THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 260/2016

In the matter between:

CATHAY PACIFIC AIRWAYS LTD	**FIRST APPELLANT**
SHIRLEY JONES	**SECOND APPELLANT**

and

HAI LIN	**FIRST RESPONDENT**
RUIHONG WENG	**SECOND RESPONDENT**

Neutral Citation: *Cathay Pacific Airways & another v Lin & another* (260/2016) [2017] ZASCA 35 (29 March 2017)

Coram: Maya AP and Majiedt and Van der Merwe JJA and Molemela and Gorven AJJA

Heard: 9 March 2017

Delivered: 29 March 2017

Summary: Practice – urgent application – whether court order issued orally only was effective – whether there was proper notice and service to affected parties – contempt of court – whether the requirements for contempt of court were proved beyond reasonable doubt

ORDER

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

1 The appeal against the convictions of civil contempt of court is upheld with costs, including the costs of two counsel.

2 The orders granted by Spilg J on 11 November 2014, and 14 October 2015 holding the appellants in contempt of court and imposing sentence upon them are set aside and replaced with an order in the following terms:-

'(a) The application to hold the third respondent and Ms Shirley Jones in contempt of court is dismissed.

(b) The applicants are directed to pay the third respondent's costs.'

3. The appeal against the order in the counterapplication is upheld in part by substituting the order of Spilg J with the following order:

'The counterapplication is dismissed with costs.'

JUDGMENT

Majiedt JA (Maya AP and Van der Merwe JA and Molemela and Gorven AJJA concurring)

INTRODUCTION

[1] Judges wield enormous power in their courts. Judges decide, sometimes conclusively, the rights and obligations of the parties before them. They are independent, subject only to the Constitution and the law, which they are constrained to apply impartially and without fear, favour or prejudice.[1] But these powers must be

[1] Section 165(2) of the Constitution: The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

exercised with great responsibility and with abundant caution. The overriding consideration in every matter must indubitably be the interests of justice. The blindfolded Lady Justice balancing the scales in her left hand and holding a sword in her right hand personifies the moral force of justice. While all three of these attributes of our system of justice come to the fore in this matter, it is the balancing of the scales of justice that is paramount.

[2] This appeal concerns contempt of court orders made against the appellants by Spilg J in the Gauteng Local Division of the High Court, Johannesburg. The learned Judge found the appellants, Cathay Pacific Airways Limited (Cathay Pacific) and Ms Shirley Jones, to have acted in contempt of orders granted in that court by Wright J. Four orders were made by Wright J in a period of one week. This appeal is with the leave of this court.

THE ISSUES

[3] The main issues for determination are:

(a) under what circumstances is a court empowered to grant an order made telephonically and how should such an order be recorded and served effectively so that it comes to the notice of affected parties and is capable of ascertainment;

(b) whether the respondents had discharged the onus of proving that the appellants had been duly cited in the proceedings and that the court orders had been properly brought to their knowledge;

(c) the liability for contempt of court of employees of a company in respect of an order granted against their employer, where such employees had neither been cited as a party nor an order granted against them.

THE FACTS

[4] The factual matrix is central to the determination of the issues and as such requires extensive narration. The facts are largely common cause and, to the extent that they were in issue, the well-known *Plascon-Evans*[2] approach should have been applied. The facts relevant to the determination of the issues are as follows. The respondents, Mr Hai Lin and his spouse Ms Ruihong Weng, who are Chinese

[2] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd*. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

citizens, had been granted permanent South African residency status. They reside in Umkomaas, Kwa-Zulu-Natal. They have three children, Xuefeng, Zhengyu and Lili Lin (the children) aged 19, 15 and 14 respectively. At the time,the children had also received permanent residency status. During the evening of 25 July 2014, the three children landed at OR Tambo International Airport on board a Cathay Pacific flight from Hong Kong. The eldest child, Xuefeng, was in control of his two younger siblings. On presenting themselves to the immigration authorities at the airport, the two younger children, both of whom were still minors at that time, were refused entry into the country. This refusal was based on the fact that they did not appear on the computer system of the Department of Home Affairs (the Department), which was the second respondent in the court a quo.

[5] Notices of refusal of entry were issued by the Department in respect of all three children. As far as Zhengyu and Lili were concerned, the notices stated that they were illegal foreigners on the basis that they were in possession of fraudulent permanent residency permits. In respect of Xuefeng, the notice declared that he was an illegal foreigner since he had accompanied his two siblings who were in possession of the fraudulent permits. The notices were issued in terms of s 34(8) of the Immigration Act 13 of 2002 (the Act), which reads as follows:

'(8) A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.'

