THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 797/2018

Name of ship: **MV 'FONARUN NAREE'**

In the matter between:

AFGRI GRAIN MARKETING (PTY) LTD **APPELLANT**

and

TRUSTEES FOR THE TIME BEING
OF COPENSHIP BULKERS A/S
(IN LIQUIDATION) **FIRST RESPONDENT**

TRUSTEES FOR THE TIME BEING
OF COPENSHIP MPP A/S
(IN LIQUIDATION) **SECOND RESPONDENT**

TRUSTEES FOR THE TIME BEING
OF COPENSHIP MANAGEMENT A/S
(IN LIQUIDATION) **THIRD RESPONDENT**

ABSA BANK LTD **FOURTH RESPONDENT**

Neutral citation: *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others* (797/2018) [2019] ZASCA 67 (29 May 2019)

Coram: Wallis, Van der Merwe, Mocumie and Schippers JJA and Mokgohloa AJA

Heard: 14 May 2019

Delivered: 29 May 2019

Summary: Security arrest in terms of s 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 – such restricted to property existing at the time the arrest order was made – reconsideration of arrest order granted *ex parte* in terms of Uniform Rule 6(12)*(c)* – procedure – where party seeking reconsideration delivers an affidavit dealing with the merits and the applicant replies reconsideration takes place on basis of all material then before the court – onus remains on applicant to establish a genuine and reasonable need for security on a balance of probabilities – whether onus discharged.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Weiner J, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the High Court is set aside and replaced by the following order:

'(a) The application for reconsideration of this court's order dated 21 February 2018 succeeds and the order is set aside.

(b) The applicants are to pay the costs of the application in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, including the costs of the application for reconsideration of the order of 21 February 2018 and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013, such costs to include the costs of two counsel where two counsel were employed.'

JUDGMENT

Wallis JA (Mocumie and Schippers JJA and Mokgohloa AJA concurring)

Introduction

[1] Section 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the AJRA') makes provision for security arrests. It provides that a court may, in the exercise of its admiralty jurisdiction, order the arrest of

'any property' for the purpose of providing security for a claim which is or may be the subject of an arbitration or other proceedings, whether domestic or international and whether or not the claim is subject to the law of South Africa. For present purposes the person seeking the arrest must satisfy the court that (a) it has a maritime claim enforceable by an action *in personam* in the chosen forum against the owner of the property concerned; (b) that it has a *prima facie* case in respect of that claim, which is *prima facie* enforceable in the chosen forum; and (c) that it has a genuine and reasonable need for security in respect of the claim.[1]

[2] Relying on this provision, on 21 February 2018, the first to third respondents, to which I shall refer collectively as Copenship,[2] sought and obtained from the Gauteng Division of the High Court, Johannesburg (Mashile J) the following order:

'2 The Sheriff for the district of Sandton South is hereby authorised and directed to arrest the first respondent's right, title and interest in and to all monies presently held, and if necessary for the purposes of obtaining the full security set out herein, all future monies to be deposited to the credit of the first respondent in the following Absa Capital accounts held by Absa Bank Limited, the second respondent:

Name:	Afgri Grain Marketing (Pty) Limited …
Bank:	Absa Bank Limited
Branch:	Large Public Sector
Account Numbers:	4066574289 and 4074951807

(the 'Afgri Funds')

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[1] *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 832J-833A. That judgment dealt with a claim *in rem* against an associated ship and the relevant passage must be adapted as above to deal with the situation where the claim lies *in personam* against the owner of the property to be arrested. *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 579D-E.

[2] Copenship A/S was a Danish company the business operations of which were divided among the first to third respondents, which were subsequently liquidated and are represented in these proceedings by their trustees. The appellant accepted that the first to third respondents jointly succeeded to any rights of Copenship A/S.

The said arrest to be in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 as amended ("the Act") for the purpose of providing further security for claims that the applicants have advanced in arbitration proceedings in London against the first respondent in the amount of USD 4 713 622.61 plus interest in the amount of USD 1 178 405.65 and costs in the amount of USD 480 626.90.

3 The Sheriff is hereby authorised and directed to release the Afgri funds from arrest upon provision of further security to the satisfaction of the Registrar or the applicants' attorneys in the amount of USD 6 372 593.78 or the value of the property, whichever is the lesser.

4 Any security lodged in terms of paragraph 3 above shall be held by the applicants or its attorneys, pending the determination of the proceedings referred to in paragraph 2 above.

5 – 8 . . .

9 The first respondent is prohibited from taking steps to stop any pending transaction or divert[ing] any funds which are in the ordinary course paid, or will be paid into the accounts identified in paragraph (2) above, until such time as full security has been provided.'

[3] The order was obtained *ex parte* and without notice to the appellant, Afgri Grain Marketing (Pty) Ltd (Afgri). Its aim was to provide Copenship with security for claims under a charter party being pursued in London arbitration proceedings.[3] On 27 February 2018 Afgri applied for the reconsideration and setting aside of the arrest order in terms of Uniform Rule 6(12)*(c)*. It contended that the application was an abuse of process and that there had been material non-disclosures by Copenship. On the merits it accepted that Copenship's claim was a maritime claim capable of being pursued in the chosen forum and that it had been established on a *prima facie* basis. It denied that Copenship had established that it had a genuine and reasonable need for security. Furthermore, and in any event,

[3] The several references in the order to 'further security' appear to have been taken from a precedent. It was common cause that Copenship held no security for its claims.

it attacked the provisions of paragraph 9 of the order as being both inappropriate and beyond the powers of the court under s 5(3).

[4] The application for reconsideration came before Weiner J, who dismissed it, thereby confirming the original order. Afgri brought an application for leave to appeal. A dispute then arose between the parties concerning its impact upon the arrest. That led Copenship to bring an urgent application, in terms of s 18(3) of the Superior Courts Act 10 of 2013, for an order declaring that the arrest order remained of full force and effect, notwithstanding the application for leave to appeal, alternatively for an order that it be given effect pending any appeal. It also sought an order that Afgri re-open the two bank accounts and repay into it any funds diverted contrary to the provisions of the order.

[5] By the time the application for leave to appeal was heard by Weiner J it transpired that the two accounts had not been closed. Two amounts, a deposit of some R8 million held separately, and further amounts totalling nearly R19 million standing to the credit of Afgri in the accounts, were regarded by Afgri as being covered by the arrest order. Weiner J granted leave to appeal to this court. She dealt with the suspension of the original order by making the following orders:

'3 Pending the appeal, the amount of R 18 777 151.38 is to remain under arrest in the first respondent's accounts held at the second respondent, Absa Bank;

4 The first respondent is to repay the Rand equivalent of US$ 6 372 593.78 (less the sum of R18 777 151.38) into account number 4066574289 within 7 days hereof;

5 The first respondent is to pay the costs of this application on the attorney and client scale, including the costs consequent upon the employment of two counsel.'

