IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 15427/08

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

and

HUNKYDORY INVESTMENTS 188 (PTY) LTD First Defendant
THE NATIONAL CREDIT REGULATOR Second Defendant
THE MINISTER OF TRADE AND INDUSTRY Third Defendant

JUDGMENT: 1 JUNE 2009

OWEN ROGERS A.J.

Introduction

[1] The plaintiff, a bank, seeks summary judgment against the defendant, a company, on the strength of four mortgage bonds. The action was instituted by simple summons. The bonds attached to the summons were

registered on 11 May 2001, 8 August 2002, 10 May 2004 and 23 May 2004. The summons was issued on 25 September 2008. The sum claimed is R2 101 782,53 with interest from 3 September 2008 and an order is sought declaring the hypothecated property executable together with costs of suit on the attorney/client scale as provided for in the bonds.

[2] Notice of intention to defend was delivered on 7 October 2008, in response to which the plaintiff applied for summary judgment. An opposing affidavit was filed on 29 October 2008. On 30 October 2008 the matter was postponed to 1 December 2008. Heads of argument on both sides were delivered in November 2008. Because one of the defendant's grounds of opposition involved an attack on the constitutionality of certain provisions of the National Credit Act 34 of 2005 ("the NCA"), the matter was postponed from 1 December 2008 to 27 May 2009 to allow the joinder of the National Credit Regulator ("NCR") and the Minister of Trade and Industry ("the Minister"). Such joinder was ordered without opposition on 14 April 2009. Affidavits contesting the constitutional challenge were filed on behalf of the NCR and the Minister. (Although they were joined as second and third defendants, they are not parties against whom the plaintiff seeks any relief. All references herein to the defendant are thus to the defendant cited in the simple summons.)

The NCA issue

[3] The heads of argument on behalf of the plaintiff and defendant for the hearing before me on 27 May 2009 were those filed by the parties in November 2008. However, things have changed since then. The constitutional challenge is that it is unconstitutional for the NCA to exclude juristic persons from its ambit in the manner set out in ss4(1)(a)

and 4(1)(b). Precisely the same point had been raised in this court in case 6408/08. On 10 October 2008 my colleague Elize Steyn AJ gave judgment in case 6408/08 rejecting the constitutional challenge and granting summary judgment. The defendant in the present matter was aware of that case – indeed, the second defendant in case 6408/08 was a Mr Rupert Ingram, who happens also to have signed the plaintiff's standard terms and conditions on behalf of the defendant in the present case. Presumably the defendant, when filing its opposing affidavit in the present case on 29 October 2008, hoped that my colleague's judgment would be reversed on appeal. Alas, she refused leave to appeal, and this refusal was confirmed by the Supreme Court of Appeal and subsequently by the Constitutional Court, both of those courts finding that there were no reasonable prospects of success. The Constitutional Court's refusal of leave was issued on 7 May 2009.

[4] One would have thought that this would be the end of the NCA challenge. In the light of the Constitutional Court's refusal of leave to appeal in case 6408/08, the plaintiff's attorneys invited the defendant's attorneys to abandon the constitutional challenge. The attorneys acting for the NCR and the Minister extended a similar invitation. The defendant declined to abandon the challenge. The result was that the NCR and the Minister were represented by Mr Budlender at the hearing before me on 27 May 2009 and he submitted helpful heads of argument.

[5] I have been furnished with the court file in case 6408/08 and with the applications for leave to appeal to the Supreme Court of Appeal and to the Constitutional Court. The considerations raised in that case in the affidavit opposing summary judgment were not materially different from those raised in the opposing affidavit in the present matter. The

application for leave to appeal advanced virtually identical contentions to those contained in the defendant's heads of argument in the present matter regarding the alleged discriminatory and irrational differentiation drawn in the NCA between natural and juristic persons. This is hardly surprising, because Mr Barnard, who appeared for the defendant in the present matter, settled the applications for leave to appeal to the Supreme Court of Appeal and to the Constitutional Court in case 6408/08. Mr Barnard argued (somewhat faintly) that there were points of distinction. For example, in case 6408/08 the company's shareholders were not (as in the present matter) trusts but (apparently) private individuals, and in case 6408/08 a surety (a natural person) was sued jointly and severally with the company. Apart from the fact that these factual distinction are of no legal consequence, the constitutional validity of legislation is – as Mr Budlender correctly pointed out – an objective matter and is not affected by a particular litigant's circumstances (*De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) para 85 and cases there cited).