[6] In terms of the declaration issued to the master of the ship under s 34 (8) above, Cathay Pacific was instructed to transport the children back to Hong Kong on the next available flight. That flight was Cathay Pacific flight number CX748 and was due to leave for Hong Kong at 12h30 the following day, 26 July 2014. The respondents became aware of the children's plight on that Friday evening

(25 July 2014) and on the following day instructed an attorney, Mr Ashraf Mohamed Essop, to assist in the matter. Shortly before 12 noon, Mr Essop telephoned Wright J (who was the Judge on urgent duty on that day) and conveyed to him the situation regarding the children. Wright J summarily issued what is referred to in the papers as a 'telephonic interdict' (the first order). The contents of the first order were conveyed telephonically at approximately 12 noon on 26 July 2014 by Mr Essop to one Mr Mashoene, who was in the Cathay Pacific office at the airport at the time.

[7] In terms of the first order, Cathay Pacific was interdicted from boarding the two younger children on the flight. It will be recalled that the flight was scheduled to depart at 12h30 on that same day. The telephonic instruction to Mr Mashoene was that Cathay Pacific should not board the two children on the flight for Hong Kong. He was informed further that there was a court order to that effect. At that time Mr Mashoene, who was employed not by Cathay Pacific but by Menzies Aviation (Pty) Ltd as a lost property agent, was in the Cathay Pacific office handling telephone calls and enquiries relating to lost baggage. In this regard Menzies Aviation acts as an agent for Cathay Pacific.

[8] In response to the telephonic instruction, Mr Mashoene informed Mr Essop that he had no control over the matter, but that he would refer the matter to the employees of Cathay Pacific. To this end, Mr Mashoene conveyed the instruction telephonically to Ms Zelda Swart, employed by Cathay Pacific as an airport service officer. Importantly, Ms Swart was not informed by Mr Mashoene that there was a court order prohibiting the children from boarding the flight. Her attitude was that Cathay Pacific was enjoined by law to give effect to the Department's instruction under s 34(8) of the Act to remove the children from South Africa. The telephone conversation between Mr Mashoene and Ms Swart occurred while the latter was at the boarding gate from which passengers, including the children, were boarding flight CX748 which was departing for Hong Kong. In the event the children left on that flight for Hong Kong at 12h30 on 26 July 2014.

[9] At approximately 13h15 that same day, Mr Essop telephonically conveyed to Ms Swart the same instruction as he had conveyed earlier to Mr Mashoene. Ms Swart's response was that she was indeed aware of the matter by virtue of

Mr Mashoene's earlier telephone call, but that she had been legally bound to adhere to the Department's instruction and that consequently, the children had left for Hong Kong on flight CX748. She further explained to Mr Essop that Mr Mashoene was simply a lost property agent and that as such had no authority to enforce a telephonic order that the minor children should not board the aircraft.

[10] Mr Essop also sought the assistance of the Department by engaging in a telephonic conversation with Adv Deon Erasmus, the Department's Chief Director of Legal Services. Upon being informed by Mr Essop of the order granted by Wright J, Adv Erasmus responded that he could do nothing to prevent the children from being loaded and that he considered the matter to be out of his hands. Subsequently, Mr Essop sought to extract an agreement from Ms Swart that the children would be returned to Johannesburg on the next available flight from Hong Kong. Ms Swart indicated in response that, absent any authority from her superiors and in the face of the Departmental instruction, she was unable to accede to such a request.

[11] Shortly thereafter, at 14h49 on 26 July 2014, Wright J telephoned Ms Swart and informed her that he intended to order the return of the children from Hong Kong on the following Monday, 28 July 2014. Wright J requested that Ms Swart accede to such an order on behalf of Cathay Pacific. Ms Swart declined once more to agree to such an order, citing her lack of authority. She suggested, instead, that Wright J take the matter up with her manager, Ms Shirley Jones, the second appellant in this appeal. Ms Swart declined to furnish Wright J with Ms Jones's cellular phone number but undertook to request Ms Jones to contact the learned Judge. The latter is alleged to have put Ms Swart to terms, after which he told her to revert to him within two minutes, failing which he would issue an order. In the event, Ms Swart was unable to locate Ms Jones and when Ms Swart conveyed this telephonically to Wright J at around 14h55, the learned Judge indicated that unless he had heard again from Ms Swart within five minutes, he would issue an order, a draft whereof was subsequently sent to Ms Swart by e-mail. An incorrect e-mail address was, however, used in transmitting the draft order. The e-mail was sent to an @cathypacific.com address, instead of to an @cathaypacific.com address. The second order was made shortly thereafter at around 15h20.

[12] In providing the written reasons for the second order, Wright J outlined the above events in respect of both the first order (the 'telephonic interdict') and the second order. In broad terms, the learned Judge confirmed that:

(a) he had issued the first order at 12 noon telephonically over his cell phone in conversation with Mr Essop;

(b) that he had been informed thereafter at about 13h00 by Mr Essop that the flight had left at 12h30 with the children on board,[3] notwithstanding the order having been conveyed to Mr Mashoene by both Mr Essop and Ms Mlaba, the Judge's secretary;

(c) he had engaged in the conversation with Ms Swart narrated above, and that since no response had been forthcoming from neither Ms Swart nor Ms Jones, he had issued the second order.

