**IN THE HIGH COURT OF SOUTH AFRICA**

**(HELD AT CAPE TOWN)**

Case no.**9142/2002**

In the matter between

**EILEEN MARGARET FEY N.O.** First Applicant

**MICHAEL JOHN LANE N.O** Second Applicant
and

**NEVILLE WILLIAM MACKAY** Respondent

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**JUDGEMENT delivered on 30 April 2004**

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**WAGLAY, AJ:**

1. The plaintiffs who are the trustees in the insolvent estate of Jürgen Harksen (Harksen) instituted this action against the defendant for payment of an amount of R271 290.63 together with interest and costs.

2. The plaintiffs claim the aforesaid sum of money on the basis that the money constituted property which in terms of s20 alternatively s23 (1) of the Insolvency Act No 24 of 1936, as amended ("the Act") vested in

the Plaintiffs but which money Harksen wrongfully concealed from them and paid over to the defendant, albeit pursuant to a lease agreement concluded between Harksen and the defendant.

3. The facts alleged in support of the above claim can the summarised as follows:

3.1 The defendant represented by Accommodation Shop CC and Harksen concluded a lease agreement in terms of which Harksen hired a dwelling from the defendant for a period of 10 months at a rental of R25 000, 00 per month plus other related charges;

3.2 That it was known to the defendant alternatively was known to the defendant's agent that Harksen was an insolvent; and

3.3 That the amount claimed was paid from funds which formed part of the insolvent estate and was paid either directly by Harksen, or through banking accounts of entities directly or indirectly controlled by Harksen and used by Harksen as vehicles to disguise payments of monies which vested in the Plaintiffs.

4. The defendant denies that he is liable to the plaintiffs and does so on the basis that:

4.1 He did not conclude a lease agreement with Harksen but that the lease agreement was concluded with Janette Harksen, Harksen's spouse;

4.2 That it was not in any event, known to him that Harksen was an insolvent;
4.3 That monies received by him in respect of rental and ancillary charges were not paid by Harksen or on his behalf and even if they were, such monies did not constitute funds belonging to Harksen's estate as contemplated by s23 of the Act;
4.4 If it was found that the lease agreement was one between Harksen and him, it was a valid and binding agreement and as such performance of the obligations in terms thereof did not involve:

i) the disposal of any of Harksen's property, nor was the Harksen estate or any contribution towards the estate which Harksen was obliged to make, adversely or likely to be adversely affected by the performance of the obligation in terms of the lease agreement;

ii) alienation for valuable consideration of any property or a right to any property which Harksen acquired after the sequestration of his estate and which by such acquisition became part of the Harksen estate as contemplated by s21 of the Act.

4.5 If it is found that the lease agreement and performance in terms thereof constituted an alienation for valuable consideration as contemplated by s24(1) of the Act then he was not aware nor did he have reason to suspect: that Harksen was a true lessee; that Harksen was an insolvent and that the funds utilised to ensure compliance of the obligation of the lease agreement constituted property in the insolvent estate.

5. At the commencement of the trial the defendant applied for a separation of issues in terms of r33 (4) of the Uniform Rules of Court. The defendant identified three issues which it sought to be determined separately. I do not intend setting out these issues. I did not deem it expedient to separate the issues as I was of the view that no purpose would be served in dealing with the matter on a piecemeal basis more particularly when on the papers as they then stood all the issues were related and connected to each other to the extent that the issues, where they did nor overlap, influenced each other. In the circumstance the application for separation of issues was refused.

6. Turning then to the nature of the claim itself, in terms of s20 of the Act upon the sequestration of an insolvent's estate, the insolvent is divested of his estate which vests in the Master of the High Court until a trustee has been appointed. Subject to certain exceptions, the insolvent's estate consists of all of the insolvent's property at the date of the sequestration; all property or the proceeds thereof in the hands of the deputy sheriff or messenger under a writ of attachment, and all property which the insolvent may acquire or which may accrue to him during sequestration. (see Meskin: Insolvency Law Issue 14 paragraph 5.2 at p 5-3)

7. The word property in s20 of the Act refers to property within the borders of South Africa and includes both moveable and immoveable property. Moveable property includes every kind of property which is not an immoveable property including "contingent interest in property other than contingent interest of a fidei commissary heir or legatee" (s1 of the Act").

8. As the application of the provisions of the Act in relation to any property is dependant upon it being within South Africa it follows that property acquired by an insolvent after he is sequestrated but during the sequestration and situate outside of South Africa cannot vest in the trustee of his estate. The exception is where the property is moveable property and the insolvent is domiciled within the area of jurisdiction of the sequestrating Court (see Viljoen v Venter NO 1981 (2) SA 152 (w) and Meskin supra 5-3 and 5-4).

