



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not 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 Bulkiers A/S (in liquidation) and Others* (797/2018) [2019] ZASCA 104 (23 August 2019)

Coram: Wallis, Van der Merwe, Mocumie, Schippers and Mokgohloa JA

Heard: Matter disposed of without a hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013

Delivered: 23 August 2019

Summary: Variation of costs order granted in error.

ORDER

Paragraph 2(b) of the order granted in this matter is amended by the deletion of the words ‘and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013’.

JUDGMENT

Wallis JA (Van der Merwe, Mocumie and Mokgohloa JJA concurring)

[1] The costs order granted in this appeal read:

‘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.’

[2] On 21 June 2019 the unsuccessful respondents, referred to collectively as Copenship, lodged an application seeking the deletion from that order of the words ‘and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013’. They did so on the basis

that this portion of the order had been made in error. The appellant abided the decision of the court on the application and Copenship did not seek an order for costs against it.

[3] The appeal arose from an order granted by the Gauteng Division of the High Court, Johannesburg, on 14 March 2018 confirming an order for the arrest of funds standing to the credit of the appellant in two bank accounts. Leave to appeal against that order was sought and at the same time a dispute arose between the parties in regard to the effect of the grant of leave to appeal on the funds subject to the arrest order. To resolve that dispute Copenship brought an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act) seeking to give effect to the arrest order notwithstanding the grant of leave to appeal. Opposing and replying affidavits were delivered in that application.

[4] The two applications were dealt with together by Weiner J in a judgment handed down on 18 June 2018. She granted leave to appeal and in regard to the application directed that certain funds should remain under arrest and that those funds should be supplemented by the deposit of further security up to the total value of Copenship's claim. In making those orders the judge was aware that this might render the appeal in relation to certain of the relief ordered in the security arrest moot, but she held that these orders were within the powers of the court in terms of s 173 of the Constitution. The court's order read as follows:

‘1 Leave to appeal is granted to the Supreme Court of Appeal.

2 Costs of the application for leave to appeal are to be costs in the appeal.

3 Pending the appeal, the amount of R18 771 151.38 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 771 151.38) 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 costs consequent upon the employment of two counsel.’

[5] The appellant’s notice of appeal pursuant to this order noted an appeal against the whole of the judgment and order granted on 14 March 2018. It did not appeal against paragraphs 3, 4 and 5 of the order of 18 June 2018. Leave to appeal against those portions of the order had not been sought or granted, although insofar as the judge was dealing with an application under s 18(3) the appellant had an automatic right of appeal against the order by virtue of s 18(4)(ii) of the Act. However, there is nothing in the record to indicate that the appellant wished to exercise, or took any steps to exercise, that right.

[6] The record filed in this court included all the papers in the s 18(3) application, but that was not admissible for the purpose of considering whether the arrest order should have been confirmed and it was disregarded as recorded in para 16 of the main judgment. The position is therefore that Copenship is correct in its submission that this court was not seized of the question whether paras 3, 4 and 5 of the order of 16 June 2018 were correct. Accordingly the inclusion in the order of a provision altering the high court’s decision in regard to the costs of the s 18(3) application was erroneous and it must be amended by the deletion of the words ‘and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013’ in para 2(b) thereof.

[7] Our brother Schippers JA is at present absent from the court and accordingly in terms of s 13(3)(a) of the Act this application is determined by the decision of the remaining members of the bench that heard this appeal.

[8] It is ordered that:

Paragraph 2(b) of the order granted in this matter is amended by the deletion of the words ‘and the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013’.

M J D WALLIS
JUSTICE OF APPEAL

Appearances

Applicants' attorneys: Bowman Gilfillan, Cape Town
Matsepes, Bloemfontein.

Respondent's attorneys: Van Greunen Attorneys, Centurion;
Noordmans Attorneys, Bloemfontein.