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BASIL BLOCH V FIRST NATIONAL BANK

CASE NO. (P) A 239/2000

2000/08/22

Maritz, J.

CIVIL PROCEDURE

R35 discovery - statement in discovery affidavit by a party that he or she does not have any further relevant documents in his or her possession is *prima facie* conclusive of that fact - party alleging the contrary to discharge *onus* of establishing facts that raise a strong possibility that there are further documents which the other party is obliged to discover.

CASE NO.: (P) A 239/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BASIL BLOCH

versus

FIRST NATIONAL BANK

v

CORAM: MARITZ, J.

Heard on: 2000.08.22

Delivered on: 2000.08.22 *(extempore)*

JUDGMENT

MARITZ, J.: This is an application brought by the Plaintiff to compel the Defendant to discover the documents requested in paragraphs 1 to 7, 9 to 12, 14 to 17, 19, 21 and 22 of a notice filed by the Plaintiff in terms of Rule 35(3) of the Rules of Court.

The main action is one instituted by the Applicant (as Plaintiff) against the Respondent (as Defendant) for payment of damages in the sum of NS250 000 and for an order interdicting and restraining the Respondent from distributing and publishing that the Plaintiffs trust account held with the Defendant is a "risk 1 account".

The facts on which that claim has been based may be summarized as follows: The Plaintiff is an attorney practicing for his own account. The Defendant is one of the largest commercial banks in Namibia. In the course of his practice, the Plaintiff opened a trust account in the books of the Defendant and he operated that account for a number of years. In the course of his practice represented, amongst others, a certain Mr. Preuss in a dispute the latter had with Commercial Bank. Ltd. As I understand the papers fded of record, the Defendant had an interest in the issues and outcome of that case. In the course of the litigation between Preuss and Commercial Bank an order was issued in the Magistrate's Court, Windhoek (in case no. 7086/99 on the 14th of May 1999) in which the Plaintiff was interdicted and restrained to pay an amount ofNS215 502,37 held for the credit of Mr Preuss in his trust account with the defendant to either Preuss or any other third party. The Messenger of Court was also authorized to attach that amount in the Plaintiffs trust account.

The Defendant changed the risk categorization of the Plaintiffs trust account in its books from 0 to 1 on or about 14 May 1999 pursuant to the issuing of that interdict. Plaintiff avers that, as a consequence of that re-categorisation, he was defamed. He initially alleged that by using the phrase "risk 1", the Defendant classified the account as one carrying the highest degree of risk and that the account required the most careful monitoring and scrutiny. That allegation was apparently based on an incorrect understanding of the defendant's risk classification of accounts. It is evident from the documents discovered that a "risk 1" classification is one of the lowest - if not the lowest - risk category that can be attached to a customer's account. The particular risk classification is discussed at length in the discovered documents. I find it necessary for the findings I shall make in due course to cite parts of the discovered documents relating to that classification. The category 1 classification is explained as follows:

> "Every prospective borrower has a credit risk profile. Profits are earned from lending to customers whose risk profiles have been evaluated and found to be acceptable. It is acknowledged that every credit risk profile is in a constant state of change and whilst these changes remain within acceptable parameters there is no reason to feel concerned about the safety of the account. It is expected of managers that they recognize the signs which herald a change in this credit risk profile. If it is a positive change then marketing opportunities will present themselves. If it is a negative change then action must be taken firstly to protect and then to improve the bank's position. Category 1 has been designed to accommodate those borrowing accounts, where a sign of possible negative change in the risk profile of a customer has been detected. Managers are therefore expected to categorize a customer category 1, whilst they investigate the apparent deterioration. Detailed procedures for captures of risk category codes is covered in the CIS procedures guide.... Movement into and out of category 1 is within the branch manager's discretion irrespective of the amount of the exposure. Should there be some exceptional reason why branch wishes to retain a customer in category 1 for longer than the prescribed 3 months period, this may be done only with written approval of higher authority.