It is necessary to briefly revert to these written reasons at a later stage. It will suffice to emphasize that the written reasons constitute the only written recordal of the first order. The order itself had never been reduced to writing.

[13] The terms of the second order were as follows:

'1. The third respondent, [Cathay Pacific] is to return to OR Tambo International Airport the children, Zhengyu Lin (with date of birth 18 August 1999 and passport number G34605379) and Lili Lin (with date of birth 22 November 2000 and passport number G34605382) on the first available Cathay Pacific flight from Hong Kong to OR Tambo International Airport.

2. The first and second respondents are ordered to admit the children to South Africa.

3. The first and second respondents are interdicted from deporting the children unless the first and second respondents have a court order to that effect.

4. The first, second, fourth and fifth respondents are ordered to hold the children at the fourth respondent's holding facility at OR Tambo International Airport until:

4.1 There is a court order to the contrary or

4.2 They are released into the custody of the applicants at the option of the first and second respondents.

5. The respondents are to allow the children to be visited by the applicants and the applicant's legal practitioners immediately on the children's arrival at OR Tambo International Airport.

6. This case is postponed to 14H00 on Monday 28 July 2014 in front of Wright J.

[3] While the learned Judge referred to the 'two younger children' having been on board, it became common cause that all three children had left on flight CX748.

7. The second to fifth respondents are to bring the children to court for the hearing at 14H00 on Monday 28 July 2014 before Wright J, High Court Building, corner Pritchard and Kruis Streets, Johannesburg, Court 9F.
8. The question of costs is reserved.'

[14] The second order was purportedly communicated to Cathay Pacific via an e-mail from the learned Judge's chambers. As with the draft order earlier, the order was sent to a '@cathypacific.com' address, instead of to one with the suffix '@cathaypacific.com'. This error abounds in the papers outlining both the Reasons for Judgment and the subsequent contempt application. The effect of the misspelling of the email address is that neither the draft second order nor the order itself came to the knowledge of Cathay Pacific until the third order was served on it. This has important consequences for the contempt of court convictions and reference will be made to it in due course. It also bears mention that the second appellant, Ms Jones, had not been cited as a party in the second order, nor was she cited in any other order issued by Wright J.

[15] There was no appearance by Cathay Pacific in court before Wright J on 28 July 2014 at 14h00. This non-appearance was caused by its lack of knowledge of the second order due to the circumstances explained above. On 28 July 2014 Wright J issued the third order which was similar to the terms contained in the second order, save for the following: it also referred to the eldest child, Xuefeng, after it had become apparent that he too had also been returned to Hong Kong on flight CX748; it also included a further order directing Cathay Pacific 'to return the three children to OR Tambo International Airport without asking for payment but subject to Cathay Pacific's right later to institute legal proceedings for the recovery of any money which Cathay Pacific considers payable to it'; lastly, the matter was postponed to 10h00 on Friday 1 August 2014 before Wright J and the question of costs was reserved.

[16] On the following day, 29 July 2014, Mr Essop delivered a hard copy of the Reasons for Judgment as well as the third order from the previous day to Ms Jones, who refused to sign an acknowledgment of receipt. It became common cause, however, that on that date Cathay Pacific for the first time acquired knowledge of the existence and contents of the first three orders.

[17] Cathay Pacific did not appear before Wright J on 1 August 2014. I will advert to its reasons for that non-appearance shortly. On that date Wright J granted the fourth order, directing Cathay Pacific to pay the respondents' costs of the proceedings of 26 July 2014, 28 July 2014 and 1 August 2014 on an attorney and client scale. Written reasons for that order form part of the record. They merely repeat the events which gave rise to the first three orders and set out the terms of the third and fourth orders.

[18] The respondents launched an urgent application after the fourth order had been granted. They sought an order holding the appellants and Mr Mashoene in contempt of the court orders issued by Wright J. A striking feature of the application is that neither Ms Jones nor Mr Mashoene had been cited as parties to the contempt proceedings.

[19] The contempt application served before Spilg J on 15 August 2014. The learned Judge issued a rule nisi returnable on 9 September 2014. In terms of the rule nisi the appellants and Mr Mashoene were called upon to show cause on 9 September 2014 why they should not be held in contempt of the orders granted by Wright J on 26 and 28 July 2014.

[20] The appellants opposed the contempt application and issued a counterapplication to have the first, second and third orders by Wright J, or parts thereof, declared null and void and set aside. They also sought to have the punitive costs order granted by Wright J on 1 August 2014 set aside. Spilg J found the appellants in contempt of the court orders and he dismissed the counterapplication. Cathay Pacific was found to be in contempt of the first, second and third orders and Ms Jones was found in contempt of the second and third orders. No such finding was made against Mr Mashoene as Spilg J 'was unable to find that Mashoene acted wilfully since he was obliged to obtain instructions from and was under the authority of Swart'.

[21] It is necessary to highlight the following:

(a) No notice of motion nor any affidavit had ever been filed in any of the proceedings before Wright J from which the first, second, third and fourth orders had emanated.

