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DISPUTE RESOLUTION ALERT

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The facts of the matter concerned an insolvent of Irish descent who resided in the USA and conducted business through an intricate web of holding and subsidiary companies registered in different parts of the world, including tax havens. However, the insolvent's immense wealth was short-lived as he was first declared bankrupt in USA on 23 March 2013 and thereafter declared bankrupt in Ireland. Pursuant to the two bankruptcy orders, a trustee was appointed in USA (American trustee) and a another was appointed in Ireland (Irish trustee).

One of the particular assets that the insolvent held was an interest in the Lagoon Beach Hotel (Pty) Ltd (Lagoon Beach Hotel), situated in Cape Town. In fulfilling his duties, the Irish trustee, acting with the support of the American trustee, uncovered two handwritten contracts entered into between the insolvent and his wife wherein the shareholding of the Lagoon Beach Hotel was transferred by the insolvent to his wife for purposes of frustrating the insolvent's creditors. According to the Irish trustee's investigations, he believed that the insolvent had been insolvent at the time that he concluded the handwritten agreements and made the dispositions to his wife. The Irish trustee therefore instituted proceedings in Ireland to have the dispositions made under these handwritten agreements set aside and in effect to recover the Lagoon Beach Hotel as an asset in the insolvent's estate.

Apart from the written agreements between the insolvent and his wife, a sale was underway for Lagoon Beach Hotel to a third party. As such, the Irish trustee applied to the Western Cape High Court (WCC) for an order recognising him as a foreign trustee in South Africa (SA) and further interdicting the proposed sale. Yekiso J in the WCC granted the interdict and further granted Lagoon Beach Hotel leave to appeal to the SCA, which it did.

The SCA ultimately had to decide whether the Irish trustee had the authority to act given that the USA bankruptcy order was granted first and whether the Irish trustee should be afforded recognition within SA to effectively deal with the assets of the insolvent that were situated in SA.

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Lagoon Beach expressed the view that the effect that the USA bankruptcy order was to bring about a worldwide stay which applies extraterritorially. This worldwide stay operates to bar any person from obtaining possession of, or commencing action to obtain control over property falling within the bankrupt estate of the insolvents.

The SCA found against this and noted that it was important to consider the fact that the American and Irish bankruptcy officials were "working hand in glove to attempt to recover assets for the benefit of the insolvent's creditors" and the Irish trustee's efforts in seeking a preservation of the assets, was to ensure the integrity of

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The SCA reiterated the established principle that a foreign trustee who seeks to deal with assets present in this country, must first obtain the active assistance of a South African Court by obtaining recognition of the foreign bankruptcy order.

the legal process in both Courts in the USA as well as in Ireland. In any event, the SCA found that the USA worldwide stay can be lifted and is not absolute.

Pertinent to the issue of recognition as a foreign trustee within SA, was the question of the insolvent's domicile. The SCA reiterated the established principle that a foreign trustee who seeks to deal with assets present in this country, must first obtain the active assistance of a South African Court by obtaining recognition of the foreign bankruptcy order. The grant of recognition by a South African Court to deal with that insolvent's immovable property situated in this country is permissible only where the insolvent was domiciled in the foreign state, the Court of which sequestrated his estate and the foreign trustee was appointed pursuant to the sequestration order.

However, the SCA stated that this was not a law set in stone. In exceptional circumstances, the requirement of domicile will not be strictly insisted upon.

The SCA therefore concluded that given the uncertainty as to the insolvent's domicile and the fact that the American Courts have invoked the justice system of Ireland to assist in tracing assets and administering bankruptcy proceedings, there are in any event exceptional circumstances present that justify a South African Court also rendering assistance by taking the necessary steps to recognise the Irish trustee in order to protect the interests of the insolvent's creditors.

Accordingly, the SCA found that there was no reason to interfere with the Court a quo's recognition of the Irish trustee as a foreign trustee within SA and further that the Court a quo properly exercised its discretion to grant an interim interdict to preserve the assets of the insolvent pending the litigation in Ireland.

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DEFAULT JUDGMENT UNDER SECTION 424(1) OF THE COMPANIES ACT 61 OF 1973: WHO CARES ABOUT PROOF?

Section 424(1) of the Companies Act, No 61 of 1973 entitles the court, on application, to declare a party personally liable for a company's debt where it is found that such party had conducted the business of the company in a reckless or fraudulent manner.

One thing we have learnt from the hit series '*Murder She Wrote*', other than the fact that the star of the show Angela Lansbury never aged during its 12 years of airing, is that it is often the one closest to us that does the most harm.

This is particularly the case when liquidators unearth reckless and fraudulent conduct of directors and prescribed officers, trusted to run the company in a legally compliant and professional manner. Section 424(1) of the Companies Act, No 61 of 1973 entitles the court, on application, to declare a party personally liable for a company's debt where it is found that such party had conducted the business of the company in a reckless or fraudulent manner.

The effect of s424(1) is punitive in nature and requires a party alleging such conduct to prove it.

But is it possible for a court to grant an order by default, holding a director liable under s424(1), without any evidence being adduced by the party alleging reckless or fraudulent conduct? The Supreme Court of Appeal (SCA) in the case of *Minnaar v Van Rooyen NO 2016* (1) SA 117 (SCA) had to deal with this question.

The *Minnaar* case involved the appeal of Mr Casper Minnaar against the judgment of Keightley AJ sitting in the Gauteng Division of the High Court, Pretoria (*court a quo*) who refused to grant a rescission, in terms of the common law and rule 42(1)(a) of the Uniforms Rules of court, of an order made against him by default.

Mr Minnaar was appointed as a financial director of Askari Mining and Equipment Ltd (Askari) in 2000 however he subsequently resigned in 2001. In June 2003 Askari was provisionally liquidated and finally liquidated July 2008. During the liquidation process an enquiry in terms of s417 of the Companies Act was conducted. It became apparent from the enquiry report that a possible s424(1) action should be taken against the former directors of Askari. It was on this basis that the liquidators of Askari instituted s424(1) proceedings against the five directors of Askari, including Mr Minnaar, in 2008. The directors had filed a joint plea. The liquidators during the course of the proceedings had tried to enter into settlement negotiations with the directors however Mr Minnaar, in professing his innocence, refused to take part. The liquidators had, with Mr Minnaar being aware, applied for a trial date, on 22 February 2012. Mr Minnaar had failed to attend the trial and as such the liquidators had, in terms of rule 39 (1) of the Uniform Rules of court, obtained a default judgment against Mr Minnaar. The *court a quo*, in granting default judgment, had only considered the allegations raised in the particulars of claim which were denied in the joint plea.

The SCA, in agreeing with Mr Minnaar's argument that evidence needs to be led for recourse in terms of s424(1), found that although the court exercises its discretion in granting default judgments it cannot make a finding of recklessness or intent to defraud without any evidence brought before it. The effect of s424(1) is punitive in nature and requires a party alleging such conduct to prove it.

Mr Minnaar's appeal was upheld and the rescission of the default judgment was granted. Like in all the *Murder She Wrote* episodes the evidence was critical in convicting a wife of her husband's murder, even though he had it coming.

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