THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1109/2024

In the matter between:

JÜRGEN SCHEER **APPELLANT**

and

RAOUL GREGOR WAGNER N.O. **RESPONDENT**
(In his capacity as the duly appointed trustee
of the insolvent estate of Jürgen Scheer
in the Republic of Austria, File No: AZ 6 S 77/17s)

In re:

RAOUL GREGOR WAGNER N.O. **APPLICANT**
(In his capacity as the duly appointed trustee
of the insolvent estate of Jürgen Scheer in the
Republic of Austria, File No: AZ 6 S 77/17s)

and

JOHAN CHRISTIAN GIJSBERS N.O. **FIRST RESPONDENT**
(In his capacity as duly appointed joint trustee
of the insolvent estate of Jürgen Scheer
Masters Ref No: C82/2018)

NTANGANEDZENI FRANK NEMAKWARANI N.O. **SECOND RESPONDENT**
(In his capacity as duly appointed joint trustee
of the insolvent estate of Jurgen Scheer
Master Ref No: C82/2018)

JÜRGEN SCHEER **THIRD RESPONDENT**

THE MASTER OF THE WESTERN CAPE HIGH COURT **FOURTH RESPONDENT**

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

Coram: SMITH and KOEN JJA and MAMOSEBO AJA

Heard: 27 February 2026

Delivered: 23 March 2026

Summary: Insolvency law **–** interpretation of 'surplus' in s 116 of the Insolvency Act 34 of 1936 (the Act) – recognition of foreign trustee in terms of common law principle of comity – presumption against alteration of the common law – whether foreign trustee entitled to claim surplus in South African insolvent estate to settle.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (De Wet AJ sitting as court of first instance):

1 The respondent is granted leave to adduce further evidence on appeal. The judgments of the Vienna Higher Regional Court of Austria, which are attached to the respondent's application to adduce further evidence, are admitted into evidence.

2 The respondent is to pay the costs of the application to adduce further evidence.

3 The appeal is dismissed with costs including the costs of two counsel, where so employed.

JUDGMENT

Smith JA (Koen JA and Mamosebo AJA concurring):

Introduction

[1] This appeal concerns the interpretation of the word 'surplus' in s 116 of the Insolvency Act 24 of 1936 (the Act). Section 116 provides that if any surplus remains in an in solvent estate, after settling all claims, costs, charges, and interest, the trustee must, following the confirmation of the final distribution plan, 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.[1]

[2] The respondent, Mr. Wagner, is the trustee of the insolvent estate of the appellant, Mr. Scheer, in Austria. Mr Scheer's estate in South Africa was also subsequently

[1] **'Surplus to be paid into Guardians' Fund until rehabilitation of insolvent**
(1) If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall, immediately after the confirmation of that account, pay that surplus over to the Master, who shall deposit it in the Guardians' Fund and after the rehabilitation of the insolvent shall pay it out to him at his request.'

sequestrated. Mr Johan Christian Gijsbers and Mr Ntanganedzeni Frank Nemakwarani are the duly appointed joint co-trustees of his South African estate.

[3] Mr Wagner applied to the high court for: recognition as the receiver of the insolvent estate in Austria, within the Republic for the purposes outlined in the notice of motion; a declaration that the co-trustees to the South African estate remain as the only persons empowered to administer the South African estate; and the removal of any remaining surplus funds to Austria, upon conclusion of the distribution of the South African estate, and the Master of the High Court confirming the amount of surplus funds available for transfer and the details of the Austrian estate into which the surplus funds are to be paid. Costs were sought only in the event of opposition.

[4] 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. Mr Scheer appeals against that order with the leave of the high court.

[5] At the hearing of the appeal, Mr Wagner applied for an order allowing him to adduce further evidence. 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 judgments on 5 December 2025. The delay in seeking leave to submit the judgments into evidence is alleged to have been caused by the need to obtain sworn translations and to confirm their finality under Austrian law. The judgments 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, alleged to be an issue before this Court. Mr Scheer did not oppose the application and gave notice that he abides by the decision of this Court.