(b) The first order had never been reduced to writing – the only recordal thereof is to be found in the Reasons for Judgment of 28 July 2014 after the second order had been made.

(c) The first and second orders had never been served on the appellants as the e-mail addresses used to transmit the second order were erroneous, as indicated above.

(d) The first time that the appellants became aware of the orders made by Wright J was on 29 July 2014, when Mr Essop had delivered a hard copy to Ms Jones at the Cathay Pacific offices.

(e) Ms Jones had not been cited as a party in the contempt proceedings nor in the proceedings before Wright J.

[22] In relevant part the order made by Spilg J reads as follows:

'1. The Third Respondent [Cathay Pacific] is held to be in contempt of the court orders granted on 26 July 2014 by Wright J under case number 2014/22434 in that;

a. it boarded the applicants' two minor children, Zhengyu and Lili onto flight CX748 and did not disembark them despite the interdict preventing it from boarding the said children,

b. it did not return the said children to OR Tambo International Airport on a Cathay Pacific flight departing from Hong Kong despite the second order granted to that effect;

and for the reasons set out in the judgment to be handed down by Friday 14 November 2014.

2. The Third Respondent is held to be in contempt of the court orders granted on 28 July 2014 by Wright J under the said case number in that;

it did not return the applicant's eldest child Xuefeng to OR Tambo International Airport on a Cathay Pacific flight departing from Hong Kong despite the order granted to that effect;

and for the reasons set out in the judgment to be handed down by Friday 14 November 2014

3. Ms Shirley Jones is held to be in contempt of the second court order granted on 26 July 2014 and the order granted on 28 July 2014 by Wright J under the said case number in that;

she did not cause Cathay Pacific to return the applicant's three children to OR Tambo International Airport on a Cathay Pacific flight departing from Hong Kong despite the orders granted to that effect;'

The learned Judge made further orders dismissing the counterapplication, ordering Cathay Pacific to pay the costs of both the contempt application and the counterapplication on the attorney and client scale and stood the sanctions imposed on the appellants (the payment of fines) over until 11 December 2014.

THE ANSWERING AFFIDAVIT

[23] Cathay Pacific's answering affidavit in the contempt proceedings was deposed to by Mr Rakesh Raicar, its South African country manager. He had been appointed to that position on 18 August 2014, ie after the orders had been made by Wright J and after the rule nisi had been issued by Spilg J. According to Mr Raicar, upon becoming aware of the case, he immediately consulted the airline's attorneys. Prior to his appointment the stance adopted by Cathay Pacific was that it was not bound by the orders granted, since it had merely carried out instructions issued by the Department. He hastened to add that that did not mean that Cathay Pacific was inclined to disobey court orders but that equally, it was obliged to adhere to the immigration laws of the various countries it operated in. The airline's attorneys advised him that the court orders were in fact null and void and should never have been issued in the first place. This advice appears to have been based on the judgment of this court in *Motala*.[4]

[24] Mr Raicar narrated the facts known to him from the airline's perspective and elaborated on his assertion that, as advised, the orders were null and void. He motivated why the non-compliance by the appellants and Mr Mashoene was not wilful. Mr Raicar concluded by asking that the rule be discharged with costs. He also asked that, in terms of the counterapplication, the orders by Wright J be set aside, as nullities, alternatively as orders having been erroneously sought and/or granted in terms of Uniform Rule 42(1)(*a*), alternatively in terms of the common law. Insofar as the fourth order is concerned, Mr Raicar contended that that order was erroneously granted in the absence of Cathay Pacific.

[4] *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* 2012 (3) SA 325 (SCA) para 14.

[25] The relief sought in the counterapplication has become moot, since Cathay Pacific had in the meantime transported the children back to South Africa at its own cost and without prejudice to its rights. In this appeal Cathay Pacific seeks the dismissal of the contempt application and the setting aside of the order of Wright J of 1 August 2014 as well as costs.

THE LAW

[26] The requirements for civil contempt of court are well established. An applicant who seeks a committal order must establish the following:

(a) that a court order was made;

(b) that the order had been served;

(c) non-compliance with the order;

(d) wilfulness and mala fides.

Proof beyond reasonable doubt is required. But, once the applicant has adduced sufficient evidence to prove requirements (a), (b) and (c), the respondent bears an evidentiary burden in respect of requirement (d). A failure by the respondent to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, will mean that civil contempt will have been established beyond reasonable doubt.[5]

[27] In the present instance, we are concerned with an alleged contumacious failure or refusal to obey an order of court. Committal for civil contempt was sought in the court a quo against the appellants for both coercive and punitive reasons: first to compel Cathay Pacific to issue air tickets for the children's return from Hong Kong, and second, to punish both appellants for their alleged contumacy. In the event, as stated, the children were flown back to South Africa without any concession on the part of Cathay Pacific that it was in law compelled to do so. What remained therefore was the committal sought by the respondents. Applying these general legal principles to the facts in this matter, I propose dealing sequentially with the various orders.