[6] I am thus bound to find that the constitutional challenge is bad in law. I may add that even if the matter were *res nova* I would have come to the same conclusion but in the circumstances no purpose would be served in dealing further with the merits of the issue.

[7] I should perhaps say something on a point of procedure. As noted, the NCR and the Minister filed affidavits in opposition to the constitutional challenge. Since this is an application for summary judgment I do not think that affidavits should have been filed at this stage. The summary procedure laid down in rule 32 permits no evidence beyond the plaintiff's confirmatory affidavit (rule 32(2)) and the defendant's opposing affidavit

(rule 32(3)(b)). If parties with an interest in a constitutional challenge foreshadowed in the defendant's opposing affidavit could file affidavits, then fairness would dictate that the defendant could respond thereto, and the whole procedure would assume an altogether different character from the summary procedure permitted by rule 32. If the court rejects the constitutional challenge on the defendant's own papers and grants summary judgment, the interested parties would suffer no prejudice. If summary judgment were refused, the interested parties could then be heard in the trial itself. The refusal of summary judgment on the strength of a constitutional challenge would not involve any declaration of constitutional invalidity. The court would merely be permitting the defendant to pursue the challenge by the appropriate procedure in the main case.

[8] Accordingly, if interested parties wish to be heard at the stage of summary judgment, their contribution should, in my view, be confined to making legal submissions on the papers filed in accordance with rule 32. Such parties could argue, for example, that on the defendant's own papers the point is without merit and should not be allowed to go forward, thereby saving them the costs of further proceedings.

The s228 issue

[9] Turning to the other grounds of opposition, I shall consider first the defendant's contention that the mortgage bonds are not binding on it because the passing of the bonds constituted disposals as contemplated in s228 of the Companies Act 61 of 1973 and because shareholder resolutions as required by that section were not procured. The factual foundation of the defence is contained in paragraphs 7 to 11 of the

opposing affidavit. There the deponent, one Jansen, alleges that the defendant has two trusts as its shareholders. He is the trustee of one of the trusts, namely the Castille Trust. He says that neither he nor the Castille Trust received notice of a general meeting to approve the registration of the bonds. He alleges that the company's only substantial asset is the hypothecated property (which is a residential property in Somerset West).

[10] The defence raises two main questions. The first is a legal one: does s228 apply to the registration of mortgage bonds over a company's main asset? The second is a factual one: was the necessary shareholder approval given? In addressing these questions I shall assume in the defendant's favour that the property was at all material times the defendant's only or major asset.

[11] As to the legal question, the issue is whether the registration of a mortgage bond over a company's main asset constitutes an act whereby the company "*disposes of*" the whole or the greater part of its assets within the meaning of s228(1). The range of transactions encompassed by the phrase "*dispose of*" has been the subject of some discussion in academic writing (see, eg, Von Willich *Die Uitwerking van a228 van die Maatskappywet 61 van 1973 op die Turquand-reël* (1988) 10 *Modern Business Law* 7 at footnote 77; Ribbens *Disposal of the Undertaking of the Whole or Greater Part of the Assets of a Company* (1976) 37 *THRHR* 162 at 164-166). Since the issue is one of considerable practical importance it warrants careful consideration.

