



# Dispute Resolution

21 April 2026

SOUTH AFRICA

- Part 2: Insolvents worldwide beware
- Language, tradition and risk: Why legal doublets refuse to die
- SOC procurement exclusivity declared unconstitutional



For more insight into our expertise and services

## Part 2: Insolvents worldwide beware

This is a sequel to our previous alert, "*Insolvents worldwide beware*," in respect of the same matter, in which the Supreme Court of Appeal (SCA) has now authoritatively addressed the interplay between section 116 of the Insolvency Act 34 of 1936 (Act) and the common law principles of international comity in the context of dual-jurisdiction sequestrations.

### Background

In *Scheer v Wagner N.O. and Others* (1109/2024) [2026] ZASCA 32 the appeal before the SCA concerned (i) the interpretation of what constitutes "surplus" as contemplated in section 116 of the Act; and (ii) whether "surplus" funds in the insolvent's (Mr Scheer) sequestrated South African estate should be transferred to his Austrian administrators to settle any claims proven by his Austrian creditors.

Section 116 provides:

*"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 request."*

### Contention by the parties

Scheer argued that the joint trustees should be treated as any ordinary creditor and should lodge a claim against his South African estate in terms of section 44 of the Act. He further submitted that since he was sequestrated in both Austria and South Africa, section 116 of the Act applied and not the common law principles of international comity. In addition, Scheer contended that the effect of the High Court's judgment was that claims by his Austrian creditors were allowed without deference to section 44 of the Act, and the application was speculative and premature.

On the other hand, the joint trustees argued that section 116 of the Act should be interpreted to consider the broader pool of Scheer's creditors, encompassing both South African and Austrian obligations. It was further contended that although Scheer's insolvency spans across two jurisdictions, he possesses one estate. Consequently, no "surplus" in terms of section 116 of the Act should be paid to the Guardian Fund until all Scheer's creditors, including those in Austria, have been satisfied.



# Dispute Resolution

SOUTH AFRICA

## The court's findings

In rejecting Scheer's contentions as untenable, the SCA reaffirmed the High Court's ruling that the common law principle of international comity applied to the dispute, particularly because recognising the authority of the joint trustees did not conflict with South African law or public policy.

Having been formally recognised, the joint trustees could, in terms of private international law, deal with Scheer's "movable property located in South Africa because such assets follow the *lex domicilli* (law of domicile), and therefore vest in the trustee upon the foreign sequestration". Sheer was domiciled in Austria at the time of his Austrian sequestration.

Pertinently, the court further held that their recognition allows the joint trustees, after the final distribution of Scheer's South African estate under section 113 of the Act, to transfer any surplus funds from Scheer's South African estate to the Austrian estate for the benefit of his Austrian creditors.

As for the postulated application of section 116 of the Act, the court authoritatively held that this section does not apply in circumstances where, after the distribution in a South African estate, a surplus remains while a shortfall persists in the insolvent state in the individual's country of domicile. In such situations, the common law principles prevail and provide the applicable legal framework.

## Key takeaways

The SCA confirmed the common law principle that when an insolvent is sequestrated in a foreign jurisdiction, in which jurisdiction they were **domiciled** at the time of their sequestration, their foreign trustees are automatically vested with their movable property in South Africa. In terms of immovable property, the foreign trustees would have to seek the recognition of their authority from the South African High Court before they are authorised, under South African law, to deal with such immovable property.

This judgment further settles the position in our law that a foreign trustee appointed in the jurisdiction of the insolvent's domicile is entitled, upon formal recognition of the foreign appointment in South Africa, to claim any surplus remaining in the local sequestrated estate after local creditors have been paid.

It is important to note that the permanent residence (domicile) of the insolvent is of utmost importance in the comity of South African foreign insolvency law. If the insolvent is not domiciled in the foreign jurisdiction at the time of their foreign sequestration, then the foreign trustees or foreign sequestration cannot be recognised by our South African courts. This, however, does not mean foreign creditors are left without relief. If the insolvent has been sequestrated in South Africa, then the foreign creditor can still lodge a claim in the local insolvent estate. If the insolvent has not been sequestrated in South Africa, then the foreign creditor can apply to the South African courts to have the insolvent sequestrated locally and thereafter lodge a claim in the local estates.

