REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

EXERCISING ITS ADMIRALTY JURISDICTION

Reportable	Yes
Of interest to other judges	Yes
Revised	No
COWEN AJ	6 August 2019

CASE NO: 18/6681

Name of ship: MV 'Fonarun Naree'

In the matter between:

TRUSTEES FOR THE TIME BEING OF COPENSHIP BULKERS A/S (IN LIQUIDATION) First applicant

TRUSTEES FOR THE TIME BEING OF COPENSHIP MPP A/S (IN LIQUIDATION) Second applicant

TRUSTEES FOR THE TIME BEING OF COPENSHIP MANAGEMENT A/S (IN LIQUIDATION) Third applicant

and

AFGRI GRAIN MARKETING (PTY) LIMITED First respondent

AFGRI OPERATIONS (PTY) LIMITED Second respondent

FREDA REFILWE MOLETSI ON BEHALF OF SHERIFF SANDTON SOUTH Third respondent

ABSA BANK LIMITED Fourth respondent

THE REGISTRAR OF THE HIGH COURT GAUTENG LOCAL DIVISION, JOHANNESBURG Fifth respondent

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JUDGMENT

Cowen AJ

1. At issue in these proceedings are monies in two bank accounts held at Absa Bank Limited by the first respondent, Afgri Grain Marketing (Pty) Ltd ('**Afgri Marketing'**). Both the applicants and the second respondent, Afgri Operations (Pty) Limited ('**Afgri Operations'**) assert rights in respect of the monies.

2. In the main application, the dispute manifests as a dispute about the regularity of interpleader proceedings that the third respondent, the Sheriff of Sandton South commenced in respect of the monies. In a conditional counter-claim, Afgri Operations seeks an interim interdict to protect the monies pending the outcome of an action in which it asserts its right, title and interest thereto by virtue of an alleged cession. The counter-claim is conditional upon the Court finding that the interpleader proceedings were irregular.

3. The first, second and third applicants are the Trustees for the Time Being of Copenship Bulkers A/S (in liquidation), Copenship MPP A/S (in liquidation) and Copenship Management A/S) (in liquidation). The applicants are the successors under Danish law to

Copenship A/S following its demerger on 1 July 2010 and their subsequent bankruptcy. The applicants have advanced claims in arbitration proceedings in London against Afgri Marketing 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.

Background to the applications

4. On 21 February 2018, the applicants, proceeding *ex parte*, obtained the authorization of this Court, in an order granted by Mashile J, to arrest the right, title and interest in and to monies in the bank accounts. The applicants obtained authorization in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('**the AJR Act'**). Section 5(3) of the AJR Act confers a power on the court when exercising its admiralty jurisdiction to 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 any proceedings, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, 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 or which would be so enforceable but for any such arbitration or proceedings*.' The arrest was for purposes of providing security for the claims advanced in the arbitration proceedings in London against Afgri Marketing. In turn, the right asserted by the applicants in respect of the monies at this stage, is a right to hold security for their claims pursuant to an order granted in terms of section 5(3) of the AJR Act.

5. Prayer 2 of the arrest order granted provides:

> *'2. The Sheriff for the district of Sandton South is hereby authorized 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, or future monies to be deposited to the credit of the first respondent in the following ABSA Accounts held by ABSA Bank Limited ….'*

6. Prayer 6 provides:

> *'The first respondent and any other interested parties are hereby given leave to apply to this honourable Court to vary or to discharge this order on not less than 24 hours written notice delivered to the applicants' attorneys, together with any affidavit(s) in support of such an application.'*

7. Afgri Marketing sought the urgent reconsideration of the matter in terms of Rule 6(12)(c)[1] and filed an answering affidavit. In its answering affidavit, Afgri Marketing referred to the existence of what it described as a '*sweeping arrangement*' that applied to the bank accounts whereby cleared funds standing to the credit of Afgri Marketing's accounts with ABSA are automatically transferred to Afgri Operations on a daily basis in settlement of loan indebtedness to Afgri Operations. The applicants filed a replying affidavit and the matter came before Weiner J on 6 March 2018.