The Manual then further discusses the criteria for categorization into category 1 and it commences the citation of those criteria with the following words:

> "Listed hereunder are some ideas as to what could form categorization of a customer to this category. These are only guidelines and if such an event occurs it does not necessarily mean that a customer must be categorized. Managers must use their judgment in deciding whether or not to categorize. No hard and fast rules are laid down and the criteria are largely subjective. The presence of security should not necessarily influence a decision to categorize a customer. Security is only important if the customer is unable to re-pay and it is therefore only important in deciding whether a customer should go into category 3 or 4. Similarly, there is no maximum or minimum balance, which governs with their customer should or should not be relegated to this category. Any borrowing customer may be categorized. And it then cites for example, the deterioration in the quality of the management information and control system, strikes or labour problems, the change of key management, the change of strategic direction and alike as examples which may prompt categorization of a customer on their category 1 risk.

The Defendant admits in his plea that it categorized the Plaintiffs trust account as a category 1 account on or about the 14th of May 1999. A number of particulars were requested as to why that had been done. In the "Plaintiffs Request for Further Particulars for purposes of Trial", he

enquired about particulars concerning the negative change in the risk profile of the Plaintiff that was detected and which apparently caused the change in categorization. The Defendant's response to request was quite clear: "The Court order of 14 May 1999". Upon a further question, i.e. what sign of change was identified in the Plaintiffs risk profile for which prompted the change of the Plaintiffs category, the answer was again: "The Court order of 14th May 1999".

It is not necessary for purposes of this Application to further deal with the issues on the pleadings in the main action. Suffice it to say that whether or not the risk categorization was justified simply on account of the Magistrate's Court Order in litigation between Commercial Bank and Preuss and, to a lesser extent, the citation of the Plaintiff as a second Respondent in the interdictory relief sought, is a matter to be decided by the Court in the main action.

The Plaintiff contended in the application to compel the documents required (which I have already mentioned) under the Rule 35(3) Notice were necessary to enable him to determine why his account had been re-categorized as a "risk 1" account. When it was pointed out to him in the course of legal argument that it was clear on the pleadings what the reason for such categorization had been, the Plaintiff, changing tack, added that it was also necessary for him to determine the background of the circumstances under which the Magistrate's Court Order had come to the attention of the Defendant and why the Defendant, not being a party to the litigation in the Magistrate's Court, had acted on account of the interdictory relief granted to Commercial Bank?

It is trite law that a statement on oath that a party does not have any further documents relevant to the issues in his or her possession to discover will be *prima facie* conclusive. Any person who seeks to compel another to make discovery of further documents notwithstanding such a statement should discharge an onus of establishing facts which raise a strong possibility that there are further documents or tape recordings which such a party is obliged to discover. It is within this context and against the background of the issues I have referred to, that I must decide whether the Applicant is entitled to the discovery of the documents mentioned in the Notice of Motion. As the list of documents is extensive, it may be expedient if sequential regard

is to be had to the various paragraphs of the Rule 35(3) Notice enumerating the documents in question.

In paragraphs 1 and 2 of the Rule 35 Notice (to which I shall henceforth simply refer to as the "Notice") the Plaintiff is seeking discovery of the following documents:

> "All memoranda and/or manuals and/or computer data and/or computer printouts and/or other documents and/or letters which relate to the Defendant's practice of dealing with the types of risk categorization and/ or credit risk profiles of clients in the ordinary course of business of the Defendant."

It is apparent that in describing the nature of the documents of which discovery is being sought, the Plaintiff adopted a shotgun approach rather than particularizing the documents with a degree of preciseness from which it is apparent that those documents may be relevant to the issues in the main action. The Plaintiff conceded that much. As it is, the manner in which the paragraph has been formulated, require discovery of the credit risk profiles of all the clients of the Defendant with which the Defendant is dealing with. That information, as Mr Bloch rightly conceded, has no bearing on the issues in this case.