**Lucinde Rhodie, Belinda Scriba and Dipuo Titipana**



## Chambers Global 2026 Results

### Dispute Resolution

**2022–2026** ranked our practice in Band 2: Dispute Resolution.

**2018–2026** ranked our practice in: Band 2: Restructuring/Insolvency.

**2026** ranked our Kenya practice in Band 5: Dispute Resolution.

### Individual Rankings

**Tim Fletcher:** 2025–2026 as an "Eminent Practitioner", a category in which lawyers are ranked as highly influential lawyers and exceptional individuals.

**Lucinde Rhodie:** 2023–2026 in Band 4: Dispute Resolution and in Band 4: Restructuring/Insolvency.

**Natascha Harduth:** 2023–2026 in Band 4: Restructuring/Insolvency.

**Desmond Odhiambo:** 2026 in Band 4: Dispute Resolution.

**Clive Rumsey:** 2025–2026 in Band 5: Dispute Resolution.

**Anja Hofmeyr:** 2025–2026 in Band 5: Dispute Resolution.

**Jackwell Feris:** 2026 in Band 5: Dispute Resolution.

**Corné Lewis:** 2026 as an "Up & Coming" dispute resolution lawyer.

## Language, tradition and risk: Why legal doublets refuse to die

In 1066, William the Conqueror of Normandy defeated King Harold of England. English legal scribes then began pairing Anglo-Saxon terms with Latin or Norman French equivalents. Despite the merger of the underlying legal concepts, 1,000 year-old doublets like *"will and testament"* and *"cease and desist"* survive in modern legal documents through a combination of history, risk aversion, and ritual. These phrases have circulated through courts, statutes, and other legal documents for centuries. Judges have progressively stripped them of ambiguity, and they have developed settled legal meanings. Lawyers, notoriously risk-averse, prefer something known over a modern plain language alternative.

Take *"will and testament"* as an example. There was a historical distinction between a *"will"* (which dealt with immovable property) and a *"testament"* (which dealt with personal movable property). But if the legal significance in a doublet has disappeared, why is it still used? At a psychological and practical level, many lawyers experience *"severance anxiety"* – a deeply ingrained reluctance to change tested wording. They may accept intellectually that *"will"* and *"testament"* are now functionally identical, yet many retain a residual fear that a court may one day find meaning in the omission. For some, the rational justification is absent; they use archaic phrases only out of habit. The rational concern, though, is reinforced by interpretive principles<sup>1</sup> that might sometimes require a court to treat apparent redundancies as deliberate and meaningful. A court may reason that a skilled drafter would not have included a word unless it was intended to add something. Words used out of habit or caution may then be given significance by the courts. The risk that courts may *"read in"* meaning makes drafters even less inclined to change habitual wording.

<sup>1</sup> Such as *ut res magis valeat quam pereat* – meaning literally, "it is better for a thing to have effect than to be destroyed". This operates in our law as a canon of construction: a court should prefer an interpretation that renders a provision operative and effective, over one that would render it meaningless, void or unworkable. A document should, where possible, be construed so as to give effect to every word rather than treat any word as superfluous.



# Dispute Resolution

SOUTH AFRICA

The legal profession itself is a powerful agent for conserving language. Junior lawyers are trained on precedents, not blank pages. These precedents are valued because they are *"tried and tested"*, evolving incrementally rather than being radically modernised. Phrases like *"will and testament"* are absorbed without their origins being questioned. They are used through repetition rather than active choice.

Legal documents - particularly those concerning death, property, and fundamental rights - also have a ceremonial element. The traditional language is associated with seriousness and authority, by contrast with everyday correspondence. This ceremonial language does nothing to ease understanding, but it affects how carefully parties approach the document. Stripping away ceremonial language may be perceived as stripping away some of the document's gravitas.