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[5] *Fakie NO v CCII Systems (Pty) Ltd* (653/2004); [2006] ZASCA 54; 2006 (4) SA 326 (SCA) para 42; *Tasima (Pty) Ltd v Department of Transport* (792/2015) [2015] ZASCA 200; [2016] 1 All SA 465 (SCA) para 18; *Pheko & others v Ekurhuleni Metropolitan Municipality* (No 2) (CCT 19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC) para 32.

THE FIRST ORDER

[28] It is readily evident from the facts outlined above that on 26 July 2014 Wright J was seized with a matter of extreme urgency. Moreover, it involved the welfare of minor children, whose best interests are always paramount in any and every matter.[6] Flight CX748 was due to leave for Hong Kong within just over half an hour. By then the boarding gates in all likelihood had either already been closed or on the verge of being closed. And as indicated above Mr Essop had been instructed only during the course of that morning – from the papers this instruction appears to have happened during the late morning. During the previous evening, as soon as the respondents had become aware of their children's predicament, they had first telephonically contacted the Departmental officials without any success and second, they thereafter invoked the assistance of attorneys in Sandton whose staff were conversant in Mandarin. Finally, on the Saturday morning of 26 July 2014, Mr Lin (the first respondent) had sought the assistance of an immigration agent in Durban. The immigration agent, one Mr Hashim Malani, is the person who then referred him to Mr Essop, who ultimately represented the respondents. It is evident that there simply was not sufficient time for Mr Essop to have prepared a notice of motion, let alone a founding affidavit.

[29] It is axiomatic that there are degrees of urgency. An applicant may, in a case of sufficient urgency, create its own rules subject only to the court's control and insofar as possible in accordance with the Rules.[7] Uniform Rule 6(12)(*a*) permits a court in an urgent application to dispense with the normal forms and service and to deal with the matter 'as to it seems meet'. The degree of urgency will determine to what extent a departure from the rules will be permitted.[8] Where appropriate and in cases of extreme urgency, the application may even be heard without service or notice to the Registrar.[9] Urgency is of course facts based. I am satisfied that the matter before Wright J on 26 July 2014 which culminated in the first order was of the

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[6] Section 28(2) of the Constitution: A child's best interests are of paramount importance in every matter concerning the child.

[7] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A-783H; *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and others* 2006 (4) SA 292 (SCA) para 9.

[8] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).

[9] *Republikeinse Publikasies,* fn 6 at 782E.

utmost urgency which justified hearing it over the telephone and issuing an order telephonically.

[30] The difficulties in respect of the first order relate to the failure to have it reduced to writing and the failure to communicate the order to the relevant party, Cathay Pacific. Absent a written order and given the extreme and urgent nature of the circumstances, the only manner in which the order could have been communicated, was orally. As outlined above, the order was communicated to Mr Mashoene, who was not in the employ of Cathay Pacific, but of Menzies Aviation which acted as an agent for the airline. And, while Ms Swart had been told by Mr Mashoene not to board the children, he crucially failed to inform her that he was telling her this based on a court order to that effect. These facts were set out in some detail in Mr Raicar's answering affidavit and were confirmed in confirmatory affidavits by both Mr Mashoene and Ms Swart.

[31] Absent a finding that these averments in the answering papers were so palpably far-fetched or so clearly untenable that they warrant rejection merely on the papers, the matter had to be decided on the common cause facts and on the appellants' version. This trite principle was restated in *National Director of Public Prosecutions v Zuma*.[10] Spilg J failed to apply this approach. Knowledge by Cathay Pacific of the existence and the content of the first order was essential before a contempt finding could be made. However, the learned Judge had 'no hesitation in finding that notification of the order to [Mr Mashoene] was notification to Cathay Pacific and that Swart had actual knowledge before the flight departed'. In addition, Spilg J found that '(i)t is also common cause that Swart refused to comply with the first order. Mr Mashoene conveyed as much on the version given by the airline. The fact that a deliberate decision was taken to ignore the order because of the declaration given effectively to Cathay Pacific by immigration officials satisfies the requirements for wilfulness'. These findings are against the weight of the evidence. First, it was not common cause at all that Ms Swart refused to comply with the first order. In fact, on the version advanced on behalf of the appellants, she had unequivocally conveyed to Wright J that she was unable to take a decision on the

[10] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

learned Judge's request, given her lack of authority. Second, notice to Mr Mashoene could never have constituted notice to Cathay Pacific. He was not authorised to act for Cathay Pacific. He was a Menzies Aviation employee, tasked with handling baggage enquiries as an employee of Cathay Pacific's agent.

