Of Credit Cards, Unauthorised Withdrawals and Fraudulent Credit-Card Users

WG SCHULZE
University of South Africa

1 Introduction

In the recently reported case of *Diners Club SA (Pty) Ltd v Singh & Another* (2004 (3) SA 630 (D)), the relationship between a bank and its client who had used a credit card issued by the bank came under the spotlight. In a lengthy judgment that ran a fraction short of 40 printed pages in the Law Reports, Levinsohn J made same instructive comments regarding the relationship between the issuer of a credit card, on the one hand, and the holder of the card, on the other hand. This is the first ever reported South African case in which the legal relationship between a credit-card issuer and the holder of the card came up for decision. In the still unreported decision in *Living Legends Motors (Pty) Ltd v De Villiers & Others* (for a reference to and some discussion of which, see Steve Cornelius 'The Legal Nature of Payment by Credit Card" (2003) 15 *SA Merc LJ* 153 at 156-7), the Court considered the legal nature of a payment by credit card.

But neither the *Diners Club* case nor the *Living Legends* case was the first ever in which a credit-card scheme enjoyed judicial scrutiny. In *Western Bank Limited v Registrar of Financial Institutions & The Minister of Justice* (1975 (4) SA 37 (T)), the Court was asked to pronounce on the question whether a certain credit-card scheme ran by Wesbank could be classified as a money-lending transaction in terms of the Limitation and Disclosure of Finance Charges Act 73 of 1968 ('the Act'). It held that the scheme did not amount to a money-lending transaction and was therefore not subject to the provisions of the Act (see further Catharine Smith 'Credit Cards and the Law" (1976) 39 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 107 at 116-9).

Before turning to the facts and decision in *Diners Club v Singh*, a brief background to the legal relationships underlying the operation of a three-party credit card seems called for.

2 Credit Cards: General

A credit card has been described as an instrument which 'offers a revolving credit whereby the card issuer allows the cardholder to use the card during a monthly accounting period to pay for goods and services or to draw cash, up to a prescribed limit, interest being payable on the amount outstanding at the end of the monthly accounting period' (see Oliver Hance & Suzan Dionne Balz *The New Virtual Money: Law and Practice* (1999) at 242; on the role of payment cards in a virtual society, see Dérick Swart 'Online Banking Law and Payment Systems' in: Reinhardt Buys (ed) *Cyberlaw. The Law of the Internet in South Africa* (2000) 277 at 284 et seq).

The legal nature of a credit card was first investigated and explained in the English case of *R v Lambie* ([1981] 2 All ER 776 (HL)). In that case it was decided that when a person uses a credit card, the presentation of the card to the supplier is a representation by the cardholder that he or she has the actual authority of the card issuer to conclude a contract between the issuer and the supplier in terms of which the issuer will honour the sales voucher for the goods or services on the presentation of the voucher to the issuer (see further Denis V Cowen & Leonard Gering *Cowen's The Law of Negotiable Instruments in South Africa Vol 1: General Principles* (1985) at 269; Hance & Balz op cit at 250-1).

Because the relationships underlying the use of a credit card are usually governed by extensive and detailed written agreements between the parties, as well as the fact that the amount involved in the average credit-card transaction is usually relatively small, few disputes regarding credit-card transactions ever reach the courts (for a discussion of the terms that are included in the standard agreement between the card issuer and card holder, see Hance & Balz op cit at 248 et seq).The fact that the issuer of the credit card is usually the sole scribe of the tri-partite agreement between it, the card holder and the supplier, ensures that the dice is loaded heavily in favour of the card issuer, further hampering the chances of successful litigation by the card holder. For these reasons alone the decision in *Diners Club v Singh* is a welcome if not important addition to existing sources on the legal position pertaining to credit cards.

