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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2014/22434

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

14 October 2015

DATE

.....

SIGNATURE

In the matter between:

HAI LIN

1ST Applicant

RUIHONG WENG

2nd Applicant

And

CATHAY PACIFIC AIRWAYS LTD

1st Respondent

JONES, SHIRLEY

2nd Respondent

JUDGMENT

SPILG J;

INTRODUCTION

1. The case concerns the appropriate sanction to be imposed on the respondents pursuant to an order made on 18 November 2014 in which they were held to be in contempt of several court orders.
2. I found that Cathay Pacific Airways Ltd ('*Cathay Pacific*') was in contempt of three orders granted by my brother Wright J;
 - a. The first order was made at about noon on Saturday 26 July 2014 and interdicted the airline from removing the applicants' two minor children, then 14 and 15 years of age, from South Africa, although their parents were resident in South Africa;
 - b. The second order was granted later on the same day when it became evident that the children had been boarded onto the Cathay Pacific flight which had departed at 12h30. In terms of this order Cathay Pacific was required to effect the immediate return of the two minor children and to secure their attendance at court on Monday 28 July;
 - c. The third order was granted on Monday 28 July. Cathay Pacific was again directed to immediately return the minor children to South Africa and the order was extended to include the return of the eldest child who had also been boarded onto the flight with his younger siblings.

Ms Shirley Jones, the responsible manager, was held to be in contempt of court in relation to the second order granted on 26 July and also the subsequent one granted on 28 July.

3. The decision is reported in *Lin and another v Minister of Home Affairs and others* 2015(4) SA 197 (GLD); [2015] 1 All SA 335 (GJ). It is therefore unnecessary to repeat the facts of the case in detail.

4. Cathay Pacific is the first respondent. It was the third respondent in the main proceedings.

Jones was not one of the original parties cited. However she had claimed to be the most senior person at the Cathay Pacific offices when the second and third orders were communicated.

On 15 August a *rule nisi* was issued calling on her to show cause at the hearing of the application, set down for the week of 9 September 2014, why she should not personally be held in contempt for failing to comply with the two court orders. A rule was also issued against a Mr Mashoene (who was originally identified as Mr Mashile).

5. After considering the papers and hearing argument Cathay Pacific was held to be in contempt of all three of the court orders and Jones in respect of the of the latter two. I also found that Cathay Pacific's averments exculpated Mashoene of wilful conduct in failing to comply with the first court order.
6. Since neither Cathay Pacific nor Jones had yet been required to address the court on an appropriate sanction the order holding them in contempt also required them to show cause why substantial fines should not be imposed and why Cathay Pacific should not be obliged to provide a one way airline ticket from Hong Kong to OR Tambo International Airport ('OR Tambo') for each of the children at an appropriate class considering that their departure had not been voluntary.

The order issued on 18 November 2014 therefore also covered these issues. It read:

1. *The Third Respondent (ie the First Respondent in the current proceedings) 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, [Z.....] and [L.....] 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;

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

- 4. *The counter-application brought by the Third Respondent is dismissed*

- 5. *The Third respondent is to pay;*

- a. *the costs of the application to date, including all the reserved costs on the scale as between attorney and client;*
- b. *the costs of the counter-application brought by it on the scale as between attorney and client*

6. *The sanctions to be imposed on the Third Respondent and Jones for their contempt of the court orders are the payment of fines.*

7. *The Third Respondent is to show cause to this court on Wednesday 10 December 2014 before Spilg J at 10H00 or so soon as the matter can be heard why it should not be;*
 - a. *fined for its contempt of the court order of 26 July 2014 in a significant sum;*

 - b. *fined for its contempt of the second court order of 26 July and the order of 28 July 2014;*
 - i. *in a sum equal to the cost of a premium economy class ticket for each of the applicants' three children on a scheduled Cathay Pacific passenger flight from Hong Kong to OR Tambo International Airport;*

 - ii. *in a further sum payable weekly commencing on Friday 22 November 2014 for so long as it fails to comply with the orders and fails to return all the children to Johannesburg on a Cathay Pacific flight as aforesaid;*

 - c. *ordered to pay the costs of these further proceedings on the scale as between attorney and own client*

8. *Jones is to show cause to this court on Wednesday 10 December 2014 before Spilg J at 10H00 or so soon as the matter can be heard why she should not be fined for her contempt of the second court order of 26 July and the order of 28 July 2014 in a significant sum of money relative to her salary and position at the time;*

9. *The Third Respondent and Jones shall file their affidavits by no later than Monday 1 December 2014. The affidavit of the Third Respondent must include;*

- a. *the annual financial returns of the Third Respondent for the last two years as required to be submitted in terms of South African company and tax laws*
 - b. *details of the current airfare for a one way Cathay Pacific airline ticket on its scheduled passenger airline flight from Hong Kong International Airport to OR Tambo International Airport Johannesburg for a person twelve years and older on business class, premium economy class and economy class;*
 - c. *details of the cost of delaying an aircraft from its slotted departure flight time before the aircraft doors have been closed where a passenger and his or her baggage must be located and taken off the flight;*
 - d. *details of the cost of aborting the take-off of a flight, once the aircraft doors are closed and the gantries, jet bridges or stairs have been withdrawn, in order to have a passenger disembark with his or her luggage*
 - e. *the pay package and monthly salary slips of Jones for the last twelve months*
10. *The Applicant shall file any affidavit in answer by no later than Thursday 4 December 2014;*
11. *The Third Respondent and Jones shall file any affidavit in reply by no later than Monday 8 December 2014*
12. *The Third Respondent shall index, paginate and bind the papers by no later than Monday 8 December 2014.*
7. In compliance with the court order the respondents' subsequent affidavits also contained certain of the details required under para 9. These included the annual financial returns of Cathay Pacific, its current airfares for a one way airline ticket from Hong Kong to OR Tambo and some details regarding the type of costs that might be incurred if an aircraft was delayed from taking

off at its allotted departure time, the cost of aborting the take-off of a flight and the pay package together with monthly salary slips of Jones.