[32] Spilg J relied on two aspects insofar as his findings on Mr Mashoene's role were concerned. Reference was firstly made to the fact that Mr Mashoene had later accepted service of the second order on 19 August 2014, and had identified himself - according to the Sheriff's return of service - as the 'admin officer'. Service was effected at the Cathay Pacific offices at the OR Tambo airport. The return stated that Mr Mashoene was 'ostensibly a responsible employee . . . of and in control of and in direct authority at the place of employment of Shirley Jones, addressee . . .'. It is well established that a Sheriff's return of service is prima facie proof of its contents. But in this instance there was direct evidence to the contrary. In the absence of an affidavit by the sheriff, the controverting evidence could not simply be ignored as was done by Spilg J.

[33] Secondly, Spilg J found that, contrary to the evidence adduced in the answering and confirmatory affidavits, 'Menzies Aviation . . . does not perform only baggage clearance on behalf of Cathay Pacific'. For this finding the learned Judge referred to *Menzies Aviation South Africa (Pty) Ltd v South African Airways (Pty) Ltd*.[11] That case concerned the review and setting aside of a decision to award a tender for the provision of ground handling and passenger services for SAA flights. Paragraph 7 of the judgment by Blieden J describes the nature of the services for which SAA had invited tenders. Blieden J listed these as follows:

'Ground handling services comprise both ramp and passenger handling services. The former, rendered on airport aprons (where aircraft are parked), include push back and towing services for aircraft; providing steps for embarking and disembarking; bussing passengers and crew between the airport and aircraft; loading and unloading luggage and cargo; transporting luggage and cargo between terminals and aircrafts; supplying water and toilet services to aircraft; supplying ground power to aircraft as required; manually starting aircraft engines as required.'

[11] *Menzies Aviation South Africa (Pty) Ltd v South African Airways (Pty) Ltd & others* [2009] ZA GPJHC 65; 2009 JDR 1362 (GSJ) para 7.

The boarding of passengers is not one of the tasks outlined. In the opening paragraph Blieden J describes Menzies Aviation thus:

'. . . Menzies Aviation . . . is part of an international group of companies and specializes in ground handling operations at airports. '

Even if it was permissible to rely on the evidence in another case, the passenger services relevant in the present instance are plainly not part of Menzies Aviation's core business. And, as stated, it handled baggage services and enquiries on behalf of Cathay Pacific in terms of an agency agreement. There is not an iota of evidence in the papers that that agency agreement extended to passenger services of any kind. In the premises the reference by Spilg J to *Menzies Aviation v SAA* was ill-conceived.

[34] A court order should always be embodied in writing by the Registrar of the court. The reasons for this are self-evident: it constitutes the recordal of what the Judge had ordered and is the official document to be served by the Sheriff.[12] In addition, the order must not only be formulated carefully (since that is what may eventually be appealed against), but must also be clear and easily understandable.[13] In the Gauteng Division of the High Court, Johannesburg (from where this matter originates), an applicant must ensure in instances where an urgent application is moved outside the ordinary court hours, that 'the order of the court can be typed so that it can be signed by the presiding judge's clerk'.[14] As stated, this has not happened in the present case.

[35] In summary as far as the first order is concerned – the order had, on the evidence before us, never come to the knowledge of Cathay Pacific by the time flight CX748 departed for Hong Kong. Cathay Pacific should therefore not have been convicted of contempt of court in respect of the first order.

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[12] *Administrator, Cape & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 715D.

[13] *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A); *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177; [2016] 1 All SA 676 (SCA); [2016] 1 All SA 676 (SCA) para 14; *Mazibuko NO v Sisulu & others NNO* 2013 (6) SA 249 (CC) para 24.

[14] Practice Note 7.3 of the *Practice Manual of the Gauteng Local Division, Johannesburg*; since replaced by Practice Directive 02/2013.

THE SECOND ORDER

[36] As stated, the second order was also made on Saturday 26 July 2014, at around 15h20. With Mr Essop present in his chambers, Wright J engaged in the telephonic conversation with Ms Swart alluded to above. During that conversation the learned Judge enquired from Ms Swart why he should not order Cathay Pacific to return the children to South Africa. It appears that the telephone's speakerphone had been activated to enable Mr Essop to follow the conversation. It is common cause that by this time the children were already on board flight CX748 and in international airspace. There was no evidence adduced at all that Cathay Pacific was able to comply with the order. The children had left the shores of this country and were beyond the jurisdiction of South African courts.[15] Courts cannot make orders which will have no effect, such as those to be enforced in foreign jurisdictions.[16]

[37] Counsel for the respondents placed rather tentative reliance on *Metlika Trading*.[17] That case is entirely distinguishable on the facts. It concerned the return of a Falcon aircraft to South Africa from Switzerland. This court held that, since the respondents in that case were *incola*, an order was competent to compel them to pursue all efforts to have the aircraft returned to South Africa. The court held (per Streicher JA):

'. . . if the respondent is an incola, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) *in personam* no matter if the act in question is to be performed or restrained outside the court's area of jurisdiction.'[18]

In the present instance, Cathay Pacific is a company duly registered and incorporated in Hong Kong, in the People's Republic of China. It is a *peregrinus* and any order for it to perform an act in a foreign jurisdiction (Hong Kong) will be of no force and effect.

