THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 463/04

In the matter between:

NEVILLE WILLIAM MACKAY **Appellant**

and

EILEEN MARGARET FEY NO **1ST Respondent**
MICHAEL JOHN LANE NO **2ND Respondent**

Coram : **HARMS, SCOTT, ZULMAN, CAMERON *et* JAFTA JJA**

Date of hearing : **29 August 2005**

Date of delivery : **22 September 2005**

Summary: **Insolvency – relationship between s 20 and s 23(2) of the Insolvency Act – essence of a simulated transaction is an intent on the part of both parties to deceive**

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The respondents in this appeal are the joint trustees of the insolvent estate of Mr Jurgen Harksen. They were provisionally appointed in 1995 and their appointment was made final in 1999. I shall refer to them as the trustees. The appellant is a businessman and resides in Gauteng. In November 2000 he purchased an expensive dwelling in the Cape, known as 16 Third Beach, Clifton ('the bungalow'), and took transfer in January 2001. In February he signed a lease agreement which had been negotiated on his behalf by a letting agency called Accommodation Shop CC. The lessee was stated in the lease to be Mrs Jeannette Harksen and it was purportedly signed by her. She is the wife of the insolvent. The appellant had met neither. The circumstances in which the lease came to be concluded were the subject of much evidence and I shall refer to these in detail later. For the moment it is sufficient to record that the lease was for a period of 10 months and expired at the end of November 2001. The rent was R25 000 per month. In addition, the lessee was obliged to pay various incidental expenses such as a domestic worker's salary, telephone and electricity charges and administration fees. In all, a total amount of R271 290,63 was paid to the appellant through the letting agency which deducted its commission. In November 2002 the trustees instituted action against the

appellant in the Cape High Court for repayment of the total amount which the lessee had paid pursuant to the lease.

[2] The case against the appellant, as pleaded, was in short the following. It was alleged that Harksen himself (and not his wife) had entered into an oral lease with the appellant; that the money paid to the appellant as rental had emanated from the insolvent estate, and that the conclusion of the lease had been concealed from the trustees and was without their knowledge or consent. Accordingly, so it was pleaded, the money paid to the appellant constituted property which in terms of s 20 of the Insolvency Act 24 of 1936 was vested in the trustees. In the alternative, it was alleged that in terms of s 23(2) of the Act the lease and the payments made were voidable at the instance of the trustees who had elected to regard them as void.

[3] In his plea the appellant denied the existence of an oral lease with Harksen and alleged that he had entered into a written lease with Mrs Harksen. He denied, too, that the funds used to pay the rental emanated from Harksen's insolvent estate. In the alternative, it was pleaded that in the event of it being found that the conclusion of the lease and the payment of rent constituted an alienation for valuable consideration as contemplated in terms of s 24(1) of the Act, then the alienation was nonetheless valid as

the appellant ‘was not aware and had no reason to suspect that Mr Harksen was the true lessee [and] that his estate was under sequestration’.

[4] The trustees filed a replication in which they alleged that in the event of it being found that the payments of rental were made pursuant to the written lease alleged by the appellant, then the reference therein to ‘Mrs Jeanette Harksen’ as the lessee was a simulation, the true lessee being Harksen himself. It was further alleged that in any event the payments made in terms of the lease were made by Harksen with money that vested in the trustees.

[5] In the court below the appellant accepted that the funds used to pay the rental had not emanated from Harksen’s insolvent estate and in this court the defence was abandoned. The trustees, on the other hand, did not persist in their claim that for this reason alone the rental received by the appellant was repayable and the question was not considered by the trial judge (Waglay AJ). The learned judge found, however, that the purported lease between the appellant and Mrs Harksen was a simulated transaction and that the true lessee was Harksen himself who had paid the rent with funds belonging to his insolvent estate. He furthermore rejected the defence raised in terms of s 24(1) of the Act, holding that the appellant not only had reason to suspect that Harksen was insolvent but must have been

aware of his status as an insolvent. It was accordingly held that the lease was voidable at the instance of the trustees in terms of s 23(2) of the Act and that they were entitled to the sum claimed. The appeal is with the leave of the court *a quo*.