9. Insofar as domicile is concerned the ingredient of animus manendi or the intention to remain permanently or indefinitely, is, in addition to residence, essential. The mere fact that the High Court orders an insolvent's sequestration does not mean that the insolvent is domiciled in South Africa as local domicilium is not a pre-requisite for the Court to

grant a sequestration order.

10. In terms of s20 of the Act, therefore, all immovable and movable property owned by an insolvent at the time of his insolvency or during his insolvency and situate within South Africa vests with his Trustee. Moveable property situated outside South Africa also vests in the Trustee but only if the insolvent was domiciled in South Africa at the time he was sequestrated.

11. Having defined the insolvent's property and the fact that such property vest in that insolvent's trustee, s23 of the Act provides that where an insolvent enters into a contract:

    i) in terms of which he purports to dispose of any property in his estate; or

    ii) in terms of which his estate, or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected and prior written consent of the trustee was not obtained to conclude the contract;

such contract shall not be a valid contract.

12. However in terms of s24 (1) of the Act if an insolvent alienates property

which he acquired after the sequestration of his estate for valuable consideration without the consent of his trustee such alienation will be valid if the party receiving the property “proves that he was not aware and had no reason to suspect that the estate of the insolvent was under sequestration.”

13. s24 (1) is designed to protect a third party acquiring assets from an insolvent as against creditors of the insolvent but only if the third party is bona fide. This section places an onus upon a third party who has acquired assets from an insolvent to prove that he was neither aware nor had reason to suspect that the insolvent with who he contracted was under sequestration. This very stringent requirement consists of more than a mere suspicion. A third party acquiring assets from an insolvent cannot simply claim not to have a reasonable ground to suspect insolvency, this is not enough, the third party must actually have no reason whatsoever to suspect that the estate of the person with whom he is dealing is under a sequestration order.

14. Having regard to the claim made and the defences raised, for the plaintiffs to succeed they must satisfy this Court: that Harksen entered into a lease agreement with the defendant without their consent; that Harksen complied with his obligations in terms of the said agreement

in that he paid the rentals and other charges; that the monies paid by Harksen were monies which vested in them and that there are entitled to recover the monies from the defendant. If the plaintiffs discharge the onus in respect of the above issues the defendant is still able to avoid paying the amount claimed by the plaintiffs if he can satisfy this Court that he was neither aware nor had any grounds to suspect that Harksen was an insolvent at the time the lease agreement was concluded and payment received by him in terms of the agreement.

15. Dealing then with the agreed facts, the evidence presented and the chronology of events leading to the claim can be summarised as follows:

15.1 Ferguson, duly representing the business known as the Accommodation Shop CC first received a telephone call from a person who identified himself as Peterson. Peterson informed Ferguson that he was looking for accommodation for a Swiss national who would require a bungalow at Clifton for a six month period;

15.2 In response to that enquiry, the Accommodation Shop CC enquired of Watson, the owner of a bungalow in Clifton, which was on the books of the Accommodation Shop CC, whether same would be available for hire.

15.3 On receiving a positive response from Watson, Ferguson met with Peterson and one Studer the Swiss national, on 24 June 2000, took all of Studer

details, completed a data sheet for internal business purposes. The bungalow was then shown to Studer and Petersen and a lease agreement was signed at the bungalow that day. Further, a pro rata amount for June plus the July rental was paid over in cash on the same day. At the time the lease was concluded between Studer and Watson (Ferguson of the Accommodation Shop CC then represented Watson the landlord) it was envisaged that although Studer would be the lessee Petersen and his family would enjoy access to the bungalow on weekends and to this end, same was reflected in an addendum to the lease agreement.

15.4 At the time of the conclusion of the lease agreement, Ferguson had no doubt that the lessee and principal tenant would be Studer, this is confirmed in his letter to Studer enclosing a copy of the lease.

15.5 Subsequent to the conclusion of the lease agreement, Ferguson was approached with an enquiry as to whether or not the bungalow was for sale. Although the enquiry *vis-à-vis* the proposed purchase of the bungalow emanated from Petersen, Ferguson was of the view that the proposal to purchase the bungalow was being made by either or both Studer and Petersen. Ferguson testified that at the time he believed that there was some business relationship between the Studer and Petersen. This belief was borne out by the fact that the initial enquiry to rent the bungalow had emanated from Petersen; Ferguson had met Petersen and

Studer together at the bungalow and that Petersen and his family could occupy the property hired by Studer over the weekends when Studer was absent. Nothing however came of this proposed purchase primarily because Petersen and/or Studer required the purchaser to be a juristic entity and it was not possible for a juristic entity to purchase the bungalow in question due to the restriction contained in the Title Deed of the property.