(For a sample of the existing South African legal materials dealing with credit cards, see Smith op cit at 108 et seq; Jacobus Cornelis Stassen *Die Regsbetrekkinge by Driepartykredietkaarte* (unpublished LLM dissertation, Rand Afrikaans University (1977)); JC Stassen 'Betaling deur Middel van Driepartykredietkaarte' (1978) 11 *De Jure* 134; JC Stassen 'Some Legal Aspects of Credit Cards' (1978) 7 *Businessman's Law* 153; JC Stassen 'Some Legal Aspects of Credit Cards' (1979) 8 *Businessman's Law* at 189; JC Stassen 'Some Legal Aspects of Credit Cards. Part III: Paying by Credit Card' (1978) 8 *Businessman's Law* 12; JC Stassen 'South African Credit Cards Used Overseas' 1978 (7) *Businessman's Law* 189; JC Stassen 'Some Legal Aspects of Credit Cards. Part IV: What Happens when the Card Issuer Does not Pay?' (1979) 8 *Businessman's Law* 35; JC Stassen 'Some Legal Aspects of Credit Cards. Part V: Payment by Credit Card – Cash or Credit?' (1979) 8 *Businessman's Law* 183; JC Stassen & Ina Meiring 'Onregmatige Kredietkaartgebruik: Wie Dra die Skade?' (1979) 1 *Modern Business Law* 28. For a recent South African perspective on the legal nature of a payment made by credit card, a topic which falls outside the scope of the present research, see Cornelius op cit at 159 et seq.)

The concept of a 'credit card' includes two-party as well as three-party credit cards. The distinction between these two types of credit card is not important for present purposes (for a brief explanation of the distinction, see HCF Schoordijk 'Creditcards van het drie-partijen-type' (14-21 Jun 1975) no 5311 *Weekblad voor Privaatrecht, Notariaat en Registratie* 409; HCF Schoordijk

'Creditcards van het drie-partijen-type' (28 Jun - 5 Jul 1975) no 5312 *Weekblad voor Privaatrecht, Notariaat en Registratie* 425; Peter Havenga, Michele Havenga, Roshana Kelbrick, Marié McGregor, WG Schulze, Kathleen van der Linde & Trix van der Merwe *General Principles of Commercial Law* 5 ed (2004) ('Havenga et al') at 370). Suffice it to mention here that in the case of a three-party credit card, there are three different sets of legal relationships involved: first, the relationship between the card issuer and the cardholder; secondly, the relationship between the card issuer and the supplier; and finally, the relationship between the cardholder and the supplier (see Cowen & Gering op cit at 267; Havenga et al op cit at 370). The facts in *Diners Club v Singh* turned on some aspects of the first relationship, namely the one between the card issuer and the cardholder.

A credit card has four main functions.

- Payment is its primary function. Credit cards may either be used as a method of payment where the card holder and the merchant are in each others' presence, or they may be used to pay for goods bought over the Internet or telephone where the parties are not each others' presence (for a discussion of the potential problems when using a credit card in transactions over the Internet, a topic which falls outside the scope of the present note, see Hance & Balz op cit at 244).
- Secondly, a credit card also provides credit to the cardholder since he or she only pays the card issuer for the purchases made with the card at a later stage.
- Thirdly, some credit cards entitle the cardholder to cash personal cheques by showing their cards at any of the banks used as agencies (see Havenga et al op cit at 369).
- Finally, credit cards issued by banks may be used by the cardholder to effect cash withdrawals at any branch of the issuer and at automatic teller machines ('ATM') which are linked to the specific network to which the issuer of the cards belong. The facts in *Diners Club v Singh* turned on the function of a credit card as an instrument to effect cash withdrawals at an ATM.

The standard agreement between the card issuer and the supplier does not usually provide whether payment with a credit card is an absolute or a conditional payment. Put differently, the standard agreement is usually silent on the question whether the cardholder becomes the owner of the goods bought with the credit card.

Under English law, payment with a credit card is regarded as absolute payment. The leading English case dealing with the nature of a credit-card payment is that of *Re Charge Card Services Limited* ([1989] 1 Ch 497 (CA)). Although English case law has no binding force in South Africa, it does have strong persuasive value and I believe that the decision in *Re Charge Card Services* will indeed have strong persuasive force should a similar case ever come before a South African court. The gist of the decision in that case (for a discussion, see Peter E Sayer *Credit Cards and the Law: An Introduction*

(1988) at 8 et seq) was that a credit-card or charge-card payment is absolute in all cases except where it is an express term of the agreement between the cardholder and the supplier that the card payment is conditional. The position under South African law is not settled yet (for an opinion arguing that a credit-card payment, like a cheque payment, will under South African law be treated as conditional payment only, see JC Stassen 'Payment by Credit Card – Cash or Credit?' (1979) 8 *Businessman's Law* 183 at 184-5) and will have to be determined with reference to the general principles of the law of things.