[38] For the reasons outlined above, there can be no basis to impute wilfulness or mala fides to the appellants in circumstances where they were unable to comply with the second order. Moreover, and in any event, the second order was never served

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[15] *B v S* 2006 (5) SA 540 (SCA) paras 19-20; *Di Bona v Di Bona & another* 1993 (2) SA 682 (C) at 695E-F.
[16] *Foize Africa (Pty) Ltd v Foize Beheer BV & others* 2013 (3) SA 91 (SCA) para 15.
[17] *Metlika Trading Ltd & others v Commissioner, South African Revenue Services* 2005 (3) SA 1 (SCA).
[18] *Metlika Trading* para 49.

on the appellants. It first came to their knowledge when the third order was hand delivered to Ms Jones on 29 July 2014. As stated, the purported service by e-mail on Cathay Pacific was fatally defective because the e-mail address was misspelt. Notwithstanding an acknowledgment of this misspelling and consequent non-delivery, Spilg J held that 'the content [of the second order] was known.' This finding is plainly wrong on the facts outlined above. The contempt convictions in respect of the second order are thus also unsustainable.

THE THIRD ORDER

[39] This order came to the appellants' knowledge when it was delivered to the Cathay Pacific offices by Mr Essop on 29 July 2014. The same difficulty, alluded to above, prevailed in respect of the third order in that the children were in Hong Kong and no effect could be given to an order whose reach was beyond the jurisdiction of South African courts. It bears repetition that the appellants were in law incapable of giving effect to the order and also that the third order was not competently issued in law as it was beyond the jurisdiction of the court a quo. The contempt convictions in respect of the third order cannot stand.

[40] Furthermore, there is the added problem that Ms Jones was never cited as a party to the contempt proceedings nor in the proceedings before Wright J. This applies to both the second and third orders in respect of which she had been convicted. No order can be made against a party who is not cited to appear.[19] It is of course so that any person who, with knowledge of a court order, aids and abets the disobedience of a court order or is wilfully party to such disobedience, can also be held in contempt, even though such person is not cited as a party to the contempt proceedings.[20] There is no evidence of such aiding and abetting here. Ms Jones' refusal to sign an acknowledgment of receipt of the documents delivered by Mr Essop on 29 July 2014 is indeed regrettable. But it appears to have been occasioned by a reluctance to become involved in a contentious matter. That reluctance also appears to have stemmed from advice by a colleague not to sign and by some trepidation regarding the gravity of the matter. And at that stage, the Cathay

[19] *Lewis & Marks v Middel* 1904 TS 291 at 303; cited with approval in *Campbell v Botha & others* 2009 (1) SA 238 (SCA) para 16.
[20] *Pheko*, fn 4 above, para 47.

Pacific management was acting on the basis that they were legally bound to adhere to the Departmental instruction to return the children to Hong Kong.

THE FOURTH ORDER

[41] The first, second and third orders are, as stated, moot given the children's return to this country. The only issue that remains in respect of the fourth order is the costs order granted against Cathay Pacific. Costs were pertinently reserved in the third order of 28 July 2014, and that had come to the knowledge of the appellants. It was contended on behalf of Cathay Pacific that, since the third order had been issued in its absence and without any knowledge by it of the matter at that time, its non-appearance on 1 August 2014 is excusable. It was also contended that the third order did not call upon the appellants to show cause on 1 August 2014 why the orders (which were in any event in final form) relating to the return of the children from Hong Kong, should not be granted. In their heads of argument appellants' counsel did, however, make the following telling concession: 'The only indication that the first appellant should attend court, could possibly be that the question of costs had been reserved'. Reference was also made to the fact that no notice of motion or affidavits had been filed or served on Cathay Pacific.

[42] The argument that, for the reasons outlined above, the costs order had been erroneously granted, lacks persuasion. Cathay Pacific is a large international airline. When confronted on 29 July 2014 with the third order and, having been placed on notice that (a) there was to be a hearing on 1 August 2014 and (b) that costs had been reserved, it should have acted promptly and diligently to protect its interests. Admittedly, the costs order should perhaps have been framed without any ambiguity, for example by pertinently calling on Cathay Pacific to show cause why a costs order (punitive or otherwise) should not be made against it. But the threat of an adverse costs order (amongst others) nonetheless loomed large. In the event that its senior officials and others in positions of authority had been uncertain about the steps to be taken in the face of a looming potential costs order against the airline, they should immediately have sought legal counsel for advice and/or an appearance on its behalf on 1 August 2014. Argument was advanced rather tentatively that a lay person does not know what the reservation of costs means. But it was conceded that no one said so under oath in any of the affidavits for Cathay Pacific. The airline's non-

appearance on 1 August 2014 was inexcusable and the costs order cannot be interfered with. There was, however, no justification for a punitive costs order in respect of the dismissal of the counterapplication.