15.6 On approximately 1 September 2000 an enquiry was received by Ferguson from Petersen as to whether or not an upfront rental payment might be made which would result in a discount being granted by Watson on the rental. This enquiry was conveyed by Ferguson to Watson, and agreement reached. Payment was then made by Petersen (although there was nothing to suggest that the payment was not being made on behalf of Studer) in terms of the agreement. The only occupants throughout the existence of the lease which was concluded between Studer and Watson appeared to be the Petersen family. They also only occupied the bungalow over the weekends. Since the initial enquiry had emanated from Petersen on behalf of Studer

and as Studer was a real person (whose credentials as a Swiss lawyer had been checked by The Accommodation Shop CC) there appeared to be no reason for the Accommodation Shop CC to be either alarmed or concerned at the fact that Petersen and his family were occupying the bungalow and all its dealings later seemed to be primarily with Petersen as opposed to Studer. This was particularly so as:

(i) it was foreshadowed that Petersen and his family would be entitled to occupy the bungalow at weekends if they so wished; and

(ii) there was no problem when it came to payment of the rental and ancillary charges or with the maintenance of the bungalow.

15.7 Further, because compliance with the lease agreement proceeded smoothly, there was talk, in the absence of the purchase of the bungalow, of the lease being renewed in the following year. The lease between Watson and Studer came to an end in December 2000.

15.8 The bungalow was then sold by Watson to the defendant.

The defendant was then introduced to the Accommodation Shop CC and his initial meeting with Strickland of the Accommodation Shop CC related to the possible letting of a flat owned by him. This in turn led to an enquiry emanating from the Accommodation Shop CC as to whether the defendant would be interested in letting the bungalow purchased from Watson to the tenant who had previously occupied the bungalow. This enquiry was made in writing on 18 January 2001.

15.9 It is important to note what was known to the parties as at 18 January 2001 when the written enquiry was despatched by the Accommodation Shop CC to the defendant:

i) After the bungalow had been sold to the defendant, one Sylvai Dohne (Dohne), the estate agent met Strickland of the Accommodation Shop CC and enquired of her as to whether she knew that the erstwhile tenant at the bungalow was "Harksen". Strickland did not know who Harksen was and Dohne advised her that he was a person who had swindled pension funds, whose wife had hired her property and painted it purple which led to a dispute as a result of

which she (Dohne) was disliked by the Harksens. Strickland in her evidence stated that she did not pursue the matter further with Dohne, but did in fact enquire from her father-in-law, who is German whether he knew who Harksen was. Her father-in-law had provided her with information similar to that provided by Dohne pertaining to Harksen. It appears that it was only after Dohne had spoken to Strickland did the Accommodation shop CC, who were the agents for Watson the landlord of the bungalow, realise that the person who had introduced himself as Petersen was in fact Jürgen Harksen;

ii) The defendant had no knowledge whatsoever of who Harksen was, having not heard his name before; and

iii) Patsy Watson, the erstwhile owner of the bungalow, only learnt after Harksen had moved out i.e. in December 2000 that he had been her tenant. She informed the defendant that Harksen had been the subject of a number of extradition attempts by the German government as he was wanted for massive bank fraud in Germany; that he was the subject of many articles in *Noseweek* and that he was

apparently widely believed to be a conman. However, she had regarded him as a model tenant and emphasised that all these allegations were hearsay.

15.10 The defendant did not respond immediately to the enquiry from Accommodation Shop CC about letting the property. Instead, later that day on 18 January 2001, he enquired from Watson as to what she could tell him about the former tenant of the bungalow. Watson's response resulted in a despatch by the defendant of a further e-mail where he requested further information from Watson as regards Harksen. Watson responded the following day, i.e. 19 January 2001. She provided details of what had happened with regard to property hired by Harksen previously. She alluded to the stories about Harksen and his wife covered by both *Style* and *Newsweek* magazines adding the following: "None are relevant to what kind of tenant he would make. Also they are all hearsay". Further, Watson went so far as to say to the defendant that she would let the bungalow to Harksen again if the decision was hers to make.