8. On 14 March 2018, Weiner J dismissed the application for reconsideration. The judgment records that the only issue in contention was whether the applicants had shown 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. This is one of the requirements for a section 5(3) arrest.[2] The judgment records further that during the proceedings Afgri Marketing conceded that the applicants had demonstrated the requirements that they had a claim enforceable by way of an action *in personam* against the owner of the property to be arrested and a *prima facie* case in respect of its claim that is *prima facie* enforceable in the nominated forum.[3]

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[1] Rule 6(12)(c) provides: 'A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.'
[2] *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Company Limited* [2008] ZASCA 111; 2009(1) SA 246 (SCA) para 7.
[3] Paragraphs 12 and 13 of the judgment.

9. In June 2018, Weiner J granted Afgri Marketing leave to appeal to the Supreme Court of Appeal against the order of 14 March 2018. At that stage, Weiner J was also called upon to consider the status of the arrest order pending the appeal including insofar as it affected funds deposited into the accounts after the date of the arrest order.[4] In that application, Afgri Marketing described the sweeping arrangement with Afgri Operations as entailing 'in effect' a cession. Weiner J delivered her judgment on 18 June 2018. It is apparent from the judgment that the question whether Afgri Marketing or Afgri Operations had right, title and interest in the monies in the accounts at the time of the arrest and in respect of future deposits had become contentious.

10. Afgri Operations was not a party to the arrest proceedings. It must be noted however that Afgri Operations is the holding company of Afgri Marketing and its sole shareholder. Furthermore, the first and second respondents are, and have been represented by the same attorneys. Mr Swart SC, acting for the second respondent, confirmed, moreover, that Afgri Operations was at all material times aware of the arrest proceedings. Afgri Operations elected not to utilize the procedure afforded by prayer 6 of the arrest order contending it had no obligation to do so.

11. Rather, on 26 June 2018, Mr Van Greunen of Van Greunen and Associates (first and second respondents' attorneys) wrote to the Sheriff, contending on behalf of Afgri Operations that Afgri Marketing had ceded the right, title and interest in and to the money in the accounts to Afgri Operations and that the attachment had no effect on the rights of Afgri Operations to deal with the money. The letter stated that these were also the contentions of Afgri Marketing (referred to in the letter as Afgri Grain) but that Weiner J

[4] The arrest order purported to regulate, in prayers 2 and 9, not only funds already in the accounts but future deposits, for purposes of enabling full security for the claims.

had dismissed Afgri Grain's these contentions in her judgment. The letter referred specifically to the order of Weiner J of 18 June 2018 and anticipated the institution of a claim by Afgri Operations to the funds. Mr Van Greunen sought an undertaking from the Sheriff not to proceed with any further steps in removing funds from the accounts pending the adjudication of the claim and concluded by requesting the Sheriff '*to proceed with the necessary interpleader proceedings as a matter of urgency*.'

12. The letter of 26 June 2018 was not copied to the applicants' attorneys but it came to their attention. It elicited correspondence on 31 July 2018 from the applicants' attorneys to the Sheriff (copying Van Greunen and Associates) in which applicants' attorneys contended, amongst other things, that interpleader proceedings would be incompetent and that in any event Weiner J had determined the issue of ownership in her judgment of 18 June 2018. The applicants' attorneys contended that the interpleader proceedings were irregular because they are confined to the execution procedure whereas the right, title and interest to the monies had, in this case, been arrested for purposes of security.

13. On 4 September 2018, the Sheriff commenced interpleader proceedings in terms of Rule 58 of the Uniform Rules of Court. In the interpleader notice, the sheriff records that:

    13.1. The applicants contend that the right, title and interest in and to monies in the accounts vest in Afgri Marketing and were susceptible to arrest in terms of the order of Mashile J.

    13.2. Afgri Operations contends that the right, title and interest in and to monies in the accounts vest in it and as such were not susceptible to arrest in terms of the order of Mashile J.