[6] The discretion to admit new evidence on appeal is governed by s 19(*b*) of the Superior Courts Act 10 of 2013 and guided by principles that ensure fairness, finality, and the integrity of judicial proceedings. Courts exercise this discretion sparingly, requiring applicants to demonstrate exceptional circumstances, materiality, and the absence of prejudice to the opposing party.

[7] The guiding principles include:

(a) It is essential that there should be finality to legal proceedings and a litigant should not, except in exceptional circumstances, be allowed to adduce further evidence.

(b) The applicant must show that the failure to adduce the evidence was not due to their negligence and must satisfy the court that they could not have obtained the evidence through reasonable diligence.

(c) The evidence tendered must be admissible, weighty and material and likely to be true, and must be such, that if adduced, it would be practically conclusive.[2]

[8] I am satisfied that Mr Wagner provided a reasonable explanation for the failure to tender the judgments at the hearing in the high court. The judgments are clearly relevant to the determination of Mr Scheer's contention that Mr Wagner's application was premature as the extent of the deficit in his Austrian estate had not yet been determined. The judgments provide objective and final confirmation of the dismissal of Mr Scheer's appeals in respect of his applications to set aside: the sale and transfer of his immovable property; the determination of costs and the distribution of proceeds from the sale of the immovable property; the refusal to amend minutes of the distribution meeting; and the decision to reject his proposed restructuring plan to settle his Austrian creditors. The judgments are therefore relevant insofar as they provide confirmation that all disputes regarding Mr Scheer's Austrian debts have been finally adjudicated by a competent tribunal in Austria. Accordingly, the judgments are admitted into evidence.

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[2] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 43. See also: *Prince v President, Cape Law Society and Others* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (CC); 2002 (1) SACR 431 (CC) at para 39; *S v Schaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC); 2008 (1) SACR 1 (CC) at para 21; and *S v Swanepoel* 1983 (1) SA 435 (A).

Factual background

[9] As the appeal turns on the interpretation of a statutory provision, it is only necessary for me to provide a summary of those facts required to establish context and to determine its application to the facts of this appeal. The relevant facts can be stated briefly.

[10] 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 in Austria. It is also common cause that most of his creditors are in Austria.

[11] Mr Wagner has shown that the shortfall in the Austrian estate is likely to exceed €4.4 million. There was some dispute over the value of an Austrian situated immovable property, with Mr. Scheer estimating it at €3.3 million and Mr. Wagner insisting on a valuation of €1.8 million. Mr. Wagner has, however, demonstrated that Mr. Scheer had overstated the value of the immovable property, as the sale agreement upon which he relied related to two properties. Furthermore, the €3.3 million price was conditional upon the lifting of the insolvency proceedings. In any event, the Austrian Bankruptcy Court authorised the sale of the immovable property at a purchase price of €1.8 million. This detail, however, is not important for the purposes of the appeal since Mr Scheer accepts that the shortfall in his Austrian estate will be substantial. It is undisputed that there will be a surplus in his South African estate, which could be used for the benefit of Austrian creditors without prejudice to South African creditors.

Submissions by the parties

[12] Mr Scheer contended that Mr Wagner must be treated as an ordinary creditor and must lodge a claim against the estate in terms of s 44 of the Act. That provision regulates the procedure that creditors must follow when submitting claims in an insolvent estate.

[13] He submitted that where an insolvent's estate had only been sequestrated in a foreign jurisdiction, the common law principles of international comity apply. However, where the insolvent's estate was also sequestrated in the Republic of South Africa, the

position is regulated by s 116 of the Act. The provisions of s 116 are both express and peremptory. They determine that any surplus in the insolvent estate shall be paid to the Master and – once rehabilitated – to the insolvent, at his request. Mr Scheer argued that a court cannot override or circumvent these explicitly peremptory provisions in the absence of a legislative provision granting such powers.

