MR KISSOON SINGH He has, M'Lord, and he's taken issue with them in his expert knowledge.

<u>LEVINSOHN J</u> Yes, but don't they deal with the software systems that are being used?

MR KISSOON SINGH M'Lord, he says to Your Lordship, in his expert opinion, that they are incorrect in various regards and he sets out in his preliminary opinion why he says they are incorrect. Therefore, M'Lord, at this particular point in time Your Lordship is sitting with a situation where the plaintiff's some 16 experts say one thing. Dr Anderson and his two colleagues say something else. Your Lordship would have to evaluate the evidence once the experts are tested under cross-examination, as Your Lordship pointed out, once Your Lordship has an opportunity of observing them to decide which is more reliable. M'Lord, with respect, this is not the forum before Your Lordship today to make submissions about whether Dr Anderson

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is credible or whether he...[intervention]

LEVINSOHN J No, absolutely right. Absolutely correct.

MR KISSOON SINGH And Your Lordship will also recall that it was the defendants who were adamant that Your Lordship should come and hear this evidence. We brought the application for the commission, asking Your Lordship to sit as judicial commission, which again is somewhat unusual in South Africa for a Judge to go on commission.

LEVINSOHN J Well, I think it was a sensible attitude and I didn't understand Mr Lane at the time to oppose that.

MR KISSOON SINGH M'Lord, I'm not commenting about what the plaintiff did or didn't do. I am simply saying that the ...[inaudible]... that Your Lordship should come and hear this evidence because we appreciate how difficult the matter is going to be and how complex the evidence of Dr Anderson is going to be once we spent the 1½ days with him in London prompted us to bring the application asking Your Lordship to sit as the commissioner.

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, as far as the question of how would somebody in London know that there's a blocked card. M'Lord, these computer systems are all linked with each other. My learned friend mutters under his breath that no they are not. M'Lord, we have yet to see the evidence from his side. There is no evidence led for him. His expert witnesses' summaries cannot be evidence before Your Lordship. We need the opportunity, M'Lord, of accessing the system to ascertain whether these are linked in any way, whether - I'm not

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saying, M'Lord, for PIN verification, I'm saying whether there notification by Diners Club, the plaintiff in this case, to other outfits around the world operating the systems as to whether the account is suspended or not suspended. We can't simply accept expert notices, M'Lord, not evidence at this particular point, as being proof and therefore prohibiting us from exploring that.

M'Lord, as far as the equipment that we seek access to, the rule 36(6) notice itself in bold print on page 3 says that we're not asking for access to live keys. That means we are asking for access to the system when it's off-line, not when it's on-line. Dr Anderson says...[intervention]

LEVINSOHN J When will it be off-line?

MR KISSOON SINGH Well, there are back-up systems...[intervention]

<u>LEVINSOHN J</u> On Christmas Day?

MR KISSOON SINGH No, M'Lord, Christmas Day one would assume it is being used. Dr Anderson explained that in his affidavit, that all the systems operate with back-ups; that there are times when they are maintained, when they are not on line as the main system, and so on. None of this has been challenged by an expert in the field, M'Lord. We have Mr Bond, a Director of the plaintiff, who professes to dispute these things. Your Lordship, does not have before Your Lordship any evidence whatsoever of any of the organizations saying that they will not give access ...[inaudible]...[intervention]

LEVINSOHN J Well, there's evidence from the plaintiff that says that

they won't. What are the probabilities, Mr Kissoon Singh?

MR KISSOON SINGH I don't know, M'Lord, but plaintiff could very well, if Your Lordship gave an order, file an affidavit and say, "We cannot comply with the order for access". Well, that is what happened...[intervention]

LEVINSOHN J Yes, unfortunately I can't make any orders against non-parties to the case.