Apart from whether payment by credit card is an absolute or conditional payment of the debt, a further question concerns the revocability of the payment order given by the cardholder to the card issuer when the former presents the card to the merchant. In the United Kingdom and Canada, the relationship between the card issuer and the cardholder is regarded as a loan, and therefore the relationship between the cardholder and the merchant is independent from the cardholder's or the merchant's contract with the card issuer. In these two jurisdictions the debt is discharged upon presentation of a valid credit card. In France, a civil-law jurisdiction, the payment order given by the cardholder is irrevocable except in cases of loss or theft of the card. But under French law the cardholder is not discharged from his or her debt until the merchant has been paid by the card issuer and the latter has, in turn, been reimbursed by the cardholder (see Hance & Balz op cit at 272-3).

The standard agreement between the card issuer, supplier and cardholder usually contains provisions in respect of losses which may be incurred as a result of the unauthorised use of the credit card. More specifically these terms provide who bears the risk of loss in the case of an unauthorised use of the card (see Sally A Jones *The Law Relating to Credit Cards* (c1990) at 177 et seq for a discussion of this aspect of credit cards in English law, including the different English statutory measures which apply to credit-card transactions; see further Havenga et al op cit at 371 for examples of the different scenarios where there has been unauthorized use of a credit card). The decision in *Diners Club v Singh* turned on the interpretation of the terms of the standard agreement between Diners Club and Singh, and more specifically involved the question as to the fairness of the terms of the standard agreement.

3 The Facts in *Diners Club v Singh*

In 1997 the plaintiff, Diners Club, issued a Diners Club credit card to the two defendants, Singh and his wife. Over the week-end of 4 and 5 March 2000, 190 successful ATM cash withdrawals were made with Singh's credit card in London. The proceeds of these withdrawals amounted to some £54 000, roughly equivalent to R500 000 at that time.

Singh's case was that he had not been in London that weekend, that his card was at all times in his possession, and that his Personal Identification Number ('PIN') had not been given to anyone else.

Diners Club, in turn, relied on a number of contractual clauses which formed part of the contract in terms of which they had issued the credit card to Singh.

The most important and relevant of these was clause 7.3 which provided that the cardholder would be liable irrespective of who used his or her PIN. The agreement further provided that 'cards are issued subject to the prevailing terms and conditions accompanying the card, of which the Cardholder shall be deemed to be aware of and to have accepted upon use of the card' (at 633D).

4 The Decision in *Diners Club v Singh*

Three main points for decision arose in the *Diners Club* case. The first two points concerned two defences raised by Singh against Diners Club's claim. The third concerned the constitutionality of the Electronic Communications Transactions Act 25 of 2002 ('the ACT Act').

Singh's first defence was an alibi; he argued that he was not in London during the fateful week-end in March 2000. Further, so he contended, the withdrawals were made with the co-operation of an 'insider' either in Standard Bank South Africa or in the Diners Club organisation. This defence will be discussed in par 5 below.

Singh's second defence turned on the alleged illegality of clause 7.3 of the agreement between him and Diners Club. He argued that that clause was contra bonos mores and therefore invalid. This defence will be discussed in par 6 below.

Thirdly, Singh argued that the provisions of the ECT Act had infringed on his constitutional right to a fair trial. This aspect of the Court's decision will be discussed in par 7 below.

5 Singh's First Defence: An Alibi

Singh procured an expert witness who explained to the Court that an 'insider' either in Standard Bank South Africa or in the Diners Club organisation had probably accessed these transactions. Singh also claimed an alibi. After considering all the evidence before it, the Court rejected Singh's defence that because he was not in London during that the week-end in question, the cash withdrawals had therefore been made with the help of such an 'insider'. As a matter of fact, the Court rejected Singh's evidence in toto and held that he was indeed in cahoots with the person or persons who took his card to London to withdraw the money there (see at 659G where Levinson J held that 'I am most unimpressed with [Singh] as a witness. He left me with a clear impression that he was a thoroughly untruthful witness').