The Consumer Protection Act 68 of 2008 requires *"plain and understandable language"* in consumer contracts. That Act applies to contracts below a threshold value but not to high value, specialist documents like wills or complex commercial contracts. The parties to these documents are often sophisticated and less in need of statutory plain language protection. In these documents, any unanticipated interpretation introduces risk which could be catastrophic.

Some doublets and triplets do have justification, but many do not and should be weeded out. These phrases use words that mean the same thing, making one of the words unnecessary:

- **"Cease and desist"** - Both words mean to stop. Neither adds meaning to the other.
  - **"Null and void"** - Both mean: having no legal effect. This might be the best example of pure legal tautology.
  - **"Sole and exclusive"** - Both words convey the same meaning.
  - **"True and correct"** - Found in most affidavits; *"true"* and *"correct"* are interchangeable in that context.
  - **"By and between"** - The word *"by"* in *"this agreement made by and between the parties"* adds nothing.
  - **"Unless and until"** - Both words introduce the same conditional trigger.
- Care must be taken though when cleaning up legal language. Many doublets look redundant but do retain meaning, either historically or in current legal practice. Such as:
- **"Full and final"** - *"Full"* speaks to **completeness**: it captures everything owed, with no outstanding balance. *"Final"* speaks to **finality**: there can be no future claim in the same matter. The two words have distinct functions.



# Dispute Resolution

SOUTH AFRICA

- **"Rights and remedies"** - A *"right"* is a legally protected entitlement; a *"remedy"* is the mechanism to enforce a right. A right can exist without an available remedy, and so the phrase is used correctly to preserve both.
- **"Indemnify and hold harmless"** - Traditionally, to *"indemnify"* means to compensate a party **after** a loss has been suffered. To *"hold harmless"* means to **prevent** the party from suffering loss in the first place.
- **"Fit and proper"** - This is used extensively in the admission of legal practitioners and in corporate governance. *"Fit"* relates to competence and capability. *"Proper"* relates to integrity and good character. Both requirements must usually be satisfied independently.
- **"Heirs and assigns"** - *"Heirs"* are those who receive property of a deceased person through the law of succession. *"Assigns"* are those to whom property has been transferred during the owner's lifetime. The phrase captures different modes of transmission.
- **"Right, title and interest"** - *"Right"* refers to the legal entitlement; *"title"* to formal ownership; and *"interest"* to any equitable or beneficial stake. The full phrase covers every legal and equitable dimension of ownership.

The modern drafter should neither abandon doublets, triplets or traditional wording completely, nor be totally resistant to change. Instead, drafting should be deliberate, distinguishing the genuinely meaningful from words used out of habit. Drafters must have the courage, where a phrase adds nothing but syllables, to let it go.

**Tim Fletcher**



## SOC procurement exclusivity declared unconstitutional

Section 217 of the Constitution requires that when contracting for goods or services, public entities do so through “a system that is fair, equitable, transparent, competitive and cost-effective”. Once a preferred bidder is selected, public entities ordinarily enter into contractual negotiations with such bidders prior to concluding a contract. Such negotiations are a recognised feature of public procurement processes and are typically directed at clarifying terms, allocating risk and improving value-for-money outcomes, within the limits of the procurement framework.

While public entities may negotiate and conclude contracts lawfully pursuant to competitive tender processes, the Gauteng Division of the High Court has now reaffirmed that public entities cannot, by contractual design, fetter their future procurement powers by restraining themselves from approaching the open market once a contract term has expired. In *Sekela Xabiso CA Incorporated v Transnet SOC Limited and Others* [2026] JOL 74084 (GJ), the court held that a contractual clause which bound Transnet SOC Limited (Transnet) to procure auditing services only from a single provider beyond the contract period, unless those services were insourced, was unconstitutional and invalid. The clause was severed, and Transnet’s decision to incorporate it was reviewed and set aside.