[6] Before dealing with the true nature of the lease, it is necessary to say something about the claim based on s 20 of the Act (which was not proceeded with) and the relationship between that section and s 23(2) on which reliance was placed at the trial. In terms of s 20 the effect of sequestration is to vest the insolvent's estate in the Master until a trustee has been appointed and upon the latter event to vest it in the trustee. The estate of the insolvent is moreover stated to include all property which the insolvent may acquire or which may accrue to him or her during the sequestration, except as otherwise provided in section twenty-three. It follows that where the insolvent without the consent of the trustee delivers specific property vesting in the trustee to another, whether in pursuance of a contract or otherwise, the trustee may recover the property by way of a vindicatory action. The reason is that in the absence of the consent of the trustee, the insolvent has no authority to pass ownership to another. Had Harksen, for example, delivered specific property to the appellant in pursuance of a contract between his wife and the appellant, the trustees

could simply have recovered it on the basis that it belonged to the estate. But money is different; unless in some way identifiable or possibly ear-marked as a particular fund, money in the hands of a payee becomes the property of the payee by *confusio* and cannot be recovered by vindicatory action (see *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) 810H-811H; *S v Gathercole* 1964 (1) SA 21 (A) at 24F-25E). If it is assumed for the moment that the contract of lease in the present case was indeed one between Mrs Harksen and the appellant, as the latter alleges, and Harksen had used money emanating from his insolvent estate to discharge the lessees' debt, it would follow that the trustees' action against the appellant for repayment would be limited to an action based on unjustified enrichment. But the difficulties that would be associated with such an action are readily apparent. The trustees in these circumstances may well have had a claim against Mrs Harksen whose debt had been discharged. This could result in the trustees being unable to show that the estate had been impoverished. Similarly, as the payment would have had the effect of discharging the debt owed to the appellant, the latter would be precluded from recovering the debt from Mrs Harksen, in which event the appellant would not have been enriched. But none of this was pleaded or canvassed in evidence and need not be considered further. Instead, the trustees

based their claim on an alleged contract of lease between Harksen and the appellant which it was contended fell within the ambit of one or other of the provisos to s 23(2) of the Act and which for that reason entitled them to repayment of the rental. It was assumed by counsel both in this court and in the court below that in the event of this being established the trustees would be entitled to succeed. In the absence of full argument on the issue and in view of the conclusion to which I have come regarding the identity of the parties to the lease, I shall similarly assume, without deciding, that the approach adopted by counsel was correct.

[7] Nonetheless, I propose to make certain observations regarding the issue. Section 23(2) reads:

'23(2) The fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not, without the consent in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected, but in either case subject to the provisions of sub-section (1) of section *twenty-four.*'

[8] The first proviso is of little assistance because it adds nothing to s 20(2). An insolvent has no authority to dispose of any property of the insolvent estate and a contract whereby the insolvent purports to do so

cannot be enforced against either the trustee or against the insolvent. In any event, it is doubtful whether the written lease – assuming it to have been in the name of Harksen – 'purported' to dispose of any property of his insolvent estate. Harksen merely undertook to pay rental. He did not undertake to pay rental with monies belonging to the insolvent estate. It may have been an unrealistic undertaking but that does not necessarily mean that he 'thereby' (ie, the contract) purported to dispose of estate assets.

[9] However, given that the rental was R25 000 per month and, as will become apparent, the Harksens already had a house in Constantia not far from the bungalow, it would seem that the contract, if with Harksen, was one 'whereby his estate or any contribution towards his estate which he is obliged to make is or is likely to be adversely affected' within the meaning of the second proviso.

[10] Although not expressly stated in the section, it is well established that a contract entered into by an insolvent falling under either the first or second proviso to s 23(2) is voidable only and not void. See *W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) 728 (T) at 731A-732C; *Ex Parte Olivier* 1948 (2) 545 (C) at 548-549; *Fairlie v Raubenheimer* 1935 AD 135. In the event of such a contract being avoided the appropriate remedy is

restitutio in integrum. In *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) at 743H Van den Heever J formulated the remedy thus:

'In *restitutio in integrum* an attempt is made to put the parties to a contract retrospectively declared null and void *ab initio,* into the same position in which they would have been had the contract not been concluded.'