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MR KISSOON SINGH That is so, M'Lord, but we are not asking Your Lordship, to direct any non-party. We are saying to the plaintiff that Your Lordship should direct the plaintiff. If the plaintiff can then not comply with the order, as has happened in some of the reported decisions on rule 36(6), the Court makes provision, M'Lord, for the party against whom an order is made to come back to the Court and say to the Court, "We can't comply with the order for the following reasons".

M'Lord, as far as the hypotheses of Dr Anderson are concerned, Your Lordship will recall that during the first portion of the matter when evidence was being led and I think it was Mr Gibson who was being cross-examined, M'Lord, that the point was made, and I forget whether it was Your Lordship who made the point or whether it was my learned friend in cross-examination, the point was made that this case was not to be decided or cannot be decided on generalities. You can't come up here with a whole lot of theories about how these things could be done *in abstracto*. One would have to focus in on what is likely to have happened on a balance of probabilities in the present matter. M'Lord, that is what we are trying to get, because otherwise a defendant is impossibly faced in any matter where there

is a certificate and somebody says, "I'm not giving you access because I just rely on the certificate". It's impossible for a defendant then to even begin to start discharging any *onus* which a Court might hold it bears.

LEVINSOHN J Does your expert really, at the end of the day, he wants to show that he can hack into the systems.

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MR KISSOON SINGH M'Lord, he wants to do more than that. He wants to show not only that he can hack into the systems, because obviously he would have to do that in order to satisfy Your Lordship, but he wants to satisfy the Court for the niceties of this particular case that it is probable on a balance of probabilities that an insider did the job and not Mr Anil Singh. Now, M'Lord, if we can't get access to any information, not even information as to who went into the Diners Club premises at a certain time or who went out of it or who had access to the room where the security modules were and so on and so forth, if we can't even get that, M'Lord, how are we ever going to begin to start discharging any *onus* which Your Lordship might rule that we bear?

M'Lord, it's impossible for a defendant in those circumstances to even start presenting a case or presenting a defence. And, M'Lord, is I can perhaps just refer Your Lordship to a case where, although it was dealing with machinery and it is not on all fours with this matter for obvious reasons, the Court in that matter said that it would not be against allowing access to the machinery to be dismantled and reassembled, to ascertain whether there was even a defence. Forget about the fact that here we are saying through an expert of the

highest order that we do have prospects of satisfying Your Lordship. The matter is that of *EIMCO South Africa v Magistrate Weinberg & Others* 1967 (3) at page 715 (CPD), in particular at page 719. I'm sorry, does Your Lordship have the reference? I perhaps spoke too quickly.

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LEVINSOHN J Yes, 1967 (3) 715 (CPD).

MR KISSOON SINGH At 719 D-E, M'Lord. His Lordship there remarked, because there was an initially an order *pendente litis* attaching the equipment, and then a Magistrate ordered access for the equipment to be dismantled and His Lordship there remarked,

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"It was never intended that the order should be used to embarrass in any way the defendants in their defence or to deprive them of an opportunity of discovering whether they had a defence and if a defence were discovered to prevent the defendants from ascertaining the nature and the extent of the discovered defence."

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Now, M'Lord, we are not saying we are looking on a fishing expedition for a defence. Dr Anderson has set forth in his expert summary and the only evidence from an expert before Your Lordship in his affidavit in this matter, M'Lord, what his theories are. He set forth to Your Lordship what he intends to do. More importantly, M'Lord, in paragraph - M'Lord please bear with me. It's the paragraph where he deals with the fact that he is not going to tamper with the

device. It's at paragraph 13 and paragraph 14 at pages 723 and 74,

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where he tells Your Lordship what he intends to do. He is not bringing the whole of the commercial enterprise in the European bloc and the United Kingdom to a standstill. What he says in paragraph 13, M'Lord, that he wants, in order to prove the vulnerability of the hardware security module, that's the Racal one,

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"We propose to first analyze its transaction set using the manual sought and determine which of the attacks known to us should work against it. We then propose to verify that at least one of these attacks works in practice. To do that we will connect a personal computer to the device, pass a number of transactions to it and analyze the results. This will simulate the kind of attack in which a bank insider programmes one of the computers to interrogate the HSM and analyze the results. I stress that we do not propose to tamper physically with the device. Accordingly, the risk of protective self-destruction will be no higher than in the normal operations."