[12] The ordinary meaning of the phrase "*dispose of*" is "*to make over or part with by way of sale or bargain, sell*", "*to transfer into new hands or to the control of someone else (as by selling or bargaining away)*" (see *Kinloch*

NO and Another v Kinloch 1982 (1) SA 679 (A) at 697H-698C). The Afrikaans text uses the verb "*vervreem*" which was said in *Grobler v Trustee Estate De Beer* 1915 AD 265 to mean the act of transferring ownership (at 274). I do not think that one would ordinarily describe a transaction whereby a debtor agrees to the hypothecation of his property as one whereby the debtor disposes of the property to the creditor or to anybody else. True, if the debtor defaults and the creditor becomes entitled to execute on his security the property may then be transferred and lost to the debtor, but the object of the transaction from the debtor's perspective is not to part with his property and if all goes well the property will stay with him. If the property is eventually disposed of, that is not because that is the wish or intention of the debtor but because the creditor has rights under the bond which, because of the debtor's default, the creditor can enforce whatever the debtor's wish may be. Moreover, when property is sold in execution, the person who sells the property is the sheriff, not the debtor (see *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T) at 674H-676D; *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central and Another* 1997 (1) SA 764 (D) at 773E-774B; *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town and Others* 2005 (6) SA 96 (C) para 66).

[13] Mr Barnard for the defendant referred me to the interpretation of *"disposition"* in s1 of the Insolvency Act 24 of 1936. Since a statutory definition often has the effect of broadening the ordinary meaning of a word, I do not think any assistance can be derived from the Insolvency Act. The same holds true for ss340 and 341 of the Companies Act. If the word *"disposition"* in those sections has the same meaning as in the Insolvency Act (as was held in *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79 (C) at 85E), that is because s339 of the

Companies Act so provides in relation to companies which are being wound up.

[14] Mr Barnard also cited certain cases to the effect that a prohibition on alienation also prohibits hypothecation. The case of *Estate Foley Alias Melville v Natal Bank* (1883) 4 NLR 26 concerned a statutory provision to the effect that no transfer of shares would be valid until approved by the company's directors. The court held, with reference to certain old authorities, that when alienation is prohibited so is pledging or hypothecation. I have consulted some of the old authorities (including Voet 27.9.4 and the Code 4.51.7). Some of these authorities are concerned with limitations on the power of a guardian to deal with his ward's property. I can understand that in certain contexts the same reasons which justify limitations on an outright disposal would also apply to hypothecation, but this is not of much assistance in interpreting the words "*dispose of*" in the Companies Act. I may add that a restriction on the "*transfer*" of shares may potentially have a different meaning from a restriction on the "*disposal*" of shares. If, in order to create a pledge of shares, the shares are to be transferred into the name of the creditor, the restriction on transfer may well be applicable. As noted, *Estate Foley* was such a case, as was one of the other cases cited by Mr Barnard, namely *Britz NO v Sniegocki and Others* 1989 (4) SA 372 (D).

[15] Mr Barnard also referred to *Ex Parte De Jager* (1926) 47 NPD 413. That case concerned a will which created a *fideicommissum*. In terms of the will the fiduciaries were not to sell or dispose of the property in any manner. The court held that the will prohibited the mortgaging of the property, since a mortgage "*is a first step to a sale in execution, if the debt is not repaid*". Again, I do not find the meaning attached to the will in

that case to be of much assistance in interpreting s228. It is true that a mortgage might result in a sale in execution, but whether this potential result means that the creation of the mortgage is itself a disposal depends on the proper interpretation of the relevant provision. While a mortgage might eventually result in a forced sale, it is not a transaction which has a sale as its object and the forced sale, if it eventuates, is not one to which the mortgagor is party. This is, to my mind, a material distinction, because what s228 regulates is not a disposal of the company's assets *simpliciter* but a disposal of such assets *by the directors*. As pointed out in *Sedibe supra* at 676A-B with reference to an execution sale, the fact that judgment debtors were the owners of the property "*affords no basis for the legal fiction that they were really disposing of the property"*.