It has frequently been said that the action for *restitutio in integrum* is a separate and distinct remedy and that it is not an enrichment action. See *eg Davidson v Bonafede* 1981 (2) SA 501 (C) at 510A-E where Marais AJ cites with approval *De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2ed at 144. However, under the influence of English law, which recognises *restitutio in integrum* as based on unjust enrichment, there has been over the years a general relaxation of the rule that a party seeking restitution must first be willing and able to restore what he or she received. See Daniel Visser 'Unjustified Enrichment' in *Southern Cross: Civil law and Common law in SA* editors Zimmerman and Visser at 536-537. Whether the need to make restitution is excused, either wholly or partially, will now depend upon considerations of equity and justice and the circumstances of each case; the occasions on which it will do so are not limited to a specified and limited number of exceptions. See *Feinstein v Niggli* 1981 (2) SA 684 (A) at 700G-701C where the cases are collected. If

one assumes that trustees are as a matter of principle entitled to restitution, they are unable in the present case to return what was received by the lessee, ie occupation of the premises, but that of course is due to no fault of their own. It is also true that s 23(2) is subject to s 24(1) which would afford some protection for a party entering into a contract with an insolvent. However, whether the trustees would be excused from making any form of restitution is not an issue that was debated before us.

[11] Another question that arises is the correctness of the assumption that a trustee who avoids a contract under s 23(2) is in principle entitled to restitution. A contract entered into by an insolvent is prima facie valid and the contract is one between the insolvent and the third party, whether the trustee gives the necessary prior consent or ratifies the agreement or chooses not to avoid it. The trustee does not derive any rights or benefit from the contract; nor could it create liabilities for the insolvent estate. If the trustee avoids the contract, should reciprocal restitution not therefore take place between the parties to the contract? A few examples will illustrate the problem. If, for instance, an insolvent buys an expensive motor vehicle, it is unlikely that the trustee would have to restore possession. If an insolvent hires a house within his means, the contract is valid, but if he hires one beyond his means but pays the rental, the trustee may avoid the lease

because it may affect the ability of the insolvent to make a contribution towards his insolvent estate. Can the trustee simply step into the shoes of the insolvent and claim everything the third person received from the insolvent? A third example: an insolvent sells a vehicle belonging to his new estate, ie an estate he has validly acquired subsequent to sequestration. The trustee believes that this may affect the insolvent's earning capacity and his ability to make a contribution, and avoids the contract. Is it likely that the trustee will then be entitled to restitution? All this suggests that the proviso does not purport to deal with the disposal of estate assets (something Harksen did by paying the rental) but rather with the validity of a contract whereby the insolvent estate 'is or is likely to be adversely affected' and that a trustee in a case such as this has to rely on either vindication or enrichment. But, as I have said, there was no debate before us on the issue and I shall assume that the trustees were entitled to succeed if the parties to the contract were the appellant and Harksen. It is common cause that the latter did not have the consent of the trustees.

[12] No attempt was made to prove the oral lease alleged by the trustees. The latter accordingly bore the onus of proving that the written lease alleged by the appellant was a simulated transaction and that in truth the lease was a contract between the appellant and Harksen himself. To

determine this issue it is necessary, first, to trace the events leading up to the conclusion of the lease. Much is common cause.

[13] As previously indicated, the appellant purchased the bungalow in November 2000. Its value was in excess of R10m. The furniture alone was said to be worth something in the region of R1 000 000 and included artifacts imported from Bali. The appellant, who also owned another dwelling in the vicinity, was initially in two minds whether to let the bungalow but after taking transfer was approached by two letting agents who both indicated that the previous tenant was anxious to hire the bungalow for a further period. On 18 January 2001 the appellant wrote by email to the former owner, Ms Patsy Watson, requesting information concerning the tenant and the rent that was paid. He noted that he had been told that the tenant only used the bungalow over weekends which, he said, seemed amazing given that he paid rental for the whole month. Watson replied on the same day. After giving details of the rental, ie R25 000 per month and other expenses paid by the tenant, she wrote:

‘The lease agreement was signed by a Mr Studer. However, the de facto tenant was Mr Jurgen Harksen, his wife Jeannette and their three children. Mr Harksen is a German who has been the subject of a number of extradition attempts by the German government, as he is wanted for massive bank fraud in Germany. He is also the subject

of many articles in “Noseweek” and is apparently widely regarded as a “conman”. I was not aware of the identity of the real tenant until after he had moved out.

