THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 23 March 2026

Status: Immediate

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Scheer v Wagner N.O. & Others (1109/2024) [2026] ZASCA 32 (23 March 2026)

Today, the Supreme Court of Appeal (SCA) handed down judgment in which it dismissed the appeal with costs including the costs of two counsel, where so employed.

This appeal concerned the interpretation of s 116 of the Insolvency Act 24 of 1936 (the Act), and particularly the meaning of the word 'surplus' mentioned therein. That section provides that if, after settling all claims, costs, charges, and interest, there remains any surplus in an insolvent estate following the confirmation of the final distribution plan, the trustee must pay that surplus to the Master of the High Court. The surplus is then deposited in the Guardians' Fund and will only be paid out to the rehabilitated insolvent upon their request.

Mr Scheer's Austrian estate was sequestrated in 2017 and his South African estate in 2018. At the time of the sequestration of his Austrian estate, Mr Scheer was domiciled there. It is also common cause that most of his creditors are in Austria. The respondent, Mr. Wagner, is the trustee of the insolvent estate of the appellant (Mr. Scheer) in Austria. Mr Wagner applied to the high court for recognition, meaning official acceptance of his role and authority, in the Republic of South Africa. This recognition would allow him, after the final distribution of Mr Scheer's South African insolvent estate under s 113 of the Act, to transfer any surplus funds from the South African estate to the Austrian estate for the benefit of creditors in Austria.

Mr Scheer opposed the application on the ground that s 116 requires any surplus in his South African estate to be paid into the Guardians Fund and thereafter to him after his rehabilitation. This provision, Mr Scheer argued, is peremptory and accordingly does not allow South African courts any discretion to deal with the surplus in any other manner. The high court, however, rejected this argument and granted the relief sought with costs on a punitive scale.

Aggrieved by the order of the high court, Mr Scheer appeals against that order with the leave of the high court. The appeal is about the interpretation of a statutory provision.

At the hearing of the matter, Mr Wagner applied for an order allowing him to adduce further evidence on appeal. He sought to place before this Court two judgments of the Vienna Higher Regional Court of Austria, delivered on 25 and 26 November 2025, respectively. He asserted that he only became aware of the judgment on 5 December 2025. The delay in seeking leave to submit the judgments into evidence was caused by the need to obtain sworn translations and to confirm their finality under Austrian law. The judgment arose from Mr Scheer's appeals against decisions rejecting his proposed restructuring plan to settle his Austrian creditors. Mr Wagner contended that the judgments are 'highly material' because they provided definitive findings on the extent of the deficit in Mr Scheer's Austrian estate, which is an issue before this Court. Mr Scheer did not oppose the application and gave notice that he abides the decision of this Court. The SCA was satisfied that Mr Wagner provided a reasonable explanation for the failure to tender the judgments at the hearing in the high court and granted leave to adduce further evidence on appeal.

The SCA held that that on a plain reading, s 116 does not provide for the situation which has arisen in this case. The section clearly regulates circumstances where there is no foreign insolvent estate in which a shortfall exists. The section neither explicitly states that it is the intention of the legislature to alter the common law, nor can an inference be drawn that the legislature did have such an intention.
The SCA held further that s 116 of the Act is not applicable in circumstances where, after the distribution of assets in a South African insolvent estate, a surplus remains while a shortfall persists in the insolvent estate in the individual's country of domicile. In such situations, the common law principles take precedence and provide the applicable legal framework. The high court correctly concluded that a surplus, as contemplated by s 116, cannot exist if there is still a deficit in a foreign insolvent estate, particularly where the foreign trustee has been recognised in South Africa. This interpretation is consistent with the established common law principles.

Accordingly, the SCA dismissed the appeal with costs, and the respondent is to pay the costs associated with the application to adduce new evidence.

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