



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 20876/19

In the matter between:

RAOUL GREGOR WAGNER N.O.

First Applicant

(In his capacity as the duly appointed trustee of the Insolvent State 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 the duly appointed trustee of the Insolvent estate of Jürgen Scheer Master's Ref No: C82/2018)

NTANGANEDZENI FRANK NEMAKWARANI N.O.

Second Respondent

(In his capacity as the duly appointed trustee of the Insolvent estate of Jürgen Scheer Master's Ref No: C82/2018)

JÜRGEN SCHEER

Third Respondent

THE MASTER OF THE WESTERN CAPE HIGH COURT

Fourth Respondent

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 5 June 2024.

JUDGMENT

DE WET AJ:

Introduction:

[1] This matter concerns the application of cross-border insolvency principles and whether the applicant has established, having regard to the considerations of comity, convenience and equity, an entitlement to the relief claimed.

[2] The applicant, in his capacity as the appointed official receiver of the insolvent estate of Jürgen Scheer (the third respondent to whom I refer to as "Scheer" for ease of reference) in Austria, brought an application in this Court seeking, in essence, an order that his appointment as the official receiver of the insolvent estate of Scheer, be recognised within the Republic of South Africa, for the sole purpose of enabling him, upon the conclusion of the distribution of Scheer's South African insolvent estate in terms of s 113 of the Insolvency Act 24 of 1936 ("the Act"), to remove any surplus funds in his South African insolvent estate to his Austrian insolvent estate for the benefit of his Austrian creditors.

[3] Scheer initially opposed the application on the basis that the applicant lacks the necessary *locus standi* as the relief sought does not include relief for the recognition of the foreign bankruptcy order and further that the application is speculative and premature as the shortfall in the Austrian estate has not yet eventuated and more pertinently, that there will be no shortfall. Therefore, based on the considerations of comity, convenience and equity, it was argued, that the administration of his Austrian estate should first be finalized and then, if the applicant is in a position to positively confirm that there is a shortfall in the Austrian estate, the South African Court will be in a position to determine whether an order should be granted as requested. Hence, he requested that the application be dismissed with costs. The grounds of opposition have morphed into more technical arguments which I deal with later.

[4] It bears mentioning that the application had been launched in November 2019 but only served for the first time before me on the opposed motion roll on 2 November 2023. On the day of the hearing the applicant launched an application for leave to file a supplementary affidavit as new evidence became available after the founding and replying affidavits were filed, which evidence, it was alleged, is material to the issues in the application. In the interest of justice and in the exercise of my discretion, I allowed the supplementary affidavit and granted Scheer leave to file an answer to the new evidence which pertained to the value of a luxury property owned by Scheer in Austria. The applicant in turn was afforded the right to reply thereto.

[5] Prior to filing opposing papers, a notice in terms of Rule 47(1) was filed on behalf of Scheer, wherein security for costs was demanded from the applicant. He only launched an application for security for costs during November 2022. The applicant, without admitting liability, then provided security but Scheer requested costs in respect of the application. Consequently, the applicant filed opposing papers and it was agreed that the issue of the costs would be determined simultaneously with the main application.

[6] Scheer did not file his further answering affidavit timeously¹ and consequently the parties agreed to a further postponement of the matter with the Court to determine the wasted costs in respect of the postponements on 2 November 2023 and 11 January 2024.

[7] The legal representatives filed comprehensive submissions, supplementary submissions and additional notes after the hearing of the matter which have been extremely helpful.

Relevant facts:

[8] Scheer's estate was declared bankrupt² by the Commercial Court of Vienna on 19 June 2017 and the applicant was appointed as the official receiver of his Austrian estate on 7 August 2017. Scheer was domiciled in Austria at the date of the bankruptcy order and the majority of his creditors and assets are in Austria.

[9] Scheer's estate in South Africa was finally sequestrated on 14 August 2018 under case number 1489/2018 and the first and second respondents were appointed as joint trustees of his estate in South Africa. The first and second respondents do not oppose the relief sought by the applicant.

[10] There will be surplus funds in Scheer's insolvent estate in South Africa after all proved claims, costs, charges and interest have been paid.³

[11] In respect of Scheer's Austrian estate, there is a dispute whether there will be sufficient funds to pay all the claims and costs, mainly as a result of the respective values ascribed by the applicant and Scheer to the property known as Gut Kellerhof.

[12] The parties agree that the administration of an insolvent estate is an "on-going" process.