[6] Although the judge thought that paragraph 4 of her order might render the appeal moot insofar as it related to paragraph 9 of the original

order, both parties accepted that it was, like paragraph 3, an interim order pending the outcome of the appeal and was not therefore moot. The arguments that the proceedings constituted an abuse of process, or were tainted by non-disclosure, were not pursued when new counsel were briefed to argue the appeal and, with the leave of the court, filed supplementary heads of argument. Accordingly, the substantive issues before us in this appeal were whether Copenship established that it had a genuine and reasonable need for security and, if so, whether the terms of the arrest order, and in particular paragraph 9 thereof, were appropriate. But first it is necessary briefly to outline the facts.

The facts

[7] On 21 August 2008, Copenship and Afgri[4] concluded a charter party on the GENCON form, in respect of a vessel or vessels to be nominated by Copenship, for three voyages during September, October and November 2008 respectively, from either a Mozambican (Matola or Maputo) or South African (Durban or Richards Bay) port to Mombasa, Kenya. The cargo in respect of each voyage was to consist of 20 000 metric tons, three percent more or less in carrier's option, of bulk maize. Copenship nominated the *Fonarun Naree* as the vessel to perform its obligations under the charter party in respect of the November fixture. That vessel was owned by Precious Trees Limited (Precious Trees), a Thai company, which had time chartered the vessel to Copenship.

[8] The *Fonarun Naree* arrived at Maputo on 4 November 2008 to take on the third consignment of maize. The cargo required fumigation and, as it was entitled to do, Afgri arranged for a fumigation team to attend on

[4] Under its former name of Afgri Trading (Pty) Ltd.

board the vessel. They left the ship early in the morning. In mid-afternoon an explosion occurred in No 3 hold. This caused damage to the hold, which had to be repaired. The Master inspected the cargo and concluded that it was still in good order and condition. On that basis a clean bill of lading was signed, for and on behalf of the Master, acknowledging shipment of the cargo in apparent good order and condition. The bill of lading named Afgri as the shipper and National Cereals & Produce Board (NCPB) of Nairobi as the consignee.

[9] On arrival in Mombasa it was found that the top layer of the cargo in hold No 3 had become discoloured and some 27 metric tons were removed by skimming. This was insufficient to satisfy the NCPB and in due course they rejected the whole of the cargo in hold No 3. Basing their claim on the clean bill of lading they caused the vessel to be arrested in admiralty proceedings before the Kenyan courts. Those proceedings were delayed for lengthy periods and ultimately settled by way of a settlement agreement concluded in May 2017 between Precious Trees and NCPB and their respective insurers.

[10] While those proceedings were ongoing two sets of arbitration proceedings were being pursued in London. The one, between Precious Trees and Copenship, concerned which of them was liable for the claim by NCPB in terms of the Inter Club Agreement, governing the liability *inter se* of owners and charterers under time charter parties on the NYPE form. The other, between Copenship and Afgri, concerned the latter's liability to indemnify Copenship for any claims successfully made against it by Precious Trees. The two arbitrations were run in tandem. The security arrest that was in issue in these proceedings was in respect of Copenship's

claim in the latter arbitration that Afgri indemnify it against any successful claims by Precious Trees and for damages.

The reconsideration application

[11] There was some debate before us as to the proper approach to a reconsideration application in a case of this nature. Afgri's counsel contended that the founding affidavit on behalf of Copenship failed to make out a case that Copenship had a genuine and reasonable need for security. He criticised the argument on behalf of Copenship as amounting to an endeavour to make its case in reply. Counsel for Copenship submitted that the high court was entitled to have regard to all the affidavits that had been filed and if there was new material in the replying affidavit that Afgri objected to, or regarded as factually incorrect, its remedy was either to apply to strike it out or to apply for leave to file a further affidavit to deal with that material.

[12] Rule 6(12)*(c)* does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional and the procedure will vary depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party wishing to have the order set aside, on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the

original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.[5]

[13] The party seeking reconsideration is not confined to this route. It may file an answering affidavit, either traversing the entire case against it, or restricted to certain issues relevant to the reconsideration. In many instances such an affidavit will be desirable.[6] Even if an affidavit is filed, however, it does not preclude the party seeking reconsideration arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. That is a well-established entitlement in application proceedings[7] and there is no reason why it should not be adopted in reconsideration applications.[8]

[14] If an affidavit is filed in support of the application for reconsideration then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings.[9] That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original *ex parte* order.[10]

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[5] *Basil Read (Pty) Ltd v Nedbank Ltd and Another* 2012 (6) SA 514 (GSJ) para 37.
[6] *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 487C-D.
[7] *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 136B-C; *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 519E-F; *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 465E-G.
[8] It was adopted in *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (W) at 291B-G.
[9] *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269H-J.
[10] *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 (1) SA 215 (SE) at 218D-F.

[15] Afgri delivered an answering affidavit and Copenship a reply. When the application for reconsideration was argued before the high court this was done on the basis of all the affidavits and all the factual material then available to the court. Whilst it is apparent from counsel's submissions before us that, had they been briefed at that stage, they would have argued as a preliminary point that the application papers did not make out a proper case for a security arrest, their predecessor did not adopt that approach. In the circumstances that particular horse has bolted and it is not open to counsel on appeal to retrieve it.

[16] The proper approach to this appeal is, therefore, to have regard to the factual material that was placed before the high court for the purposes of reconsidering the order originally granted by Mashile J. As a result of the various interlocutory proceedings arising as a result of the application for leave to appeal, as described above in paragraph 4, a good deal of additional factual material was before Weiner J when she dealt with the application for leave to appeal and the s 18(3) application, and all of this is contained in the record before us. It was not, however, the material on which the reconsideration decision was made and it should not be referred to for the purposes of determining this appeal. Against that background I turn to deal with the merits.

The terms of the security arrest

[17] It is convenient to deal first with the ambit of the arrest order, albeit that in the light of my conclusion on the main issue it becomes academic. Paragraph 2 ordered the arrest not only of the funds standing to Afgri's credit in the two identified bank accounts, but also 'if necessary for the

purposes of obtaining the full security set out herein, all future monies to be deposited to the credit of' Afgri in those accounts. This was reinforced by the provisions of paragraph 9 of the order prohibiting Afgri from preventing funds from being deposited in that account or diverting such funds, until full security had been obtained.