### The dispute

Transnet issued a request for proposals for auditing services, envisaging a five-year appointment. Sekela Xabiso CA Incorporated (Sekela) was appointed as a preferred bidder.

During negotiations, Transnet disclosed its intention to insource the audit function and was unwilling to commit to a five-year outsourcing arrangement. The parties ultimately concluded a contract for an initial 30 months. However, the contract included a restrictive clause, clause 6, which prevented Transnet, for a total period of 60 months, from procuring audit services from any provider other than Sekela unless Transnet decided to insource such services.

Despite the restriction in clause 6, Transnet issued a new tender for an appointment of an audit firm, which was awarded to Deloitte & Touche for five years. Sekela’s contract was extended briefly to facilitate the handover. Sekela thereafter declared a dispute under the arbitration clause for a damages claim based on the alleged breach of the exclusivity restriction. In response, Transnet challenged the constitutional validity of clause 6, an issue that was beyond the arbitrator’s jurisdiction. This resulted in Sekela approaching the High Court seeking a declaration that clause 6 was constitutionally valid and enforceable. Transnet opposed that relief and instituted a counter application to review and set aside its own decision to include clause 6 in the contract, contending that the clause unlawfully infringed section 217 of the Constitution.



It was common cause between the parties that clause 6 was severable from the remainder of the contract. The central issue for determination was the proper interpretation of the clause and whether, properly construed, it could withstand constitutional scrutiny.

## **Contractual interpretation in the procurement context**

The High Court approached the matter by applying established principles of contractual interpretation and analysing clause 6 in the context of the contract as a whole, including the duration and renewal provisions. The court held that the contract did not provide for automatic renewal on fixed terms. On the contrary, the contract expressly reserved Transnet's discretion on whether to extend the contract at all, subject to terms and conditions to be agreed and applicable procurement and National Treasury requirements. Read together, the clauses made it clear that clause 6 operated independently of the contract's duration. Its effect was not to extend the contract but to restrain Transnet, even after expiry of the contractual term, from procuring similar services from any other provider.

The court concluded that clause 6 amounted to a restrictive covenant that bound Transnet to a single service provider for a fixed period, regardless of whether a contractual relationship on agreed terms remained in place. Crucially, the court emphasised that because no contractual terms governed

the restricted post-expiry period, clause 6 effectively permitted Sekela to dictate pricing and conditions during that period. This reinforced the conclusion that the arrangement was neither competitive nor transparent, as Transnet was disabled from testing the market or securing improved value once the agreed contractual term had ended.

## **Constitutional invalidity of clause 6**

Once interpreted in that manner, the constitutional consequences were decisive. The court held that:

*"[S]ection 217 of the Constitution forecloses the possibility of one company cornering the market for the provision of services to a particular state entity, even for a limited period – especially if the effect of it doing so would be that it could name its own price."*

The court further held that *"the very purpose of section 217 is to prevent private entities from monopolising state resources"* and clarified that clause 6 had the effect of wholly extinguishing Transnet's procurement powers for the duration of the restriction and preventing it from testing the market or securing better value, albeit for a limited period and regardless of how commercially advantageous such an arrangement may have appeared at the time of contracting.

While Transnet could lawfully have concluded a five year contract through an open tender process, it could not lawfully agree to restrain itself from future procurement beyond the life of a concluded contract.

The court held that the effect of the clause was to capture the state's purchasing power for a period exceeding the term of the contract. That sort of arrangement cannot lawfully be executed, not least because it will inevitably lend a legal veneer to corrupt control of state resources. The restrictive clause 6 of the contract was accordingly declared unconstitutional and invalid.

## **Conclusion**

This judgment draws a clear and important boundary in public procurement. post award negotiations are a legitimate and often necessary feature of public procurement, aimed at refining contractual terms and improving value for money. However, such negotiations cannot be used to entrench exclusivity or restrain an organ of state from returning to the market, even for a limited period, where the effect is to eliminate competition and transparency in public contracting.