In passing, the Court pointed out that the facts in the present case were similar to the facts in three other cases where a Diners Club credit card was used to withdraw large amounts of cash in London. In each of these cases, including the present one, the modus operandi of a certain syndicate of fraudsters was to procure a Diners Card and a PIN for it. They first tested the card at a local ATM to ensure that transactions could be activated without any problem, and then took the card overseas where large amounts of cash was withdrew. In all cases the cardholder disavowed any knowledge of the cash withdrawals (see

at 662G-H). In all these instances, the card holder was in cahoots with the syndicate.

On the evidence before it, the Court was satisfied that Singh conspired with the members of a syndicate to provide them with his card and PIN to enable them to withdraw the money in London (see at 662H-I). Singh's first defence and the Court's decision on it do not merit any further comment here.

6 Singh's Second Defence: The Legality of the Credit-Card Agreement

6.1 General

Singh argued that clause 7.3 of the agreement between him and Diners Club was contra bonos mores and therefore invalid (on the legality of contracts in general, see Schalk van der Merwe & LF van Huyssteen 'The Force of Agreements: Valid, Void, Voidable, Unenforceable?' (1995) 58 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 549 et seq). Singh's attack on the validity of clause 7.3 was based on the fact that because of its unfairness it was unreasonable and therefore illegal.

It is an acknowledged principle of South African law that contracts seriously entered into should be enforced. However, it is equally trite that in no jurisdiction will all agreements be enforced without exception (see *Farlam & Hathaway Contract: Cases, Materials and Commentary* 3 ed by GF Lubbe & CM Murray (1988) at 237).

One of the possible grounds for the illegality of contract is the fact that it might be contrary to the public interest to enforce the contract. The potential unfairness of a contract may constitute a ground upon which a court may find that one or more of its terms are so unfair that the contract is contrary to public policy and therefore illegal (see Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract. General Principles* 2 ed (2003), revised reprint (2004) ('Van der Merwe et al') at 180-3 and 201). Unfairness in contract may also be dealt with in a variety of other ways, for instance, in terms of the manner in which consensus is acquired, the legal impossibility of performance, the disturbance of the balance between performance and counter-performance, or a remedy such as the exceptio doli generalis (idem at 200-1).

An unfair agreement may thus be declared illegal if it is contrary to the public interest (on public policy as a reason for the invalidity of a contract, see further DJ Joubert *General Principles of the Law of Contract* (1987) at 132 et seq; Reinhard Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) at 713 n 258; but see Gerhard Lubbe '*Bona Fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg' (1990) 1 *Stellenbosch LR* 7 at 9 where the author points out that in *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A), the majority of the Court held that neither Roman-Dutch nor South African law acknowledged a general contractual defence based on the unfairness of a contractual term: the Court in the *Bank of Lisbon* decision concluded that the exceptio doli was a 'defunct anachronism' and could therefore also not be used as a basis for the

development of a general judicial discretion to enhance (contractual) justice 'between man and man').

A court would take a number of circumstances into account in considering the alleged unfairness of the contract: the interests of the individual parties and the interests of society in general, and good faith (Van der Merwe et al op cit at 201). The locus classicus in South African law as far as unfair contractual terms are concerned is the decision in *Sasfin (Pty) Ltd v Beukes* (1989 (1) SA 1 (A)). In that case certain terms in an agreement were found to be illegal for being 'unconscionable and incompatible with the public interest, and therefore contrary to public policy' (at 13J-14A). The Court had to find a balance between the two age-old potentially conflicting considerations in the law of contract, namely the sanctity of contract, on the one hand, and 'simple justice between man and man', on the other hand (for a discussion of the different philosophies underlying the application of principles such as 'freedom of contract', 'commercial freedom', and 'pacta sunt servanda', see Lubbe op cit at 15-7). The Court held that on the grounds of the particular facts in that case, the total effect of the agreement was to place the one party almost entirely within the economic power of the other, while far exceeding the reasonable protection of the latter's own interests (see at 8I-13H).