8. In order to determine the appropriate sanction it will also be necessary to characterise the type of contempt under consideration and to deal with the factors that should be taken into account. In my view the enquiry ought to have regard to the interests that are sought to be protected, the reason advanced for not complying with the court order and any other relevant circumstance that ought to be taken into account whether of a mitigating or an aggravating nature when considering an appropriate penalty.

THE ORIGINAL APPLICATION OF 26 JUNE 2014

9. During 2008 the applicants, Mr Lin and his wife, obtained permanent residency in South Africa. They alleged that on the same date permanent resident permits were also issued to their three children.
10. It was not disputed that the applicants had travelled abroad together with their three children on several occasions since 2008 without experiencing any difficulties with immigration officials upon re-entering the country.
11. On the evening of 25 July 2014 when the three children arrived at OR Tambo aboard a Cathay Pacific Airways flight from Hong Kong immigration officials refused to allow the two younger children entry into South Africa on the ground that their residence permits were not reflected on the data base of the Department of Home Affairs (*'Home Affairs'*). They also concluded that the permits were fraudulent. The children were then held at a facility within OR Tambo operated by ARM-Analytic Management which was the Fourth Respondent in the original application.
12. Although the eldest child's permit was recorded on the system he too was held in the facility. It later emerged that he was denied entry on the ground that he had accompanied two minors who had produced fraudulent permits.

13. Lin attempted to engage immigration officials at the airport but they were adamant that the children could not enter the country. Since it was after hours Lin could not contact the main offices of Home Affairs to satisfy them as to the veracity of the permits by reference to their control and other numbers or to establish why the two permits were not currently captured on their data base.
14. The applicants' attorney, Mr Essop, attempted to engage immigration officials to allow the two children entry into the country. This was also unsuccessful and, after being informed by them that the children would be placed on the 13H00 Cathay Pacific flight to Hong Kong, Essop contacted Ms Mlaba, the registrar of my brother Wright J who was the urgent court duty judge. The purpose was to obtain an urgent interdict preventing the children from being returned to Hong Kong.

The registrar immediately contacted Wright J who, due to the urgent nature of a matter affecting minor children, instructed that Essop contact him directly. This occurred at about 11H52.

A few minutes later Essop contacted Wright J. Due to the imminent departure of the flight (which Essop still believed from the immigration officials would be at 13H00) the applicants were not able to prepare papers or reach the court prior to the flight's departure.

15. On the basis of these facts Wright J granted the first order at about 12H00 interdicting Cathay Pacific from boarding the two children on its flight. The order was notified to Mashoene who was at the Cathay Pacific desk at OR Tambo. He claimed to be responsible for boarding the children and advised that the children had not yet been boarded.

THE FIRST CONTEMPT (First Respondent only)

16. The court order could not be delivered in written form prior to the expected time of the flight's departure on 26 July. Accordingly the court directed that verbal notification of the order could be given to Cathay Pacific.
17. At about 12h00 both Wright J's registrar and Essop informed Mashoene of the order. According to the registrar he was not co-operative and this was recorded in my brother's brief reasons for granting the order.
18. Ms Zelda Swart, who Cathay Pacific claimed was its most senior staff member at the airport on that day, was also aware of Wright J's order before the children, on Cathay Pacific's version, were in fact boarded onto the flight.
19. I held on the facts that although Cathay Pacific had claimed that Mashoene was not its employee or its agent but an employee of Menzies Aviation (Pty) Ltd he was nonetheless a responsible person acting as the airline's agent. The reasons were that;
 - a. Mashoene was instructed by a responsible employee of Cathay Pacific not to provide the contact number of its senior supervisory staff member on duty when the judge's registrar and Essop informed him of the first order. He therefore was given the trappings of authority to receive notification of the court order on its behalf;
 - b. Mashoene was employed by Menzies Aviation yet he accepted service of the subsequent court orders as the administration officer at Cathay Pacific's offices at OR Tambo;
 - c. Cathay Pacific had not been open with the court regarding the services Menzies Aviation was providing to it and the function that Mashoene was actually performing at the airport for Cathay Pacific. I was satisfied for reasons set out in the previous judgment that Menzies Aviation performed not only baggage clearance on behalf of Cathay Pacific as the latter admitted to, but also provided passenger services which it had not disclosed. At that stage the

court was not aware of the comprehensive nature of such services or the working relationship that would have to exist between Menzies Aviation and immigration officials.

Cathay Pacific's lack of frankness in a matter of direct concern to the court is a factor that impacts on the appropriate sanction.

20. I held that notification of the order to Mashoene was notification to Cathay Pacific and that Swart had actual knowledge before the flight departed¹. I accept that she wanted a written copy of the order but that did not alter the situation when it was sent to an incorrectly noted address. Swart could have readily contacted the registrar, whose number she had been given, to find out why it had not been received. Swart also claimed that she was unable to contact her supervisor, who was identified as Ms Shirley Jones.

Since it was admitted by Cathay Pacific that Swart refused to comply with the first order I held that the airline had taken a deliberate decision to ignore it.

THE SECOND CONTEMPT (Both Respondents)

21. At approximately 13H00 Essop attended court and advised that he had been informed by Swart that Cathay Pacific's flight CX748 had departed at 12H30 with the children on board.