Furthermore, the request also relate to types of risk categorization that are not in issue in the main action. The main action is limited to risk categorization of "category 1" only. Categories 2 to 5 are not relevant for purposes thereof. As far as "category 1" is concerned, there has already been extensive discovery dealing with it, the meaning thereof, the circumstances under which such categorization may take place, etc. There is no reason (and none has been advanced) to believe that there exists in the possession of the Defendant any documentation containing particulars about the content, effect and impact of such categorization, other than those already discovered (and from which I have quoted certain parts of). In the premises, I am not inclined to grant any relief in so far as the discovery of documents mentioned in paragraph 1 of the Notice is concerned.

Paragraph 2 of the notice reads as follows:

> "All memoranda and/or manuals and/or instructions and/or computer data and/or computer printouts and/or documents and/or lectures which relate to the Defendant's practice of dealing with types of risk categorization and/or credit risk profdes of the Plaintiff in the ordinary course of business of the Defendant."

Much of what I have already stated in relation to paragraph 1 also applies to paragraph 2 - the difference being that in paragraph 2, the Plaintiff limited the information sought to his own risk profde. It seems to me that it will be relevant to the issues in the main action for the Plaintiff to obtain discovery of memoranda, instructions, documents or letters which relate to his credit risk profde and his trust account with the Defendant kept by the defendant in the ordinary course of its business. The other documents mentioned in that paragraph appear, on the face thereof, to be irrelevant to the issues and I am certainly not persuaded on the basis of the affidavit filed in support of the application that the Plaintiff is entitled to such discovery.

In response to paragraph 2 (and bearing in mind that it was initially formulated in a much wider manner), the Defendant stated that "the request is for copies of the Defendant's procedural manuals covering a number of disciplines. These guides are stored in an electronic format only and are accessible to authorized employees at the bank. The Plaintiff can view these manuals at the premises of the Defendant. However, the Plaintiff would have to be subjected to security clearance by our internal audit security division. Should authorization be forthcoming the Plaintiff will furthermore be required to enter into confidentiality undertaking with the Plaintiff. Whereas that response was clearly formulated to protect the confidentiality which exists between the bank and its other clients and to protect the confidentiality attaching to the operating procedures and policies of the bank, it does not in my view address the legitimate demand for discovery of some of the documents to which I have referred to on a disjunctive interpretation of some of the words in paragraph 2. Inasmuch as I have held that the Plaintiff is entitled to discovery of those documents, the demand of security clearance by an internal audit security division is an unreasonable one which the Plaintiff was entitled not to accept - so too, the demand for a confidentiality undertaking.

Paragraph 3 requires discovery of "all correspondence and/or letters and/or documents and/or telefax communications and/or communications addressed to P F Koep & Co by the Defendant or its employees in connection with or relating to the matter in the Magistrate's Court of Windhoek, case no. 7898/99 between *Commercial Bank of Namibia and A R Preuss* and/or the Plaintiff during February 1999." Formulated along the same lines paragraph 4, requires discovery of "all correspondence and/or letters and/or documents and/or telefax communications and/or communications addressed to the Defendant or its employees by P F Koep & Co in connection with all relating to the matter in the Magistrate's Court Windhoek, case no. 7986/99 between the *Commercial Bank of Namibia and A R Preuss* and/or the Plaintiff during or about February 1999."

The Defendant declined to discover those documents and claimed privilege. In an answering affidavit filed in opposition to the application to compel, the Defendant avers that those documents are privileged as between attorney and client. Mr Koep strenuously argued that such privilege should be preserved and referred the Court to the case of *Euro Shipping Corporation of Monrovia versus The Minister of Agriculture, Economics and Marketing and Others* 1979 (1) SA 637 (C) at 640H and a quotation from Herbstein & Van Winsen "The Civil Practice of the Supreme Court of South Africa" (4th Edition) pp. 595 and 596 in which learned author said the following:

> "The appellant division of South Africa has accepted that the privilege, which exists between a client and his legal advisor is a mere manifestation of the fundamental principle upon which our judicial system is based and that justification is to be found in a fact that a proper function of our legal system depends on the freedom of communication between legal advisors and their clients which would not exists if either could be compelled disclosed and what passed between for the purpose of giving or receiving advice".