The tenants did not use the premises often, and were model tenants. However, once the identity of the “real tenant” became apparent, I was told some horror stories about previous lets he had undertaken which had resulted in litigation. Although this was not our experience, and it is all hearsay, perhaps you should bear it in mind.’

The reference to ‘horror stories’ was a reference to an incident involving Mrs Harksen repainting the walls of a hired house on some previous occasion. The appellant remained concerned but his concern related to the ‘horror stories’ rather than to the extradition attempts. The following day he again wrote to Watson saying:

‘My greatest fear in renting the bungalow is that some people would not appreciate the quality of the house and the preciousness of the furnishings and objects - and leave a trail of damage.

I am really troubled about Mr Jurgen Harksen. On the one hand it seems he looked after the bungalow very well, and as he rarely used it he was the ideal tenant. But I am disturbed at the horror stories . . . .’

Watson replied the same day in effect recommending Harksen as a tenant. She said:

‘I understand how you feel about Mr Harksen - if it helps, I would let the bungalow to him again if it were my decision, because he really seemed to have a love for the place, and treated it very well. Gladys also liked the family which I took as a good sign.’

(The ‘Gladys’ referred to was the domestic worker.)

[14] Thus assured, the appellant wrote to Mr Keith Ferguson, an agent employed by Accommodation Shop who had been pressing the appellant to let the property, proposing the terms on which he was prepared to enter into a lease. (This letter and all subsequent correspondence, unless otherwise stated, was sent by telefax.) Ferguson replied, recording Harksen’s comments on the proposed terms and annexing a copy of the previous lease with Watson. With regard to that lease, he wrote:

‘The agreement was signed by Mr Harksen’s advocate Mr W Studer when the deal was originally negotiated.’

The appellant responded on 24 January 2001 seeking advice as to Studer signing the lease. After commenting on other aspects of the proposed lease, he wrote:

‘Incidentally, as the Letting Agent I would ask you to advise me what is the legality of Mr Harksen’s advocate signing the lease agreement. If he does, I believe he should accompany the agreement signed by him with a separate letter from Mr Harksen, saying that he, Mr W Studer, is authorized to contract on his behalf. Someone has got to be liable in the event of a breach of the contract.’

Ferguson’s reply on the same day contained the following:

‘Mr Harksen’s advocate (an acting Swiss Judge) would be required to sign the lease agreement (which would be in his name) for diplomatic reasons as explained to you

telephonically. There was no problem with Patsy Watson's Lease Agreement which was also in the Studers' name, however it must be understood that Mr Harksen and his family would be occupying the bungalow as before.'

[15] I interpose that Ferguson in evidence sought to explain that by the expression 'for diplomatic reasons' he meant no more than that Harksen had previously been a good tenant and it would be unwise to go against his wishes. This however was not the attitude adopted by the appellant who remained dissatisfied. As far as he was concerned it did not matter who the principal was as long as that person was creditworthy and available to be sued in the event of a breach of the lease. On 26 January 2001 he wrote to Ferguson:

'You have not yet addressed my question as to who is legally liable to fulfil the contents of this lease. For whatever reason Mr Harksen does not wish to sign it, [the lease agreement], he is the de facto tenant. If he wishes someone else to sign the lease on his behalf, then I require from him a Power of Attorney authorizing that person to sign on his behalf.'

With regard to the possibility of Studer being the principal, he enquired:

'If Mr Studer is the Principal, is he a South African citizen? Is he an accredited member of the Law Society? Is he creditworthy?'

He added:

'At least one of the parties - either Mr Harksen or Mr Studer - [must] be the Principal, and be domiciled in South Africa (it would probably cost me more to sue in a Swiss

court, than any damages suffered) . . . the least I require is that one party clearly be the "Principal", and you must satisfy me with his ID number, domicile and credit-worthiness.'