But it has been pointed out that the decision in *Sasfin Ltd v Beukes* does not substantiate the argument that the mere fact that a term is harsh or unconscionable necessarily means that the agreement is therefore illegal (see Van der Merwe et al op cit at 201). 'Simple justice between man and man', so it is argued, and correctly so I would hasten to add, does not alone determine whether an agreement is unfair and therefore potentially illegal. A number of other factors must be taken into consideration, including the debtor's capacity to engage freely in professional or commercial activities, and the personal sphere of the parties, especially that of the debtor (other circumstances that might prove to be relevant include the purpose and setting of the contract, the relationship between the parties, and the nature and ambit of the obligations involved: idem at 201-2).

Closely linked to the concepts of fairness and public policy, is the concept of good faith (see LF van Huyssteen & Schalk van der Merwe 'Good Faith in Contract: Proper Behaviour Amidst Changing Circumstances' (1990) 2 *Stellenbosch LR* 244 at 248). It has been argued that the fundamental principle of individual autonomy which, in conjunction with policy considerations, underlies statements to the effect that public policy requires the strict enforcement of contracts, must be balanced against the public interest in the preservation of good faith in contractual relations. Although the principle of good faith is uncertain in content, what is clear is that good faith first and foremost requires honesty in commercial dealings, and secondly entails that a party should show a minimum level of respect for the interests that the other party seeks to advance by means of the contract. The unreasonable and one-sided promotion of one's own interest at the expense of another, might, in extreme cases, infringe upon the principle of good faith to such a degree so as

to outweigh the public interest in the enforcement of contracts (Van der Merwe et al op cit at 200 et seq).

It is obvious that there is a close link between the concepts of unfairness, public policy and good faith. In this regard, Schalk van der Merwe and Gerhard Lubbe conclude ('Bona Fides and Public Policy in Contract' (1991) 3 *Stellenbosch LR* 91 at 96) that

> 'it is clear that the courts do not regard *Sasfin's* case as laying down a general rule that a harsh contract per se allows a debtor to escape liability. The courts do accept that a particular contract may be so harsh as to be unenforceable. The decisions referred to base unenforceability on public policy and public interest.'

I believe that these three concepts should have been considered by the Court in *Diners Club v Singh* in reaching its decision. I will again briefly refer to the interaction between the concepts in par 8 below.

6.2 The Legality of the Agreement in *Diners Club v Singh*

The gist of clause 7.3 entailed that the cardholder, Singh, was liable for all purchases or cash withdrawals made with his credit card irrespective of who used the card and the PIN. In considering the fairness of the clause, the Court held that it is trite that a credit card may be used throughout the world. The Court reasoned that while it may be said that the clause was one-sided and favoured the issuer of the card, Diners Club was entitled to protect itself by placing the risk of wrongful use on its customer (see at 659A). It referred with approval to the decision in *Van Rensburg v Straughan* (1914 AD 317 at 328) where it was held that 'those who enter into onerous or one-sided agreements have only themselves to thank. A court of law cannot assist them merely because the results are harsh' (see further *McGullough & Whitehead v Whiteaway & Co* 1914 AD 599 at 625-6 where the Court explained that the fact that 'the document was one-sided and harsh admits of no doubt; but I am not aware of any principle of our law by which, on that ground alone, an undertaking deliberately and knowingly entered into could be repudiated').

Importantly, the Court pointed out that Singh had accepted his credit card knowing that he would be bound by the relevant contractual terms and conditions. Singh was further under no obligation to do so, nor was he obliged to apply for a PIN. The Court reasoned further that at the time when Singh accepted the credit card from Diners Club, he ought to have known, or alternatively have apprised himself, of the terms applicable to the use of the PIN (see at 659D-E). The Court accordingly made short shrift of Singh's contention that clause 7.3 was against public policy (see at 659E). In the process of rejecting Singh's argument, the Court did not find it necessary to consider the issue of good faith. I believe that Singh's own bad faith, or rather, his fraudulent dealings in trying to swindle his bank, played a not an insignificant role in the Court's not deeming it necessary to consider the aspect of good faith in interpreting the possible unfairness of the agreement between Diners Club and Singh. More about this in par 8 below.

