



LEGAL UPDATE

Supreme Court of Appeal Ruling on Foreign Trustee Recognition and Cross-Border Surplus Distribution

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In a recent decision, *Scheer v Wagner NO and Others*, the Supreme Court of Appeal considered the key issue of the recognition of a foreign insolvency trustee, and the novel issue of how to deal with a local surplus where the same person's estate has been sequestrated in multiple jurisdictions, raising questions of statutory interpretation and the common law principle of comity.

Briefly, the facts: The estate of Scheer, domiciled in Austria, was sequestrated in Austria in 2017, and Wagner was appointed as the trustee of Scheer's insolvent estate in Austria. After Scheer's South African estate met the same demise in 2018, Wagner applied in a South African High Court to be recognised, in South Africa, as the receiver of Scheer's insolvent Austrian estate.

Why would Wagner want to be so recognised? The simple answer is that whilst there were insufficient funds in Scheer's Austrian estate to settle the Austrian creditors, it became apparent that there would be a surplus of funds in Scheer's South African estate (i.e. once the South African creditors were settled, it was envisaged that there would be funds remaining). If recognised, Wagner hoped to be able to 'sweep up' and repatriate any such surplus to Austria, and use those surplus funds to make further payments to creditors of Scheer's Austrian estate.

Wagner argued that the Court must regard Scheer's estate as a single estate, and must consider the broader pool of both Austrian and South African creditors. If so, said Wagner, the existence of an Austrian shortfall meant that it could never be said that a 'surplus' could exist. Wagner argued that this approach aligned with the established common law principles governing the recognition of foreign trustees.

Scheer, naturally, disagreed, and opposed Wagner's attempts. Scheer contended that had his estate only been sequestrated in Austria, the common law principles of international comity would apply, but that because his estate had also been sequestrated in South Africa, s116 of the South African Insolvency Act applied, and had to be followed by the Courts: in the event of a surplus in South Africa, it could not be transferred to another jurisdiction, but instead the surplus should (and could only) be paid into the Guardian's Fund, and thereafter to Wagner, once he is rehabilitated.

The High Court sided with Wagner, and Scheer appealed that finding to the SCA.

The first issue dealt with by the SCA related to the principles applicable in recognising trustees of foreign estates, and summarised these as follows:

1. Recognition is governed by the principle of comity, encouraging Courts to extend recognition and respect of the laws and judicial acts of another country, and to acknowledge the appointment of foreign trustees, provided that such recognition does not conflict with local laws of public policy.
2. A foreign trustee requires such formal recognition (on the basis of a discretion grounded in comity and convenience) to be permitted to deal with immovable property in South Africa, but does not strictly speaking require recognition to deal with movable property in South Africa (although recognition in the latter circumstance is still commonly sought).
3. Recognition, whilst discretionary (and potentially subject to additional conditions), is usually granted if local creditors are not prejudiced, or if local insolvency laws are not contravened.

The second issue dealt with by the SCA was that of the interpretation surrounding s116. The SCA re-affirmed the standard principles applicable to the interpretation of statutory provisions, and noted the presumption that statutes do not alter the common law more than is necessary. On the basis of these principles, the SCA noted that:

1. s116 must be reconciled with the principles of comity and the discretion to recognise foreign trustees, where local creditors are protected and mandatory rules respected; and
2. the term 'surplus' could not be understood in isolation, where a foreign trustee was recognised, and where a deficit abroad would persist.

The SCA held that s116 only envisaged a scenario, and only applies, where a surplus arises in South Africa, where there is no foreign estate which suffers a shortfall. The SCA found that in the present circumstances, and on a plain reading, s116 did not apply to this matter's factual matrix. Instead, said the SCA, the common law (which was unchanged by statute) applies.

Under the common law, where a foreign trustee is recognised, the surplus (i.e. once the South African estate was finally distributed and creditors and cost settled) can be transferred to the Austrian estate for the benefit of those creditors.

By adopting this approach, the interests of South African creditors would be prioritised, whilst the cross-border nature of insolvency would be respected. And if there is a surplus in Austria thereafter, Scheer would be entitled to those remaining funds. In addition, the anomaly of the Guardian's Fund holding the surplus indefinitely (given that no party could claim such a surplus, including Scheer, who was unlikely to be rehabilitated whilst the Austrian shortfall persisted), could be avoided by adopting this approach.

In the circumstances, the SCA dismissed Scheer's appeal, and sided with Wagner. It confirmed the correctness of Wagner's recognition, the inapplicability of s116 to the present matter, and instead the need to place reliance on established common law principles to determine the matter.

The SCA's decision is a confirmation of our ability to conduct our insolvency proceedings, and interpret our local laws, in the context of a cross-border context. The decision demonstrates that this can be done without prejudice to local creditors, and without harm to domestic laws, and in a manner which dovetails with foreign insolvency interests. The decision is a victory for cross-border comity, and will go a long way in providing comfort and protection to a plethora of participants within an increasingly multi-jurisdictional environment.



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