And in paragraph 14, M'Lord, he repeats that when he says that when Mr Gibson does these he will send out a test to be attached, and again the device is not to be tampered with.

M'Lord, our submissions are that as far as the application in terms of rule 36(6) is concerned, this is a matter of absolute

importance to the outcome of this case. M'Lord, it is perfectly permissible for the defendants, if Your Lordship were to allow the access, to come back to Your Lordship and say, "We are not in contempt of any court order. We cannot get access. The persons that we are partners with, for whatever reason, do not accept that they must give access to their systems and, therefore, we cannot comply with the order. It does not mean to say that Your Lordship should not order us to have access, M'Lord. The compliance with the order is a different issue entirely. M'Lord, if I can perhaps refer Your Lordship...[intervention]

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LEVINSOHN J But I can't make an order that's just like a ...[indistinct]. Say I order Diners Card to do it and then in anticipation of them coming back to say it's impossible of performance.

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MR KISSOON SINGH M'Lord, there is a case in which a similar approach was adopted. I'm just trying to find the authority. Yes, M'Lord, the matter is that of *SA Neon Advertising v Claude Neon Lights*. I had the law report in my hand all the time, M'Lord. It's reported at 1968 (3) SA 381 (W), and the order which I have made reference to appears at page 386, where His Lordship made provision in that case for the person against whom the order operated to come back.

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M'Lord, as far as whether the inspection need necessarily be one restricted to an ocular examination - I'm not sure that I ever understood my learned friend to make that submission, and I don't think he would because there are different circumstances when the Courts have actually ordered that you can do more than simply

observe the thing in terms of rule 36(6). For example, M'Lord, in the matter of - a very old case, M'Lord, in the matter of *London and South African Exploration Company v De Beers Mines* there was a dispute about whether land was diamondiferous and the Court ordered that they should be given access in order to ascertain whether the soil was diamondiferous or not. M'Lord, in the Rhodesian case of *Caltex Oil Rhodesia v Perfecto Dry Cleaners*, the Court went so far there as to order that sinkholes could be made into a drive-way in order to ascertain the condition of the soil and the structure complained of. So, M'Lord, it goes beyond simply saying you've got to observe it by the eye. The Courts have gone further and have allowed interference with the actual property, provided no material damage is caused to the items sought to be inspected and examined.

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Now, M'Lord, our submission is that the crux of the matter is on this, Dr Anderson has given evidence in the affidavit before Your Lordship as to what tests he intends to subject it to. He has said that he does not want access to live keys. That's in the 36(6) notice, M'Lord. He said in his affidavit what he proposes to do with the items. He said to Your Lordship that no material damage will come to it and he said to Your Lordship what the prejudice is that we will suffer if he's not given access. Those, by and large, M'Lord, cannot be refuted by any person who has expertise in this matter. Mr Craig Bond, who deposes to the affidavit for the plaintiff does not in his founding affidavit nor in reply tell Your Lordship that he has any qualifications to say that Dr Anderson is wrong in what Dr Anderson has said under oath in his affidavit in this matter.

M'Lord, we challenged him specifically in our initial affidavit by Mr Singh and in Dr Anderson's affidavit, where Dr Anderson, in fact, took issue with him by saying perhaps he misunderstood various things in the founding affidavit when he looked at my summary and, M'Lord, in that regard I can perhaps refer Your Lordship...[intervention]

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LEVINSOHN J You don't want me to make any sort of findings about the reliability of the respective witnesses at this stage. It's premature, Mr Kissoon Singh.

MR KISSOON SINGH M'Lord, I'm not saying that Your Lordship should. I am simply saying to Your Lordship that when Your Lordship decides this matter, Your Lordship has to look at whatever evidence is before Your Lordship in coming to a conclusion on this particular matter without going into credibility. Because at the end of the day if Your Lordship were, in the exercise of Your Lordship's discretion, to say no access is going to be allowed, well, the defendant is going to have to live with that order.