[18] The order for the arrest of funds not in the two accounts at the time the order was granted was not an order sanctioned by s 5(3)*(a)* of the AJRA. The section permits the arrest of property owned by the person against whom, or which, the *in personam* claim lies. The property to be arrested must be clearly identified.[11] The relevant portion of the section provides that the court may: '… order the arrest of any property for the purpose of providing security for a claim … if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property…'. The reference to the parallel provision where the party seeking the arrest has an action *in rem* against the property makes this clear. An action *in rem* cannot be instituted against property not yet in existence. The AJRA recognises that sometimes an arrest may not result in a claimant obtaining full security and makes provision in s 5(2)*(d)* of the AJRA for an application for additional security. Such an application is brought against property in existence at the time it is brought. The process cannot be shortened, and the need for a further application avoided, by providing that an existing arrest will encompass assets not yet in existence. Copenship said that these provisions 'obviate the need repeatedly to approach the court for top-up security'. In other words its purpose was to circumvent the provisions of the AJRA directed to obtaining top-up security. That was impermissible.

[11] *MSC Gina: Mediterranean Shipping Co SA v Cape Town Iron and Steel Works Pty Ltd* 2011 (2) SA 547 (KZD) para 17.

[19] Counsel accepted that this portion of paragraph 2, as well as paragraph 9, of the order could not be justified in terms of s 5(3)*(a)*. Nor did he seek to justify their inclusion on the basis that paragraph 9 was a condition imposed under s 3(5)(2)*(c)* of the AJRA. He submitted, timorously to use his own description, that these provisions were a form of interdict or injunction against Afgri dissipating funds with a view to defeating Copenship's entitlement to security.[12] His hesitance was fully justified because that was not the case made in the founding affidavit. There the provisions of paragraph 9 were justified on the basis that otherwise Afgri might prevent any further funds from being deposited in the two accounts. There was not the slightest suggestion that the funds might be dissipated or concealed with a view to defeating any legitimate claim that Copenship might have to them.

[20] This portion of paragraph 2 and the whole of paragraph 9 of the order for a security arrest should not have been granted. This renders it unnecessary for us to consider the appropriateness of the judge in the high court ordering Afgri to restore funds removed from the accounts and if necessary increasing them so as to give full security, when granting leave to appeal.

A genuine and reasonable need for security

The test

[21] There was no debate concerning the requirements that must be satisfied in order for an applicant to have a genuine and reasonable need

[12] Relying on *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 371G-373H.

for security. They were set out in the matter of the *MV Orient Stride*.[13] The applicant does not have to show that the respondent has insufficient assets to meet a judgment granted against it, although that may in appropriate circumstances justify an order for a security arrest. It was pointed out in that judgment that often ships of far greater value than the claim are arrested by way of security, and conversely an insufficiency of assets is not essential to a claim for security. What must be demonstrated is a genuine and reasonable apprehension that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party. That apprehension may arise from actual knowledge of the extent of the assets of the party whose property has been arrested or other factors that legitimately justify an inference that they will seek to conceal assets or otherwise prevent the award from being satisfied. The enquiry is a factual one and the onus of proof on a balance of probabilities rests upon the applicant.[14]

The case made in the founding affidavit

[22] Copenship's South African attorney set out in the founding affidavit the basis for Copenship's alleged genuine and reasonable apprehension that Afgri would not satisfy any award in its favour. First, he drew attention to the fact that Copenship's English solicitors had requested their counterparts for Afgri to provide security and this had been refused. Second, he pointed out that this left Copenship financially exposed in the sense that it had no certainty that any award would be satisfied. Third, he said that the shipping industry as a whole was under financial strain and that the movements of the market were unpredictable, particularly as

[13] *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Company Limited* [2008] ZASCA 111; 2009 (1) SA 246 (SCA) para 7.
[14] *Bocimar NV v Kotor Overseas Shipping Ltd op cit* fn 1 at 583E-F.

regards freight and hire rates. Related to this he said that a number of charterers had recently experienced financial difficulties or been placed in liquidation. Fourthly, in regard to Afgri's assets he said that a search had been done some two and a half years previously and had not discovered any movable physical assets that could be attached or arrested in South Africa.

[23] In the light of this evidence, Copenship's case was summarised in the following paragraphs of the affidavit:

'89.9 In the circumstances and considering that a number of substantial group companies have collapsed over the past few years, Copenship has a genuine and reasonable apprehension that Afgri may cease to exist or may have insufficient assets against which Copenship will be able to execute any award in its favour.

89.10 This apprehension is confirmed by the delay and/or refusal to voluntarily provide security.

89.11 In summary, there is a genuine and reasonable concern on the part of Copenship that it will not be paid, and that no assets otherwise exist against which it could execute, in the event of obtaining an award in its favour.'

The reference in paragraph 89.9 to 'a number of substantial group companies' collapsing was not explained and was correctly described in the answering affidavit as 'vague and meaningless'.

[24] The case rested on the four points set out above. As to the first it was entirely neutral. The rejection of a demand for security is not, without more, evidence of an intention not to honour a judgment or award. Nor is it evidence of an inability to do so once an award is made. An obvious reason for such a refusal is that the party demanding security is not entitled thereto. That was the reason Afgri gave. Unless the refusal to furnish security can be plausibly linked to an unwillingness or inability to satisfy the award or judgment, it does not support a claim for security. No

plausible link to such an inability or unwillingness was suggested in this case. That also disposed of the second point that Copenship was exposed to a risk of non-payment as a result of not having security. It would only be exposed to any risk if there was plausible evidence of an inability or unwillingness to pay an award. Here there was none. In those circumstances, the complaint that a demand for security had been rejected was akin to attempting to lift oneself by one's own bootlaces.

[25] The third point about financial uncertainty in the shipping industry likewise did not support Copenship's case. The primary and obvious reason was that Afgri is not a participant in the shipping industry in the sense of a business whose financial well-being is subject to the vagaries of that industry. It is a commodity trader operating primarily in the grain market. It is not a shipowner and its involvement in the chartering market arises, as it did in this case, because it sometimes sells commodities on CIF terms that require it to conclude contracts of carriage in respect of those goods. Those contracts may involve it, as here, in chartering in tonnage, for the purpose of carrying the cargo it has sold to its destination in terms of the sale agreement. But such charters are contracts of carriage. They do not make the charterer a participant in the business of chartering in a way that renders its financial viability vulnerable to the problems of charter markets. In fact, if freight and hire rates decline, because the chartering industry is in the doldrums, that is beneficial to Afgri because it is able to arrange shipping at competitive rates.