15.11 As a result of the contents of Accommodation Shop CC's

letter of enquiry as also the information the defendant had received about Harksen from Watson, the defendant wrote to Accommodation Shop CC on 19 January 2001 advising them that he would be agreeable to giving a rental contract for 12 months to Harksen on certain terms and conditions. He pointed out that he had another enquiry to rent the bungalow but would prefer a long-term tenant and would therefore prefer to concluded a lease agreement with Harksen.

15.12 In response, Accommodation Shop CC addressed a letter to the defendant wherein it drew to the defendant's attention that the previous lease agreement had been signed by what it called Harksen's advocate, Studer. This gave the defendant some cause for concern. As a result he addressed a letter to the Accommodation Shop CC on 24 January 2001, where he asked it to advise him as to the legality of Harksen's advocate signing the lease agreement. The defendant was of the view that if some person other then Harksen were to sign the lease agreement and do so on behalf of Harksen, then there should be a separate letter from Harksen saying that such other person,(Studer in this

case) was authorised to contract on Harksen's behalf. The defendant's concern was that someone had to be liable in the event of a breach of the contract. In response, Ferguson advised that Harksen's advocate would be signing the lease agreement, which would be in Studer's name " for diplomatic reasons as explained to you telephonically", the defendant could not recall what these reasons were that were explained to him, and Ferguson linked the reasons to what followed in the second paragraph namely "there was no problems with Watson's lease agreement which was also in the Studer's name, however it must be understood that Mr Harksen and his family would be occupying the bungalow as before"

15.13 In response, the defendant on 26 January 2001 stated that if Harksen wished someone else to sign the lease on his behalf, the defendant required a power of attorney authorising that person to sign on his behalf. He also wanted to know more about Studer, namely whether he was a South African citizen, whether he was an accredited member of the Law Society and whether he was creditworthy. His motivation for the foregoing enquiry was

as follows: " It is vital in any agreement that both parties have identifiable identifications and domiciles. In the unlikely, though possible, event that there is a dispute and litigation follows, I would have difficulty with the parties at my disposal to know who to deal with. At least one of the parties – either Mr Harksen or Mr Studer – 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)."

15.14 The defendant also enquired as to the correct spelling of Harksen's name adding, "On the basis of advice given by Patsy Watson, Mr Harksen was an exemplary tenant and therefore I am encouraged to pursue this negotiation, but will not do so unless the above questions are answered". Further, he concluded by stating as follows: " As I explained to you this morning, I am willing to proceed with this lease, since Mr Harksen eagerly wants the property and Patsy Watson recommended him, but I must protect my interest in the event of any default. I certainly mean no disrespect to him as I have never met him".

15.15 In a letter dated the same date to Accommodation Shop CC

the defendant records: “You have not 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, 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 authorising that person to sign on his behalf”.

15.16 It was agreed that Studer would sign the lease agreement and do so on behalf of Harksen. As at 6 February 2001, it was still envisaged that Studer would sign the lease agreement and that he would do so on 8 February 2001. Studer failed to arrive which prompted Accommodation Shop CC to address a letter to Harksen on 13 February 2001 wherein it recorded its frustration and embarrassment and indicated that it needed to know urgently what Harksen’s intention were so that it could convey same to the defendant. Harksen responded immediately stating that Studer would be arriving on 15 February 2001 to sign the lease agreement. He also gave details of Studer in order that Studer’s creditworthiness could be checked.

15.17 The exasperation of the defendant appears from the contents of the letter which he sent to Ferguson on 14 February 2001. This letter concluded by imposing a deadline of Monday 19 February 2001 for either Harksen or Studer to sign the lease agreement, failing which, negotiations would be at an end. Paragraph 1.1 of the letter makes it clear that unless a written agreement was signed there would be no agreement in force despite all the terms of the lease being orally agreed. Thus although the terms of the lease agreement were essentially agreed upon before the end of January 2001, it was understood that a written document had to be signed before the parties regarded themselves bound to the agreement.

15.18 The defendant's deadline of 19 February 2001 was conveyed to Harksen who then volunteered his wife Jenette Harksen as the party who would sign the lease agreement.

15.19 The evidence of Ferguson of the Accommodation Shop CC was to the effect that he had taken the lease agreement to Jenette Harksen's shop in Burg Street for her signature and he had left the agreement there because neither Harksen

nor Jenette Harksen were present. His evidence further was to the effect that Jenette Harksen had brought the signed lease agreement, in an envelop to the Accommodation Shop.