¹ In terms of the order granted on 2 November 2023 the answering affidavit had to be filed by 17 November 2023 but it was only filed on 31 December 2023.

² Using the terminology of the Austrian Insolvency (Bankruptcy) code.

³ From the founding papers it appears that it is anticipated that there will be a surplus amount of approximately R3 000 000, before the costs of sequestration and any interest payable. In answer to this Scheer replied that "it may be so", but "there is no need for the applicant, at this stage, to retain such surplus."

The applicant's case regarding the issue of whether there will be a shortfall in the Austrian estate:

[13] According to the applicant and as set out in the supplementary affidavit filed in November 2023, the liabilities in Scheer's Austrian estate as at 18 September 2023, can be summarised as follows:

- 13.1 The total proven claims amount to €2,041,775.67.
- 13.2 In addition to the proven claims, there are claims totaling €835 592.56 which are already enforceable as the claiming authorities can deem them enforceable even if the claims are still subject to appeals and proceedings, and because the claimants have obtained an enforceable decision.
- 13.3 In addition, the applicant expects further claims totaling €201 201.39 to be fully proven during the applicant's bankruptcy proceedings.
- 13.4 There are disputed claims and a contingent liability of €1 327 397.39 in the insolvent estate.

[14] Based on these amounts, it is the applicant's case that the total claims he must take into account as at 23 September 2023, is €4 405 967.01. (The applicant conceded that he does not anticipate that additional claims totaling €2 224 882.84 will be confirmed or proven and had consequently not taken these claims into account).

[15] In addition to the aforementioned claims, he estimates the costs pertaining to the administration of the estate to be approximately €450 000.00⁴ which brings the total liabilities in the Austrian estate to an estimate of €4 855 967.01.

[16] As at 23 September 2023, the applicant estimated the total value of Scheer's Austrian assets to be €3 790 000.00. This was on the basis that the luxury property owned by Scheer, Gut Kellerhof, could realise an amount of €1 800 000 (with the possibility that he could negotiate it up to €2 000 000.00) and not €3 300 000.00 as initially anticipated and set out in the founding papers. In this regard it was common cause that Gut Kellerhof was valued during November 2021 at €3 300 000.00.

[17] In his supplementary affidavit, the applicant explained that it has been difficult to sell Gut Kellerhof for various reasons which included but are not limited to, the conduct of Scheer⁵, the inability of estate agents appointed by him to obtain offers

⁴ The applicant explained that the costs of administration would depend on the estimated value of Scheer's immovable property, and the potential for addition fees based on effort which will be determined by the Austrian Bankruptcy Court.

⁵ The applicant could not gain access to the property as Scheer, after his release from jail, changed the locks on the property. This necessitated an eviction application which was only finalised in favour of the applicant on appeal during December 2022 in Austria.

and the general decline in the Austrian economic and property market due to Covid 19, the Ukrainian war and the energy and inflation crisis world-wide. He, after marketing the property himself since July 2023, received two relevant offers on the property. The highest offer, which was made on 23 October 2023, was for €1 800 000.00.

[18] On 10 January 2024 the Austrian Bankruptcy court authorised the sale of Gut Kellerhof for €1,800 000.00 and the sale at this price was approved by the Austrian creditors.

[19] On these calculations it was obvious that there would be a significant shortfall in the Austrian insolvent estate.

Scheer's contentions regarding a shortfall in the Austrian estate:

[20] In his answering affidavit, which was signed during August 2023, Scheer stated that the value of Gut Kellerhof which should be taken into account for purposes of determining whether there would be a shortfall in his estate, is €3 300 000.00. This was based on the valuation obtained by the applicant during November 2021. He disputed the inclusion of other liabilities and in essence argued that the application was premature, that there will not be a shortfall in the Austrian estate, and that the application should consequently be dismissed.⁶

[21] In answer to the further supplementary affidavit filed by the applicant regarding the reduced value of Gut Kellerhof, Scheer filed an answering affidavit stating that he had secured the sale of Gut Kellerhof in an amount of €2 750 000.00 on 19 May 2023 and further that an appeal had been lodged against the decision of the Austrian Bankruptcy Court authorising the sale of Gut Kellerhof for €1 800 000.00. He further attached an updated valuation by Dr Georg Hillinger in respect of Gut Kellerhof which states that the value has declined from €3 290 000.00 in 2021 to €2 860 000.00 in November 2023.

[22] Based on these main facts, he persisted that there would not be a shortfall in the Austrian estate.