[16] There had been some prior discussion between the appellant and Ferguson regarding the possibility of an upfront payment of the rent. After referring to the need for clarity on the issue of the identity of the principal, the appellant concluded his letter of 26 January 2001 by indicating that if his requirements regarding domicile and credit-worthiness presented a problem he was prepared to accept an upfront payment of the entire rental or to conclude three separate leases (two of three months and one of four months) with the rent in each case being paid in advance.

[17] It appears that after this letter was sent, Ferguson went off sick and Harksen, ostensibly because of a 'busy schedule', could not be reached. The issue of who was to be the principal and the method of payment remained unresolved. The lease was supposed to have commenced on 5 February 2001. By that date nothing had happened. However, on 6 February 2001 Harksen wrote to Ferguson advising that Studer was due to arrive on 8 February when he would sign the lease. The letter was couched in the form of an agent writing on behalf of his principal. The ultimate sentence read: 'On behalf of Mr Studer, I would like to mention that he is looking forward to a long and successful tenancy.' On the same day

Ferguson, after meeting with Harksen, wrote to the appellant advising that Harksen ‘has agreed to take up the option of 3 month, 3 month, 4 month respective “upfront” payments’ but ‘has asked if you will accept a 5% reduction on each of the 3 upfront payments’. The next day, the appellant wrote back indicating that he would not agree to a five per cent discount.

[18] The 8th of February came and went. Once again Harksen could not be reached and nothing happened. On 13 February Ferguson wrote to both Harksen and the appellant expressing his embarrassment. Harksen replied on the same day. After stating that Studer had been delayed and would be arriving on 15 February 2001 he continued:

‘In connection with the lease contract, I would appreciate it, if you could make some changes regarding the method of payment. Mr Studer agrees to the deposit and he is willing to pay a couple of months in advance when you offer him a discount of 10%. Otherwise, he is prepared to pay the lease on monthly basis.

Your argument that Mr Studer has to pay so many months in advance because he is a foreigner doesn’t make sense, as he has been legally the tenant during the last year.

In order for you to check the credit-worthiness of Mr Studer I shall give you herewith all the relevant details.’

The letter was disingenuous. By writing that Studer was not agreeable to payments in advance, Harksen was in effect reneging on what he had previously agreed to. Significantly, the proposal of ‘upfront’ payments had

been put up as an alternative to the appellant's requirement that the principal be domiciled in South Africa and creditworthy. The effect of Harksen's letter was therefore to present him with neither of these alternatives. By this time, however, the holiday season was well past its peak. The prospect of finding another suitable tenant and starting the whole process all over again was clearly not one the appellant welcomed. His obvious annoyance is understandable. The next day, 14 February 2001, he wrote a formal letter to Ferguson addressing him no longer as 'Keith' but as 'Mr Ferguson'. After summarizing what had occurred since 18 January 2001 he proceeded to 'set out [his] position' in numbered paragraphs. The first and ultimate paragraphs are relevant. They read as follows:

'(1) As Mr Harksen advises that Mr Studer is not willing to pay rent in advance, I will take the risk of entering the lease with Mr Studer, knowing he is a non resident and relying in good faith on the reputation of Mr Harksen, as given to me by yourself and Mrs Watson.

. . .

(4) If the lease is not signed by Mr Studer (or Mr Harksen) by Monday, 19th February, I will seek another tenant and will consider these negotiations as terminated for the present, and in future.'

[19] In response to the deadline set by the appellant, Ferguson repeatedly attempted to contact Harksen by telephone. Once again he could not be

reached. On the advice of Ms Anne Strickland, the owner of Accommodation Shop CC, Ferguson eventually on 19 February 2001 left a message on Harksen's mobile telephone to the effect that unless a lease was signed that day the transaction would fall through. Shortly thereafter Harksen phoned back. He said that Studer had not arrived but that he was quite happy for his wife 'to have the lease; and he was sure she would have no objection. He explained that she was domiciled in South Africa (which was not true) and had a shop in Cape Town (which was true). Ferguson telephoned the appellant to seek his instructions. This was confirmed by the appellant who testified that he first questioned Ferguson on what the latter had been told about Mrs Harksen and then expressed his willingness to have her as the lessee. He said it never entered his head that she was to be a mere nominee for Harksen, in other words, that Harksen was to be the other contracting party.