15.20 No one, on receipt of the lease agreement scrutinised the signature on the document. Had they done so it would have been noted that the lease agreement was signed for and on behalf of Jenette Harksen and not by her. That someone who signed on behalf of Jenette Harksen has subsequently been identified as Harksen himself. What was noticed however was that the commencement date on the lease had been altered and this gave rise to further correspondence and the drawing and signing of an addendum to the lease agreement. The addendum also was signed not by Jenette Harksen but by Harksen. This also went unnoticed at the time.

15.21 The lease came into operation on 20 February 2001 and terminated on 30 November 2001. The lessee met its obligations in terms of the lease by making payment of the rental and ancillary charges. These payments were made to

the Accommodation Shop CC who administered the lease on behalf of the defendant.

15.22 The payments made in respect of the lease were made either in cash or by cheque drawn on the bank account of Voyager Trust or Unitrade 463 (Pty) Ltd. The banking account under the name of Voyager Trust was a business account operated by one Karsten whilst the banking account in the name of Unitrade 463 (Pty) Ltd was the business account of the business operated by Jenette Harksen.

16. Having regard to the relevant sections of the Act as referred to above and the summary of the agreed evidence and the documents presented at the trial the issues that require to be considered are:

i) whether or not the monies paid to the defendant as rental and other charges constituted property as contemplated in s20 of the Act and as such assets in Harksen's insolvent estate which vested in the plaintiffs; and if it did

ii) whether the lease agreement was concluded between Harksen and the defendant; and if so

iii) if the defendant liable to repay the monies received in

terms of said lease agreement.

17. As recorded earlier monies due to the defendant in respect of the letting of his property in Clifton was paid either in cash or by cheques drawn from the banking accounts of Voyager Trust or Unitrade 463 (Pty) Ltd ("Unitrade"). With regard to the payments made in cash, Rossouw gave evidence that he was the person who had delivered the cash and that the cash emanated from Harksen. Likewise cheques drawn from Voyager Trust were drawn against monies which were that of Harksen, in this regard the evidence of Karsten was that only once Harksen made money available to Voyager Trust were cheques drawn on behalf of Harksen and payment made to the Accommodation Shop CC in respect of the rental and other ancillary charges for the Clifton property. With respect to cheques drawn against the Unitrade account, these cheques were drawn on monies made available by Harksen. Jenette Harksen who ran the business of the Unitrade company gave evidence to the effect that the revenue generated by the business operated by Unitrade was insufficient to cover the costs associated with conducting its own business and that Harksen utilised the banking account of Unitrade for his own purposes; that Harksen deposited monies into that account and made payments therefrom as he pleased; payments to the Accommodation Shop CC were made

from monies deposited by Harksen into the Unitrade account and cheques were issued against such deposits.

18. All the evidence pointed to the monies which were utilised to make payment in respect of the hiring of the defendant's bungalow emanating from Harksen and the plaintiffs thus claim that the money constitutes property in the insolvent estate. The defendant on the other hand disputes that the monies paid in respect of the lease was the property of Harksen. This the defendant does so on the basis that:

18.1 it cannot be proved that the monies paid over to him did in fact belong to Harksen; and

18.2 if it did belong to Harksen, the monies did not vest in the Trustees because Harksen was not domiciled in South Africa and it (the money) originated in a foreign jurisdiction and only became Harksen's while he was under a sequestration order.

19. Defendant argues quite properly that the plaintiffs must prove that the monies paid to him were monies acquired by Harksen in a manner that made Harksen the owner of the monies. The defendant avers that plaintiffs have failed to discharge this onus because the ipse dixit of the witnesses is not borne out by the documentary evidence before this Court. Accordingly to the defendant: the bank statements of both Voyager Trust and Unitrade does not evince that payments made to Accommodation Shop CC preceded by like deposits; there was only

the ipse dixit of Rossouw to indicate that the cash he delivered to Accommodation Shop CC was given to him by Harksen; all of the witnesses who gave evidence for and on behalf of the plaintiffs are those who have in the past lied under oath to protect Harksen. Notwithstanding the fact that all of he witnesses who gave evidence for the plaintiffs had liberally lied in the past, their evidence to the effect that the monies paid to the Accommodation Shop CC in respect of the hire of the defendant's bungalow belonged to Harksen, cannot simply be rejected for that reason. Their evidence must be examined with care and caution and account must also be taken of he circumstances under which they gave false evidence and the circumstances that pertain at present. Their oral evidence must further be weighed against the documentary evidence presented at the hearing. When proper consideration is given to all of the surrounding circumstances the documentation that was presented and the other relevant factors it cannot be said that the evidence of Karstens, in relations to the Voyager Trust; Jenette Harksen, in relation to the Unitrade account (and her other evidence which I shall deal with later) and the evidence of Rossouw in relation to the cash handed to him was such that the Court should reject it. In so far as defendant expects cheques drawn on banking accounts to be matched with deposits this is not necessary as the evidence points to ongoing deposits and balances in these

accounts lying to the “credit” of Harksen.