[14] He further argued that Mr Wagner's notice of motion does not only seek recognition for the purposes of the administration of his South African estate, but also an order that he be authorised to remove any surplus funds in that estate. While South African courts would ordinarily grant requests for recognition based on the principle of international comity, the order which Mr Wagner seeks regarding the surplus in his estate is not sanctioned by s 116 of the Act. The reference to 'claims, charges and costs' in s 116 is to those in his South African estate and the relief sought by Mr Wagner can therefore not encompass the surplus. He further asserted that the effect of the high court's judgment is that claims by Austrian creditors were allowed without deference to the provisions of s 44 of the Act. Moreover, Mr Scheer argued, the application was speculative and premature since the shortfall in the Austrian estate has not yet been fully determined.

[15] Conversely, Mr Wagner contended for an interpretation of s 116 that considers the broader pool of Mr Scheer's creditors, encompassing both South African and Austrian obligations. He asserted that funds remaining in the South African insolvent estate, after satisfying the claims of South African creditors and covering the associated proceedings' costs, do not constitute a 'surplus' as contemplated by s 116. Although Mr Scheer's insolvency spans across two jurisdictions, he possesses only a single estate. Therefore, Mr. Wagner argued, no 'surplus' as envisioned by s 116 should be paid into the Guardian Fund until the claims of all Austrian creditors have been satisfied.

[16] According to Mr Wagner, this interpretation aligns with established common law principles governing the recognition of foreign trustees, particularly those appointed in the jurisdiction of the insolvent's domicile, which apply in this case. He further maintains that the relief he seeks would not prejudice Mr Scheer, as it is improbable that Mr Scheer will

be rehabilitated or that any surplus in South Africa would be returned to him while debts to his Austrian creditors remain outstanding. Mr Scheer’s entitlement to any surplus would arise only after the full settlement of all creditors’ claims in both jurisdictions, as well as all insolvency and bankruptcy costs. Mr Wagner asserts that should such a surplus eventually exist, Mr. Scheer would be entitled thereto in Austria.

Findings by the high court

[17] The high court was satisfied that Mr Wagner had been properly appointed as receiver of Mr Scheer’s insolvent estate in Austria. It was Mr Scheer’s place of residence at the time of the bankruptcy order. Accordingly, the high court was satisfied that Mr Wagner had the necessary authority to bring the application for recognition.

[18] The high court further found that Mr Wagner had established that the Austrian creditors’ claims would probably not be satisfied from the proceeds of the Austrian assets alone, and that the claims process was ongoing. It also considered the impact of s 116 of the Act. In this regard it found that while s 116 sets out mandatory obligations regarding surplus funds, courts are not precluded from applying the principle of comity in cases where a foreign insolvent estate is likely to have a deficit. The significance of this principle will be discussed in detail below.

[19] The high court ultimately found that funds remaining after the final distribution of an insolvent estate administered in South Africa do not constitute a surplus as contemplated by s 116(1). On a purposive interpretation, such a surplus would vest in Mr Wagner as the recognised receiver of the Austrian estate. The high court further found that, considering that Mr Scheer cannot lay claim to the surplus until his rehabilitation, requiring the funds to be paid into the Guardian’s Fund would be impractical, costly, and inconvenient.

Discussion

[20] The principles relating to the recognition of trustees of foreign insolvent estates were comprehensively explained in *Ex Parte Palmer NO: In re Hahn*.[3] These principles can be summarised as follows.

[21] First, the recognition of foreign trustees is guided primarily by the principle of comity, which encourages courts to acknowledge the appointment of foreign trustees, provided such recognition does not conflict with local laws or public policy. The principle of comity is a long-established doctrine of private international law through which courts of one sovereign state, as a matter of judicial policy, extend a measure of recognition and respect to the laws and judicial acts of another. It is not a rule of law that binds courts, but a discretionary principle grounded in mutual respect, convenience, and the orderly administration of justice in matters that transcend national boundaries.