22. Due to the court's express concern as recorded in its written reasons regarding the two minor children who were now *en route* to Hong Kong and

¹ The contents of Cathay Pacific's answering affidavit which are set out in paras 46 and 49 -53 of my earlier judgment reveal that, as one would have expected, Mashoene had immediately informed Swart of the first court order prior to the children being boarded. The information that Swart instructed Mashoene to convey as set out in para 51 of the judgment makes it perfectly clear that the flight had not yet departed and that the children had not yet been placed on the flight. The subsequent contradictory statement in the answering affidavit that Mashoene only informed Swart of the court order '*after the aircraft had already departed*' was rejected. It also flies in the face of Swart's confirmation that she was already at the boarding gate at about the time Mashoene was contacted by the registrar about the terms of the court order.

that under section 28(2) of the Constitution “*A child’s best interests are of paramount importance in every matter concerning the child*” the judge contacted Cathay Pacific and spoke directly to Swart.

Wright J informed Swart to provide reasons why Cathay Pacific should not be ordered to return the two children to OR Tambo on the next available flight. The judge also advised Swart that a proposed draft order had been prepared in these terms. At that stage Swart mentioned that her supervisor was Ms Shirley Jones who she would attempt to contact. Wright J furthermore informed her that unless the judge’s registrar, Ms Mlaba, was told to the contrary an order would be granted against Cathay Pacific in the proposed terms.

The judge also provided Swart with Mlaba’s urgent court cellphone number.

23. Cathay Pacific did not dispute that the court again attempted to contact Swart. She said that she was still unable to reach Jones and was not at liberty to provide it with Jones’ number. The court gave her a further opportunity to contact a person in authority at Cathay Pacific and revert immediately; failing which the order that had been drafted would be issued.
24. No one on behalf of Cathay Pacific reverted within the period directed and some 25 minutes after the last discussion at 15h20 the order was granted. The judge noted that no one on behalf of Cathay Pacific had responded even by 16h40 when the written reasons for judgment were finalised.
25. The second court order read;
 1. *The third respondent is to return to OR Tambo International Airport the children, [Z.....] [L.....] (with date of birth [1.....] [A.....] [1.....] and passport number [G3.....]) and [L.....] [L.....] (with date of birth 22 November 2000 and passport number [G3.....]) 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 applicants' 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.*
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 reserved.*

26. I accepted that the order was not received by Cathay Pacific since it was emailed to an incorrect address. However I was satisfied that Cathay Pacific and Jones had express knowledge of the existence of the order and that suffices in contempt cases². It is difficult to comprehend a clearer case of knowledge of the existence of a court order than in the present case where the party is informed by the judge directly that if no-one reverts to his registrar within a given time then an order would be granted for the return of the two minor children on the next available flight and that the matter would be dealt with in court on Monday 28 July.

27. Swart did not claim that she withheld from Jones her knowledge that the court order would be issued if she or Jones failed to revert forthwith as directed by the judge. They do not claim that for whatever reason the judge was somehow not to be taken at his word if they did not revert.

² *Pheko and others v Ekurhuleni Metropolitan Municipality (no 2)* [2015] ZACC 10 at para 32 and *Mthimkulu and another v Mahomed and others* 2011 (6) SA 147 (GSJ) at para 16

28. By Monday 28 July the airline had not returned the two minor children to South Africa.

29. Once again Cathay Pacific admitted that it refused to comply with the second order pursuant to a deliberate decision taken to ignore it.

THE THIRD CONTEMPT (Both respondents)

30. The matter was duly called on Monday 28 July 2014. There was no appearance on behalf of any respondent nor had any answering affidavits been served.

The court was informed that the eldest child had also been placed on the flight to Hong Kong with the two younger children. The court then made the following order;

1. *The third respondent is to return to OR Tambo International Airport, on the first available Cathay Pacific flight, the 19 year old Lin Child, Xuefeng Lin, born 24 June 1995 with passport number [G.....].*
2. *The first and second respondents are ordered to admit the said 19 year old Lin child to South Africa.*
3. *The first and second respondents are interdicted from deporting the said 19 year old Lin child unless the first and second respondents have a court order to that effect.*
4. *The first, second, fourth and fifth respondents are ordered immediately to return the said 19 year old Lin child and the child [Z.....] [L.....], born [1.....] [A.....] [1.....] with passport number [G.....] and the child [L.....] [L.....], born [2.....] [N.....] [2.....] with passport number [G.....] to the care of the applicants.*
5. *Cathay Pacific is 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 considered payable to it.

6. *This case is postponed to 10H00 on Friday 1 August 2014 in front of Wright J.*

7. *The question of costs is reserved.*

31. The court also handed down written reasons.

In its reasons the court emphasised the protection of the children's best interests under s28(2) of the Constitution, which it clearly explained underpinned the order requiring Cathay Pacific to return the children to South Africa on the next available flight.

The written reasons also indicated the court's concern that either Mashoene or Cathay Pacific or both were in contempt of the earlier court order as the available information indicated that the order had been brought to their attention prior to the flight's departure. The court also set out in its reasons the contact made by the judge's registrar and the judge personally with the persons mentioned earlier to whom the orders had been conveyed.

32. On the following day Essop attended Cathay Pacific's offices at OR Tambo in order to serve a hard copy of the court order of 28 July 2014 together with the reasons that had been prepared by Wright J. Swart took both and was about to sign for receipt when a fellow employee advised her to take it to Jones. Essop then waited for some 25 minutes until Jones eventually came through and said that she would not sign.