[16] In any event, I consider that the description of a mortgage as the first step towards a disposal of the hypothecated property is not really accurate. Whenever a company borrows money or incurs a debt the company's assets are exposed to the risk of attachment and disposal by judicial sale. To take the present case as an example, the bank – even if there were not a mortgage – could take judgment on its loan and then attach the property for sale in execution (on the defendant's own version the company has no or insufficient movable assets to meet the debt). The only real difference which the mortgage makes is that if the defendant were to have other creditors apart from the bank, the mortgage would give the bank preference in the judicial sale whereas without the mortgage the bank would have to share *pro rata* with other judgment creditors (if there were any). With or without the mortgage, the property would be "*disposed of*" (though by the sheriff, not the company). (A similar analysis applies if the forced sale were to occur pursuant to the company's liquidation.) Thus the transaction which exposes the company's assets to the risk of forced

disposal is the borrowing of money or the incurring of debt, not the mortgage *per se*. Yet nobody could with accuracy say that the borrowing by the company of a sum equal to the greater part by value of the company's assets is the first step towards the disposal by the company of the greater part of its assets[1].

[17] In short, to construe s228 as applying to mortgages is to extend its operation to cases where the transaction which could potentially result in the disposal of the company's assets is the borrowing of money or the incurring of debt. But was it the legislature's intention to provide shareholders with that protection? If so, why stop at mortgages? As noted earlier, any transaction whereby debt is incurred equal to a greater part by value of the company's assets exposes the greater part of the company's assets to the risk of forced disposal, even if no security is given. The mortgage is not the component of the transaction which creates the risk of forced disposal; the mortgage merely determines who benefits first from the forced disposal. The mortgage has significance for the creditors, not the debtor company (which would, if it ran into financial difficulties, face a forced disposal in any event).

[18] Section 228's predecessor in the Companies Act 46 of 1926 was s70*dec*(2), introduced by Act 46 of 1952. For many years prior to that time (indeed, from the inception of the 1926 Act) the question of directors' powers to borrow money and to mortgage the company's assets had been dealt with in the standard articles of association attached as a schedule to the Act. Those articles (though in slightly different form) are

[1] A mortgage bond often serves the function not only of hypothecating property but of simultaneously recording an acknowledgment of debt and the terms of the contract creating the indebtedness (see *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 (3) SA 25 (A) at 31D-32F). The argument that a mortgage is a disposition of the pledged property must necessarily be confined to the bond's character as a deed of hypothecation.

now to be found as article 60 of Table A and article 61 of Table B in Schedule 1 to the current Act[2]. They provide that the amount for the time being remaining undischarged in respect of monies borrowed or secured by the directors shall not, without the prior sanction of the company in general meeting, exceed one-half of the amount of the company's issued share capital plus the amount of the share premium account (if any) or of the stated capital. An exception is made for temporary loans obtained from the company's bankers in the ordinary course (where the amount borrowed or secured may exceed the said half). These standard articles are and have always been subject to alteration (this is true both of the 1973 Act and the 1926 Act), and the directors could thus be given (and often are given) more extensive powers to borrow and charge property.

[19] If in 1952 (when s70*dec*(2) was introduced) the legislature's intention had been to alter the existing state of affairs (whereby directors' powers to borrow and charge property were regulated by variable articles), the amending legislation would have made this clear. The language of the new s70*dec*(2) would have been more explicit and the standard articles of association relating to the directors' powers to borrow and mortgage property would have been qualified. The absence of these features fortifies me in my view that the legislature was rather seeking to restrain disposals by directors in the narrower (and ordinary) sense. Furthermore, if s70*dec*(2) had been intended to apply to mortgages there are other issues to which one would have expected the legislature to give explicit attention. In the case of a mortgage, is the "*greater part*" issue to be judged by the value of the mortgaged property or by the secured amount? In the case of a mortgage, how are directors to go about getting

[2] In the 1926 Act there was a single table of standard articles. The borrowing power of directors and the associated power to give security for borrowed moneys were dealt with in articles 51 and 52 respectively. A special resolution was required for borrowings exceeding one half of the issued share capital.

shareholder approval for the "*specific transaction*"? Where property is sold or exchanged, the terms of the sale or exchange can be formulated and placed before shareholders for approval. In the case of a mortgage, the terms of the bond could be placed before the shareholders but the bond would not (and could not) set out the terms of the potential future disposal of the property (since the future disposal would be a forced sale whose terms would be determined by the sheriff or the company's liquidator).