CONCLUSION

[43] In summary – the contempt orders in respect of the first, second and third orders as far as Cathay Pacific is concerned, are legally untenable and should be set aside. The same is true in respect of Ms Jones' conviction in respect of the second and third orders. The costs order of 1 August 2014 was justified in the absence of appearance by Cathay Pacific. The punitive costs order in dismissing the counterapplication must be set aside.

[44] It is necessary to repeat the well-established principles in respect of urgent applications, service and contempt of court. Courts are sometimes seized with applications of the most extreme urgency. Where the exigencies so require, a notice of motion and founding and supporting affidavits may be dispensed with. But the court order which emanates from even the most urgent of applications, must always, without exception, be subsequently recorded in writing for the various reasons outlined above. In the present instance there is no reason imaginable (and none was proffered) why the first order was never transcribed. And it is inexplicable why the third order of 28 July 2014 was not preceded by a notice of motion and founding affidavit setting out the events from 25 July 2014 onwards and motivating the need for the third order which, as stated, amplified the second order to include the child, Xuefeng. By 1 August 2014 it must have been apparent to all concerned, including with respect, Wright J, that the urgency of the matter had abated. There appears to have been inordinate haste in issuing the fourth order. In my view, prudence and propriety required that the fourth order relating to costs should have been couched in the form of a rule nisi calling upon Cathay Pacific to show cause why it should not be ordered to pay costs (punitive or otherwise).

[45] It appears from the record that, understandably, Wright J seemed agitated by the apparent lack of co-operation on the part of the Cathay Pacific employees. That agitation, again understandably, increased as events unfolded after 26 July 2014 until 1 August 2014. This must have been exacerbated by a belief on his part that the

e-mails had been correctly addressed and, therefore, received. An unhappy coincidence of events conspired to culminate in the unfortunate outcome in this matter. The wellbeing of the children was implicated, time was of extreme essence to restrain the departure of the children from this country's shores (and in the end time counted against an effective order being made), the wrong e-mail addresses were used to purportedly effect service and, lastly, Cathay Pacific employees were hesitant to act decisively. They were faced with the conundrum of an instruction from the Department on the one hand and an oral court order on the other. An appellate court must, of course, be slow to be overly critical in circumstances where it has the crucial benefit of hindsight. But, with respect, Wright J erred in issuing orders beyond his jurisdiction and in failing to ensure that proper service of the orders was effected. And the failure to record the first order in writing, other than in the later Reasons for Judgment, was highly irregular. The mistakes were self-evidently made under great pressure and in an honest attempt to dispense justice expeditiously due to the exigencies of the case. Abundant caution should, however, always be exercised to act fairly and even-handedly in dispensing justice, even in the most urgent of cases.

[46] Convictions for civil contempt of court are axiomatically very serious. For this reason the standard of proof is one beyond reasonable doubt. Equally self-evident is the fact that a party must be cited before it can be convicted for civil contempt, unless that party is alleged to have aided and abetted the contumacious disobeying of a court order. A discernible feature in the judgment of Spilg J is an irritation with what the learned Judge regarded as a serious lack of co-operation and contumacy on the part of Cathay Pacific and Ms Jones. In finding against the appellants, the learned Judge overlooked the various difficulties with the first three orders, enunciated above. And in some instances he made bald findings against the weight of the evidence. The most striking of these is that, notwithstanding having acknowledged that the wrong e-mail addresses had been utilised in purporting to effect service on Cathay Pacific, the learned Judge found that the contents of the first and second order were in fact known to Ms Swart. Regrettably, the learned Judge failed to correctly apply the well-established principles laid down in *Fakie*, *Tasima* and *Pheko*. Importantly, further, the learned Judge failed to apply the proper approach to disputes of fact where final relief was being sought.

[47] What remains is the issue of the costs of the appeal. One of the most unfortunate aspects of the outcome of this case is that the party who precipitated the flurry of events and who was plainly at fault, namely the Department, escaped censure and is no longer before the court. The respondents acted in good faith and with full justification, desperately trying to safeguard their children's interests. But their opposition to and active participation in the appeal were, in my view, ill-advised. Cathay Pacific, on the other hand, was fully entitled to protect its interests in the contempt proceedings. It is a large, globally known airline, in operation for more than 70 years, offering passenger and cargo services to 188 destinations in 47 countries and territories. It had every reason to vigorously defend its reputation in the face of a civil contempt conviction. Its employment of two counsel was warranted in the circumstances.

[48] The following order is issued:

1 The appeal against the convictions of civil contempt of court is upheld with costs, including the costs of two counsel.

2 The order granted by Spilg J on 11 November 2014, holding the appellants in contempt of court, and the sentences imposed on 14 October 2015 is set aside and replaced with an order in the following terms:-

'(a) The application to hold the third respondent and Ms Shirley Jones in contempt of court is dismissed.

(b) The applicants are directed to pay the third respondent's costs.'

3. The appeal against the order in the counterapplication is upheld in part by substituting the order of Spilg J with the following order:

'The counterapplication is dismissed with costs'.

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S A Majiedt

Judge of Appeal

APPEARANCES

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