[26] One other point that should be made is that the allegation of strain in the shipping industry was not supported by any facts. In the replying affidavit two chartering businesses, Hanjin Shipping, a Korean company and one of the largest charterers in the world, and Copenship itself, were

identified as having gone into liquidation. Otherwise the statement in the affidavit was entirely general and no endeavour was made to link it in any way to Afgri's business. That was true of most of the evidence tendered by Copenship. It amounted to vague generalities that had little or no application to the issue of whether there were grounds to found an apprehension that Afgri would not be able or willing to satisfy an award. It must be stressed that the apprehension needs to be both genuine, that is, actually entertained by the party claiming security, and reasonable, that is one that can on the basis of the facts reasonably be entertained.

[27] The fourth point had little, if any, weight. One would not expect a commodity trader such as Afgri to be possessed of 'vehicles, trailers, boats, aeroplanes or helicopters' suitable for attachment to satisfy an arbitration award or judgment. Its primary assets are likely to be claims against the parties with which it trades and various financial instruments. And that was precisely what Afgri's accounts showed. Its largest current asset for the financial year ended 31 March 2017 was trade and other receivables of some R533 million, an amount far in excess of Copenship's claim.

[28] A number of other factors were relevant to the assessment whether Copenship entertained a genuine and reasonable apprehension that any award would not be satisfied. The first, highlighted by the fourth point, was that there had been a very substantial delay in bringing proceedings to obtain security. The events in question occurred at the end of 2008 but the application for security was only launched in 2018. The investigation into Afgri's movable assets was undertaken in 2015. No explanation was proffered for this delay. In the replying affidavit it was suggested that under the Inter Club Agreement there was no claim until the claim by the NCPB had been satisfied. That was incorrect. In fact the claim to an indemnity

was already being advanced in the arbitration and could have been conceded, subject only to its quantification in due course. Furthermore, this court has sanctioned the grant of an attachment *ad fundandam et confirmandam jurisdictionem* in relation to an indemnity claim, where the party seeking the attachment was denying liability for the claim made against it and neither the validity nor the quantification of that claim had yet been determined.[15]

[29] The second point is that the furnishing of security is always a costly business. Either a guarantee must be obtained from a financial institution or an insurer in respect of the claim, for which substantial charges will be levied, or the party concerned must, as occurred here, isolate a portion of its own funds and sterilise them indefinitely while the process of arbitration or litigation proceeds. In either case the party providing security will incur significant costs as a result of doing so. These may disrupt its ordinary business operations or require it to secure costly banking facilities to finance a portion of its trading activities. The fact that such costs must be incurred over a potentially protracted period puts significant pressure on that party to settle the dispute in favour of the other party irrespective of its merits. The court asked to order a security arrest must therefore be alert to the possibility that it is being sought for purposes other than the applicant's genuine and reasonable apprehension that a future award may not be satisfied.

[30] The third point is that no evidence was placed before the high court dealing with the nature and extent of Afgri's business. All that the court could distil from the affidavits and annexures was that it was a commodity

[15] *MT Tigr: Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouyges Offshore SA and Another intervening)* 1998 (3) SA 861 (SCA).

trader involved in the grain market. The charterparty related to three shipments of maize in bulk totalling some 60 000 tons – a not insignificant quantity. It required payment of freight of US$ 44 per metric ton for cargoes shipped from Maputo, amounting to some US$ 880 000 per consignment and nearly US$2.5 million for all three shipments. There was no suggestion that Afgri was not good for these amounts and it was not alleged that it had failed to pay the freight in respect of this and the other consignments. The maize was provided to an entity, the NCPB, the name of which proclaimed that it was a national board established to deal with cereals and produce in Kenya and apparently responsible for the importation of maize to meet that country's needs for a staple foodstuff. On the basis of the figures in the settlement agreement with Precious Trees, which related to a claim in respect of 6 250 tons out of a 20 000 ton consignment of maize carried in one of the four holds on the *Fonarun Naree*, the NCPB must have agreed to pay Afgri in excess of $10 million for the whole shipment and over $30 million for all three shipments. None of this suggested that Afgri was a small business operation incapable of meeting an arbitration award estimated as amounting to some $6 million, or that it was inclined to try and avoid its commercial obligations.

[31] Had Copenship wished to make a proper case of Afgri's potential inability to pay the award, or to lay some foundation for the proposition that it was a business of such a character that it would take measures to avoid paying the award, by, for example, liquidating the company and transferring its activities elsewhere in the group, it needed to produce evidence pointing in that direction. No such evidence was produced. In an age when information is readily available about entities such as Afgri and the NCPB by way of an internet search, the absence of any such

information leads to the inference that there was none that would assist the applicant's case.

[32] Pausing at this point, there was considerable force in the submission by Afgri's counsel that the original order should not have been granted and that a reconsideration on the basis of the allegations in the founding affidavit justified its being set aside. But, as I have said, that is not the basis upon which the case was argued in the high court and the issue must be addressed in the light of the evidence in all the affidavits. On this point counsel for Copenship said that he was grateful that Afgri had chosen to file an affidavit. This was reflected in his argument, which focused entirely on the answering affidavit and an analysis of the contents of Afgri's financial statements annexed to those affidavits. It is to this that I now turn.

The answering affidavit

[33] Mr Badenhorst, who identified himself as the Director: Legal of the Afgri Group of Companies, of which Afgri is a member, deposed to the answering affidavit. That is a reference to a group of companies of which the ultimate holding company is Afgri (Pty) Ltd, which includes Afgri Operations (Pty) Ltd, the direct holding company of the appellant. There was nothing to indicate that Mr Badenhorst had anything to do directly with the trading operations of Afgri. His affidavit dealt with two matters namely whether Copenship had established a genuine and reasonable need for security and Afgri's objections to the orders in paragraphs 2 and 9.

[34] Mr Badenhorst responded to the allegations on behalf of Copenship that were considered in the previous section of this judgment. He first drew attention to the unexplained delay in seeking security for Copenship's claim since the commencement of the arbitral proceedings in 2010. In those

proceedings there had been an interim settlement concluded in January 2013 resolving all aspects of the claim, save what was then expressed as an indemnity claim in respect of any liability incurred by Copenship arising out of the explosion on board the *Fonarun Naree*. That claim was already the subject of the head arbitration between Precious Trees and Copenship. The existence of that settlement was not disclosed in the founding affidavit.

[35] The settlement required Afgri to pay Copenship amounts totalling around US$ 1 million plus some costs. It was correctly submitted that the settlement should have been disclosed[16] and the contention by Copenship that it was irrelevant because it was unrelated to the issues still in dispute in the pending arbitration was wrong. The conclusion in the high court that its non-disclosure was not material was incorrect. The settlement demonstrated Afgri's willingness and ability to settle all its obligations arising from the charterparty with Copenship. The claim by NCPB was known at the time of the settlement to be equivalent to about US$ 3.6 million, so that it was not vastly greater than the amount of the interim settlement. It was well within the range of revenues enjoyed by Afgri from its trading operations as this very transaction demonstrated. It was not suggested that Afgri's financial position had deteriorated since the settlement or that its approach to discharging its commercial obligations had changed. All of this was highly material to the issue of the existence of a genuine apprehension that Afgri might not honour an award in respect of the indemnity claim. The settlement undermined Copenship's claim that it entertained such an apprehension.