33. Jones confirmed that she was the most senior official in charge at Cathay Pacific's offices at OR Tambo. A copy of the court order and reasons were then left on Swart's desk. Essop also wrote down the address for the children in Hong Kong. Swart refused to receive it. Essop then contacted the sheriff of Kempton Park. Neither he nor his deputy was available to serve the documents. The attorney was able to serve hard copies on the State Attorney on behalf of the Minister and the Department.

34. On 30 July the orders were emailed to Cathay Pacific's incorrect address. Nonetheless, as stated earlier, the order and court's reasons had been left at Cathay Pacific's offices on the 29th
35. Despite service of the order of 28 July the children were not returned to South Africa as directed. Once again Cathay Pacific admits that it deliberately refused to comply with the court order. Jones remained the most senior representative disclosed by Cathay Pacific at the time.

THE CONTEMPT PROCEEDINGS

36. The court order of 28 July referred to the case being postponed to 1 August. Cathay Pacific did not file an affidavit or appear in court to explain why they had failed to comply with what had now accumulated to three court orders, each of which had directed prompt compliance and one of which comprised a *habeas corpus* order that would have required an explanation at court on 28 July since the children were not produced on that date as required by the order.
37. At the 1 August hearing the court indicated that substantive contempt proceedings would have to be launched but did order costs on the scale as between attorney and client against Cathay Pacific in respect of the hearings on 26 July, 28 July and 1 August 2014.
38. By 12 August the children had still not been returned to South Africa despite the court orders directing Cathay Pacific to do so. The applicants then launched motion proceedings in which they sought (in Part A) a *rule nisi* calling on Cathay Pacific, Jones and Mashoene to show cause why they should not be held in contempt of the court orders granted on 26 and 28 July 2014.

Part B of the order concerned the Department of Home Affairs. The applicant sought an order reviewing the determination that the two minor children are not in possession of valid permanent residence permits together with ancillary forms of relief. I should add that the proceedings under Part B were not before this court and the applicants are at liberty to pursue them. To date the court has only been seized with contempt of court issues against Cathay Pacific, Jones and Mashoene.

39. The matter came before me on 15 August. Despite service of the application, neither Cathay Pacific nor Jones or Mashoene appeared at court. I accordingly issued a rule requiring them to file papers and attend court on 9 September if they intended opposing the contempt proceedings. The order also contained a provision that if they did not appear in court on 9 September 2014, a writ of arrest may be issued to take them into custody, which in the case of Cathay Pacific would result in the detention of its senior representative in the country.

40. On 19 August the sheriff served the orders. The returns in respect of Jones and Mashoene are instructive as they reflect that Thabo Mashoene accepted service at Cathay Pacific's offices. In both instances the returns state that Mashoene identified himself as the Admin Officer. The sheriff also stated in the return that Mashoene was the only person present at the office at the time of service.

41. I again presided in court on 9 September 2014. Cathay Pacific filed an answering affidavit deposed to on the previous day by its new country manager for South Africa and the Indian Ocean region, Mr Rakesh Raicar. It also filed a counter-application to declare null and void or otherwise set aside the three orders granted on the 26th and 28th of July.

42. After hearing argument I issued the order set out at the beginning of this judgement.

SUBSEQUENT AFFIDAVITS

43. In accordance with the directions set out in the order a further set of affidavits was filed by the respondents. In view of certain statements made in the affidavits the court requested in addition a copy of the agreements in terms of which Menzies Aviation provided services to Cathay Pacific.

44. Raicar claimed that Cathay Pacific has never adopted the stance to wilfully disobey any order granted by a court in any country. Raicar then stated that *“more importantly however it is imperative that the Third Respondent complies with the Immigration Laws of a foreign country...”*

45. In pursuing that theme Cathay Pacific repeated its stance that without an instruction from a Home Affairs official its hands were tied as it had received official notification that the children had been refused entry. That explanation logically is limited to the refusal to comply with the first court order directing that the children not be embarked on the flight to Hong Kong. The explanation is advanced as a mitigating factor.

46. What Raicar does not deal with is why Cathay Pacific did not simply state that it would abide the decision of the court. He also does not suggest that, when notified of the court order, Cathay Pacific took any steps to inform immigration officials that a court order had just been issued directing that the children not be boarded onto the flight. As appeared from the affidavits filed, prior to approaching the court to stop the children being boarded onto the flight Essop had contacted Adv Erasmus the Chief Director of Legal Services at the Department of Home Affairs who stated that the children were the responsibility of Cathay Pacific, that Home Affairs could do nothing to prevent Cathay Pacific from placing them on the flight and that he had no other contact numbers for immigration officials at OR Tambo.

47. Accordingly, if Cathay Pacific was genuinely concerned about complying with our laws it had the means and was in the physical locality of the airport to immediately contact the immigration officials stationed there. If it had done

so then it would have informed the officials that a court had just issued a telephonic order preventing the children from being boarded onto the flight. If this had been done then one would expect the officials to convey to Cathay Pacific the same information that Adv Erasmus had given to Essop (ie; that it was no longer a concern of immigration). There is also no reason to believe that immigration officers would have informed Cathay Pacific, if the latter was in any doubt, that court orders are to be obeyed.

48. The difficulty in the way of Cathay Pacific is that it did not play open cards with the court. Raicar in his earlier affidavit incorrectly tried to claim that no staff member was aware of the court order prior to the flight departing. I have demonstrated that on its own say-so Swart was already aware of the court order. Moreover Raicar in that affidavit claimed that Mashoene was simply a lost property agent employed by Menzies Aviation which;

“at times provide personnel in the form of their employees to assist in regard to certain functions that had to be performed on behalf of the Third Respondent (ie; Cathay Pacific). Mashoene assists the Third Respondent generally by handling missing baggage reports and baggage claims. On the day in question, Mashoene was at the offices of Cathay Pacific at OR Tamboand was answering the telephone in regard to baggage claims and baggage queries. Mashoene is also employed by Menzies as a Lost Property Agent and in this regard assists persons whose property is lost when they arrive ... on a flight”

Raicar stated in the earlier affidavit that by virtue of these facts and circumstances Mashoene had no authority to give effect to the court order on behalf of Cathay Pacific. It was argued that Mashoene could not bind Cathay Pacific, as he had nothing to do with embarking the children on the flight in question, and his refusal to assist cannot be imputed to Cathay Pacific.