That then brings me to the final submissions, M'Lord, and that is on the question of costs. It is our submission that irrespective of whatever decision Your Lordship comes to the defendants should not be mulcted for the costs of this application.

LEVINSOHN J What I think *prima facie* is that costs, which of course will include the costs of two counsel, it's a given, must be, in the nature of things, reserved because I take the view that this is a heavily interlocutory matter, Mr Kissoon Singh. A ruling of this sort of - whatever ruling I give would be provision, surely.

MR KISSOON SINGH M'Lord, we accept that ...[intervention]

LEVINSOHN J It might well be that after I've heard evidence, cross-examination, I might alter - take a different view but at this stage it seems to me that what is before me is an interlocutory matter. I'm asked to give a ruling.

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MR KISSOON SINGH And apart from that, M'Lord, it might very well be that after Dr Anderson gives evidence Your Lordship is troubled with a similar application arising out of the evidence and the cross-examination of Dr Anderson and Your Lordship might then better, having seen the witness, understand for Your Lordship's own decision in the matter as to why he needs access. If he's challenged on certain things and he puts forward his hypotheses and it's said, "Well,

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X is going to dispute whatever you say" and he hasn't got access to it, M'Lord, well, Your Lordship might take a different view that Your

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simple, M'Lord. We serve the notice. Whether it's on the 27th

Lordship adopts at this particular point in time, but the point is very

August, M'Lord, or whether it was earlier than that, we were dominus

litis in respect of that notice. The rule specifically says that we serve

the notice. Rule 36(7) says that my learned friend's side will then

have to ask us what is the nature of the examination and they would

then have the right to refuse it. We then must decide whether to take

this matter further, and not just further to a formal hearing in court

before Your Lordship, but the rule says to a Judge, Judge in

chambers, M'Lord.

<u>LEVINSOHN J</u> Well, do you want me to recuse myself?

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MR KISSOON SINGH No, certainly not, M'Lord. We said in our

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affidavit that we would have been more than happy ...[inaudible] ...[intervention]

LEVINSOHN J Look, I think the procedure that was adopted by Mr Lane's side is a practical one, Mr Kissoon Singh.

MR KISSOON SINGH M'Lord, I'm not quibbling with that.

LEVINSOHN J I am seized with the trial. I'm about to go on long leave and his side thought it desirable to get a ruling in this matter and get it expeditiously, so they brought an urgent application.

MR KISSOON SINGH M'Lord, we consented to that. The affidavit is - it's not disputed. When my learned friend telephoned me and said that Your Lordship was going on leave and would we have any problems with the matter being set down if Your Lordship consented, we immediately said to him on the telephone, "Not a problem at all". In fact, we would much rather have Your Lordship deal with this matter because Your Lordship at least has the advantage of knowing quite a bit about the case.

LEVINSOHN J Something about it, yes.

MR KISSOON SINGH Well, quite a bit, M'Lord. M'Lord has heard a fair amount of evidence and has read expert notices and the like. But, M'Lord, our submission is very simple. The fact this matter came before - if Your Lordship is going to reserve the question of costs, M'Lord, if that is *prima facie* then I needn't trouble Your Lordship with further argument.

MR LANE M'Lord, perhaps I can assist. We won't object to a reservation of costs.

LEVINSOHN J Yes.

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MR KISSOON SINGH Then I needn't trouble Your Lordship as far as that is concerned.

LEVINSOHN J That's what I intend to do.

MR KISSOON SINGH Then I needn't trouble Your Lordship further as far as that is concerned. M'Lord, the last aspect, that is the issue of the request for particulars for trial, I understood Your Lordship to say that it wasn't formally before Your Lordship.

LEVINSOHN J Well, it wasn't before me.