[16] The proposition in the replying affidavit by Copenship's attorney that the point of material non-disclosure was 'arrant nonsense' was incorrect and inappropriately expressed by an officer of the court.

[36] The next point made by Mr Badenhorst was that Copenship had made no endeavours to ascertain Afgri's financial position before launching the application for security. He said that had they done so they would have realised that they could not establish the requisite of a genuine and reasonable need for security. To that end he attached a copy of the most recent audited financial statements for the year ended 31 March 2017 and drew attention to the fact that they reflected a profit from continuing operations of over R57 million and current assets in excess of R639 million. He added that the financial position of the company had not changed.

[37] The financial statements painted a picture of a profitable company in robust financial health. They were prepared on a going concern basis and the auditors reported that they fairly presented, in all material respects, the financial position of Afgri. Sales for the year exceeded R100 million and, together with substantial finance income, profit before tax was over R80 million. After tax of R22 million, net profit attributable to shareholders was R57 million. At the end of the year the company held cash and cash equivalents of nearly R43 million. That was after payment of a dividend of R66.5 million to its holding company. There was not, and could not have been, any question on the basis of those financial statements of Afgri's ability to satisfy any award made against it.

[38] As regards any apprehension that Afgri might nonetheless try to avoid its obligations under an award, the accounts set out in some detail the financial risk management policy of the Afgri Group. This revealed, as is common financial practice in large enterprises with multiple subsidiaries, that management of the Group's financial resources was

centralised through what was referred to as Group Treasury. The objective of this on the part of the Group as a whole was:

'… to ensure that all foreseeable funding commitments can be met when due, and that funding market access is co-ordinated and cost-effective. It is the Group's objective to maintain a stable funding base comprising institutional funding facilities with the objective of enabling the Group to respond quickly and smoothly to any unforeseen liquidity requirements.

The Group strives to maintain a strong liquidity position and to manage the liquidity profile of its assets, liabilities and commitments with the objective of ensuring that cash flows are appropriately balanced and *all obligations are met when due*.' (Emphasis added.)

[39] Accordingly the accounts contained a clear and public statement by the directors of the ultimate holding company that the Group would ensure that all obligations were met when due. This was an important consideration for it meant that Afgri was not limited to its own resources in satisfying any arbitration award made against it, but could look to the backing of the Group as a whole if that was necessary. Indeed it was Group Treasury's function to ensure that any such obligation would be met when due. The size and stability of the Afgri Group was not put in issue. An indication of its size was that the Group Audit, Risk and Credit Committee to which the Board of Directors had delegated theses issues regarded large exposures as those in excess of R100 million ie more, subject to fluctuations in exchange rates, than Copenship's claim for security.

[40] Mr Badenhorst claimed that the accounts demonstrated that the company was in a healthy financial situation and that this showed that Copenship did not have a genuine and reasonable need for security. Taking the accounts at face value that was an entirely justifiable claim. It followed

that Copenship could only discharge the onus resting on it if that case could be satisfactorily controverted in reply.

The reply

[41] The problem facing Copenship was recognised in the replying affidavit. The deponent, once again one of its South African attorneys, sought to argue, on the basis of certain provisions of the financial statements, that the picture was not as rosy as Mr Badenhorst claimed. It is important to have regard to what was said in that regard. The relevant portion of the replying affidavit reads as follows:

'50.1 The purported reliance by Badenhorst on the financial statements is misguided.

50.2 First, it is apparent from the balance sheet … that Afgri owns no immovable property.

50.3 Second, it is apparent … that *"the group's activities expose it to a variety of financial risks"* and, the directors' report … emphasises *the unpredictability of financial markets"* and the attempts thus *"to minimise potential adverse effects on the group's financial performance"*.

50.4 Third, the net cash generated from operating expenses [*sc* operations] in the year ended 31 March 2017 was a negative [72558] as opposed to a positive 98895 in respect of the previous financial year.

50.5 Notwithstanding this – which prima facie indicates revenue from some other source – in the year in question a dividend in the amount of ZAR 66508 million was declared as opposed to a declaration of "ZAR NIL" in the 2016 year. I assume no such dividend was in fact distributed.

50.6 For what it is worth, the bank overdraft which was said to be NIL in 2016 is now a negative [10499] for the year ending 2017.

50.7 In summary, with regard to the financial statements, it appears that Afgri is dependent upon the goodwill of its holding company and as aforesaid Afgri has no immovable property.

50.8 It follows in my submission that the financial statements do not provide an answer to Afgri's inability to secure the claim in question.

50.9 to 50.16 …

50.17 In the circumstances, Copenship is of the reasonable view that Afgri may not have sufficient assets in the future to satisfy a claim [*sc* an award] made in favour of Copenship. …
50.18 This much is borne out by a review of the financial statements of Afgri as I have stated above.
50.19 Indeed should Copenship obtain the arbitration award in its favour, it will be executable against an entity whose assets are highly fluid and moveable and which may be diverted quickly and easily so as to avoid it having to meet the award.
50.20 Nothing contained in [the financial statements] dispels Copenship's apprehension that Afgri will not meet any award voluntarily; it is a wholly owned subsidiary which could be wound up quickly and effortlessly by the holding company after its highly fluid assets had been transferred to another entity.'

[42] I have quoted this portion of the replying affidavit at some length, because nowhere in that analysis was there the slightest suggestion that the accounts were not properly audited, or did not accurately reflect the financial position of Afgri at the relevant date. It was not gainsaid that its financial position at the time the application was brought had not materially altered since the date of those accounts. Nor was there any suggestion that they were inconsistent with anything Mr Badenhorst had said in his answering affidavit. More particularly, there was no suggestion that they were inconsistent with what he said in relation to the provisions of paragraphs 2 and 9 of the order and their effect on the business not only of Afgri, but of its immediate holding company Afgri Operations (Pty) Ltd and the Afgri Group generally.

[43] The short supplementary heads of argument lodged by Afgri's new counsel dealt with and sought to refute the analysis by Copenship's attorney quoted at length above. This was a response to Copenship's initial heads of argument, which repeated the analysis in the replying affidavit in

support of its case. Up until that stage there was no challenge by Copenship to the accuracy of the financial statements. The supplementary heads of argument on behalf of Afgri were the catalyst that changed that stance. In Copenship's supplementary heads of argument it was submitted for the first time that the financial statements 'are misleading and do not accurately record the affairs of the Appellant'. What followed was an endeavour to show by reference to one paragraph of Mr Badenhorst's answering affidavit and certain paragraphs in affidavits filed in the rule 18(3) proceedings that 'the factual circumstances described by Badenhorst … demonstrate the obvious inaccuracy of the financial statements'. The oral argument followed the same course.