These allegations were in stark contrast to the reasons for judgment prepared by Wright J in which he recorded that his registrar had advised that

when she informed Mashoene of the court order the latter told her that the two children had not yet boarded and “*confirmed that he was the person responsible for boarding the children*”.

49. In view of the subsequent claim that Mashoene was only responsible for lost property and the apparent downplaying of Menzies Aviation’s functions and responsibilities I required sight of the services agreement to ensure that I would not be prejudicing Cathay Pacific at the present leg of the enquiry which really concerns the mitigating and aggravating factors that should be taken into account when imposing an appropriate penalty.

50. The agreement between the two companies is headed “*IATA Standard Ground Handling Agreement*” and comprises a main agreement and a number of annexures as well as four subsequent addenda. Far from Menzies Aviation performing limited services, the agreement reveals that Menzies Aviation provides a comprehensive ground handling service for and on behalf of Cathay Pacific and in their place and stead. For present purposes the most significant service is that of providing or arranging for assistance to passengers.

The agreement expressly mentions assistance to unaccompanied minors, transit without visa passengers and deportees³, and in respect of arrivals to direct passengers from the aircraft through immigration controls⁴. Menzies Aviation is also to provide or arrange for check-in positions, service counters and lounge facilities⁵. Their duties in regard to the aircraft departures include check-in and directing passengers through controls to the departure gate, verify travel documents for the flight concerned and enter required passenger or travel document information into Cathay Pacific’s and, where applicable, government systems and carry out seat allocations⁶.

³ Main agreement Sections 2.1.3

⁴ Ibid Section 2.3.2

⁵ Ibid Section 2.1.9

⁶ Ibid Section 2.2

The main agreement also contains a specific exemption clause excluding liability for immigration fines in the event of non-bona fide travel documents or other events which are outside their control⁷.

Annexure B provides that Menzies Aviation will indemnify Cathay Pacific for penalty fees assessed against the latter by Immigration arising from any negligent act or omission in performing services under the agreement save in cases where the passenger carries a false visa or if a passenger with a valid passport and visa is refused entry for any other reason.

Attachment 1 which is termed a '*Service Level Agreement*' provides that on arrival Menzies Aviation should direct passengers to customs and immigration or the transit desk and provide assistance for passengers with Customs or Immigration problems. It also provides that their agents are to be '*visible and available at all times to attend passengers' problems*'⁸

Menzies Aviation are also to provide a minimum of one supervisor and three agents per flight at the boarding gate sufficiently in advance of boarding to attend to passengers' queries and to perform boarding functions⁹. It is also obliged to adequately man counters for handling the transfer passengers. Furthermore the transfer desk must be manned at all times during Cathay Pacific's operations at the airport¹⁰

51. It is evident that Raicar sought to mislead the court in regard to the functions of Menzies Aviation as the airline's effective surrogate and also regarding its interaction with immigration officials in respect of both arriving and departing passengers. Since Raicar did not suggest that anyone more senior than Mashoene was present on behalf of Menzies Aviation to handle passengers through customs and immigration formalities it is evident that he would have been in a position to communicate directly and immediately with immigration

⁷ Ibid Section 2.2.3

⁸ Annex B, Attachment 1 clauses 3.6 and 3.9

⁹ Ibid clause 4.4

¹⁰ Ibid clause 6.1

officials when informed of the court order. He would also have been in a position to act as an intermediary between immigration officials and his superiors or Cathay Pacific's staff.

52. It therefore appears that Cathay Pacific was not frank with the court when ordered to show cause why it and Jones should not be held in contempt of court. It appears that Cathay Pacific wished to avoid explaining why it did not immediately approach the immigration officials and speak to their superiors or simply advise that they had been informed of the court order and were considering abiding the decision. There is nothing in the affidavit to suggest that they had even bothered to approach immigration officials. The failure to do so when informed of a court order and when on any basis there could be no adverse repercussions by complying with the order, or at least establishing whether there might be any adverse consequences, are aggravating factors- particularly bearing in mind the standing of Cathay Pacific as a leading international airline serving almost 50 international destinations and with landing rights at 188 airports. It would be facile to suggest that Cathay Pacific was unaware of the import of a court order, or somehow felt reluctant to approach immigration officers who were in close proximity and with whom they have daily contact.

53. There are a number of other aggravating features with regard to the failure to comply with the first court order. The children are minors and it was evident to Mashoene that their parents were not in Hong Kong but in South Africa. One of the functions of Menzies Aviation is to provide assistance to unaccompanied minors. They would therefore be expected to appreciate the consequences to the children and how their interests are affected if they are forcibly parted from their parents. Cathay Pacific also had a copy of the court's reasons which reflected that it sought to protect the constitutional rights of minors whose parents were not accompanying them and where the children's best interests were determined to govern at least until the issue could be ventilated in court. This was not a simple issue over goods or chattels.

54. The nature of the right the court was seeking to protect and which Cathay Pacific ignored is a fundamental constitutional right and a right embodied in many international instruments of which Cathay Pacific ought to be aware. In addition the court was not simply resolving issues between parties; it was obliged in considering the exercise of its powers to act in its capacity as upper guardian of children. Accordingly the nature of the rights infringed by Cathay Pacific's failure to comply with the court order is a further aggravating factor.