[20] Ferguson then drafted a lease agreement which reflected Mrs Harksen as the lessee and proceeded to the latter's shop for her to sign it. I interpose that the shop was called 'J H Design' and sold women's clothing. It was owned by a company, Unitrade 463 (Pty) Ltd, in which Mrs Harksen apparently held the shares. On arriving at the shop, Ferguson found that neither Harksen nor his wife was there. He waited for an hour and a half

and eventually left the lease with one of the assistants with instructions to give it to Mrs Harksen to sign in the presence of witnesses.

[21] Ferguson testified that the next day the signed lease was returned to the premises of Accommodation Shop. As he expressed it, he was ‘fairly sure’ that it was Mrs Harksen who delivered the lease. He had met her before. He recalled her arriving in a four-wheeled drive vehicle and having to double-park outside. Strickland, was also present. She, too, had previously met Mrs Harksen and had no doubt that it was she who delivered the lease. I mention this because Mrs Harksen testified that at that stage she had no knowledge of the lease and although she did drive a four-wheeled drive motor car she ‘could not remember’ delivering the lease. I shall return to her evidence later.

[22] The lessee’s signature on the lease was wholly illegible. The same signature appeared on two addenda signed on the same day. (They were presumably also signed at the shop as they were witnessed by the same person.) The letters ‘pp’ were inserted immediately in front of the lessee’s signature on one of them. Their proximity to the signature, which was nothing more than a scrawl, rendered them not readily apparent and they went unnoticed. It was only after the trustees demanded payment that it

was appreciated that all three documents had been signed by Harksen himself and not by Mrs Harksen.

[23] The reason for the second addendum (the first merely contained some additional terms) was that the draft lease agreement had been altered by the insertion of 1 March 2001 as the commencement date. I mention this because counsel for the trustees sought to make something of the letter dated 20 February which Ferguson wrote to the appellant reporting what had happened. The letter began:

'I have just received the signed agreement and addendum. I noticed that *he* had altered the date of occupation to 1 March 2001. I phoned *him* immediately and reminded *him* that our original negotiation dated back . . . .' (My emphasis.)

It was argued that this constituted a recognition by Ferguson, and for that matter also the appellant who received the letter, that the true lessee was Harksen himself. I mention at this stage that I do not think much significance can be attached to the reference to Harksen as opposed to his wife. After all, he had done all the negotiating and for him to have altered the lease before signature would not have been inconsistent with Mrs Harksen being the signatory and lessee. The same can be said of a letter of the same date recording that Ferguson had 'prepared a statement for Mr Harksen'. Significantly, in yet another letter to the appellant written on the

same day Ferguson reported that he had arranged for an inventory to be 'signed by *Mrs* Harksen after it has been checked'.

[24] Mrs Harksen testified on behalf of the trustees. She explained that her husband, who had since been extradited to Germany, had used persons and companies as 'fronts' to hold assets on his behalf and in this way to maintain his lifestyle of opulence. She said Studer was one such a person and that she too had on occasions served as a 'front' for Harksen. She denied that she knew at the time that the lease with the appellant had been concluded in her name and said she could not remember delivering the lease to the letting agents on 20 February 2001. Her evidence was severely criticised by counsel for the appellant in this court. But it is unnecessary to deal with the criticism. The inference arising from her evidence is that Harksen was authorized to act on her behalf. But even if he was not, and she was unaware of the conclusion of the lease at the time, she readily conceded that once she discovered what had happened she 'went along with it' and indicated by her conduct that she was the lessee. Indeed, she was not only directly involved in the drawing up of the inventory at the commencement and termination of the lease but personally wrote to the appellant on 28 November 2001 requiring the latter 'to pay out my remaining deposit'. On 4 April she personally signed a cheque for R25

000 drawn on Unitrade 463 (Pty) Ltd in favour of Accommodation Shop for that month's rent. In passing, I mention that the other payments of rental to the agents were either by cheque drawn on an account operated by Harksen in the name of Voyager Trust or in cash.