[44] These contentions, raised for the first time in argument at the appellate stage of the case, when Afgri had been afforded no opportunity to respond to them, were not open to Copenship. Had it raised the supposed inconsistency between Mr Badenhorst's affidavit and the financial statements in the replying affidavit, Afgri would plainly have been entitled to address the issue by way of a fourth set of affidavits. As it was not raised there was no need for it to do so. What is more, it was sought to bolster the argument by reference to affidavits of Mr Badenhorst that were not before the high court in the reconsideration application, but were filed in the s 18(3) application after the high court had delivered its judgment. This appeal involves a challenge to the high court's judgment and like any other appeal, unless leave is sought and granted to lead further evidence on appeal, it must be decided on the record as it stood before the high court. I understood Mr Fitzgerald SC for Copenship to accept this when it was put to him from the bench.

[45] In point of fact the replying affidavit accepted the accuracy of the accounts and, in the portions quoted above, sought, by pointing to other features of them, to show that they justified Copenship's alleged apprehension that an award would not be met. In my view that attempt failed because it involved a misreading and misunderstanding of those accounts. In the first place it is hardly surprising that a commodity trader would not own immovable property. It would have no reason to do so, any more than it would have had a reason to own vehicles, ships or planes. None of that detracted from Mr Badenhorst's point that it had current assets in excess of R639 million and had generated profits of around R57 million in 2017. Those current assets would be available for execution and could be attached in the same way as the debtors' book of any business can be attached in execution. Unless Afgri's trading position materially altered to its detriment, and there was no evidence to suggest that it might, its current assets were likely at any given time to far exceed the amount of any potential award. The fact that there were also current liabilities was irrelevant, as execution is levied against assets without regard to liabilities.

[46] The quoted extracts from the financial risk statements misunderstood the nature and purpose of such statements. They are obligatory in financial reporting and will be found in all major companies' accounts. The existence of risks does not mean that there is any expectation or likelihood that those risks will materialise. The purpose of risk statements is for the company to identify the risks facing the business and to inform shareholders and others reading its annual report of the steps being taken to minimise those risks. That is apparent from a full reading of the entire directors' report under the heading of financial risk management, which extends over four pages and covers a wide variety of potential risks. The accounts of an international commodity trader will always, even in

relatively benign economic times, refer to the financial risks that are inherent in that type of trade. Businesses are never entirely risk free. For example, the accounts of a major farming business would always mention the risk of drought or other adverse weather conditions affecting the business.

[47] The comments about the cash flow statement similarly misunderstood the purpose of that statement. It is to explain the reasons behind the changes from year to year in the cash and cash equivalents held by the company at the end of the financial year. The primary reasons for the change between 2016 and 2017 were twofold, namely, a modest increase in working capital, explained elsewhere in the notes to the financial statements, and the payment of the dividend to which Copenship referred. The assumption that this had not in fact been distributed was remarkable and unfounded. Had that been so, not only would it not have affected the cash flow statement, but it would have resulted in Afgri Operations having to account for and pay tax on a dividend that it did not receive. The assumption of non-payment was unwarranted.

[48] It is unclear what inference the deponent sought to draw from the existence of a bank overdraft in 2017. A business such as Afgri's would require working capital and that would ordinarily be obtained by way of a bank overdraft or inter-company borrowings. The accounts reflect both sources. In the light of the fact that Afgri Operations performed the treasury function for Afgri and had banking facilities, by which was meant a line of credit from its bankers, it may be that this was an accounting allocation of portion of its overdraft to Afgri, but the fact that the accounts reflected an overdraft was not questioned in a way that called for an explanation, so that remained unexplained.

[49] Finally, in dealing with what was said in the replying affidavit, the accounts did not show that Afgri was dependent upon its holding company to meet its obligations under an award. Its profitable trading position indicated otherwise. Furthermore the financial statements provided firm evidence that it would, if need be, have the support of its immediate holding company and the Afgri Group. The damage to the trading reputation of the Group, were it to do what Copenship suggested and cynically liquidate Afgri so as to avoid paying an arbitration award, would be enormous. Who would be willing to trade with it if it could not be trusted to honour its obligations? International commodity trading and maritime disputes are probably more often resolved by arbitration than by litigation. A major company that resorted to underhand tactics to avoid paying an award would be shunned by many participants in the areas of commerce in which Afgri operated and still operates, because it could not be trusted to meet its obligations under an arbitration award. Copenship did not address this obvious issue.

The bank sweeping arrrangement

[50] Overall therefore, the arguments advanced in the replying affidavit did not strengthen Copenship's case. On the allegations summarised in the discussion thus far it had not made out a case that it had a genuine, much less a reasonable, apprehension that Afgri would not satisfy any award made against it. Therefore their case stood or fell on the basis of the arguments surrounding Mr Badenhorst's affidavit. This was an enquiry restricted to three paragraphs in Mr Badenhorst's answering affidavit. Virtually all the oral argument revolved around the first of these, as does the dissenting judgement of my colleague, Van der Merwe JA. They read as follows:

‘5 The first respondent is a wholly owned subsidiary of Afgri Operations (Pty) Ltd (“Afgri Operations”). The business of the Group is structured in such a manner that Afgri Operations finances the business operations of several of its subsidiaries, including the first respondent. Afgri Operations has general banking facilities (“banking facilities”) with the second respondent (“Absa”). The first respondent does not in its own name have banking facilities with Absa and relies on Afgri Operations to provide it with money in the ordinary course of its business. Afgri Operations utilises the banking facilities to on lend the money to the first respondent, as and when it is required. The indebtedness of the first respondent towards Afgri Operations, so created, is settled on a continuous basis in terms of a “sweeping arrangement” with the second respondent, in terms whereof cleared funds standing to the credit of the first respondent’s account with Absa are automatically transferred to Afgri Operations’ account with Absa on a daily basis, in settlement of first respondent’s loan indebtedness. It must be stressed that all the funds in the applicable account is in fact not due to the first respondent as a result of the aforesaid.

6 In terms of paragraph 9 of the Order, the first respondent is prohibited from:

“taking steps to stop any pending transaction or divert funds which are in the ordinary course paid, or will be paid into the accounts identified in paragraph (2) above, until such time as full security has been provided.”