55. Cathay Pacific claimed that it was *"placed in the invidious position between the immigration laws of South Africa, the instructions of the Department of Home Affairs ... on the one hand and the Court process that had been issued by the ... Court on the other hand."*

This is a conclusion unsupported by any facts. Nowhere does Cathay Pacific suggest that the personnel at the airport, whether its own Ms Swart or that of Menzies Aviation (as its effective proxy under the service agreement), engaged immigration officials who would have been on duty and presumably in ready contact with their superiors to inform them of the contents of the court order. It is not suggested that they were not able to make prompt enquiries regarding the status of a court order. According to Raicar, who only took up his post in South Africa on 18 August 2014, the first time Cathay Pacific engaged legal representatives was approximately during that week of 18 August. In my view this further reflects a disdain for the court and its order by those in charge. In particular they did not bother to establish whether they were entitled to act in the manner they did until after four court orders had been issued.

56. The court has the distinct impression that Cathay Pacific took a calculated decision to ignore the court order in the hope that once the horse had bolted that would be the end of it, and if the applicants could demonstrate that their children were entitled to reside in South Africa then they would make their own arrangements for the children's return.

57. Insofar as the failure to comply with the other two orders is concerned Cathay Pacific relies on the advice of their attorney Mr Assenmacher. The advice was that the orders were null and void which entitled Cathay Pacific to ignore them. This view finds no support and Adv Pincus was unable to refer me to any case law upon which Mr Assenmacher could have relied to support his conclusion. Moreover this explanation does not account for the position taken by Cathay Pacific between 26 July and 18 August to ignore two court orders directing that the children be returned on the next available flight.
58. I have already mentioned that it does not assist the respondents to contend in relation to the second and third orders that immigration's direction to repatriate the children trumps a court order. The court orders in their terms also directed Home Affairs to admit the children into the country and not to deport them unless under a subsequent court order. The orders were served on the State Attorney.
59. Accordingly it would have been evident to those in authority at Cathay Pacific that they could simply contact Home Affairs and receive confirmation that it was not opposing the orders. To this day Home Affairs has not attended court or filed papers to set aside any part of the orders concerning it.
60. Accordingly, for over half a month until the week of 18 August Cathay Pacific took no steps to comply with the two subsequent orders. It was given an opportunity to explain why it did not do so during this period. On a proper analysis none is forthcoming since the only time when it claimed to be aware that the two orders could be ignored was on receiving the belated advice.
61. There are a number of aggravating features. First is that Cathay Pacific did not bother to engage any lawyers to attend court on 28 July or on 1 August to explain its position. It is difficult to comprehend that any responsible international company which has engaged a specialist ground handling agent would simply ignore court orders or believe that they would be immune from any consequences if they failed to attend court when given the opportunity; and not just once.

62. In my view this demonstrates that the original disdain for the court's order was not isolated but appears institutionalised within the management of Cathay Pacific and all those responsible for taking the decisions not to comply with the court orders and the further decisions not to attend court. Once again these are significant aggravating factors.

63. There are a number of further disturbing features which reflect adversely on the attitude to the court and its processes by Cathay Pacific and Jones, as its most senior disclosed official at the time.

On 29 July the applicants' attorney attempted to serve the court order of 28 July together with the judge's reasons. It will be recalled that Jones would have been aware that the judge had directed that the two minor children be brought before court on the previous day, yet no explanation was forthcoming from Cathay Pacific as to its failure to enable that to occur.

Moreover Swart was about to accept service of the order and the court's reasons when she was advised to take them to Jones. Jones then refused to receive the documents. In the most recent affidavit Raicar explains that Jones refused to sign for or accept the court order as she did not believe that Cathay Pacific was bound by it as the issue was between Home Affairs and the applicants.

Jones had identified herself to the applicants' attorney as the most senior official in charge at Cathay Pacific. In the answering affidavit Raicar did not dispute that she was the most senior person then present in South Africa but claimed that she had received instructions from Lau, the then country manager as set out earlier for South Africa and the Indian Ocean region, not to accept documentation or get involved in the matter any further.

No explanation is offered as to why the receipting of a court order that was directed at a number of parties could simply be declined by one of them even on the ground alleged. A court order is a process. It lay in Cathay Pacific's

hands to attend court on 1 August, as directed in the order, to explain to the court why the order was not binding and why it should not be cited. Again no explanation is offered as to why it did not simply engage attorneys to do so.

The inference is overwhelming that Cathay Pacific adopted a contemptuous attitude to the court and its orders. It would not abide by them. It would not explain to the court why it so refused nor did it seek professional legal advice at that time. It is equally clear that it considered itself immune from this court's processes and the consequences of its actions since it did not even bother to engage attorneys until its senior manager was faced with the real threat of arrest if it again failed to appear in court. An international company should not be compelled to show its face in court only under threat of arrest of its officials. Orders are obliged to be respected and complied with unless set aside.

64. It is clear that Jones falls out of the picture once Raicar takes up his position. It is also evident that she was under instructions. However she did not disclose this at the time the application was launched. She was made the face of Cathay Pacific and effectively ensured that no one else in the organisation who had taken the decisions that appeared to emanate from her would be implicated.
65. There is no explanation offered as to why she did not tell Lau that she was obliged to accept court documents or request that legal advice first be obtained.
66. The cavalier attitude of Cathay Pacific to court orders and its processes continued to manifest itself when Cathay Pacific did not attend court on 15 August when the contempt application was set down and is unlikely to have bothered engaging attorneys even by then (for otherwise there would have been an appearance). In order to secure its attendance the order that appears in para 33 of my earlier judgment was made.