[20] I noted earlier that s70*dec*(2) was introduced by Act 46 of 1952. This was one of a number of amendments made to the 1926 Act pursuant to the final report of the Millin Commission dated 13 September 1948 (UG No 69–1948) in order to give shareholders greater protection from potential abuses of power by directors. In paragraph 156 of the Millin Commission's report the following was said concerning the proposed new provision (at that stage to be numbered as s70*dec*(3):

> "*Sub-section (3) contains another limitation on the power of directors which was advocated by the accountants and other witnesses. It is to prevent the directors from disposing of the whole or the greater portion of the assets of the company without the consent of the company in general meeting to the specific transaction proposed. This is a provision upon which the Johannesburg Stock Exchange has for many years insisted as a necessary article for companies seeking a quotation.*
>
> *We have been urged to recommend a provision in the Act to restrict the borrowing powers of directors on behalf of the company, but, on consideration, we think this is a matter which can be left, as in the past, for regulation by the articles of association. See section 51 of Table 'A'.*"

[21] This makes it clear, I think, that the mischief at which the new section was directed was a disposal in the form of a transfer of ownership rather than a transaction which exposed the company's assets to the risk of forced

disposal because of borrowing[3]. Although the Millin Commission's report did not expatiate on the ambit of the provision insisted upon by the Johannesburg Stock Exchange nor on the evidence received by the Commission in support of the new provision, it is of interest to note that a few years later the Jenkins Commission in England, in its report dated 5 January 1960 (Cmnd 1749, presented to Parliament in June 1962), recommended the adoption of a very similar provision. The Jenkins Commission referred in paragraph 111 to cases, albeit rare, in which directors vested with wide delegated powers made use of those powers "*for the purpose of diverting the company's assets without the knowledge of the shareholders to uses to which the shareholders if they had been consulted might well have objected*". The Commission made this observation just after mentioning that one of the usual exceptions to the directors' wide management powers was the provision in the standard articles limiting directors' borrowing powers, and the Commission thus clearly saw itself in paragraph 111 as addressing a different mischief. In paragraph 113 the Jenkins Commission said that after full discussion they had come to the conclusion that a case was made out for legislation *inter alia* "*excluding from the general delegation of power to directors any sale of the whole of substantially the whole of the company's undertaking and assets*" (my emphasis). They expanded on this aspect in paragraph 117:

"*We agree with the Institute of Chartered Accountants in England and Wales that 'in general the principle should be that the function of the directors is to manage the shareholders' business, not to dispose of it.' We also agree with the Federation of British Industries who stated that 'it is already standard practice among well-conducted companies to obtain the consent of the shareholders to a sale of a substantial part of the company's undertaking.' The balance of opinion of witnesses was heavily*

[3] On the use of commission reports in the interpretation of statutes as an aid to discovering the mischief with which the statutory provision is concerned, see *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 668H-669D and cases there cited.

in favour of some statutory requirement of approval by the shareholders before the disposal of the whole or substantially the whole of the undertaking or assets of the company. Those relatively few who opposed this suggestion did so mainly on the grounds that, by interposing a delay and involving publicity, the Act might in some cases frustrate the directors' attempts to conclude a bargain advantageous to the shareholders. However, if prior consultation were in future always obligatory for all companies we think it unlikely that shareholders would be baulked of an advantageous bargain because of it; the directors would still be able to negotiate and conclude, in privacy, with the purchaser an agreement which was conditional on its subsequent acceptance by the shareholders. In any case it would seem that the possible risk of losing an advantageous bargain must be accepted as a necessary incident of control by shareholders in this fundamental matter."