14. This step resulted in the institution of the main application on 30 August 2018 on an urgent basis. In the notice of motion, the applicants seek an order setting aside the interpleader proceedings in terms of Rule 20 of the Admiralty Proceedings Rules[5] read with section 5(2)(a) of the AJR Act.[6] The applicants also sought interim relief pending the determination of the application interdicting the Sheriff from dealing with the arrested monies. Both Afgri Marketing and Afgri Operations filed a notice of intention to oppose the application. However, on 4 September 2018, Unterhalter J made an order by agreement between the applicants, Afgri Marketing and Afgri Operations, regulating the further conduct of the application and staying the interpleader proceedings pending its determination. The order determines that the costs of the postponement are to be costs in the cause, in other words in the main application.

15. On 3 October 2018, Afgri Operations filed its answering affidavits. When it did so, it filed a conditional counter-application. In the event that the main application succeeded, Afgri Operations sought an interim interdict pending the adjudication of an action instituted by the second respondent under case number 36468/18, also on 3 October 2018. The interim interdict sought was an interdict restraining Afgri Marketing, the Sheriff and Absa from dealing in any manner with the arrested monies.

[5] The Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa (GN R571 in GG 17926 of 18 April 1997)

[6] Section 5(2)(a) of the AJR Act provides as follows:

'5. Powers of Court

(1) …

(2) A Court may in the exercise of its admiralty jurisdiction –

(a) consider and decide any matter arising in connection with any maritime claim, notwithstanding that any such matter may not be one which would give rise to a maritime claim.'

16. These applications came before me on the opposed motion roll and were argued on Monday 19 April 2019. Mr M Fitzgerald SC (with Mr R Fitzgerald) appeared for the applicants. Mr Swart SC appeared for the second respondent, Afgri Operations. The other parties to the proceedings, including the first respondent, had not filed any affidavits. The third to fifth respondents, the Sheriff, Absa Bank and the Registrar of this Court did not participate in the proceedings. I heard argument and reserved judgment.

17. The appeal against the decision of Weiner J was since argued in the Supreme Court of Appeal on 14 May 2019 and the SCA delivered judgment on 29 May 2019.[7] The SCA *inter alia* upheld the appeal and set aside the order of Weiner J replacing it with an order that the application for reconsideration succeeds and set aside the order of Mashile J. The reasons appear from the judgment. The main finding of the SCA was that the applicants had failed to discharge the onus of proving that it had a genuine and reasonable need for security.[8] The Court held that the applicants were accordingly not entitled to the arrest and the order to that effect should have been set aside on reconsideration.[9] Although the SCA considered the sweeping arrangement,[10] the question whether it is underpinned by a cession between Afgri Marketing and Afgri Operations did not arise for decision.

18. In view of the SCA's judgment and order, and on 26 June 2019, I requested the parties to provide me with supplementary written submissions addressing the impact of the decision

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[7] *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). A copy of the judgment was sent to my chambers by Van Greunen and Associates under cover of a letter dated 5 June 2019 and did not immediately come to my attention.

[8] Although the issue became academic in light of the main finding, the Court also found that the portions of paragraph 2 of the order and the whole of paragraph 9 which made provision for the arrest of future deposits should not have been granted as the section 5(3) procedure can only be brought against property in existence at the time it is brought. See paragraphs 17 to 20 of the judgment.

[9] See judgment, supra, paragraphs 59 to 61.

[10] See judgment, supra, paragraphs 50 to 56.

and whether the decision had rendered the applications before me academic. The applicants supplied their submissions on 10 July and the second respondent on 11 July 2019. The parties are in agreement that any decision I make will have no practical effect and that the matter has become academic. The applicants however urge the Court to decide the applications in view of the public importance of the issues for the development of Admiralty Law and because the court is still required to decide the issue of costs, which has not been settled in the meantime. The second respondent submits that there is no reason for the Court to exercise its discretion to determine the matter. On costs, the second respondent submits that the main application should be dismissed with costs in view of the fact that the SCA has set aside the arrest order.