20. Based on what I have said above I am satisfied that the monies paid to the defendant in respect of rental and other ancillary charges were paid by Harksen and that they is no reason to conclude that the monies did not belong to Harksen.

21. Defendant’s further argument is that even if the monies were that of Harksen it could not vests in Harksen’s trustees (the plaintiffs) because its origin is not South African and Harksen was not domiciled in South Africa. There was evidence that most if not all of the monies paid to the defendant pursuant to the lease agreement were monies which were brought in from outside of South African borders after Harksen’s sequestration. Defendant argues that since these monies emanated from a foreign jurisdiction and after Harksen’s sequestration the creditors in Harksen’s insolvent estate cannot lay claim thereto. This argument fails to appreciate the very simple principle that once the money was brought within the South African border it was no longer in a foreign jurisdiction. The fact that the funds were brought into this country from Germany or other countries after Harksen’s sequestration did not insulate it from the provisions of s20(2)(b) of the Act. The origin of the funds is for present purposes irrelevant. Once the monies were

brought into South Africa and Harksen took control of it to the extent that he exercised the right to do with the monies what he pleased the monies became the property of the insolvent estate and the fact that he may not at the time been domiciled in this country is therefore of no consequence. The monies received by the defendant in respect of rentals and other ancillary charges were thus property belonging to Harksen's estate as contemplated by s23(2) of the Act and vested with his trustees, the plaintiffs herein.

22. As the monies paid to the defendant constituted "property" in the insolvent estate of Harksen, are the plaintiffs entitled to recover this from the defendant? The defendant states that his tenant was not Harksen but the wife Jenette Harksen. Jenette Harksen was the person who concluded the lease agreement and that there was no impediment on her from concluding such an agreement and the payments received in compliance of her obligation in terms of the lease agreement remained payments received from Jenette Harksen. If the payments emanated form Harksen than the plaintiffs should seek to recover the monies from Jenette Harksen so defendant appears to argue, and not the defendant. This argument may be of merit if it is found that Jenette Harksen and not Harksen was indeed the lessee. In this respect the evidence of Jenette Harksen was clear. She said she

was not the lessee. She had no intention to lease the bungalow nor did she sign any lease agreement. The “written agreement” presented to this Court clearly displays that while the lessee’s name is recorded as Jenette Harksen it was not signed by her—this was patently evident on perusal of the place where she was required to sign. The document was in fact signed by Harksen. Defendant’s reliance on the fact that Jenette Harksen dropped the envelop which contained the signed agreement at the Accommodation Shop CC cannot lead to the conclusion that she was the lessee or that she was aware that she was entering into a lease agreement with the defendant to hire his bungalow. If anything the correspondence between the Accommodation Shop CC and the defendant evinces the following:

22.1 The defendant was satisfied in having Harksen as the l lessee;

22.2 Before he would give occupation of the bungalow he required a written lease agreement to be concluded;

22.3 He had no objection to one Studor signing the lease on behalf of Harksen;

22.4 That when Studor failed to arrive in South Africa and the defendant required the matter to be finalised, the proposal by Harksen that his wife sign the lease was not objected to.

23. There is nothing to indicate that Jenette Harksen was a new lessee

this notwithstanding defendant's attempt to satisfy the court that once Jenette Harksen was proposed by Harksen, Harksen was no longer a feature in the lease the agreement. I say this for the following reasons:

23.1 defendant knew that if Studer signed the lease he could do so as Harksen's "nominee";

23.2 before agreeing to Studer signing as a nominee, the defendant expressed disquiet to such an arrangement but abandoned this line of enquiry when informed by the Accommodation Shop CC that Studer was signing the lease on behalf of Harksen "for diplomatic reasons";

23.3 that Jenette Harksen is proposed by Harksen not as a lessee but as the person who would sign the lease in the place of Studer, this was the evidence of Ferguson who communicated with Harksen in respect of the leasing of the defendant's bungalow;

23.4 that no checks or enquiries were made as to the creditworthiness of Jenette Harksen when this was the standard procedure and the defendant who throughout his discussions with Accommodation Shop CC sought to protect himself in the event of litigation did not even enquire if he was protected against Jenette Harksen;

23.5 the detailed discussions when agreeing to Harksen as a lessee were totally absent with regard to Jenette Harksen as a lessee so much so that the clear indication on the signed lease agreement that displayed that the lease was not signed by Jenette Harksen seemed to be overlooked by both the defendant and his agent Ferguson, of the Accommodation Shop CC. An addendum to the lease which similarly indicated that it was not signed by Jenette Harksen was again overlooked by the Accommodation Shop CC and the defendant. The addendum was signed on a different occasion to the lease.