In passing, I should point out that South African banking law currently lags

behind European banking law as far as consumer protection in this regard is concerned (for a concise summary of consumer protection in the European banking sphere, see Ross Cranston (ed) *European Banking Law: The Banker-Customer Relationship* 2 ed (1999) at 22 et seq (English law); 48 et seq (French law); 98 et seq (Italian law); 124 (Dutch law); and 148 (Swedish law). A brief reference to English law will have to suffice. Where there is a dispute between the cardholder and the card issuer whether a particular transaction was authorised (as was the case in the *Diners Club v Singh*), English law provides that the burden of showing authorisation rests upon the issuer of the card (see par 171(4)(*b*) of ch 39 of the Consumer Credit Act 1974 (c 39); Hance & Balz op cit at 256 n 55 and 266). In terms of the English Banking Code, the card issuer bears the burden of proving fraud or gross negligence on the part of the cardholder where the latter alleges that a transaction was not authorised (idem at 267).

7 The Electronic Communications and Transactions Act

7.1 General

There is no specific or dedicated legislation in South Africa covering electronic fund transfers or credit-card schemes. This is in stark contrast with many overseas' jurisdictions where such legislation has been enacted to provide for credit-card payments (see, eg, Hance & Balz op cit at 246-7 for a brief discussion of French legislation governing the payment function of a credit card).

The ECT Act is a recent attempt by the South African Legislature to introduce some statutory regulation into the fast-moving area of electronic communications and transactions (on the role of the ECT Act in electronic trade, see Ryk Meiring 'Electronic Transactions' in: Reinhardt Buys & Francis Cronjé (eds) *Cyberlaw: The Law of the Internet in South Africa* 2 ed (2004) 82 at 83 et seq; Juana Coetzee 'Incoterms, Electronic Data Interchange, and the Electronic Communications and Transactions Act' (2003) 15 *SA Merc LJ* 1). It is trite that the ECT Act applies also to electronic-banking transactions (see WG Schulze 'E Money and Electronic Fund Transfers. A Shortlist of Some of the Unresolved Issues' (2004) 16 *SA Merc LJ* 50 at 57).

Although the ECT Act provides a wide and general framework for the facilitation and regulation of electronic communications and transactions, including electronic transactions for financial services, it does not deal exclusively with electronic-banking services (for a discussion of the effect of the ECT Act on Internet activities, see Coenraad Visser 'Online Service Provider Liability under the Electronic Communications and Transactions Act 25 of 2002' (2002) 14 *SA Merc LJ* 758; see also Tana Pistorius '"Nobody Knows You're a Dog": The Attribution of Data Messages' (2002) 14 *SA Merc LJ* 737 at 738). I believe that a number of aspects surrounding the use of electronic-banking products are not necessarily covered by the provisions of the ECT Act. I further believe that the rapid development of electronic banking will disclose

further holes in the Act as far as its viability as an all-encompassing legislative instrument is concerned.

Suffice it to mention here that there can be little doubt that the electronic-payment system and electronic money products offered by banks will have to be regulated by their own dedicated legislative measures sometime in the future.

Until such regulation is put in place, the relationship between the providers of electronic payment facilities (ie, banks), on the one hand, and the users of such facilities (ie, the clients of banks), on the other hand, will be regulated by those few provisions of the ECT Act that apply to electronic financial services, read with the common-law principles bearing on the law of contract. At this stage it is only banks that provide electronic-transfer services. Because the relationship between a bank and its client is generally in the nature of a contract of mandate, it may be surmised that the rights and obligations flowing from the contract of mandate will apply to the relationship between a bank that provides electronic transfer services and its client who makes use of such services.

7.2 The Application of the ECT Act in *Diners Club v Singh*

Diners Club v Singh is the first reported case in which the ECT Act was applied to an electronic transaction made in the sphere of banking. The Court laid down a number of instructive guidelines as to the parameters of some of the provisions of the ECT Act. It further also ruled on the possibility, raised by counsel for the defendant, that the provisions of the ECT Act had in the present case infringed on his constitutional right to a fair trial.