The Court's power to determine academic issues

19. Mr Swart referred me to the decision of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[11] in which the Constitutional Court noted that a case '*is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.*'[12] As indicated above, both parties accepted, however, and it is well established, that the Court has a discretion to decide a matter even if it has become academic or moot, a discretion that must be exercised according to what the interests of justice require.[13]

[11] 2000(2) SA 1 (CC) at para 21 fn18. The holding has been repeatedly re-affirmed in decisions of the Constitutional Court and the Supreme Court of Appeal.
[12] In this regard, the Constitutional Court referred to the cases of *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599) and *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC) (1999 (11) BCLR 1219.
[13] *Cape Town City v Aurecon SA (Pty) Ltd* 2017(4) SA 223 (CC) at para 54.

20. In *Independent Electoral Commission v Langeberg Municipality*[14] the Constitutional Court held as follows:

> *'This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.'*

21. Mr Swart submitted that the principles apply equally when a matter becomes academic on appeal to when it becomes academic after a case was instituted and argued but before judgment has been delivered. He cited no authority for that proposition nor did I receive submissions in respect of section 16 of the Superior Courts Act 10 of 2013, which now expressly regulates the power of courts on appeal generally where a decision sought will have no practical effect or result. However, I regard the proposition to be correct,[15] and I proceed to deal with the matters before me on that basis.

22. It warrants emphasis that even if I were to determine that it is not in the interests of justice to determine the applications, it would be necessary for me to have regard to the merits of the applications in determining the issue of costs, which remains before me.[16]

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[14] *Independent Electoral Commission v Langeberg Municipality* 2001(3) SA 925 (CC) at para 11.

[15] *Minister of Justice and Correctional Services and others v Estate Late Stransham-Ford (Doctors for Life International NPC and others as amici curiae*) [2017] 1 All SA 354 (SCA).

[16] Lawsa 'Costs' Vol 10 (3 ed) at para 250 '… *(w)here a decision concerning costs is divorced from the merits because a decision on the merits is no longer required or is not permissible, the decision as to costs should not be reached in total isolation from considerations linked to the merits*.' This is a reference to the dictum in *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) at 798C – H which was followed in, amongst other cases, *Thusi v Minister of Home Affairs and another and 71 other cases* 2011 (2) SA 561 (KZP) at para 64. In the latter case, Wallis J locates the applicable principle in the following dictum of Watermeyer CJ in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 863:

> *'A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The*

23. **The main application**

24. Interpleader proceedings are governed by Rule 58 of the Uniform Rules of Court. Rule 58 provides as follows:

> **58 Interpleader**
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> (1) Where any person, in this rule called 'the applicant', alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as 'the claimants', in respect thereto, the applicant may deliver a notice, in terms of this rule called an 'interpleader notice', to the claimants. In regard to conflicting claims with respect to property attached in execution, the sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.
>
> (2) (a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in subrule (1) hereof, to pay the money to the registrar who shall hold it until the conflicting claims have been decided.
>
> (b) Where the claims relate to a thing capable of delivery the applicant shall tender the subject-matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct.
>
> (c) Where the conflicting claims relate to immovable property the applicant shall place the title deeds thereof, if available to him, in the possession of the registrar when delivering the interpleader notice and shall at the same time hand to the registrar an undertaking to sign all documents necessary to effect transfer of such immovable property in accordance with any order which the court may take or any agreement of the claimants.
>
> (3) The interpleader notice shall —
>
> (a) state the nature of the liability, property or claim which is the subject-matter of the dispute;
>
> (b) call upon the claimants within the time stated in the notice, not being less than 15 days from the date of service thereof, to deliver particulars of their claims; and
>
> (c) state that upon a further date, not being less than 15 days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his liability or the validity of the respective claims.

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form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs. Now, discarding for the moment the idea of discretion, in an appeal against an order for costs, the Court of Appeal does not judge a party's right to his costs in the Court a quo by asking the question was he the successful party in that Court. It asks ought he to have been the successful party in the Court and decides the question of costs accordingly.'