24. All the facts and circumstances point thereto that Jenette Harksen simply replaced Studer as a front for Harksen and that the "written agreement" only reflected the name of Jenette Harksen but that the lease agreement was in fact one between Harksen and the defendant.

25. The payments made to the defendant were therefore made pursuant to a lease agreement between the defendant and Harksen which agreement was entered into by Harksen without the consent of his trustees. Defendant however

denies that he is liable to repay the monies received pursuant to the lease agreement because such monies did not constitute disposal of Harksen's property or the disposal did not affect Harksen's creditors. This argument is premised on the belief that since the monies were brought into this country after Harksen's sequestration and from foreign countries and may have been investments in some or other of Harksen's projects it could not utilised to liquidate debts owed to creditors of his insolvent estate. The flaw in this argument is that it fails to take into account the import of s20 and s23 of the Act. These sections specifically state what constitutes property in the insolvent estate after sequestration. Property which becomes that of the insolvent estate includes a salary earned by the insolvent from his own labour. Therefore money earned or received by the insolvent during the period of his insolvency constitutes property which becomes part of his estate and vests with his trustees.

26. Defendant further argument is that the monies paid by Harksen is not recoverable by the plaintiffs because Harksen received valuable consideration in return for the monies paid and which consideration cannot be returned by the plaintiffs. This argument is of no merit. While the rental and charges levied in respect of the hire of the bungalow was the normal rental payable in respect of the property in question it does not mean that the defendant is entitled to retain the monies received as rentals. It is always open to the trustees in terms of the Act to ratify a contract entered into by an insolvent without his (trustee's) consent. It is equally open to the trustee not to be bound to a contract concluded by the insolvent without his consent and do this without providing any justification for such action. I see no reason why a trustee should be called upon to explain his refusal to ratify a contract entered into by the insolvent without his consent when an insolvent is not entitled to enter such a contract in the first place. In so far as there is an innocent party at the other end of the contract the

Act itself provides sufficient safeguards for such an innocent party in terms of s24 of the Act. In the present matter, however, there was no reason for the insolvent to hire the bungalow as he was already in occupation of luxurious accommodation in one of the more plush suburbs in Cape Town. In the circumstances the plaintiffs are entitled to claim repayment of the monies paid by the defendant in respect of rental for the bungalow although it cannot undo the occupation enjoyed by the insolvent.

27. Finally the defendant relies on the provisions of s24(1) of the Act for refusing to repay the monies received by him. S24(1) as recorded earlier provides protection to a third party who has entered into a contract with an insolvent under sequestration but only if the third party is able to prove that he had no grounds to suspect that the contracting party was an insolvent. In this regard I need to reiterate that performance made by an insolvent in terms of an agreement concluded between the said insolvent while under sequestration, without the consent of his trustee and a third party and such performance albeit for valuable consideration, may be reclaimed by the trustee if the performance constitutes alienation of any property of the insolvent estate. As I have already found that the monies paid to the defendant were the property of Harksen, the fact that Harksen may have received valuable consideration is irrelevant. The Trustees are entitled to reclaim these monies unless the defendant can satisfy the

Court that he had no reason whatsoever to believe that Harksen was under a sequestration order when he decided to hire his bungalow to Harksen or at the time he received payment in respect of the aforesaid hire form Harksen.

28. The defendant states that he had no reason to suspect let alone believe that Harksen was insolvent at any material time. In support of this contention defendant refers to the following:

28.1 correspondence he received from Watson where she indicated that Harksen was a conman but added that this was a rumour based on hearsay;

Watson indicated to him that if the decision had been hers to let the bungalow she would not hesitate to let it to Harksen, as he was a model tenant;

28.2 he was only prepared to allow Studer to sign the lease on behalf of Harksen if a power of attorney had been executed by Harksen in favour of Studer;

28.3 he was never informed, not even by the Accommodation Shop CC that Harksen was an insolvent; and

28.4 representatives of the Accommodation Shop CC with whom he dealt, themselves, were not aware that Harksen was an insolvent.