[22] Second, a foreign-appointed trustee may, as a matter of South African private international law, deal with an insolvent's movable property located in South Africa because such assets follow the *lex domicilii* (law of domicile), and therefore vest in the trustee upon the foreign sequestration. Although formal recognition is not strictly required for movables, it remains standard practice to apply for it. In contrast, immovable property is governed by the *lex situs* – the law of the country where the immovable property is situated. A foreign trustee may only administer such property once formally recognised by a South African court, which exercises an absolute discretion grounded in comity and convenience. This discretion applies to all aspects of cross-border estate administration, including convening meetings under the Act. Recognition is available only where the insolvent was domiciled in the foreign state at the time of sequestration. Recognition would allow the foreign trustee, 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.

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[3] *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); See also: *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 27.

[23] Third, recognition is discretionary but will generally be granted if it does not prejudice the interests of local creditors or contravene mandatory local insolvency rules. Local courts may impose conditions to protect domestic priorities, such as the ranking of claims and the rights of secured creditors.

[24] In interpreting s 116 of the Act, the following principles should be borne in mind. The approach to statutory interpretation in our law is well established. This Court in the often-cited authority, *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] confirmed that interpretation is "a unitary exercise", which entails attributing meaning to the words used in a statute by considering (a) the ordinary rules of grammar and syntax; (b) the context in which the provision appears; (c) the apparent purpose of the provision; and (d) the material known to those responsible for its production. This Court emphasised that a sensible construction is to be preferred over one that is insensible or unbusinesslike.

[25] The Constitutional Court expanded on these principles in *Cool Ideas 1186 CC v Hubbard and Another*,[5] where it reaffirmed that statutory interpretation begins with the words themselves, which must ordinarily be given their plain grammatical meaning. At the same time, the Constitutional Court stressed that this cannot be done in isolation, and that in addition to context and purpose, meaning must also be informed by constitutional values.

[26] Another important interpretative principle of our law is the presumption that statutes do not alter the common law more than is necessary. Legislation must therefore be interpreted in the light of the common law; must as far as possible be reconciled with related precepts of the common law; and must therefore be read to be capable of co-existing with common law *in pari materia* (in a similar matter).[6] This presumption

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[5] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.
[6] *S v Leeuw* 1980 3 SA 815 (A) 823F-G.

enhances legal certainty and continuity by discouraging unintended disruption of established common-law doctrine. It follows that a statute will be taken to modify or abolish the common law only where the legislature has expressed such intention in clear and unambiguous terms, or where such alteration follows by necessary implication. Courts therefore endeavour, as far as the statutory language permits, to construe legislation in a manner that permits it to coexist harmoniously with the common law.[7]

[27] The presumption against altering the common law sits alongside the broader constitutional imperative. Section 39(2) of the Constitution obliges courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. Where a statutory provision is reasonably capable of more than one meaning, the interpretation that best aligns with constitutional values must be preferred.

[28] These interpretive principles inform the present matter in two ways. First, s 116 of the Act must be read against the common-law framework governing cross-border insolvency and the recognition of foreign trustees. The presumption against altering the common law, together with the purposive approach, requires that s 116 be reconciled with the principles of comity and the court's inherent discretion to recognise and assist foreign office-holders where local creditors are protected and local mandatory rules are respected.

[29] Second, on a purposive and harmonious reading of s 116, the term 'surplus' cannot be understood in isolation from the universal administration of the insolvent's estate where the foreign trustee has been recognised and a deficit persists abroad. The high court's conclusion, which correctly found that funds remaining after local distributions are made do not constitute a 'surplus' in the sense contemplated by s 116 while the foreign estate remains in deficit, must be understood in this context.

[7] *Casserley v Stubbs* 1916 TPD 310-312 per Wessels J. See also: *Bills of Costs (Pty) Ltd v The Registrar, Cape* 1979 4 All SA 585 (A); 1979 3 SA 925 (A) 942D-E; *Law Society of the Cape of Good Hope v C* 1986 4 All SA 51 (A); 1986 1 SA 616 (A) 639E.