MR KISSOON SINGH M'Lord, there is only the request in the opposing affidavits but if Your Lordship's view is that it's not formally before you then I wouldn't make any submissions in that either, and perhaps that can be the subject matter of another hearing or, alternatively, if we communicate Your Lordship's *prima facie* indication, perhaps we might even withdraw that.

LEVINSOHN J Yes, very well.

MR KISSOON SINGH M'Lord, those are our submissions.

LEVINSOHN J Thank you. Any reply, Mr Lane?

MR LANE Yes, M'Lord, very briefly. I don't intend to ...[inaudible]... plus just in relation to the proposition as to what the level of proof is, M'Lord. It is in our heads, M'Lord, the *ex parte*, *Minister of Justice in re Rex v Jacobson and Levy* matter. M'Lord, it's in our heads, in dealing with this question of what *prima facie* means in the context, and we refer specifically, M'Lord, to page 478 of that judgment where - it's an Appellate Division - where His Lordship Mr Justice ...[indistinct]... had the following to say:

"I think, however, it is desirable to state

clearly what the question was intended to be with the use of the words prima facie proof in a judgment ...[inaudible]. Some burden of proof on issue is admittedly cast upon the accused and the choice lies between ...[indistinct]... (a) that he discharges by giving evidence sufficient to cause a reasonable doubt as to the existence of intention to prefer or (b) that he must affirmatively prove beyond reasonable doubt that he had no such intention. The last, in my view, is the burden placed by the Legislature upon the accused. Prima facie evidence in its more usual ...[indistinct]... prima facie proof of an issue, the burden of proving which is upon the party giving that evidence."

M'Lord, it is suggested that it is no different here and ...[indistinct]... the question of probability.

Then, M'Lord, as far as the pleadings are concerned, and this is an important feature which our learned friends have neglected. We set it out very fully in our heads. And that is the question of what the pleadings - the pleadings go beyond just the certificate. The structure of the contract, M'Lord, is that once the - it starts with the computer print-outs. Once they are conceded to be computer print-outs, and that's been conceded by Mr Gibson, they become proof of the

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content. They are deemed to be proved beyond just the normal level of evidence. That then establishes the use of a card because then it deems to establish the use of a card in accordance with the terms of the contract and then, M'Lord, you establish the deeming provision in relation to the PIN. Those are the three contracts. And you'll find this, M'Lord, in paragraph 16 of our heads of argument, where we set out very fully those terms and conditions of a contract and the steps by which by operation of the contract in the evidence of Mr Gibson and the submission of the affidavits, we have - that there is an establishment of the proof of the use of the card, consequently the proof of the use of the PIN by any person, coupled with the *prima facie* certificate.

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LEVINSOHN J And that's sufficient evidence to get you past absolution.

MR LANE Yes, that's it, M'Lord, and then the *onus* is the defendant and that's why we refer to the *ex parte Minister of Justice* matter. And there are a number of cases, M'Lord. You will find those cases which we have set out *in extenso* in page 13, paragraph 24 of our heads. There, M'Lord, we show all the cases which deal with the concept of what constitutes *prima facie* evidence which becomes conclusive evidence if it's not rebutted by the party against whom the presumption is made.

M'Lord, the next point is that in argument, my learned friends just in passing, it seems, suggest that there are now two other avenues, and that is that no PIN was used or the defendant's PIN was not used. Now, we are taken somewhat by surprise because nowhere

in Dr Anderson's affidavit is that said. Secondly, according to Mr Gibson, he concedes that it had to be the defendant's PIN together with a card bearing the first defendant's PAN. Now, we are not certain where that suggestion comes from. Then we are attacked on the basis that Mr Bond doesn't have the expertise and that no one has said that they actually won't do, if this Court orders, won't make the systems available. Well, M'Lord, that's not correct either. Standard Bank filed an affidavit, it's at page 43 of the documents, of a Mr Grant Kennedy. He's a Director, Group Operations Processing, of the Standard Bank of South Africa Limited. He confirms all the averments in Mr Bond's affidavit in so far as it relates to the Standard Bank and ...[indistinct]... is - that's the very systems that we're talking under. Now, M'Lord, he equally then confirms the Standard Bank under no circumstances will make their computer systems available.