29. The above evidence is rather unconvincing when seen against the background of an abundance of signs pointing to the possibility and

probability that Harksen was an insolvent. More particularly the following:

29.1 the defendant is informed that Harksen deliberately concealed his identity when he hired the bungalow from its previous owner Watson. Not only did Harksen lie about his name but that he used Studer as a front for that purpose;

29.2 the defendant was informed that Harksen had defrauded others for millions and that the German government was seeking his extradition in earnest;
29.3 the defendant was informed that Harksen already had luxurious accommodation in Constantia an upmarket suburb within 30 minutes drive from the bungalow;
29.4 that Harksen was prepared to hire the bungalow at its normal rental of R25 000,00 per month and pay for a full time maid and other charges only to "use it over the weekends;"
29.5 the excuse given for Studer to sign the lease as a front for Harksen which excuse was not questioned by the defendant was that it was for "diplomatic reasons";
29.6 when Studer failed to arrive Harksen simply informed Ferguson that his wife would sign the lease in the place and instead of Studer and then signed the lease himself;
29.7 the defendant took care in sorting out issues dealing with the date of commencement of the lease; the other charges payable including the maid's salary and the issue dealing with the satellite decoder yet appeared totally unconcerned about who had actually signed the lease; and
29.8 finally the defendant's request that Harksen give written authority for Studer to sign on his behalf, was a request for a separate document and not a request that same be made part of the lease agreement.

All of this evidence which I accept, points to a deliberate desire on the part of the defendant not to establish the true position with regard to Harksen.

30. I have little doubt that in Harksen the defendant had thought he had secured an ideal tenant and he thus went about finalising the tenancy in a manner that was both careful and deliberate. Careful when it came to the

terms and conditions of the lease, deliberate when it came to the tenant itself. The defendant was deliberate in not making any real enquiries about Harksen. The only enquiry was directed to Watson who by her own admission had little knowledge about Harksen and she in any event was resident abroad. Despite being informed that Harksen was a fraudster, a crook, a conman, someone who had stolen millions from investors and being confronted with a refusal by this man to sign a lease agreement himself, defendant's failure to enquire about Harksen other than the superficial enquiry referred to above displays on the part of the defendant a rather studied lack of curiosity. Any landlord would have made some serious attempt to establish details about a possible tenant such as Harksen given the information recorded above. In addition it should also have engendered some curiosity when being advised that Harksen was already in occupation of luxurious accommodation and sought to hire the bungalow at not an unsubstantial monthly rental only to use over weekends! Furthermore Harksen's acceptance of Ferguson's advise that Harksen required the lease to be signed by a person other then Harksen for "diplomatic reasons" could only mean that there must have been some underlying strategy for Harksen to avoid signing the lease and the defendant was prepared to be party to such strategy by his failure to seriously raise any questions in that respect. The only inference that can be drawn from the defendant's action or lack of it is that defendant knew

that any serious enquiry about Harksen would lead to information that may evince an impediment to letting the bungalow to Harksen. The most obvious impediment must be that Harksen is probably avoiding his creditors. For the above reasons I cannot be satisfied that the defendant had “no reason to suspect” that Harksen was under a sequestration order.

31. Furthermore representatives of the Accommodation Shop CC who administered the lease for the defendant and were thus the defendant’s agent gave evidence to the effect that it would not be unreasonable to expect that Harksen was an insolvent. Evidence was that at least half of the population of Cape Town believed Harksen to be an insolvent because the newspapers and magazines were awash with Harksen’s antics. Harksen had become known as the millionaire insolvent, whose home was repeatedly raided by the Trustees and millions of rands were found on such raids.

32. On the balance of probabilities despite their denial I am satisfied that those at the Accommodation Shop CC who dealt with the defendant, knew at all material times that Harksen was an insolvent. As the Accommodation Shop CC was the defendant’s agent its knowledge of Harksen must be imputed to the defendant particularly since it had a duty to communicate this to the defendant. In any event I believe that this was

communicated by them to the defendant although not in terms.

33. I am therefore satisfied that the defendant has failed to discharge the onus placed upon him to prove that he had no reasonable grounds to suspect that Harksen was an insolvent as provided in s24(1) of the Act.

34. In the circumstances I am satisfied that the plaintiffs are entitled to the order they seek which includes costs occasioned in the employment a senior council and the costs occasioned in opposing the application brought by the defendant in terms of r33 (4).

35. In the result I make the following order:

35.1 Defendant is to pay Plaintiffs the amount of R271 290,63 together with interest thereon at the rate of 15.5% from the date of judgment to date of payment.

35.2 Defendant is to pay plaintiffs costs of suit which costs to include the costs in employment of a senior council and costs relative to the application in terms of r33 (4).

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WAGLAY AJ