In the original discovery affidavit the Defendant stated that amongst the documents which it declined to discover, were the communications between attorney and client. In a supplementary discovery affidavit filed of record earlier today, it's representative stated that amongst those documents were the correspondence between the Defendant and its attorney P F Koep & Co

relating to the action instituted by Commercial Bank of Namibia Ltd against Preuss and matters relating thereto. Given the privilege based on the attorney/client relationship between the Defendant and Messrs P F Koep & Co, the Defendant was entitled to refuse discovery of those documents. Mr Bloch argued that in as much as those documents were exchanged long before the issues in the main action had come about, no privilege could attach to them. That submission does not appear to me to be sound in law. Privilege of communications as between attorney and client, once established, remains to be a bar against disclosure. In the circumstances I decline to grant any order in so far as the discovery of the items mentioned in paragraphs 3 and 4 of the Notice are concerned.

In paragraph 5 of the Notice the Plaintiff called for "all computer printouts and/or data and/or documents of the Defendant relating to or in connection with the Plaintiff and the handling or the dealing with any of the Plaintiffs accounts held with the Defendant for the entire period that the Plaintiff has been a customer of the Defendant." In response to that request the Defendant stated that the documents germane to the matter were already in the Plaintiffs possession. Defendant would however, have no objection to the Plaintiff making arrangements to view its documentation at its offices, subject to appropriate security measures being put in place.

Again, the formulation of the demand for discovery is unnecessarily wide. There is no need for the Defendant to discover documents relating to all the other accounts of the Plaintiff to determine the issues relating to the re-classification of the Plaintiffs trust account. In so far as the Defendant stated on oath that the documents germane to the matter have already been discovered and are in the possession of the Plaintiff, it appears to me to be the end of the enquiry. I remind myself that, as was pointed out in the case of *Federal Wine and Brandy Company versus Kantor,* 1958 (4) SA 735 (E) at 749G, an affidavit of discovery is normally conclusive - except "where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be

made." It appears to me that full discovery of the documents demanded in this paragraph has taken place. In the premises, I am also not inclined to grant discovery of the further documents mentioned in paragraph 5 of the Notice.

In paragraph 6 of the Notice, discovery is sought of "all messages and/or correspondence and/or documents and/or communications on computer printout or otherwise of the Defendant addressed by Mr Horn during May 1999 to August 1999 of and concerning the Plaintiff and of any accounts of the Plaintiff held with the Defendant." Also those "addressed by Mr A E Joubert during May 1999 to August 1999 of and concerning the Plaintiff and/or any accounts of the Plaintiff held with the Defendant". The Defendant stated in response to that request that, other than the correspondence addressed by the Defendant to the Plaintiff (which has been discovered), there is no further documentation to be furnished. Mr Bloch strongly contended that the deponent who made the discovery affidavit on behalf of the Respondent was not privy to the documents contemplated in the request and, was thus not qualified to state that such documents, other than the ones already discovered, do not exist. He argued that the answer of the Respondent was "misleading in the extreme".

Whilst it is so that the consequences which may arise from inadequate discovery of documents may be serious and that parties are expected to make discovery in a responsible manner, it is inevitable that, in the case of a big corporation, a person in authority who has the documents contemplated in the discovery affidavit under his or her control, would normally depose to a discovery affidavit. That being the case, the opposing party is not entitled in law to insist that only the persons who have been the authors of the documents in question should make the discovery. The insistence of the Applicant that Mr Horn and Mr Joubert should have made the discovery affidavits and the submission that Mr Sparrow (who had sworn to the affidavit) was not qualified to do so, is in my view without substance. Hence, I decline to grant the relief prayed for in paragraph 6 of the Notice.