[22] It seems likely that the Millin Commission's recommendation was based on similar grounds. The provision was again debated in the main report of the Van Wyk De Vries Commission dated 15 April 1970 (RP45/1970). The latter Commission had the benefit of the Jenkins Commission's recommendations[4]. Despite some criticism of s70*dec*(2), it was taken up as s228 of the 1973 Act[5]. If the Jenkins Commission's report reflects the mischief with which the provision is concerned, this would favour the narrower (and ordinary) meaning of the words "*dispose of*". It might be said that a sale or other transfer of the company's business or the bulk of its assets to a third party is too far removed from the director's proper domain of managing the company's business to be permitted without shareholder approval. By contrast, borrowing money for use in the business is an act of management, and the director should be free to do so (and to give security) subject to any limitations set by the articles of association. There is no hint in the report of the Van Wyk De Vries Commission that transactions other than outright disposals were in mind.

[4] See para 9.04 of the report and para 9.02 of the reservations of Mr Suzman QC (annexure "C" to the report).

[5] See paras 44.44-44.47 of the main report. The new s228 did not, however, follow the recommendation in the main report that the prohibition in question be treated as a limitation on the powers of the company rather than on the powers of the directors.

[23] Accordingly, and accepting for the moment that in certain contexts the words "*dispose of*" might be given a wide meaning that could include hypothecation, I see no warrant for adopting the wide meaning in the interpretation of s228(1). The meaning I favour is the one espoused by the learned authors of *Henochsberg on the Companies Act* at page 444. It is supported by the *prima facie* view expressed by Basson AJ in *Advance Seed Company (Edms) Bpk v Marrok Plase (Edms) Bpk* 1974 (4) SA 127 (NC) at 132E, which Mr Sievers for the plaintiff cited in his heads. It is also in accordance with a judgment not cited in the heads, namely *Alexander and Another NNO v Standard Merchant Bank Ltd* 1978 (4) SA 730 (W), a decision of Viljoen J (as he then was). That case concerned a pledge of shares as security for a debt. The case was decided on the factual assumption that the shares constituted the greater part of the company's assets. It seems that eminent counsel on both sides took the view that disposal in s70*dec*(2) and in s228 meant an outright transfer, and clearly Viljoen J agreed with that view. The main issue in the case involved the question whether the pledging of incorporeal property inevitably involved the complete transfer of the rights to the creditor. That question was answered in the negative, but it was a question which would have been irrelevant if in the ordinary course a hypothecation of corporeal property was covered by s70*dec*(2). I might add that in the majority judgment in *Kinloch*, which I mentioned earlier on the ordinary meaning of "*dispose of*", Corbett JA cited *Alexander's* case with approval (see at 698B-C).

[24] I thus conclude that in law the s228 point is bad. But even if the law point had merit, I do not think the defendant has advanced sufficient facts in support of it. In assessing this question one must remember that the level

of factual detail required by an affidavit in opposition to summary judgment depends on the circumstances. What is important in the present case is that the s228 point does not traverse an issue on which the plaintiff has alleged a version. There is no indication that the s228 issue was ever raised prior to the filing of the opposing affidavit on 29 October 2008. It would thus seem to have come as a bolt from the blue, more than seven years after the first of the four bonds was registered and more than three and a half years after the last of the bonds was registered. The plaintiff could not have been expected to deal with this issue in the summons. After all, and as each of the bonds records, a conveyancer had appeared before the registrar of deeds armed with an apparently valid power of attorney from the defendant. In those circumstances, fullness and candour from the defendant in its opposing affidavit are of particular importance.