**Kelo Seleka and Buhle Duma**

## OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa, Kenya and Namibia, please contact:



### Rishaban Moodley

Practice Head & Director:  
Dispute Resolution  
Sector Head:  
Gambling & Regulatory Compliance  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



### Tim Fletcher

Chairperson  
Chief Risk Officer  
Director: Dispute Resolution  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



### Patrick Kauta

Managing Partner | Namibia  
T +264 833 730 100  
M +264 811 447 777  
E patrick.kauta@cdhlegal.com

### Imraan Abdullah

Director:  
Dispute Resolution  
T +27 (0)11 562 1177  
E imraan.abdullah@cdhlegal.com

### Timothy Baker

Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

### Eugene Bester

Director:  
Dispute Resolution  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

### Neha Dhana

Director:  
Dispute Resolution  
T +27 (0)11 562 1267  
E neha.dhana@cdhlegal.com

### Denise Durand

Director:  
Dispute Resolution  
T +27 (0)11 562 1835  
E denise.durand@cdhlegal.com

### Claudette Dutilleux

Director:  
Dispute Resolution  
T +27 (0)11 562 1073  
E claudette.dutilleux@cdhlegal.com

### Jackwell Feris

Sector Head:  
Industrials, Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

### Nastascha Harduth

Sector Head: Corporate Debt,  
Turnaround & Restructuring  
Director: Dispute Resolution  
T +27 (0)11 562 1453  
E n.harduth@cdhlegal.com

### Anja Hofmeyr

Director:  
Dispute Resolution  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

### Annemari Krugel

Director:  
Dispute Resolution  
T +27 (0)11 562 1709  
E annemari.krugel@cdhlegal.com

### Mercy Kuzeeko

Director:  
Dispute Resolution  
T +26 (4)83 373 0100  
E mercy.kuzeeko@cdhlegal.com

### Corné Lewis

Director:  
Dispute Resolution  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

### Nomlayo Mabhena-Mlilo

Director:  
Dispute Resolution  
T +27 (0)11 562 1743  
E nomlayo.mabhena@cdhlegal.com

### Sentebale Makara

Director:  
Dispute Resolution  
T +27 (0)11 562 1181  
E sentebale.makara@cdhlegal.com

### Vincent Manko

Director:  
Dispute Resolution  
T +27 (0)11 562 1660  
E vincent.manko@cdhlegal.com

### Khaya Mantengu

Director:  
Dispute Resolution  
T +27 (0)11 562 1312  
E khaya.mantengu@cdhlegal.com

### Richard Marcus

Director:  
Dispute Resolution  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

### Lebogang Makwela

Director:  
Dispute Resolution  
T +27 (0)11 562 1057  
E lebogang.makwela@cdhlegal.com

### Burton Meyer

Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

### Desmond Odhiambo

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com

### Lucinde Rhodie

Director:  
Dispute Resolution  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

### Clive Rumsey

Sector Head: Construction & Engineering  
Director: Dispute Resolution  
T +27 (0)11 562 1924  
E clive.rumsey@cdhlegal.com

### Belinda Scriba

Director:  
Dispute Resolution  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

### Tim Smit

Sector Head:  
Consumer Goods, Services & Retail  
Director: Dispute Resolution  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

### Joe Whittle

Director:  
Dispute Resolution  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

### Roy Barendse

Executive Consultant:  
Dispute Resolution  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

### Rimo Benjamin

Counsel:  
Dispute Resolution  
T +27 (0)11 562 1716  
E rimo.benjamin@cdhlegal.com

### Randhir Singh

Counsel:  
Dispute Resolution  
T +27 (0)11 562 1704  
E randshir.singh@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.  
Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.  
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114  
E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**ONGWEDIVA**

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.  
T +264 (0) 81 287 8330 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

**WINDHOEK**

2<sup>nd</sup> Floor, 4@Steps - East Tower, Hilltop Estate, Kleine Kuppe, Windhoek.  
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020  
T +264 833 730 100 E [cdhnamibia@cdhlegal.com](mailto:cdhnamibia@cdhlegal.com)

©2026 15725/APR