In paragraph 7 of the Notice, the Applicant sought discovery of "all memoranda and/or documents and/or articles and/or directors and/or manuals including but not limited to computer

printouts of the Defendant which deal with or relate to how to deal with transactions or dealings on an attorney's trust account held with the Defendant." In its response the Defendant again invited the Plaintiff to view those documents at the premises of the Defendant, subject to security clearance and a confidentiality undertaking. It avers that those documents are stored in an electronic format only. However, in its answering affidavit, filed of record in this application, the Defendant further states that there are no specific documents in possession of the Respondent, which deals specifically with the Respondent's treatment to attorney's trust accounts, and that there are therefore no further documents of that nature that can be discovered. Those accounts are treated like any other account. As far as the latter was concerned, it refers to the general procedure manuals covering a number of disciplines (earlier referred to in the Respondent's answer) and points out that those documents can be accessed at the premises of the Defendant.

Inasmuch as the formulation of the demand for discovery in this paragraph is premised on special procedures applying to the operation of an attorney's trust account in the books of the Defendant (and none other) and that premise has been shown to be wrong, it appears that the Respondent correctly pointed out that there were no documents specifically relating to a trust account which could be discovered. As far as the manuals relating to the management of all other accounts are concerned, the only real issue pointed to by Mr Bloch, relates to the circumstances under which and reasons why the categorization of such an account could be changed from 0 to 1. Those documents have already been discovered. In the circumstances, it does not seem appropriate, to make any further Order about the discovery of documents mentioned in paragraph 7 of the Notice.

In paragraph 9 of the Notice, the Plaintiff referred to a letter of the Defendant, dated the 25th June 1999 in which it was stated that: "Upon being informed that an Order had been obtained against you in respect of monies which were in your trust account, the bank thought it prudent to react thereto with caution which involved, as previously stated, ensuring that those funds would be treated differently from other funds in your trust account. The N$215 000.00 at all times formed part of your trust account and we are satisfied that under these circumstances that

was the correct procedure to adopt." Based on the contents of that letter, the Plaintiff required all documents used by the Defendant or its employees in regard to the "reaction" referred to and "all documents which the Defendant and/or its employees used and which formed part of the procedure so adopted". In it's response, the Defendant enclosed a number of letters and a copy of the relevant Court documentation pertaining to the Court Order that initiated the Defendant's reaction.

It is evident, from its reply, that those documents are the only ones of that nature in its possession. For the reasons that I have already mentioned, that Court will accept that statement in the absence of any indication or facts from which it may find that there are strong indications that there are further documents of that nature in existence. I also decline to Order the further discovery sought in paragraph 9 of the Notice.

In paragraph 11 and 12 of the Notice, the Plaintiff requires "all documents and/or cards and/or notes and/or memoranda and the computer printouts and/or data relating to the individual customer profile of the Plaintiff throughout the period he banked with the Defendant and all computer printouts regarding the accounts, remarks screened relating to all accounts held by the Plaintiff with the Defendant including but not limited to Plaintiffs trust account; all documents and the computer printouts and the memorandum which show the date upon which the Plaintiffs trust account was placed and recorded as risk 1 account on the Defendant's banking system". In response to that, the Defendant attached the customer information system printed out. The Plaintiffs complaint is, however, that the Defendant has failed to comply with the Rules of Court because it attached the documents to the affidavit instead of making discovery thereof in the manner contemplated by Rule 35 (3). It seems to me that, although a party attaching documents to a discovery affidavit may well not be entitled to recover the costs of having done so, the objection is highly technical. It certainly serves the convenience of the other party and it expedites the proceedings if the documents are attached. In the absence of any indication that the discovery made in response to that request was inadequate or incomplete or, for that matter that the plaintiff has suffered any prejudice as a consequence thereof, I also decline to make any Orders as far as paragraphs 11 and 12 of the Notice are concerned.