(4) There shall be delivered together with the interpleader notice an affidavit by the applicant stating that —

(a) he claims no interest in the subject-matter in dispute other than for charges and costs;

(b) he does not collude with any of the claimants;

(c) he is willing to deal with or act in regard to the subject-matter of the dispute as the court may direct.

(5) If a claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his claim within the time stated or, having delivered such particulars, fails to appear in court in support of his claim, the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject-matter of the dispute.

(5A) Simultaneously with the delivery by a claimant of particulars of claim, such claimant shall specify an address for service within 15 kilometres of the office of the registrar as referred to in rule 6(5)*(b)*.

(6) If a claimant delivers particulars of his claim and appears before it, the court may —

(a) then and there adjudicate upon such claim after hearing such evidence as it deems fit;

(b) order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant;

(c) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant;

(d) if it considers that the matter is not a proper matter for relief by way of interpleader notice dismiss the application;

(e) make such order as to costs, and the expenses (if any) incurred by the applicant under paragraph *(b)* of subrule (2), as to it may seem meet.

(7) If an interpleader notice is issued by a defendant in an action, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court upon an application made by any other party to the action otherwise orders.

25. There is no dispute between the parties that Rule 58 applies to admiralty proceedings in terms of the Admiralty Proceedings Rules.[17] Rather, the question is whether the interpleader proceedings were regular in the circumstances of this case in the sense contemplated by Rule 20(2). In their heads of argument, the applicants advanced multiple contentions why they were not, which I have considered. During the course of argument, the real issues germane to the relief sought in the notice of motion could be distilled as three-fold and I deal with these issues below.

[17] In terms of Rule 26, read with Rule 24 of the Admiralty Proceeding Rules.

25.1. The first is whether it is competent for the applicants to raise the regularity of the interpleader proceedings in terms of Rule 20(2) or whether, as the second respondent submitted, it is incumbent upon the applicants to deliver their particulars of claim and raise the issue in terms of Rule 58(6)(d);

25.2. If it is competent, the second issue is whether the jurisdictional requirements for the Sheriff to trigger the interpleader proceedings were present.

25.3. The third issue is whether the non-joinder of Afgri Marketing in the interpleader proceedings renders them fatally defective.

The first issue

26. If I were to entertain the application, I would determine the first issue in favour of the applicants in accordance with existing authority. Rule 20(2) of the Admiralty Proceedings Rules provides:

> *'If it appears to the Court on application that there have been any irregular proceedings by any party or non-compliance with the rules or any order of Court, the Court may make such order as appears to it to be just with regard to the said proceedings or non-compliance, including an order that any such party be deemed to be in default or that judgment be given against any such party.'*

27. There is authority for the proposition that where there are no adverse claims, the jurisdictional requirements to trigger Rule 58 are not present, and a party can request a Court in the exercise of its ordinary civil jurisdiction to set it aside in terms of Rule 30 of

the Uniform Rules of Court.[18] I can see no reason, and none was offered, why the same approach should not be followed when the Court exercises its admiralty jurisdiction.

The second issue

28. The second issue is whether it is competent for the Sheriff to trigger interpleader proceedings when giving effect to an arrest order in terms of section 5(3) of the AJR Act and faced with an adverse third party claim to the property. While counsel for the applicants and second respondent, respectively, each insisted that their contrary positions were obviously correct, there is no clear authority on point.

29. The authors of Herbstein and Van Winsen's Civil Practice of the High Courts of South Africa explain that interpleader proceedings are '*an expeditious procedure whereby a person who is in possession of money or property in respect of which he claims no interest, but expects to be sued by two or more persons, can obtain a ruling from the court as to the person to whom the money is in law due or the property should be transferred*.'[19]

30. There was no dispute and it is well established that it is competent for the sheriff to initiate interpleader proceedings in respect of conflicting claims with respect to property attached in execution. That this is so appears from the express terms of Rule 58 and more particularly the last sentence of Rule 58(1). The Courts are often called upon to decide cases of this sort.