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Then my learned friend says, "Well, let's look at something. Bond has got it all wrong", and he refers to a particular passage at the dealing with the 47/53 and 47/55 issue, and in that he referred to Dr Anderson's affidavit. Now, if I could ask Your Lordship to look at page 72 of Dr Anderson, paragraph 18, and let's just see how wrong Dr Anderson thinks Mr Bond is.

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LEVINSOHN J 72?

MR LANE Page 72, typed page 8. Page 72, it's a continuation of paragraph 10 of Dr Anderson's affidavit, and I read from the top. It's the second line, new sentence:

"I will testify that plaintiff brought claims

...[indistinct]... system security insupportable. I will testify that the IBM 47/58, which is similar to the 47/53 (now also 47/55) relied upon by the plaintiff is insecure. That we have demonstrated and attack."

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Now, M'Lord, far from saying that Mr Bond is incorrect, he now half adopts Mr Bond's position on the 47/55 but what is remarkable about this, M'Lord, is what he continues to say.

"The plaintiff may then baldly claim that the 47/53 is different and even if this claim is likely to be immaterial and misguided I have no effective way to rebut it."

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Now, M'Lord, I would have thought the most effective way to rebut that, very simple, phone IBM. They'll tell you whether it's a 47/53, which was the precursor to the 47/58 or they'll tell you that it was a 47/55 which was the precursor to 47/53. This demonstrates, M'Lord, the extent to which Dr Anderson - the defendant's are prepared to go without establishing the actual item. They just want open-ended access. Now, interestingly, my learned friend submits that it's not just the items. They want to see how it's configurated in operation. Coupled with that a bit later in argument they say, "But, of course, Dr Anderson has told you what he wants to do". Well, that's not correct either, M'Lord. What he has told Your Lordship is what he wants to do to the HSMs. What he hasn't told Your Lordship what does he want to do to the mainframe computers. He says, "I'm going

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to plug something into the HSMs", but he hasn't told you how he's going to attack the mainframe computers. Nowhere you will find that in Dr Anderson's affidavit. But what he wants, according to our learned friends, is end-to-end access in the sense of being able to be given complete authorised entry into the complete configuration of the operation of all the systems and yet he only tells you how he's going to attack the HSM.

Then, Your Lordship, I think my learned friends in relation to an answer as to what Dr Anderson's hypotheses were or perhaps independently were referred to paragraph 6, page 68, of Dr Anderson's affidavit. Now, Your Lordship, was simply referred to the last and concluding paragraphs of that on page 69, where he talks about a 1980 situation and then at the end the thief simply used stolen cards to enter the ATM. In fact, a PIN was required in the present case, of which I'm not convinced. The SBSA is your culprit and it might have been obtained by using SBSA's cryptographic But that is all said in the context of what - of the first facilities. sentence and where he gives a possible second explanation. member of staff at SBSA has access to a machine through which transactions pass en route from Diners UK to the machine in South Africa. Now, no 199 transactions passed to Standard Bank in South Africa, not a single one of them. The card, other than the two Nedcor transactions, which we are told are purely incidental and spur of the moment decisions within an hour of each other could possibly have passed through the Standard Bank system and then, M'Lord, one finds a remarkable thing. In Dr Anderson's summary, he also says in his