The applicant's reply:

[23] In reply to these new facts, the applicant pointed out that Scheer did not disclose the sale agreement relied on in his answering affidavit deposed to during August 2023, that the agreement would in any event be invalid for various reasons and further that Scheer was attempting to mislead the court as he had failed to disclose several material facts such as:

⁶ Based on his calculations there should be a surplus of €1 560 143.65.

- 23.1 The purported sale agreement related to two properties and the sale price Scheer referenced was for both properties;
- 23.2 The sale was conditional on the lifting of Scheer's insolvency proceedings;
- 23.3 The sale, despite not being valid for lack of authority, had become unenforceable as the other property had been sold by way of forced auction.

[24] In the final analysis it was the applicant's estimation that on the total claims to be considered and the assets available to settle those claims, with reference to the sale of Gut Kellerhof at the price approved by the credit committee and the Bankruptcy Court albeit on appeal, there is an approximate shortfall of €1,905,967.01 in the estate which shortfall would increase to approximately €2,355,967.01 if the costs of administration are added.⁷

Legal framework:

[25] Leach JA in the matter of Lagoon Beach Hotel (Pty) Ltd 2016 (3) SA (SCA) at paragraph [27], with reliance on the summary contained in Ex parte Palmer NO by Berman J⁸, confirmed the principle that a foreign trustee in all matters relating to the administration of an insolvent estate in South Africa, requires recognition by way of an application to the insolvent's local High Court and that:

"The right, power and authority of a foreign trustee to deal with the movable property of an insolvent in South Africa exists only, and the grant of recognition to him by a local Court to deal with that insolvent's immovable property situate in this country is permissible only (subject to what is set out below with regard to the question of exceptions to the proposition here being stated), where the insolvent was domiciled in the foreign State, the Court of which sequestered his estate and the trustee was appointed pursuant to the sequestration order. "Comity and convenience" is a factor which plays a part in influencing the local Court to exercise its discretion in favor of recognizing a foreign trustee; it is not a separate ground for granting such trustee recognition".

[26] As a general rule, a foreign trustee will be recognised where his appointment arose from an order in the debtor's domicile⁹.

[27] Recognition constitutes a declaration, in effect, of entitlement to deal with the South African assets in the same way as if they were within the jurisdiction of the foreign courts, subject to the South African courts' imposition of conditions for

⁷ The aforesaid calculations were made on the basis that Gut Kellerhof is sold for €2 000 000.

⁸ 1993 (3) SA 359 (C) at 362 C – 363 H.

⁹ I was also referred to in the matter of Smit v Abrahams 1992 (3) SA 158 (C) at 180C-D where Farlam AJ (as he then was), stated that "...only the Court of the debtor's domicile can in general make an order with international effect for the sequestration of his estate..."

protecting local creditors or in recognition of the requirements of South African laws.¹⁰ To grant or refuse recognition to a foreign trustee is a matter for the Court's discretion¹¹ and is granted on the grounds of comity and convenience¹².

[28] After payment of the various charges, costs and proved claims, any remaining assets and moneys may be removed from South Africa with the written consent of the Master or with the consent of the court.¹³

[29] Comity can be defined as “..neither a matter of absolute obligation on the one hand, nor of mere courtesy or goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to rights of its own citizens or of other persons who are under the protection of its law.”¹⁴

[30] Relying on the matter of *Deutsche Bank AG v Moser & Another* 1999(4) SA 216 (C), it was argued on behalf of Scheer, based on the principles of convenience, that the Austrian estate should first be finalised before proceedings pertaining to any surplus in his South African estate should be determined as, the majority of Scheer's assets are situated in Austria, the administration of the Austrian estate is already underway and at an advanced stage, the administration of the Austrian estate is an ongoing process, and the status of claims (whether disputed or accepted) may change going forward.

Locus standi:

[31] I accept that the enforcement of foreign bankruptcy orders is dealt with differently than the enforcement of foreign judgments, but for purposes of recognition of a foreign trustee, as in this application, it is moot whether it is the foreign order or the appointment of a foreign representative that is to be recognised by a South African court.¹⁵

[32] It is common cause that the applicant was appointed as Scheer's receiver in Austria which was Scheer's place of domicile at the date of the Austrian bankruptcy order. These facts are sufficient to find that he has the necessary *locus standi* to launch this application.¹⁶

¹⁰ See *Moolman v Builders & Developers (Pty) Ltd* 1990 (1) SA 954 (A) where it was held that a foreign trustee required recognition before he would be entitled to deal with any property in a company in order to comply with all his duties in terms of the machinery the local Court.

