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DISPUTE RESOLUTION ALERT

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Will funds subject to a “blocking order” vest in the trustees of an insolvent estate?

This was one of the questions that the High Court had to consider in the recent case of *Leathern N.O and Others v Reserve Bank of South Africa* (41306/2019) [2020] ZAGPPHC 181 (21 May 2020) (Leathern Case). In this case, the duly appointed joint trustees (Trustees) of the estate of Mr Ahmed Dawood Bharat (Bharat) brought an application in terms of which they requested the High Court to declare, *inter alia*, that all the funds and/or amounts standing to the credit of Bharat at Grobank Limited (Grobank), that were “blocked” by the Reserve Bank of South Africa (Reserve Bank) in terms of Regulation 22A and 22C of the Exchange Control Regulations (Exchange Control Regulations), vested in the insolvent estate of Bharat and hence vested in the Trustees.

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CLIFFE DEKKER HOFMEYR

Will funds subject to a “blocking order” vest in the trustees of an insolvent estate?

In terms of section 20(1)(a) of the Insolvency Act 24 of 1936 (Insolvency Act), one of the effects of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, at which stage the estate will vest in the trustee.

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Monies fall within the definition of movable property and will normally be included in a debtor’s insolvent estate. However, monies deposited into a banking account become the property of the bank by virtue of *commixtio* which results in a credit with that bank which belongs to the client. Under ordinary circumstances, the credit in bank accounts will fall in the insolvent estate of the insolvent. It is only when a credit in the account was obtained by theft or fraud, or erroneously paid into the account, that the client will have no claim against the bank for that money.

In the Leathern Case, the Reserve Bank argued that the credits that Bharat had with Grobank as a result of monies that were deposited into his accounts, did not fall into his insolvent estate since:

- (a) the monies were deposited into his banking account in his capacity as agent; and
- (b) he obtained the money through fraud.

After considering all the evidence, the High Court found that the Reserve Bank didn’t provide the necessary proof to show that Bharat received the monies as an agent or that there was any fraud involved in obtaining the monies.

The High Court thereafter looked at property that is specifically excluded from an insolvent estate, either by the Insolvency Act or by other statutes, to determine whether a “blocking order” in terms of the Exchange Control Regulations, could potentially result in

Will funds subject to a “blocking order” vest in the trustees of an insolvent estate?...continued

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property (credits with a bank) not vesting in the trustees of an estate. The High Court looked at the following examples of statutory exclusions of property from insolvent estates:

- (a) Section 10 of the Admiralty Jurisdiction Regulations read with section 11 (13) of such act;
- (b) Section 27(1) of the Securities Services Act, No. 36 of 2004;
- (c) Section 1(1) of the Friendly Societies Act, No. 25 of 1956;
- (d) Various sections in the Long-Term Insurance Act, No. 52 of 1998;
- (e) Various sections in the General Pensions Act, No. 29 of 1979;
- (f) Section 78(7) of the now repealed Attorneys Act, No. 53 of 1979;
- (g) Chapter 1 of the Matrimonial Property Act, No. 88 of 1984;
- (h) Compensation payable under the Occupational Injuries and Diseases Act, No. 130 of 1994;
- (j) Unemployment Insurance Benefits; and
- (k) Section 35(1) of the Prevention of Organised Crime Act, No. 121 of 1998 (POCA).

The High Court stated that in each of the abovementioned statutes the legislator included exclusion clauses, which specifically state that the property doesn't

form part of the estate of the insolvent. Considering the aforementioned, the High Court noted that it would have thought that the legislator would have included an exception clause in the Exchange Control Regulations to leave no uncertainty. However, since the legislator didn't include an exclusion clause in the Exchange Control Regulations, the High Court concluded that it is not for the court to read into the Exchange Control Regulations what is not included.

As such, the High Court held that any argument that the monies subject to the “blocking order” are to be excluded from the property which vests in the trustees of an insolvent estate, is not convincing and should be rejected. The High Court accordingly granted the application by the Trustees and declared that the funds vested in the insolvent estate and hence vested in the Trustees.

The Leathern Case judgment confirms that when a person is sequestrated, his/her entire estate ultimately vests in the duly appointed trustees of his/her estate. Only property that is specifically excluded from the estate of an insolvent in terms of the Insolvency Act and other statutes, will not vest in the trustees of the insolvent estate. The party that contends that the property or monies in question do not form part of the insolvent estate, will need to prove that the property or monies fall within one of the statutory exclusions.

Kylene Weyers and Stephan Venter

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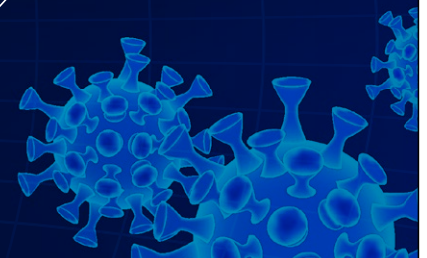
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