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line of probabilities, before he gets right down to the end and the defendant's, is that members of staff are ...[indistinct]... Nedbank. Could also have accessed this information. That's another one of his theories. Now, M'Lord, interestingly enough, the defendants have nowhere sought to access the Nedbank or Saswitch machines. Why? Are they satisfied with the explanations given in relation to Nedbank and Saswitch? Because Nedbank and Saswitch stand in exactly the same relationship to the plaintiff and Standard Bank or TNS or Link or Diners Club International or Citibank. Why then? The answer, simply, M'Lord, is that actually he doesn't attack[?] any credibility to the suggestion that someone extracted the PIN out of the Nedcor transactions. That can be the only reason because it's inexplicable why you attack TNS, Link, Citibank, Diners Club International Service Centre, Standard Bank without attacking Nedbank and Saswitch at the same time, unless that is the only inference you can draw from it. LEVINSOHN J Didn't Mr Kissoon Singh say in his argument that that is one of the possibilities that when these two transactions went through, that might have caused the leak, so to speak? MR LANE Yes. But, M'Lord, the submission we make is that if that was a real possibility, one that he was really and truly considering in the probabilities and ultimately in giving evidence, then he certainly would have said, "And I want access to the Nedbank machines and I want access to the Saswitch machines". Because they perform the same functions as Link, TNS...[intervention]

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MR LANE The transportation - transportation of the PIN for

<u>LEVINSOHN J</u> Verification of the transaction.

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authorization. They do exactly the same function. Now, if he had any doubt about that, one simply asks directly, "Why didn't you ask for access to those systems?", and there's only one inference you can draw from a failure to do that, because he's carefully applied his mind to all the rest of the transaction process, and that is he doesn't really believe that that's where it could have happened because look at the probabilities. Mr Singh, according to his version, simply steps out of his shop on the Friday, says, "I haven't got any money". Just 100 metres up or 50 metres just across the road there's an ATM, a Nedcor ATM. He goes and he tries it. It doesn't work. He pops down to the airport and he tries it there. It doesn't work. And then suddenly now, someone managed to get one single PIN out of that entire operation. Now, M'Lord, quite clearly, again it will be a fairly fertile imagination which would attach any palpabilities to that and that's why he doesn't want Nedbank and Saswitch - access to their machines.

Now, my learned friend says, "Well, you know, you've actually been very unfair because we don't want access to live keys". Well, it's perfectly - the position, very simply, M'Lord, is that a system, a computer system, as its inherent structure, has production and back-up systems which operate in tandem all the time. The reason you have a back-up system is self-explanatory. You can't take one element out of the system because if the one fails the other one must be there immediately to kick in. You can't just say to Dr Anderson, "Well, we'll strip that of all the live keys and whatever and here you are. Let's just home that that system continues to run while you are

fiddling around the with the back-up". That's not how it works. It's part of the production system which controls that bank. [Indistinct]... explain one thing. The bank doesn't have back-ups on mainframe computers. It can't suddenly just load all its information and say, "Well, we'll close that computer down now. Have a go". It doesn't have that. And these systems are all interlinked. So, M'Lord, no, it's not a simple matter of saying, "Here, take that out of the system. That is the production system". The point is that neither Standard Bank nor any of the other entities have any spare units which they can simply hand over to be tested.

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The *EIMCO* decision which our learned friends referred to, in fact we refer to in our heads of argument because what that did, M'Lord, was say, "Yes, we may authorize an examination which may amount to dismantling but you bear the *onus* of demonstrating and, beyond demonstrating, of showing that the examination will not cause the destruction of or cause damage to or reduce the value of the article. That's what that says, and you'll find that authority at paragraph 14, page 8, of our heads, where we set the principle out as far as ...[inaudible]... *EIMCO*.

Another aspect which my learned friends by simply concentrating on the explanation in relation to the ATSMs, beyond just the computers, the mainframe computers, and a lack of explanation in relation to them, forget - they ignore the fact that what Dr Anderson wants is end-to-end authorized access to the entire system. Now, that's made perfectly clear when they talk about configuration and software and all the rest. That's what they want.