¹¹ See *Ex parte Stegmann* 1902 TS 40 at 48 and 53

¹² Also see *Moolman supra* at 961; *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179.

¹³ See *Mars supra* at p 743 and the orders granted in *Moolman supra* at p 958.

¹⁴ “See *Hilton v Guyot* 1895 159 US 113.

¹⁵ See in this regard *Meskin Insolvency Law and its Operation in Winding-up, Magid et al* (“Meskin”) at §17.3.2.3

¹⁶ See *Mars: The Law of Insolvency in South Africa* (10th ed) – *Bertelsmann et al* (“Mars”) at p 736 and *Meskin* at §17.2.

[33] This ground of opposition is therefore without merit.

The application is speculative and premature:

[34] This defence is inextricably linked to the argument by Scheer that it is more convenient for the surplus in South Africa to be dealt with after it had been established that there is a shortfall in the Austrian estate.

[35] I accept that the applicant has a duty, as a court appointed receiver, to consider all claims and any contingent liabilities of the insolvent estate, and to inquire into, and secure all assets which could be utilised to meet the likely claims and the costs of the insolvency proceedings in Austria. As he is only requesting the removal of any surplus funds in South Africa, there will be no prejudice to South African creditors whilst such funds would be available for Austrian creditor's claims.

[36] The applicant explains in his affidavits that § 237 of the Austrian Insolvency (Bankruptcy) Code stipulates that the effect of the bankruptcy order in Austria extends to assets situated abroad (which would include any surplus in his South African insolvent estate), and that Scheer is obliged to assist the applicant in the realisation of the foreign assets. There is no reason to doubt the applicant's statement in this regard and it also not disputed by Scheer that it is indeed the applicable law in Austria.

[37] In my view the applicant has established that there is a real prospect that the Austrian assets will be insufficient to meet the Austrian claims and the cost of those proceedings. Even if I am wrong in this regard, I agree with the applicant that a shortfall in the foreign estate is not a requirement for a request for recognition of a foreign appointment in terms of the common law.

[38] The question is rather whether, based on the considerations of comity, convenience and equity, this Court should exercise its discretion, to recognise the applicant for the purpose of removing surplus funds to Austria for the benefit of his creditors. In my view, the relevant facts as already set out herein, show that it will be convenient and equitable to recognise the applicant and grant the ancillary relief claimed and further to this, I point out that:

- 38.1 Scheer has creditors in Austria whose claims will in all probability not be met from his Austrian assets.
- 38.2 The process of proving claims is ongoing where he is domiciled, and Scheer does not dispute that there will be a surplus in his South African estate. These funds can be utilized to the benefit of his Austrian creditors with no prejudice to any South African creditors.

38.3 There is no reason why the applicant should agree to excess funds in South Africa being paid into the Guardians' Fund pending the finalization of the Austrian estate, which is anticipated to still take a considerable time to finalise, only to later oppose Scheer's rehabilitation to prevent the surplus being paid to him or then to apply that the surplus be paid from the fund to the applicant, should the Austrian process be finalised prior to Scheer's rehabilitation. It is simply impractical, costly and inconvenient to say the least.

The impact, if any, of s 116 of the Act on the relief claimed:

[39] Section 116(1) of the Act states as follows:

"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 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".

[40] In the ordinary course of insolvency proceedings in South Africa, the meaning of s 116 is clear and contains peremptory obligations in respect of funds not required for the payment of claims, costs, charges or interests. There is no definition as to what the word surplus means but it could only apply to claims, charges and costs in the insolvent's South African estate in my view.

[41] It was argued on behalf of Scheer that a distinction should be drawn where an insolvent's estate is sequestrated in a foreign jurisdiction and where an insolvent's estate was sequestrated in the Republic of South Africa as, in the latter instance, the Court cannot grant an order as requested by the applicant, as it is in conflict with the express provision of s 116 of the Act. In support of this argument, I was referred to the unreported judgment of *Conradie and Another v Master of the High Court Kimberly and Others* [2008] ZANHC 50 (13 June 2008).

[42] This matter is clearly distinguishable from the matter before this Court as it dealt with the question as to whether surplus funds, already paid into the Guardians' Fund could be paid to a surviving spouse.

[43] Contrary to the facts in *Conradie supra*, there are unpaid creditors in the Austrian estate of Scheer and the applicant, as the duly appointed receiver of his Austrian estate, has a duty to secure and recover assets, where ever they may be found. There is consequently, strictly speaking and applying the considerations of fairness and practicality, no surplus in Scheer's South African estate. If Scheer was not

sequestered in his country of domicile, and there was only an insolvent estate in South Africa which rendered a surplus as envisaged in s 116 of the Act, the argument might have found application, but is not necessary for purposes of this application for me to make definitive finding in this regard.