7 The Order materially affects not only the business of the first respondent, but also the business of the whole Group. I am advised that, in law the applicants were not entitled to such an order. The correctness of this advice is a matter for argument which will be dealt with at the hearing of the application.’

[51] Mr Badenhorst was explaining the banking arrangements within the Afgri Group, insofar as they related to Afgri Operations and its subsidiaries, including Afgri. He did so in the context of the objection to paragraph 9 of the arrest order. He said that its provisions interfered with the business operations of the entire Afgri Group, not simply Afgri. This was because it interfered with the arrangements Afgri Operations had with Absa, with which it had general banking facilities. This meant that Absa had extended a line of credit to Afgri Operations enabling it to borrow

money on overdraft; or through money market overnight and term loans; or by way of foreign currency loans, which one would expect to be a significant element given that Afgri's business was that of an international commodities trader; and other foreign currency accounts. He explained that Afgri itself did not have general banking facilities. It had the bank accounts that featured in the order, but no overdraft or other loan facilities. If it had need of such facilities, for working capital or the like, Afgri Operations would provide the necessary funds by drawing down against its own facilities with Absa and lending the necessary sums to Afgri. It was in this context that the sweeping arrangement operated.

[52] The pattern Mr Badenhorst described is typical of the way in which large groups of companies, like the Afgri Group, manage the group's finances through a single central treasury. The treasury company negotiates with the group's bankers for the grant of general banking facilities on behalf of the group as a whole. The individual group companies do not have such facilities in their own right or in relation to their own bank accounts. The group treasury manages and controls the overall finances and indebtedness of the group. From the bank's perspective the group's obligations are centralised in one company, subject to any security to secure the overall indebtedness required from other companies in the group. When a group company needs funds, it borrows the amounts it requires from the treasury company, which in turn borrows them from the bank as part of its general banking facilities. The group companies thereby become indebted to the group treasury. This was reflected in the financial statements, which showed under the heading 'trade and other payables' an amount of some R295 million as owing to Afgri Operations. This represented the bulk of the trade and other payables of R390 million in the balance sheet.

[53] Where group companies have surplus funds in their bank accounts, while the group treasury is running an overdraft, keeping the funds separate makes no commercial sense, because it results in the group paying more by way of interest than is necessary if all the available funds in the group are consolidated. Accordingly, the group treasury causes those surplus funds to be paid to itself in order to reduce its overdraft. If the company from which the surplus funds emanate owes money to the group treasury, the accounting treatment of these payments is that they constitute partial repayment of the amounts previously borrowed. If it does not owe the group treasury anything (which was not the case here), then the funds will constitute a loan by it to group treasury that can be used to reduce the group's overall indebtedness to the bank.

[54] With the advent of computers these transactions are carried out electronically, by way of a sweeping agreement with the Group's bank. At the end of each business day, the bank's computers identify the amount and location of surplus funds and these amounts will be swept to the group treasury account. Sometimes a small balance will be left behind as a cushion for contingencies. The following day funds can be drawn by group treasury against its facilities and furnished to those group companies requiring it for the purposes of their business.

[55] The sweeping arrangement described by Mr Badenhorst followed this pattern. It was in that context that he completed his description in paragraph 5 of the affidavit by saying that the funds in Afgri's accounts were not due to it. That was because under the sweeping arrangement they became due each day to Afgri Operations. My colleague suggests that Afgri 'attempted to distance itself from the funds in its Absa accounts,

without providing any legal basis therefor.' With respect, that ignores the context of this paragraph. Mr Badenhorst was dealing with the implications for the operations of the group's business of the orders that both my colleague and I agree were not properly made. There was no call for him to go further into the legal basis for the group's financial arrangements or to provide a statement of the legal basis upon which they rested. All that he was doing was explaining the reasons why paragraphs 2 and 9 of the order improperly – as we are agreed – interfered with the business of the Afgri Group.

[56] But the sweeping arrangement did not mean, as contended by Copenship, that Afgri was thereby deprived of funding or financial resources if it needed them in order to satisfy an arbitration award. The replying affidavit said that this arrangement confirmed Copenship's fear that the funds could be transferred and held to the credit of a different entity within the Group. But the financial viability of any group of companies with a central treasury system is dependent upon the group treasury establishing lines of credit sufficient for the group's needs, including contingencies, and making funds available to the group companies as and when required. This is what the financial statements reflected in regard to the Afgri Group. If the group treasury does not do this then the entire system fails and the viability of the group as a whole is imperilled. Conversely, if as a result of a court order such as that contained in paragraph 9, the flow of funds to the group treasury is interrupted, that has potentially serious consequences for the group as a whole, as explained by Mr Badenhorst in the portion of the answering affidavit quoted above.

[57] It follows that no inference adverse to Afgri's ability and willingness to discharge any liability arising in due course under an

arbitration award could be drawn from the fact that Afgri Operations and its subsidiaries managed their banking arrangements in this way. The fact that at the end of each day all bank accounts of all the companies would be swept to the central account, did not mean that, if and when an award was made, funds would not, if needed, move in the opposite direction from Afgri Operations to Afgri, using the former's general banking facilities, to enable Afgri to satisfy the award. That is how the banking operations worked.

[58] Counsel argued that there was no record in the financial statements reflecting transactions along these lines. But that was incorrect. The accounts showed a significant bank balance of some R53 million and an overdraft of R10.5 million at 31 March 2017. Given Mr Badenhorst's explanation, this suggested that the accounting treatment used by the group was to apportion funds held by, and overdrafts of, Afgri Operations among the subsidiaries. The accounts also showed that there were no short term borrowings from Afgri Operations, but a significant amount owing in respect of trade and other payables. Even this amount (R295 million) was substantially less than the trade receivables (R534 million). On any basis therefore, even if all the amounts in Afgri's bank accounts were swept to the Afgri Operations account there would be a substantial surplus in Afgri's favour, either held in its own bank accounts or held on its behalf by and obtainable from Afgri Operations.

Conclusion

[59] The primary issue before the high court on the reconsideration application was whether Copenship had discharged the onus of proof on a balance of probabilities of showing that it had a genuine and reasonable need for security. That in turn depended on whether it had shown that it

had a genuine and reasonable apprehension that Afgri would be unable to satisfy an award made against it in the arbitration or would, either on its own or at the instance of its immediate or ultimate holding company, take steps to avoid satisfying it.

[60] The facts upon which Copenship sought to discharge the onus have been fully analysed above. For the reasons emerging from that analysis the position is that at every stage of these proceedings the evidence it produced consisted of very few facts and a good deal of speculation and submission lacking any plausible basis. The picture emerging from all the papers was that Afgri was and is a substantial company with a significant trading record. It is a profitable entity forming part of a very large agri-business group, which is itself extremely profitable. The latter is engaged in trading commodities, especially grain and maize, and Afgri is a significant component of that trading. No evidence was led to suggest that the holding company would think it appropriate to 'cut it loose' in the event of an adverse arbitration award being made in its dispute with Copenship. All the evidence in fact pointed in the opposite direction.