In paragraph 14 of the Notice, the Applicant is seeking discovery of "all computers printouts and documents which show the date upon which the Plaintiffs trust account was accessed on the Defendant's computer system or otherwise by employees of the Defendant during the period in 1997 to date". The Defendant, whilst was conceding that it is in possession of some data relating to the access by employees states that the period for which the data is required exceeds the warehousing lifespan of the record, which if obtained, will be incomplete. The system upon which the data resides is inordinately expensive and usage thereof is charged in a proportionate rate. In the Defendant's opinion, the requested information does not have bearing on the matter and all employees of the First National banking group are bound by duty of secrecy and clients' information is kept in the strictest confidence. That notwithstanding, the defendant contends, the risk 1 category status merely denotes a cautionary state for internal purposes and in that instance it was triggered by a restraint having been placed on the account, which has no bearing on the account holder's financial capacity.

Whereas criticism leveled by Mr Koep on behalf of the Respondent against the wide and sweeping formulation of this request is undoubtedly justified, it seems to me that information regarding the number of persons who have accessed the Plaintiffs trust account on the Defendant's computer system since the classification of that account as a category 1 account on the 14th of May 1999 may be relevant for purposes of determining the *quantum* in the main action. Given the extraordinary expense to obtain such data, Mr Koep, referring to the case of *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd*, 1971 (4) SA 589 (W) at 593 to 595 urged the Court not to make an Order as far as the discovery of the documents contemplated in paragraph 14 of the Notice is concerned until such time as the Applicant has proven that the classification of the trust account as a category 1 account was in fact defamatory of him. Whilst I appreciate that there may be some costs involved in the recovery of the documents referred to, that is a matter which can be dealt with by an appropriate Order of Costs to be made at the end of the trial. What this Court cannot do in the application currently before it, is to make an Order which will in due course force the trial Court to separate the issues relating to the merits and the *quantum* and to deal with the case on a piecemeal basis. If the costs of obtaining that documentation will be so prohibitive (as the Defendant seems to

suggest), that may have given it good cause to have moved timeously in a separate application an order that the merits of the case be adjudicated separate of and before the quantum of the claim. In the absence of such an application and given my earlier remarks about the relevance of those documents, I find that the Plaintiff is entitled to discovery of computer printouts and/or documents which show the date upon which the Plaintiffs trust account was accessed on the Defendant's computer system (or otherwise) by employees of the Defendant from the 14th of May 1999 until the date on which the action was instituted.

In paragraph 15 and 16 of the Notice, the Plaintiff is seeking discovery of "all documents which are used by the Defendant in its procedures for the capture of risk category codes and the Defendants CIS procedures guide". The documents required by those paragraphs simply relate to the technical means by which such a capture takes place on the computer system of the Defendant. The manner in which the date is so captured is irrelevant to the issues at hand and so too, the CIS procedures guide. The premises, I am not persuaded that those documents are relevant to the issues in the main action - especially if regard has being had to what counsel for the Plaintiff advanced as the reason why such discovery was being sought?

In paragraph 17 of the Notice, the Plaintiff is seeking "the written approval from the higher authority to retain the Plaintiffs trust account in the category 1 classification for a period longer than 3 months". Defendant responded to say that a written approval was not a requirement and no such approval was not on record. Claiming that the manner in which that response was formulated was rather disingenuous, the plaintiff contended that the statement that "the approval was not on record" did not bear any meaning or impact on the question as to whether or not such written approval existed or of its whereabouts.

The answer made on behalf of the Defendant by Mr Sparrow is quite clear: He firstly stated that it was not a requirement that such approval be in writing and, secondly, that it was not on record. Inasmuch as he stated that it was not on record, it by necessary implication means that there is no written recordial of such an approval. From that it follows in logic no such a written approval exists or existed at any point in time. The application for the document in paragraph 17

must therefore also fail.