[44] Section 116 of the Act in my view does not preclude the granting of the relief sought as the Court is empowered in terms of the common law principles pertaining to the recognition of foreign representatives to do so. Any funds remaining after final distribution by the South African trustees does not constitute a surplus within the meaning of s 116(1) on a proper and purposive interpretation of s 116(1)¹⁷ and in my view would vest in the applicant as the appointed receiver of Scheer's Austrian estate.

[45] Where a court had exercised its discretion and had recognised a foreign receiver, the common law position is that a court (or the Master) may then, as long as local creditors are protected, authorise the removal of any assets after the payment of claims, costs and incidental charges as ordered in the matter of *Ex parte Steyn* 1979 (2) SA (OPD) 309 at 312D-E. Such order, is not contrary to the Act.

[46] Whilst I do not agree with the submission that Scheer only has 1 insolvent estate which is administered in two different jurisdictions, I do agree that for as long as Scheer has unpaid creditors in Austria, there will strictly speaking be no surplus in his South African estate once a foreign trustee had been recognised.¹⁸

Costs:

[47] The application was postponed on 2 November 2023 to bring the position regarding Gut Kellerhof to the court's attention. I accept that it could not have been filed earlier as the offers were only made on 23 and 25 October 2023 respectively.

[48] Scheer's legal representatives sought a postponement to answer the supplementary affidavit and a timetable was agreed between the parties. Ordinarily I would either order the applicant to pay the wasted costs occasioned by the postponement or make no order as to costs. In this matter however, Scheer belatedly answered the supplementary affidavit by placing incomplete and misleading information before the court and his late filing of this affidavit caused yet another postponement of the application.

[49] I see no reason why the costs pertaining to these two postponements should not be costs in the cause.

¹⁷ *Viljoen v Venter* 1981(2) SA 1523 WLD.

¹⁸ See *Smit v Abrahams* supra

[50] A litigant who, through irresponsible and unreasonable conduct, forces its opponent to expend unnecessary financial resources by pursuing the litigation, must be made to pay for most of the expenses incurred by the opponent and this is done by way of a punitive costs order. In this regard it was held in *Moropa and Others v Chemical Industries National Provident Fund and Others* 2021 (1) SA 499 (GJ) at para [84] as follows:

“[84] The basic principles derived from these cases are: (a) A litigant who, through irresponsible and unreasonable conduct, forces its opponent to expend unnecessary financial resources by pursuing the litigation, must be made to pay for most of the expenses incurred by the opponent. That is done through a punitive costs order. (b) Litigation that is frivolous and vexatious should attract a punitive costs order in order to protect the party that is vexed by the litigation. Frivolous and vexatious litigation need not be motivated by malice or bad faith. It is the effect of the litigation and not the motive or intention of the culpable party that is important. (c) A litigant who (i) behaves reprehensibly; (ii) is guilty of fraud or dishonesty; (iii) falsely and / or irresponsibly accuses its opponent of acting fraudulently, or dishonestly; (iv) defames its opponent; (v) makes unwarranted attacks on its opponent; (vi) misleads the court; or (vii) fails to disclose material facts to the court, should be mulcted with a punitive costs order. The list, of course, is not exhaustive. There are other cases that have expanded on the factors that may be taken into account when determining an appropriate costs order.”

[51] It appears from the facts of this application, that despite the common cause facts regarding the appointment and duties of the applicant, Scheer opposed the application with the aim to benefit himself rather than making good any amounts owed to creditors. There was for example, no basis for him to dispute the applicant's *locus standi* and he went as far as to place misleading information before the Court in an attempt to further his case.

[52] He further launched the interlocutory application for security for costs based on the applicant's version that there will be a shortfall in Austrian estate and then in his answering affidavit and in argument, insists that there will not be a shortfall in his Austrian estate. This contradictory approach highlights the unreasonableness of his opposition.

[53] This application took more than two years before it was ripe for hearing and consists of voluminous papers and translations, which will ultimately be borne by Scheer's creditors should he not be ordered to pay the costs.

[54] I have also considered the unnecessary and baseless attacks on the applicant by Scheer. Again, this approach, in circumstances where the applicant is only complying

with his obligations in terms of his appointment, was unnecessary and only served to increase costs.