[30] The approach to interpreting s 116, as advanced by Mr Scheer, leads to results that are both impractical and unreasonable. During argument, Mr Scheer's counsel acknowledged that even on Mr Scheer's interpretation, any entitlement to the surplus would only arise after he had been rehabilitated. Furthermore, it was conceded that rehabilitation would remain unavailable to him for as long as a deficit persisted in his Austrian estate. This interpretation thus produces an anomalous outcome: neither Mr Scheer, Mr Wagner, nor the Austrian creditors could assert a claim to the surplus. The result will be that the surplus would effectively remain beyond the reach of everybody for an indefinite period. Counsel for Mr Scheer described this anomaly as representing a *lacuna* in the statutory scheme of the Act. In my view this submission is untenable.

[31] It seems to me that the potential anomaly arising from the contended interpretation of s 116 is avoided by the application of well-established common law principles. These principles have evolved specifically to prevent such anomalous outcomes and ensure a coherent approach to cross-border insolvency. Under the common law, when a foreign trustee is duly appointed to administer the insolvent estate in the country of the insolvent's domicile, that trustee is entitled to claim any surplus in the South African estate that is not required to settle claims of South African creditors.

[32] This approach has significant implications. First, it guarantees that the interests of South African creditors are prioritised, ensuring that their claims are satisfied before any surplus is distributed elsewhere. Second, any remaining surplus after local creditors have been paid is directed towards the settlement of outstanding obligations to Austrian creditors, thus addressing the cross-border nature of the insolvency. Finally, if there is still a surplus after all Austrian claims have been settled, Mr Scheer is entitled to claim whatever remains. Accordingly, the surplus in Mr Scheer's estate, following final distribution in South Africa, cannot be regarded as a surplus for the purposes of s 116 of the Act, but is governed by the relevant common law dispensation.

[33] Moreover, it is clearly in Mr Scheer's best interests that any surplus remaining in his South African estate, after the satisfaction of local creditors, be applied to the

settlement of his outstanding obligations to Austrian creditors. Should this not occur, Mr Scheer would remain subject to the ongoing consequences of insolvency in Austria, effectively placing him under the persistent burden of insolvency for an indefinite period.

[34] The argument that there is uncertainty regarding Mr Scheer's entitlement under Austrian law to any balance remaining after the satisfaction of his Austrian creditors, is untenable. The legal position on this issue has been established and clarified by Mr Wagner, who provided a reasoned explanation of the relevant provisions of Austrian law. Notably, there was no evidence presented to challenge or contradict Mr Wagner's assertions in this regard.

[35] For the above reasons I am of the view 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 had such an intention.[8]

[36] Therefore, 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 prevail 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.

[37] In considering whether the application was premature, I agree with the reasoning adopted by the high court. As I have stated earlier, Mr. Scheer acknowledged the existence of a shortfall in the Austrian estate. Although there is some disagreement

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[8] Ibid.

regarding the precise extent of this shortfall, both parties accept that it will be substantial. In any event, the judgments of the Vienna Regional Court of Austria, which have been admitted into evidence, are objective confirmation that all outstanding disputes regarding creditors' claim have been finally resolved. At the same time, it is also undisputed that there will be a surplus in the South African estate after the completion of distributions to local creditors. Against this background, Mr Scheer cannot be heard to complain about prejudice because the application was brought prior to the final determination of the Austrian shortfall or the finalisation of the administration of his South African estate.

[38] For all these reasons, the appeal must fail. In the result the following order issues:

1 The respondent is granted leave to adduce further evidence on appeal. The judgments of the Vienna Higher Regional Court of Austria, which are attached to the respondent's application to adduce further evidence, are admitted into evidence.

2 The respondent is to pay the costs of the application to adduce further evidence.

3 The appeal is dismissed with costs including the costs of two counsel, where so employed.

J E SMITH

JUDGE OF APPEAL

Appearances:

For the appellant:	A Brown and RJ Steyn
Instructed by	Goussard & Otto Inc, Somerset West
	McIntyre Van der Post, Bloemfontein
For the respondents:	S Symon SC and M Maddison
Instructed by:	Cox Yeats Attorneys, Johannesburg
	Symington De Kok, Bloemfontein.