[61] The judge's reasons for refusing to reconsider and set aside the arrest are not wholly clear. Most of the judgment is a recitation of the facts, submissions and contentions of the parties. It appears that her concerns arose from the centralised treasury operations of Afgri Operations and the fact that the bank accounts of Afgri were, in terms of those arrangements, swept on a daily basis. With respect, when the overall picture is examined, there was no reason to conclude that there was any basis upon which Copenship could entertain a genuine and reasonable apprehension that Afgri might be unable to satisfy an award or try to avoid satisfying it. Both the arguments advanced by it, and the judgment, appear not to have

appreciated the relatively commonplace nature of the manner in which the financial affairs of Afgri were conducted. The proper conclusion is that it failed to discharge the onus of proving that it had a genuine and reasonable need for security. Therefore it was not entitled to the arrest and the order to that effect should have been set aside on reconsideration.

Result

[62] For those reasons the appeal must succeed. The following order is made:

1. The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2. The order of the High Court is set aside and replaced by the following order:

'(a) The application for reconsideration of this court's order dated 21 February 2018 succeeds and the order is set aside.

(b) The applicants are to pay the costs of the application in terms of s 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, including the costs of the application for reconsideration of the order of 21 February 2018 and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013, such costs to include the costs of two counsel where two counsel were employed.'

M J D WALLIS

JUDGE OF APPEAL

Van der Merwe JA dissenting

[63] I have had the benefit of reading the eloquent and comprehensive judgment of Wallis JA. However, I find myself in respectful disagreement with his conclusion that Copenship failed to show a genuine and reasonable need for security for its claim against Afgri.

[64] As I see it, the essential question was whether, on the evidence before it at the time of the reconsideration of the arrest order, the court a quo correctly concluded that Copenship had demonstrated a genuine and reasonable need for security on a balance of probabilities. For the reasons that follow, I am not convinced that it erred in doing so and in refusing to set aside the arrest order.

[65] Copenship's claim amounted to USD 6 372 593. As at 27 February 2018 the rand equivalent of this amount was approximately R75 million. The question was thus whether there was a real apprehension that Afgri would be unable to or unwilling to pay an award in that amount when it became due and payable.

[66] It was correct that according to Afgri's financial statements as at 31 March 2017, it had trade and other receivables in the amount of approximately R533 million. But that was but one part of the picture presented by the financial statements. On 31 March 2017 Afgri had current liabilities amounting to approximately R613 million. Its non-current assets (consisting of deferred income tax assets, computer software and furniture and fittings) were valued at only R7.6 million and its current assets exceeded its current liabilities by less than R20 million.

[67] In this regard it is important to repeat what was stated by the Director: Legal of the Afgri Group of Companies in his affidavit in the reconsideration application. He said:

'The first respondent is a wholly owned subsidiary of Afgri Operations (Pty) Ltd ("Afgri Operations"). The business of the Group is structured in such a manner that Afgri Operations finances the business operations of several of its subsidiaries, including the first respondent. Afgri Operations has general banking facilities ("banking facilities") with the second respondent ("Absa"). The first respondent does not in its own name have banking facilities with Absa and relies on Afgri Operations to provide it with money in the ordinary course of its business. Afgri Operations utilises the banking facilities to on lend the money to the first respondent, as and when it is required. The indebtedness of the first respondent towards Afgri Operations, so created, is settled on a continuous basis in terms of a "sweeping arrangement" with the second respondent, in terms whereof cleared funds standing to the credit of the first respondent's account with Absa are automatically transferred to Afgri Operations' account with Absa on a daily basis, in settlement of first respondent's loan indebtedness. It must be stressed that all the funds in the applicable account is in fact not due to the first respondent as a result of the aforesaid.'

[68] That was all that he had to say about the sweeping arrangement. He did not say that the sweeping arrangement had any other purpose than to settle the indebtedness of Afgri in terms of the loans made to it by Afgri Operations. He did not say that surplus funds of Afgri were transferred to Afgri Operations and accounted for as loans by Afgri to Afgri Operations. He did not say what the amount of Afgri's 'loan indebtedness' to Afgri Operations was, nor that it formed part of Afgri's liabilities set out in the financial statements. The financial statements do not reflect a loan payable by Afgri to Afgri Operations. Even if the suggestion was accepted that the indebtedness to Afgri Operations amounted to approximately R295 million on 31 March 2017 (which was far from clear), the effect of the sweeping

arrangement would be to provide significant preference to Afgri Operations over Copenship's claim. I agree with Copenship that Afgri's affidavit in terms of rule 6(12)*(c)* raised more questions than it provided answers.

[69] But that was not the end of the matter. In the last sentence of the quoted passage, the deponent emphasised that the monies paid into Afgri's Absa accounts '… is in fact not due to' Afgri. This at least reasonably conveyed that Afgri's position was that its trade receivables belonged to Afgri Operations. The deponent did not provide any legal basis for this proposition. (It appears from the judgment of the court a quo in the application for leave to appeal that in his answering affidavits in the urgent application in terms of s 18(3) of the Superior Courts Act, the deponent relied on a cession, but that must be disregarded for present purposes.) The point is that Afgri attempted to distance itself from the funds paid into its Absa accounts, without providing any legal basis therefor. Coupled with the fact that there was no evidence and no argument that the Afgri Group of Companies would ensure payment of an arbitration award against Afgri, I believe that Copenship demonstrated a real and genuine apprehension that an award in its favour might not be paid. I can conceive of no warrant for going behind the plain meaning of the words of the Director: Legal.

[70] I fully agree with my Colleague that the portion of paragraph 2 of the arrest order that dealt with future monies to be deposited in the Absa accounts, as well as paragraph 9 thereof, were impermissible. Both counsel accepted, however, (correctly in my view) that this issue had been rendered moot by the order of the court a quo in the application for leave to appeal. That order had the practical effect of arrest of funds in the Absa accounts

up to the rand equivalent of USD 6 372 593. For these reasons I would have dismissed the appeal with costs including the costs of two counsel.

_____

C H G van der Merwe

Judge of Appeal

Appearances:

For appellant:	S R Mullins SC (with him P J Wallis and M Thessner)
Instructed by:	Van Greunen Inc, Centurion; Noordmans Attorneys, Bloemfontein
For respondent:	M J Fitzgerald SC (with him R Fitzgerald)
Instructed by:	Bowman Gilfillan Inc, Cape Town; Matsepes, Bloemfontein.