[25] Now it appears from Jansen's affidavit that the property is a residential dwelling in which Jansen lives with his family. He says that the defendant was created for estate planning purposes. He had been advised that he should protect personal assets in case something went wrong with his business and so that he could continue to provide for his family. He says elsewhere that "*we transferred the property to a different legal entity to protect the property should anything go wrong with my business*". Jansen is apparently the sole trustee of the Castille Trust. He does not say that he was unaware of the passing of the bonds. Although he is not explicit on this point, I gather from paragraph 9 of his affidavit that the first bond was passed simultaneously with the purchase of the property into the company's name. Since the property is Jansen's family residence, it is scarcely credible that he did not know of and approve the purchase of the property and the registration of the first bond. Indeed, and as noted, he describes himself as the active party in causing the property to be

transferred into the company's name. Jansen says absolutely nothing about the other trust, namely the Gibbus Trust. He does not say who its trustee or trustees are and what their knowledge was of the transactions. For all one knows, the Gibbus Trust's trustee could be Jansen's wife or his brother. Jansen does not explain anything about the purchase of the property or what the shareholders knew of the purchase and its funding. He also says nothing of how it was that bonds were registered and presumably at least partly serviced for a number of years. All of this cries out for explanation, since on the scanty facts alleged in the opposing affidavit it is impossible to suppose that the company's two shareholders were unaware of the transactions.

[26] I make these points, because the defendant seems to think that its defence is made good by the mere technical assertion that the Castille Trust never received notice of a general meeting. But that is not enough to make out a *bona fide* defence of non-compliance with s228. In the present case we are concerned with s228 as it read prior to the amendments brought about by s21 of Act 24 of 2006 with effect from 14 December 2007. It has been held on more than one occasion that s228 (at least in its pre-amendment form) can be complied with through the doctrine of unanimous assent without the formality of a general meeting (see *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others* 1963 (2) SA 174 (E) at 180H-181A; *Advance Seed supra* at 132G-133D; *Levy and Others v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 484F-485H; cf *Gohlke & Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 693E-694E). In the circumstances of this particular case, disclosure of a *bona fide* defence and the material facts of the defence required the defendant to allege that at least one of the two shareholders did not know of and approve the registration of the bonds.

There is no such allegation. Jansen says that the Castille Trust did not receive notice of a general meeting. Jansen does not say that he or the Castille Trust did not know and approve of the registration of the bonds. And he says nothing about the other trust's state of mind. I cannot help but think that the failure candidly to disclose the position was deliberate.

Quantification discrepancy

[27] The other so-called defences can be addressed more briefly. The defendant says that the certificate of indebtedness as at 3 September 2008 in the sum of R2 101 782,53 cannot be reconciled with the bond statements, which reflect a balance of R2 096 905,63 on 2 September 2008 and R2 098 655,45 on 24 October 2008. As Mr Sievers pointed out in argument, the explanation is almost certainly that the certificate incorporates interest from 30 August 2008 (the date of the last interest debit) to 2 September 2008. Be that as it may, Mr Sievers is willing to confine the plaintiff's claim to the amount of R2 098 655,45, and clearly summary judgment cannot be refused based on such trifling differences.

Counterclaim

[28] The defendant in his opposing affidavit foreshadows a counterclaim in the sum of R20 000 for breach of privacy because the plaintiff allegedly disclosed information to one Peter Barret and other identified persons. Even if the proposed counterclaim had been properly alleged, I would not have refused summary judgment on this basis. The principles governing summary judgment where the defendant raises a counterclaim to a part of the plaintiff's claim were considered by Brandt JA in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA

29 (SCA). The modest amount of the counterclaim is such that the plaintiff should not be kept out of pocket pending its determination. In any event, the counterclaim is so baldly alleged that it is quite impossible to assess its *bona fides*. The defendant does not explain why the disclosure of the defendant's address, telephone numbers, banking account and "*other details*" should have caused the defendant harm, or who Peter Barret is. Moreover, since the claim is apparently based on breach of contract, a claim for general damages (as distinct from proved pecuniary loss) would not lie (see *Administration, Natal v Edouard* 1990 (3) SA 581 (A) at 596D-597H). The circumstances of the disclosure by the bank are not alleged so that the court can assess whether the disclosure was or was not unlawful.