[55] Most concerning however, after all the substantial unnecessary additional expenses, Scheer, who is an unrehabilitated insolvent in two jurisdictions with numerous unpaid creditors, decided to place selective and misleading information before the Court to bolster his argument that there will not be a shortfall in his Austrian estate by attaching an unsigned, untranslated partial version of a purported agreement and failed to disclose the true terms of the agreement. This unscrupulous conduct led to yet further costs as the applicant had to place a full and translated copy of the purported agreement before the Court in order to show what the correct position is.

[56] In the circumstances a punitive costs order is in my view warranted.

The security for costs application:

[57] From the very helpful timeline provided to the Court, it appears that Scheer, after filing a notice in terms of Rule 47(1) during January 2022, took no further steps to file an application to compel the applicant to do so, until he was faced with a chamber book application during the beginning of November 2022, to file his answering affidavit in the main application.

[58] On 25 November 2022, Scheer launched the interlocutory application and the applicant, on 24 January 2023, and without conceding liability to do so, tendered and provided the security for costs sought by Scheer to avoid further delays in the main application.

[59] As Scheer insisted on the applicant paying the costs of the application, the applicant filed opposing papers therein to deal with the merits of the application and to show why he ought not to be held responsible for such costs. In light of the additional costs incurred by the applicant to file opposing papers after tendering security for costs without admitting liability, both parties are seeking costs against the other in respect of the interlocutory application.

[60] I deal very briefly with the basis for the application by Scheer and the well-known and often stated principles applicable in applications pertaining to security for costs, bearing in mind that the overriding principle remains that whether to grant security for costs, falls within the discretion of the court.

[61] In terms of the Rule 47(1) notice, security was sought on the basis that the applicant is a *peregrinus* with no assets in South Africa and that there are insufficient funds in the Austrian estate, on the applicant's version, to meet the claims of all of

Scheer's creditors, and that therefore, there will be no way for Scheer to recover his costs if the applicant is unsuccessful in the main application.

[62] As held in *McHugh N.O. & Others v Wright* [5641/2021] [2021] ZAWCHC 205 (19 October 2021), the fact that the applicant is a *peregrinus* is not sufficient, without more, to seek an order for him to furnish security for costs, nor is the fact that he does not have assets in the Republic. The contradictory stance adopted by Scheer in the application of security on the one hand, and his opposing affidavit on the other, shows that the application brought was without merit and with an ulterior motive to delay the relief sought by the applicant.

[63] In light of my determination on the merits of the main application that the applicant is entitled to the relief claimed and that the opposition to the application was unreasonable and vexatious, it is not necessary to debate the merits of the application for security for costs any further.

[64] In the circumstances, there is no reason why Scheer should not be ordered to pay the costs of the interlocutory application.¹⁹

[65] In the circumstances I make the following order:

1. The appointment of the applicant, Raoul Gregor Wagner, as the official receiver of the insolvent estate of Jürgen Scheer in terms of the laws of Austria is recognised withing the Republic of South Africa solely for the purpose as set out herein and until such recognition is revoked by an order of this Court.
2. The first and second respondent remain the only duly appointed co-trustees of the South African insolvent estate of Jürgen Scheer and are the only persons who remain empowered to administer the South African insolvent estate of Jürgen Scheer in terms of the Insolvency Act 24 of 1936 ("the Act") until a distribution of the estate has occurred in terms of section 113 of the Act.
3. Upon the conclusion of the distribution of the South African insolvent estate of Jürgen Scheer in terms of section 113 of the Act, the applicant is entitled to remove any surplus funds remaining in the South African estate, not required for the payment of proved claims, costs, charges or interest, to the insolvent estate of Jürgen Scheer in Austria for the benefit of Jürgen Scheer's Austrian creditors.
4. The applicant's removal of the surplus funds as contemplated herein, is subject to the fourth respondent's confirmation of:

¹⁹ I would have been inclined to grant a punitive costs order, but such order was not requested.

- 4.1 the amount of the surplus funds available for transfer after distribution has been completed; and
- 4.2 the bank account details of Jürgen Scheer's Austrian insolvent estate's bank account into which the surplus funds are to then be paid.
5. The third respondent is ordered to pay the costs of the application on the scale as between attorney and client.
6. The wasted costs occasioned by the postponements on 2 November 2023 and 11 January 2024 shall be costs in the cause.
7. The third respondent is ordered to pay the costs of the interlocutory application.

A De Wet
Acting Judge of the High Court

On behalf of the applicant:

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