[25] The court *a quo* found on the evidence 'that Jeannette Harksen simply replaced Studer as a front for Harksen and that the "written agreement" only reflected the name of Jeanette Harksen but that the lease agreement was one in fact between Harksen and [the appellant]'. The correctness or otherwise of this finding became the main issue debated before us.

[26] It has long been recognised that where parties to a transaction for whatever reason attempt to conceal its true nature by giving it some form different from what they really intend, a court called upon to give effect to the transaction will do so in accordance with its substance, not its form. See generally *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* 1996 (3) SA 942 (A) at 952C-953A and the cases therein cited. It is important to emphasise that a transaction which is disguised in this way is essentially a dishonest transaction; the object of the disguise, which is common to the parties, is to deceive the outside world. Before a court will hold a transaction to be simulated or dishonest in this sense it must

therefore be satisfied that there is some unexpressed or tacit understanding between the parties to the agreement which has been deliberately concealed. See *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369 at 395-396. On the facts of the present case it follows that the trustees were obliged to establish that whatever Harksen's intention may have been, the appellant's true intention was to contract with Harksen, notwithstanding the form of the lease.

[27] It is necessary to observe that if the appellant's intention had indeed been to contract with Mrs Harksen, it would be of no assistance to the trustees that she had no reciprocal intention and accordingly did not become a party to the lease. In other words, it would not matter that Harksen had no authority to enter into a lease on her behalf or that she had not subsequently ratified the lease. Similarly, there would be no contract if in these circumstances Harksen himself intended to be the lessee in terms of the lease. (C*f Registrateur van Aandelebeurse v Aldum h/a Onecor Group* 2002 (2) SA 767 (SCA) at 773B-E.) As previously indicated, in the absence of a contract, no reliance could be placed on s 23(2) of the Act. In that event, in order to succeed the trustees would have been obliged to formulate a claim based on unjust enrichment. Such a cause of action was neither pleaded nor established.

[28] What is critical to the inquiry, therefore, is appellant's true intention. In other words: was it established on a balance of probabilities that his true intention was to enter into a disguised and dishonest transaction in the sense discussed above?

[29] In finding for the trustees on this issue, the court *a quo* by implication rejected the evidence of the appellant that as far as he was concerned he had entered into a lease with Mrs Harksen who was the person to whom he would have to look in the event of a breach. No adverse credibility finding was made against the appellant, nor was an attempt made to assess his credibility. The trial

judge appears simply to have found that the evidence pointed to Mrs Harksen having served as a substitute for Studer who was Harksen's 'front'. In assessing the probabilities in the light of the appellant's evidence, a question that arises is why he should have wished to connive with Harksen to disguise the true identity of the lessee; in other words: what motive would he have had for the deception? The trial judge found, despite the evidence of the appellant to the contrary, that he was fully aware that Harksen was an insolvent, ie subject to a sequestration order. If this finding were correct, it is possible that Harksen's insolvent status may have played a role in influencing the appellant to enter into a disguised transaction. But

in my view, the finding was wholly unjustified. There was no direct evidence to the effect that the appellant, or for that matter the agents, knew that Harksen was insolvent. As far as the probabilities are concerned, from the very inception of the negotiations Harksen presented himself as a man of considerable means who enjoyed an opulent lifestyle. The appellant was told that Harksen had a house in Constantia in the Cape but nonetheless was prepared, and had the means, to pay R25 000 a month in rental for a bungalow which he generally occupied only over weekends. As far as Watson was concerned, he was a model tenant. The appellant explained that it was constantly impressed upon him by the letting agents who were obviously impressed by Harksen just how wealthy he was; he entertained lavishly and drove a range of very expensive motor-cars. It is true that it was also clear to the appellant from a relatively early stage in the negotiations that Harksen was unwilling to enter into a lease in his own name. But this would not give rise to an inference of insolvency in the mind of a layman. The appellant was told by Watson that Harksen was wanted for fraud in Germany and had successfully resisted being extradited. This in the appellant's mind was enough to justify Harksen's reluctance to be a contracting party. There is no reason for doubting his evidence in this regard. The brazen life of luxury enjoyed by Harksen was not the life which

an insolvent's trustee would ordinarily permit and this would be known to a layman. In any event, given the appellant's cautious nature as demonstrated by the correspondence, it is wholly improbable that he would have been prepared to do business with an insolvent.