[18] DR Harms Civil Procedure: Superior Courts in Lawsa Volume 4 - Third Edition Replacement, 744; *Beazley v Magnum Estate Agents (Pty) Ltd and another* 1976 (4) SA 94 (W)

[19] Cilliers, Loots and Nel, Civil Practice of the High Courts of South Africa (Herbstein and Van Winsen): Fifth edition, p 336.

31. An interpleader in the case of execution has been held to be '*a species of the genus*'.[20] In that instance the execution creditor has the rights of a claimant under the rule. The purpose of the procedure in the case of execution was explained by Gardiner JP in *Bernstein v Visser* as follows:[21]

> *'…The reason for providing for interpleader in the case of execution is thus stated by Mather on Sheriff and Execution Law (2nd ed., 463): -*
>
> > *"Cases frequently arise where a third party makes an adverse claim to property seized by the sheriff under an execution, and that the latter, but for the following safeguard, would be consequently subject to considerable risk in the discharge of his duties, to which, relief by way of interpleader is provided."*
>
> *The messenger is not bound to avail himself of this privilege, and no one can compel him to do so, but if he refrains from taking out an interpleader summons he does so at his own risk. As Juta AJA said in Weeks v Amalgamated Agencies Ltd (1920, AD at 238)): 'If he attaches goods while in the possession of the judgment debtor they are presumed to belong to the latter, and the messenger is not liable to the owner for such attachment. If on attachment or thereafter before they are sold, they are claimed by a third person, his duty is to take out an interpleader summons. If he neglects to do so he is answerable to the owner of the goods.'*

32. Mr Swart submitted that the present case is a 'classic case' for interpleader proceedings. I have however been unable to locate any decision in respect of interpleader proceedings initiated by a sheriff in the wake of the grant of an arrest order in terms of section 5(3) of the AJR Act where a third party makes an adverse claim to the property and none was cited.

33. Mr Fitzgerald submitted that in this case the jurisdictional facts to trigger the interpleader proceedings were not present as the applicants have not made any claim in respect of the property. Any claim against the property that may arise, so the argument went, would only arise if and when the applicants were successful in the London arbitration.

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[20] Bernstein v Visser 1934 CPD 270 at 273 per Gardiner JP
[21] Id

34. In my view, this submission overlooks the fact that the applicants have asserted a claim in respect of the property, being a claim to hold it as security in terms of section 5(3) of the AJR Act. If regard is had to the decision of Gardiner JP in *Bernstein v Visser*, there is in my view no material difference in principle between the position of a sheriff who is directed by a court to attach property for purposes of sale in execution and is then faced by an adverse claim from a third party and the present case. In both cases, control over the property, but not ownership, passes from the owner to the sheriff being the officer entrusted with it.[22] The sheriff has no personal interest in the property in either case. Rather, in both cases, the sheriff is giving effect to a court order that determines control of the property for stated purposes.

35. In arriving at my conclusion, I have had regard to the fact that the last sentence of Rule 58(1) refers only the case where the property is being sold in execution. In my view, this does not take the matter any further because the source of the sheriff's power does not seem to me to lie in that sentence. Rather, that sentence clarifies the status of the sheriff and an execution creditor in interpleader proceedings where the conflicting claims relate to property attached in execution. Logically, where the proceedings concern property arrested as security, the sheriff would similarly hold the position of an interpleader applicant and the party who obtained an arrest order would be a claimant under the rule.

36. Furthermore, I agree with the submission of Mr Swart that the last sentence in fact demonstrates the fallacy of the applicants' contention in paragraph 32 above in that the fact that an execution creditor seeks the sheriffs' assistance to attach property to satisfy a

[22] In respect of property attached in execution, see *Liquidators Union and Rhodesia Limited v Brown and Co* 1922 AD 549 at 558-8, referred to by Mr Swart.

judgment necessarily means that the execution creditor contends that the property belongs to the execution debtor.