67. Until forced to attend court under risk of its senior manager being arrested, Cathay Pacific simply disregarded every court order and date of hearing. This was disrespectful to the court and its functions.

NATURE OF THE CONTEMPT

68. In recent times our courts have been obliged to reiterate the need for respecting and implementing its orders.

69. Most recently in *Pheko* the Constitutional Court correlated the principles that underlie respect for court orders. Nkabinde J said in the opening paragraphs to the judgement;

[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord

70. In *Pheko* at para 26 the Constitutional Court emphasised the provisions of section 165 of the Constitution, which it said “*vouchsafes judicial authority*” and provides that “*no person or organ of state may interfere with the functioning of the courts. The Constitution explicitly enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness*”.

The court drew specific attention to section 165(5) which expressly confirms that under our constitutional dispensation a court order is binding on “all persons to whom and organs of state to which it applies”.

71. In the present case this court took the view that it should not countenance the undermining of an order, albeit in a civil judgment, because of its broader effect on the administration of justice. Moreover the orders relate to the interests of minors which the court as upper guardian is obliged to safeguard.

Cathay Pacific flouted three court orders, two of which were issued as a direct result of it taking a conscious decision to disregard the first. Despite its protestations of a genuine belief that the orders were ineffective, it did not bother to engage attorneys or attend court when the orders specifically afforded it the opportunity to do so and put its position forward.

In my view it did not do so because it knew the outcome. This is the only reasonable inference that can be drawn from its failure to attend court and its deliberate instruction to senior local management to do absolutely nothing, not even to accept a court order. According to the original affidavits filed, prior to engaging attorneys only Jones is alleged to have formed a view on behalf of Cathay that the court orders were not binding. In the set of recent affidavits that position has been revised to one where she was always acting on instructions. Cathay Pacific therefore chose not to provide an explanation under oath from the person in management or on the executive who actually

took the decision to ignore the court orders. The lack of transparency, want of an explanation through competent evidence and a failure of accountability are further aggravating features.

These various factors demonstrate a degree of arrogance and perceived inviolability on the part of its executive officers and a disregard for the rule of law that beggars belief. I concluded that Cathay Pacific acted deliberately and intentionally with no honest belief that it was entitled to disregard the court's lawful orders¹¹.

72. In my view this is a case where Cathay Pacific is required to answer to the court for its conduct and its violation of section 165 of the Constitution¹² and to pay a commensurate penalty based on its culpability, the intention with which it committed the contempt, the attempted justification (or want thereof) and whether it intended to remedy the situation. Moreover it was necessary to secure implementation of the original court orders either directly or by providing the applicants with its monetary equivalent¹³. I also considered that the children should not be obliged to travel economy class for such a lengthy journey when such a trip would not have been necessary if the original order had been complied with.

73. I have already mentioned the opportunities afforded to Cathay Pacific to remedy its contempt of the original order by appearing in court and explaining its position if genuinely held. It was afforded three opportunities to do so and eventually had to be forced into court under threat of the arrest of its most senior manager. Only when it was obliged to deal with the appropriate penalty, and then very belatedly, did Cathay Pacific tender to return the children on a flight at its expense.

¹¹ *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paras 6-9.

¹² *Pheko* at paras 28 and 30. See also *Fakie* at para 6 and 11

¹³ *Pheko* at paras 28 and 31

74. It is difficult to comprehend how an airline which does not claim that every flight from Hong Kong to Johannesburg since 26 July was fully booked could not have considered the commercial and reputational consequences of not finding a suitable solution at little or no expense to itself. In my view this further supports the corporate arrogance of the airline and the intent with which it disregarded the court orders and refused to attend court when directed. Moreover it was directed together with Home Affairs to bring the children to court on the 28 July. One would have expected that a *habeas corpus* order of this nature would be taken seriously and that its gravity would result in counsel being engaged to explain why the children would or could not be brought to court. Its failure to do so is a further demonstration of its high handed approach to the law and legal institutions.

75. I also reject the professed reliance on the legal advice of Cathay Pacific's attorney. It also appears that engaging attorneys was an afterthought by Cathay Pacific under threat of the arrest of the senior manager. After hearing argument I do not accept that he could have seriously held the view he professes. Nor was it claimed that he was unaware of the provisions of Section 165 of the Constitution. He is reminded that as an officer of the court he has a duty to uphold the administration of justice. And at best for the attorney, if he was out of his depth then he should have told his client as much and engaged counsel. In my view no practicing attorney in this country and at this time could have given his client advice that a court order can simply be disregarded.

76. In my view the penalty must therefore be commensurate with the degree of the contempt, the intention with which it was committed and the interests affected. It must act as a deterrent and be punitive. In a case of this nature, where executives of a corporate entity appear to consider their institution either beyond the reach of the law or themselves immunised from the consequences of actions which undermine the administration of justice and the rule of law the penalty must also be proportionate; and after taking into

account the means of the company should not amount to a slap on the wrist¹⁴.

77. If there was precedent for a high monetary penalty in contempt cases I would have had little hesitation in ensuring that the amount was not a slap on the wrist if regard is had to Cathay Pacific's revenues. It should also be an amount that would make an airline think twice before avoiding the inconvenience of changing a passenger manifest or approaching immigration about a court order or have them verify it with the court directly. The airline never claimed that, when the order was conveyed to Mashoene, the children had already boarded and could not be taken off the flight before the gates were closed or the gantries removed.

78. Even giving Cathay Pacific the benefit of the belated tender and considering the financial results over the last three years that were provided I would have had little hesitation in considering a fine of between R750 000 to R1million appropriate.