[30] Ultimately the inquiry is whether the appellant regarded Harksen or his wife as his debtor under the lease or, to put it differently, the inquiry is to which of the two would he have regarded himself as obliged to look in the event of a breach. It is clear from the correspondence that when informed of the unusual circumstances of the previous lease, the appellant's principal concern was, as he put it, who was to be the principal. He wanted to know who and where he would have to sue in the event of a breach. Although earlier in the negotiations he had contemplated contracting with Studer as agent for Harksen, in which event he required a power of attorney, by 14 February 2001, as is apparent from his letter of that date, he was prepared to contract with either Studer or Harksen as principal. The appellant testified that when Mrs Harksen was proposed as the lessee he accepted her as the party with whom he would contract as principal. There is nothing improbable about this. Indeed, the subsequent correspondence during the subsistence of the lease demonstrates quite clearly that he

regarded Mrs Harksen as the lessee and the person to whom he looked for fulfilment of the lessee's obligations.

[31] On 5 March 2001, for example, the appellant addressed a letter to Mrs Harksen drawing her attention to various features of the property. One such feature was the existence of four separate telephone lines. He wrote:

'In terms of *our agreement* (clause 4.1), you are responsible for telephone costs and therefore I bring this to your attention as four exchange lines and the usage which the previous owner envisaged may not apply to you.' (Emphasis supplied.)

Mrs Harksen replied on 20 March 2001 indicating she would comment on the points raised in the appellant's letter later in the week. On 27 September 2001 she again wrote answering the appellant's letter in detail. Both letters were signed 'Jeannette Harksen'. Every month the appellant wrote to Ferguson listing the amounts 'to be recovered from Mrs J Harksen' or 'outstanding from Mrs Harksen'. These were typically telephone, water and electricity charges which were payable by the lessee in terms of the lease. It appears that at some stage the appellant agreed to a Mr and Mrs Markowitz using the bungalow. On 15 August 2001 the appellant addressed a letter to 'Mrs Jeannette Harksen' regarding the Markowitz's use of the bungalow in which he reminded her that:

'I agreed to it on the understanding that they were guests and that you remained the tenant in terms of the existing lease contract.'

Again, on 10 October 2001 the appellant wrote to Ferguson regarding the inventory of items at the bungalow. The letter bore the heading: 'Mrs Harksen's Agreement of lease until 30th November' and commenced: 'As we are less than two months away from the time that Mrs Harksen's lease of Bungalow 16 ends . . . .' A final example is a letter written by the appellant to Ferguson on 13 November 2001 concerning *inter alia* the cost of repairs to the bungalow for damage that occurred during the currency of the lease. He wrote:

'It seems to me that the tenant must be responsible for this and we should duly convey these changes to Mrs Harksen.'

He concluded by writing:

'I believe . . . these accounts should be for Mrs Harksen's account, and I would appreciate it if you will claim the amounts from her. If you disagree, please advise me.'

[32] Counsel for the respondent did not submit that these letters were written by the appellant as part of an on-going sham to conceal the true identity of the lessee; nor indeed would there have been any basis for such a submission. The letters corroborate the appellant's evidence that he entered into a contract of lease with her on the basis that she was to be the lessee in her own right and not merely as a nominee for Harksen. In my view there was no justification for rejecting this evidence and in doing so the court *a quo* clearly erred. [33] The appeal must therefore succeed.

The following order is made:

(1) The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel;

(2) The order of the court *a quo* is set aside and the following is substituted in its place –

‘The plaintiffs’ action is dismissed with costs.’

_____
D G SCOTT
JUDGE OF APPEAL

CONCUR:

HARMS JA
ZULMAN JA
CAMERON JA
JAFTA JA