Paragraph 19 of the Notice, the Plaintiff is seeking the documents evidencing the change of the Plaintiffs trust account category into the Hogan system. In response thereto the Defendant referred the Plaintiff to the customer information system screen-dumps which were attached to its response. In the absence of any allegation that there exist any other documents (that is, over and above the screen-dumps), the application for the discovery of the documents mentioned under paragraph 19 must also fail for the reasons I have mentioned earlier.

Lastly, discovery is also being sought in paragraphs 21 and 22 of the Notice of "all documents evidencing action taken to prevent a two categorization of the Plaintiffs trust account held with the Defendant and all documents and/or printouts and/or Notices, which were used to record the categorization and the risk reasons in the Defendant's computer system, relating to the Plaintiff and/or his trust account held with the Defendant". In response thereto the Defendant referred to the remarks on the restraints starter-sheet, which was attached as part of the "screen-dumps" and "online maintenance audit journal", to the affidavit.

Given the earlier statement that other than those documents there were no further documents relevant to the issues at hand, there is no factual basis on which I can find that other documents of that description exist. Hence, discovery of the further items contemplated in those paragraphs are also declined.

As to the question of costs in this application Mr Koep argued that the applicant's success, if any would be very limited. As it is, only the documents referred to in two of the approximately 14 paragraphs will be ordered - and in respect of those 2 paragraphs on a limited basis. He further argued that if the plaintiff had limited its request to the documents relevant to the issues on the pleadings, the defendant might well have responded differently. On the other hand, as Mr. Bloch pointed out, even though a request for discovery of documents may be formulated wider than those to which a party may be entitled to, it does not derogate from the obligation on the part of the other party to discover the documents to which the one giving the notice is entitled to. In as

much as the plaintiff can be criticised for making an overbroad demand, the defendant's sweeping refusal is also not beyond reproach.

In the premises, and, also to express my displeasure about the personal attacks make about the motives of both parties in the affidavits filed of record, it will be ordered that each party shall pay his or its own costs in this application to compel.

As far as the Application to Strike Out certain portions of paragraph 12 of the replying affidavit is concerned, Mr. Koep argued that it constituted new matter which should have been incorporated in the Plaintiffs founding affidavit. It is unnecessary to cite those allegations for purposes of this judgment. Suffice it to say that the objection to the facts contained therein was well taken. Virtually no time was spend in argument on that application and the taxing master should take cognisance thereof for purposes of taxation.

In the result, the following order is made:

5. The plaintiffs non-compliance with the forms and service provided for in the Rules of Court are condoned (in so far as need be, given the interlocutory nature of the application) and leave is granted for this application to be heard as one of urgency as contemplated in Rule 6(12);
6. The defendant is ordered to discover, make available for inspection and allow the plaintiff to make copies of the following documents by no later than 28 August 2000:
    7. All memoranda, instructions, documents and/or letters relating to the credit risk profde of the plaintiffs trust account kept in the ordinary course of its business with the defendant; and
    8. all computer printouts and/or documents which show the date upon which the plaintiffs trust account was accessed on the defendant's computer system (or otherwise) by employees of the defendant during the period 15 May 1999 until the date on which the action was instituted;

9. Each party shall bear his/its own costs in this application;

10. The defendant's application to strike out is granted with costs, but, for purposes of taxation it is recorded that virtually no time was spend in argument on that application;

11. The plaintiff and the defendant shall hold a Rule 37 conference in the main action at a mutually convenient time by no later than 16:00 on the 31st of August 2000;

12. Written notice of all the factual issues to be canvassed and questions to be asked during the Rule 37 conference shall be given by the one party to the no later than noon on 29 August 2000;

13. Duly signed minutes of the Rule 37 conference shall be fded of record by no later than noon on 4 September 2000.

ON BEHALF OF THE APPLICANT:	**MR BASIL BOCH**
Instructed by:	**Basil Bloch Attorney**
ON BEHALF OF THE RESPONDENT:	**MR P F KOEP P**
Instructed by:	**F Koep & Co.**