So just to tell you, restrictively, "Oh, no, don't worry. [Indistinct]... with the HSMs". That's one little element in the system. He plugs in a PC and feeds in stuff and let's see what results we get. No, M'Lord, that doesn't explain anything in relation to what Dr Anderson actually wants to do in relation to an end-to-end access, authorized access, to huge ...[indistinct]... installation. Then our learned friends say, "Well, but you have approved through the mouth of Bond that there's really actually any detriment". The answer is through the mouth of Bond is supported by an affidavit from Standard Bank, not denied by anybody outside the defendants. It could amount to billions of rands, the disclosure of confidential information and the breach of the bank's very fundamental duties to its customers.

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M'Lord, as far as the costs are concerned, we take Your Lordship's view on it. We'll be quite satisfied if the costs are reserved.

LEVINSOHN J Something that is irrelevant to what we are discussing today, Mr Lane, I take it that counsel will keep me informed in the course of the next few months as to what progress is made in regard to making arrangements for the hearing next year.

MR LANE Yes, M'Lord.

MR KISSOON SINGH Certainly, M'Lord. Perhaps I can, just for Your Lordship's information, indicate that after considerable stone-walling in the Department of Foreign Affairs, those instructing me have eventually managed to find a particular gentleman who is now prepared to assist. I believe that he is going to come back to them by the middle of October and I heard a discussion between the two

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attorneys at court this morning that they are going to liaise with each other...[intervention]

LEVINSOHN J Have they seen the court order? There was a court order that directed them to deal with this matter. Does that not matter any more?

MR KISSOON SINGH M'Lord, the less said about the attitude of officials or certain officials in the department, the better, M'Lord. At one stage we even had to threaten them too that we would bring an application to Court to ask them to come down and explain to Your Lordship why they regarded Your Lordship's order. The papers were sent up and returned, sent up and returned, sent up and returned. And eventually we managed to get through to somebody who ...[inaudible]...[intervention]

LEVINSOHN J Shouldn't it have gone through the Department of Justice?

MR KISSOON SINGH It went to the Department of Justice, M'Lord. What happens is Justice kicks it to Foreign Affairs. Foreign Affairs said, "You must get Justice", and at one stage the Judge President was - it was suggested to those instructing me that the Judge President should do all this, why should they do it. M'Lord, that was the point at which we literally tore our hair out. But eventually, M'Lord, it appears as though the matter is on track.

<u>LEVINSOHN J</u> Yes.

MR LANE Sorry, M'Lord, there is perhaps one thing which I did not address. I believe that the case my learned friend referred to in which there was a qualified judgment, the goods were not in the possession

of the third party, on the facts. So it's distinguishable on the facts from this case. The fact that the opening was given to the ...[indistinct]... to approach the Court, I don't think there is - and again there is another fact which is distinguishable. The positive averments on his affidavit and an affidavit to Standard Bank confirming that they will not make the computer systems available and indeed it would amount to an order in ...[indistinct]... as Your Lordship suggests.

M'Lord, finally, might I hand in the original of the replying affidavit? We were only able to yesterday to get a copy down to the Court file.

<u>LEVINSOHN J</u> Thank you. Yes, I think I got this.

MR LANE Yes, M'Lord, what you got was a faxed copy of that.

That is the original affidavit, M'Lord.

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RULING

26 SEPTEMBER 2002

LEVINSOHN J I think it is desirable at this stage that I give a ruling in this matter and that such ruling not be delayed. I also think it is desirable, in view of the pending trial proceedings which are to take place overseas and the examination and cross-examination of the defendant's expert, that I do not give detailed reasons at this stage for the ruling that I make but such reasons, if required, will be given at the conclusion of the trial.

My ruling is as follows:

- 1. I grant the applicant, plaintiff's application in the first part, that is I grant an order striking out the defendant's notice in terms of rule 36(6) which is dated the 27th August 2002.
- 2. I also direct that all questions of the costs of today's application, which was an application opposed and in which two counsel on both sides appeared, will be reserved for the decision of the Court at the conclusion of the trial as well.

<u>LEVINSOHN J</u> The Court will adjourn.

COURT ADJOURNED SINE DIE

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DINERS CLUB v ANIL SINGH & ANOTHER

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3156/00

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