Section 26 of Constitution

[29] Finally, and in accordance with paragraph 25 of the decision in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), the simple summons in this case alerted the defendant to s26 of the Constitution which accords to everyone the right to have access to adequate housing. The summons stated, further, that if the order for execution would allegedly infringe the defendant's rights under s26 the defendant should place information before the court in that regard. Jansen has purported to do so by alleging in the opposing affidavit that he and his family live in the house and that his brother and family also live there from time to time. He says that if summary judgment were to be granted he would lose his family home and his place of business.

[30] While I do not wish to minimise the distress which Jansen and his family may suffer if they have to vacate the property, s26 of the Constitution

enshrines a right of access to *"adequate"* housing, not a right to continue living in the house of one's choice even though one cannot afford it (cf *Saunderson* para 16). According to the opposing affidavit the property is worth about R3 million. Since the indebtedness to the bank is about R2,1 million, there should be a residue available to the defendant of some R900 000. In the absence of more detailed information, which the defendant has chosen not to proffer, it is quite impossible to say that the granting of summary judgment would violate anybody's constitutional rights. Furthermore, Jansen has not disclosed by what arrangement he and his family occupy a house belonging to a company of which two trusts are shareholders. If there is a valid lease with the company, a sale in execution will not necessarily result in Jansen having to vacate the dwelling. The Constitutional Court in *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) set out in paragraphs 56 to 60 the sorts of considerations which would typically be relevant in assessing whether execution against immovable property would be an unjustified violation of the occupier's s26(1) rights. The defendant has not begun to make out a case with reference to these types of considerations. (I should add that in considering this question I have assumed in the defendant's favour that s26 is potentially applicable on the basis that I can look through the defendant company and through the trusts to the individuals who live in the house. Since counsel did not address this aspect in their submissions, I express no opinion on the applicability of s26 to juristic persons.)

Costs and order

[31] As to costs, Mr Budlender submitted that although the courts do not generally order costs against a litigant who has unsuccessfully asserted fundamental rights against the State, there is no inflexible rule to that

effect. The courts will not condone the raising of dilatory constitutional challenges (see *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC) para 39). Mr Budlender submitted that the defendant's conduct in persisting with the constitutional challenge after the Constitutional Court had refused leave to appeal in case 6408/08 was unreasonable. I agree and this will be reflected in my order.

[32] I make the following order:

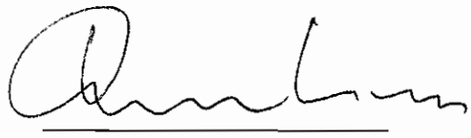
(a) The defendant is ordered to pay the plaintiff the sum of R2 098 655,45 (being the balance owing on 24 October 2008) together with interest at the rate of 14,25% per annum from 3 September 2008 (being the date of the last interest debit), such interest to be reckoned on daily balance and capitalised monthly in arrear in terms of clauses 3.7 and 1.2 of the bonds.

(b) The hypothecated property, namely Erf 3185 Somerset West in the City of Cape Town Division of Stellenbosch, is declared executable for the said sums.

(c) The defendant is to pay the plaintiff's costs of suit on the scale as between attorney and client as provided for in clause 1.1.3 of the bonds.

(d) The defendant is also ordered to pay the costs of the National Credit Regulator and the Minister of Trade and Industry, such costs to be taxed on the party and party scale and to be limited to the costs directly incurred in connection with the hearing on 27 May 2009 (including the costs of engaging counsel for the hearing and of filing

heads of argument, but excluding the costs associated with the joinder of these parties and with the affidavits filed on their behalf).



OWEN ROGERS AJ

1 JUNE 2009