In this case the card issuer, Diners Club, successfully relied on the protection provided by s 29(3) of the ECT Act to protect sensitive and secret information pertaining to technical detail and information of the security systems underlying the operation of their credit cards. As a result, the expert evidence given by a number of Diners Club employees was declared confidential, or witnesses were excused from answering certain questions under cross-examination by Singh's counsel. The Court held that the information divulged by Diners Club's employees in the course of their testimony, had to be treated as confidential by all parties and counsel involved, and that their testimony could only be used for purposes of the proceedings (at 672H-I). This protection is embodied in s 29(3) which provides that '[a] cryptography provider is not required to disclose confidential information or trade secrets in respect of its cryptography products or services'. The ECT Act provides detailed definitions of the concepts of 'cryptography provider', 'cryptographic services', and 'cryptographic product', the exact detail of which is not relevant for present purposes. Suffice it to say that the Court held (at 673H-674A) that the

> 'witnesses called to give evidence on behalf of [Diners Club] in relation to the operation of the cryptographic systems employed in South Africa were all employees of SBSA ... [and there is] absolutely no basis whatsoever for suggesting that the witnesses from SBSA do not fall within the definition of a cryptography provider. Although there is provision for registration of cryptography providers in terms of s 29 [of the ECT Act], whether or not such providers is registered has no bearing on the application of the provisions of the Act insofar as it seeks to protect, inter alia, the confidential information or trade secrets in respect of its products or services'.

Not surprisingly, Singh's counsel argued that the Court's order in this regard deprived Singh of a fair trail in so far as it was not possible to cross-examine the employees of Diners Club to investigate and test the hypothesis advanced by the expert witness on behalf of Singh that a dishonest insider in Diners Club's organisation had perpetrated the frauds in question.

In this regard counsel referred to various constitutional provisions and authorities which proclaim that a litigant's right to cross-examine witnesses is fundamental to the judicial system (see at 674B-C). The Court rejected these arguments. It held out that none of the information which counsel for Singh argued could not be extracted from the witnesses under cross-examination because of the protection provided for in terms of s 29(3) of the ECT Act, would have advanced Singh's case (at see 674E-678E). It concluded that there was no merit at all in the submissions that Singh's constitutional right to a fair trial had been impeded. At best for Singh, he would have been entitled to say that the weight attached to the witnesses' evidence might have been affected by their failure to answer certain questions. That, so the Court reasoned, was a far cry from saying that there was in general terms a curtailment of cross-examination. As a result, the Court rejected Singh's submission that he had not received a fair trial (see at 678F).

In my view Levinson J's decision on the effect of the ECT Act on Singh's right to a fair trial was correct, especially in view of the particular facts in the case. The fact that the information withheld from Singh under the protection of the ECT Act was not relevant or important to his case, made it easy for the Court to reject his submission that he did not receive a fair trial. But things might have been different had this information indeed been relevant or important to his case. Then the Court would have had to make a choice between the Diners Club's right to keep sensitive business information secret, on the hand, and Singh's constitutional right to a fair trial, on the other hand.

8 Conclusion

I believe that *Diners Club v Singh* was decided correctly. On the evidence adduced before the Court, there can be little doubt that the client in this case, Singh, was involved in fraudulent dealings. Singh then tried, through his fraudulent conduct and false testimony in court, to shift to the bank the blame for any loss he allegedly suffered. His testimony was labelled false and untruthful by the Court. Again, based on the reported judgment, one cannot fault the Court's finding on this point.

Singh's less than honest dealings with his bank may have resulted in future difficulties for clients of banks who wish to litigate against their banks on the basis of unfair contractual terms. The argument Singh advanced was not totally without merit. But I believe that his case was tainted to such an extent by his own fraudulent conduct and false testimony, that it was not really necessary for the Court to consider it seriously. Thus, Singh may well have caused other users of bank services a huge disservice. Although the Court did not refer directly to the aspect of good faith (that of banks in relying on a potentially unfair

contractual terms between them and their clients), one could safely assume that any attack on the bank's alleged bad faith in this regard would have been successfully countered by Singh's own fraudulent conduct.

There can further be little doubt that the vexed clause 7(3), like similar clauses in credit-card agreements between card issuers and card holders, was indeed potentially unfair in placing the risk of loss or unauthorised use of the credit card squarely on the cardholder, inter alia exposing the latter to the risk that an employee of the bank may collude with fraudsters outside the bank in appropriating the holder's card and PIN. But whether the provisions of clause 7(3) were *indeed* so unfair that it merited judicial intervention, is another issue altogether and one which will, in all probability, remain unanswered for the foreseeable future.

Another court, on another day, dealing with a more honest cardholder than Singh, may well lend a more sympathetic ear to the defence of an unfair contractual term in the agreement between the cardholder and the bank.