79. I am however concerned that such an amount, where case law does not indicate a fine much beyond R10 000, may divert attention away from the principles involved and only focus on the scale of the fine imposed on an international corporation. I do not wish that to occur. However I do not consider the fine I intend to impose to be misconstrued as the upper limit. Far from it; if the same set of facts were to arise in a subsequent case I would seriously consider that the amount should be sufficient to require the auditors to raise it and that it be a matter requiring explanation from the board to its shareholders, since ultimately it reflects on issues of appropriate corporate governance and responsibility in the broader society.

¹⁴ The earlier judgment in which I held the respondents to be in contempt did not distinguish between a contempt which might result in a committal and one where a fine was to be imposed. The decision adopted the higher test of proof beyond a reasonable doubt. I found that each respondent intended to ignore the orders in question, subjectively foresaw the real possibility that the orders were genuine in which case they could not be ignored and reconciled themselves to the possibility that the orders were in fact genuine. This was sufficient to satisfy the requirements of intent in the form of *dolus eventualis*. Since only a fine has been considered the degree of proof of intent is on a balance of probabilities. See *Pheko* at para 37 and *Mthimkulu* at para 18.

80. I have taken into account that there was the disregard of three court orders aggravated by the failure to provide the court with an explanation despite the orders providing for such a course. There was also the failure of Cathay Pacific to make frank disclosure in contempt proceedings by withholding relevant information of its actual operations and chain of authority, and having regard to all the other considerations which are relevant in this specific case, the imposition of a fine of not less than R350 000 is justified.

81. In addition the airline is obliged to comply with the court order of 28 July and pay a sum equal to the cost of a premium economy class ticket for each of the applicants' three children on a scheduled Cathay Pacific passenger flight from Hong Kong to OR Tambo, alternatively the procurement of such tickets for them.

82. In the previous order I indicated that a further penalty would be considered if Cathay Pacific failed to secure the children's return by 22 November 2014. They were not returned by then and no explanation is provided as to why Cathay Pacific persisted without proposing a without prejudice tender sooner. The tender was only made on 24 November. The airline must therefore pay a further sum of R2 000 for the delay between Friday 22 November and it's the tender of 24 November.

JONES

83. Jones was in fact the airport manager for Cathay Pacific. She has been employed with the airline since 2003. Her responsibilities are to lead and manage the overall operations at OR Tambo. She had no authority to make any legal decisions and referred all such matters to the country manager, who at the time was Lau.

84. Adv Pincus argued that Jones was merely carrying out the instructions of Lau, thereby diminishing her culpability.

85. The difficulty is that in the original answering affidavit Jones accepted responsibility and claimed that she herself held the view that Cathay Pacific was not bound by any of the court orders; which she contended was a matter between the applicants and Home Affairs. It was this belief *and* the instruction not to accept documentation or get involved which resulted in her refusing to sign for the court order when service was attempted by Essop on 29 July.
86. It was only in the subsequent affidavit that Jones revealed her limited powers and authority. She effectively shielded higher management from responsibility and this would have been evident to her when the court attempted to engage someone in authority at Cathay Pacific on 26 July to secure the return of the children to South Africa and afford Cathay Pacific an opportunity to explain its position and remedy the situation. The court was effectively blocked by Swart who, it was confirmed, reported directly to Jones as her superior.
87. It was therefore Jones who frustrated any meaningful engagement and who held out to the court, through Swart and subsequently directly through Essop, that she was the most senior responsible person who had the power to make relevant decisions. It is also evident that Lau was not in South Africa at the time the two orders relevant to Jones' involvement were made. In order for court orders to be respected the most senior person in the country must accept responsibility for corporate decisions. Unless this is so, remote management would result in there being no accountability within the court's jurisdiction for a refusal to comply with its orders.
88. It is unnecessary for the purpose of this judgement to set out the details of Jones' actual monthly net income, save that it is not high. In my view a total fine of R2400 in respect of both contempts of court would be proportionate in the circumstances.

APPLICANTS' COSTS

89. In my view the applicants consideration of the respondent's affidavits with regard to an appropriate penalty was necessary and so too were their appearances and argument even after the tender was made.

90. The applicants should not be out of pocket for assisting the court in the circumstances of the present case. Accordingly an order of costs on the attorney and own client scale is appropriate.

ORDER

91. On 18 August I consequently ordered that;

1. *The first respondent, Cathay Pacific Airways Ltd, is fined for being in contempt of the two court orders of 26 July 2014 and the subsequent court order of 28 July 2014;*
 - a. *In the sum of R350 000.00; and*
 - b. *In a sum equal to the cost of a premium economy class ticket for each of the applicants three children on a scheduled Cathay Pacific passenger flight from Hong Kong to OR Tambo International Airport, alternatively the procurement of such airline tickets for each of the said children on such flight; and*
 - c. *in the further sum of R2 000 for the delay between Friday 22 November 2014 and it's the tender of 24 November*

2014 to return the children to Johannesburg on a Cathay Pacific flight;

2. *The second respondent, Ms Shirley Jones, is fined the sum of R2 400 for being in contempt of the second court order of 26 July and the court order of 28 July 2014.*
3. *The respondents are required to pay the aforesaid sums respectively by no later than 30 September 2015*
4. *The first respondent is ordered to pay the costs of these further proceedings on the scale as between attorney and own client.*

Date of hearings:

Date of order: 18 August 2015

Date of judgment: 14 October 2015

Legal representatives

For applicants: Adv H Waner

Rossouws Attorneys

For Third Respondent: Adv S Pincus

Assenmacher Attorneys