37. Accordingly, I would determine the second issue in favour of the second respondent.

The third issue

38. On the evidence before me in this case, I would also determine the third issue in favour of the second respondent. Here, the sheriff was not faced with any adverse claim from Afgri Marketing in respect of the arrested property. The adverse claim was from Afgri Operations and in the letter of 26 June 2018, the Sheriff was specifically informed that Afgri Marketing agreed with Afgri Operations' contentions regarding its right, title and interest in the monies.

39. The applicants advanced various other contentions - mainly in the heads of argument but some persisted with in argument - which, on analysis, are not germane to the question of the regularity of the interpleader proceedings initiated by the Sheriff but which, in my view, would arise in a consideration of the conditional counter-application or possibly during the course of the interpleader proceedings were they to ensue. To the extent that the applicants submitted that the issue of the interpleader notice by the Sheriff was an abuse of process, no such case was established on the evidence before me.[23]

40. In the result, in my view, the merits of the application would be determined in favour of the second respondent. The questions that remain to be considered are, first, whether it is in the interests of justice to decide the main application and second, the question of costs.

[23] It is accordingly not necessary for me to consider whether the issue was properly raised in these proceedings.

Is it in the interests of justice to decide the main application?

41. I have come to the view that it is in the interests of justice for me to decide the main application although it is academic as between the applicants and the second respondent. This is for the following reasons:

    41.1. First, as set out above, the application ultimately turns on a discrete question of law that arises in connection with the second issue above. The question is whether it is competent for the office of the Sheriff to resort to interpleader proceedings when giving effect to an arrest order in terms of section 5(3) of the AJR Act and faced with an adverse claim to the property by a third party. This is a question of importance not least to the office of the Sheriff.

    41.2. Second, the remaining issues can readily be determined in the manner set out above either on existing authority or on a consideration of simple questions of evidence on the papers before me.

    41.3. Third, a decision in the main application will provide certainty for the parties who elected not to participate in the proceedings in circumstances where the interpleader proceedings have apparently not (yet) been withdrawn.

Decision and costs

42. For the reasons set out above, I conclude that it was not irregular for the Sheriff to trigger the interpleader proceedings as she did.

43. In the ordinary course, costs would follow the result. Only the second respondent seeks costs. I am, however, of the view that in this case, the second respondent should pay its own costs. On the facts of this particular case, I am of the view that the second respondent has unnecessarily generated costly parallel interpleader proceedings with inevitable attendant uncertainty, confusion and dispute.[24] Afgri Operations was aware of the arrest proceedings in which its subsidiary Afgri Marketing initially conceded its right, title and interest to the monies. Yet, it elected not to participate in those proceedings to assert its claim to the property, as it was entitled and in a position to do, but rather to assert its claim against the Sheriff. No reason was proffered for this course save that it was not obliged to participate in the arrest proceedings. Even if that is so, given the relationship between the two parties, the parties' ultimate election to be represented by the same attorneys, and the nature and similarity of the questions of fact and law that arise in this matter and the arrest proceedings, the interests of justice would have been better served, and costs significantly reduced, had the second respondent exercised its right to ventilate the issue of ownership of the property in the arrest proceedings. I point out that in coming to this conclusion, I have not lost sight of the fact that the application ultimately turned on an important question of law and that I was assisted in arriving at my conclusion by counsel for the second respondent.

44. In view of the conclusion I have reached in the main application, it is not necessary for me to deal with the conditional counter-application.

45. I make the following order:

[24] It has not been necessary to traverse in any detail all of the disputes that emerged but it can be noted that in nature several flow specifically from the choice of procedure.

45.1. The application to set aside the proceedings commenced by the third respondent in terms of Uniform Rule 58 on 4 September 2018 is dismissed.

45.2. Each party is to pay its own costs.

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SJ COWEN

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 19 April 2019

Date of supplementary submissions: 10 and 11 July 2019

Judgment delivered: 7 August 2019

APPEARANCES

For the applicants: M Fitzgerald SC and R Fitzgerald instructed by Bowman Gilfillan Inc

For the second respondent: B Swart SC instructed by Van Greunen and Associates