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**

11 November 2015 .....

DATE SIGNATURE

In the matter between:

CATHAY PACIFIC AIRWAYS LTD	1st Applicant
JONES, SHIRLEY	2nd Applicant
and	
HAI LIN	1ST Respondent
RUIHONG WENG	2nd Respondent
In re:	
HAI LIN	1ST Applicant
RUIHONG WENG	2nd Applicant
and	
MINISTER OF HOME AFFAIRS- MR GIGABA	1st Respondent
DEPARTMENT OF HOME AFFAIRS- MKUSELI APLENI	2nd Respondent
CATHAY PACIFIC AIRWAYS LTD	3rd Respondent
ARM- ANALYTIC MANAGEMENT	4th Respondent
ACSA-AIRPORTS COMPANY SOUTH AFRICA	5th Respondent

JUDGMENT- LEAVE TO APPEAL

SPILG J;

THE APPLICATION

1. This is an application for leave to appeal. The first applicant was the third respondent in the initial contempt proceedings brought by the present respondents. To avoid confusion it will be referred to by name. The second applicant, Ms Jones, was subsequently revealed as the senior responsible manager whose identity the airline was prepared to disclose at the relevant time. This resulted in the contempt proceedings not being pursued against the individual who had initially been cited. Jones was then made a party to the contempt proceedings through the issue of a rule nisi and given an opportunity to show cause why she should not be held in contempt of two of the three court orders issued by my brother Wright J.

2. Although the present application is brought only in the name of the original third respondent it appears that the intention was also to apply for leave on behalf Jones. After a brief adjournment Adv *Waner* confirmed that there was no objection to the present application also being proceeded with on behalf of Jones.

3. There are some 48 grounds of appeal. They range from a claim that the orders granted by Wright J were a nullity because there was neither a notice of motion to support the initial application to stop the children boarding the flight, nor a written court order to that effect, to a contention that the requisites of each element of contempt was not demonstrated; and from Wright J being precluded from granting the second order on the grounds that he was *functus officio* to this court having imputed knowledge to Cathay Pacific when there was no evidence that its controlling mind was aware of the orders.

4. At the hearing, *Adv Stockwell* on behalf of Cathay Pacific and Jones advised that all the grounds of appeal were persisted with. However when requested to deal with the issue of the fines imposed, he confirmed that they were not

appealing the fines or sentences imposed; only the orders made holding the present applicants to be in contempt.

GROUNDS RAISED FOR THE FIRST TIME

5. The grounds cover a number of issues that are now raised for the first time and generally concern the manner in which Wright J dealt with the matter procedurally and substantively. They include whether or not the court could entertain the matter without a notice of motion, whether contempt proceedings can be entertained if an order is only telephonically communicated by the court to the person representing a respondent, but who refuses to provide contact details of anyone else in authority, or where no order is subsequently typed out and where hearsay allegations are relied upon to grant an order without affording the respondent an opportunity to respond.

6. These grounds form the basis for the main submission that, aside from the question of whether the appeal has reasonable prospects of success[1], the Supreme Court of Appeal should consider laying down parameters both in regard to how an urgent application is to be brought and how an order is to be communicated in order to be effective; this would include whether a notice of motion is a prerequisite and whether the import of the order can be simply communicated by the court telephonically.

   In this regard the applicants rely on section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 which allows this court to grant leave to appeal if it is of the opinion that *"… there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration"*

7. The judgment of Flemming DJP in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) was the only case referred to in support of the

[1] Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013

contention that the filing of a notice of motion is a *sine qua non* before a court will entertain any urgent application.

In that case an application was launched on 10 January 1992 to declare the applicant an employee despite his purported dismissal as managing director on 13 December the previous year. The timing alone demonstrates that the court was not concerned with a case of pressing urgency such as the present (let alone one involving the violation of fundamental rights of freedom and the child).

Moreover the court's focus in *Gallagher* was to criticise the use of the short form notice of motion (Form 2) as the template in urgent applications where prior notice is not dispensed with and to adopt the long form notice (Form 2(a)) or the amalgamation of both, suitably adjusted, in a single notice of motion[2]. This case led to the Part A and Part B single notice being adopted as standard practice in this division.

8. *Gallagher* does not address the question of whether a notice of motion is peremptory irrespective of the exigencies that may prevent the court's pronouncement reaching the respondent before it is too late. If it were so then form would be rendered more important than providing court protection and one would have expected the court to deal with that consequence in some detail.

It is evident that the gravamen of the decision, which is to be found at 502G-H, does not support the applicants' contention. It reads;

> *"the intent of the Rules is that such amendment is permissible only in those respects and to that extent which is necessary in the particular circumstances. I use the word 'necessary' in its ordinary signification, but naturally in relation thereto that evidence shows 'real loss or disadvantage if he is compelled to rely solely on the normal procedure'. The Court is enjoined by Rule 6(12) to dispose of an urgent matter by*

[2] At 503D

procedures 'which shall as far as practicable be in terms of these Rules'. That obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case."

9. It should be clear that the application of the fundamental principle of our judicial system, as confirmed in the seminal High Court of Parliament case by Centlivers CJ in *Minister of the Interior and another v Harris* 1952(4) SA 769 (AD) at p781A-B remains that where a right has been infringed the court will provide an effective remedy[3].

10. *A fortiori,* procedures, as long as they properly balance competing rights and interests including the right to be heard, must yield to securing an order that does not risk frustration through procedural delay. In the present case the provisions of rule 6(12) (c) were always available to Cathay Pacific. It elected to ignore the rule or not to engage attorneys to advise them of the course to follow; until senior management was forced by a court order under pain of arrest- itself a factor which reinforces the contemptuous behavior of the airline towards the court.

11. The practice in this division has, for as long as I have been in practice, allowed a party to approach the court in extremely urgent cases without a notice of motion, permitted the reception of hearsay evidence through counsel or an attorney over the telephone and has permitted service by the court's registrar or even by the attorney contacting the respondent or its representative telephonically and advising of the order. Adv Waner confirmed that he has obtained orders in extremely urgent cases without a notice of motion. Aside from the court being obliged to provide a remedy which is effective, it also remains a fundamental principle that the rules are made for the court, not the court for the rules.

[3] See also its application in *Mkhwanazi v Quarterback Investment (Pty) Ltd and ano* 2013 (2) SA 549 (GSJ) at para 67

12. In *Lourenco v Ferela (Pty) Ltd (No 2)* 1998 (3) SA 302 (T) Southwood J was prepared to countenance an application for urgent relief without a notice of motion and solely on the basis of senior counsel informing the court orally that the applicant sought to set aside an Anton Piller order[4] . It was only when the respondent agreed to modify the terms of the Anton Piller that urgency was dissipated and the matter could be postponed for the filing of a notice of motion (as well as affidavits). It is evident from the judgment that there was no question of the applicant being non-suited in the absence of a notice of motion if the respondent had not acquiesced to modify its original order [5] .

    In the present case Cathay Pacific did not agree to delay boarding the children until papers could be filed.

13. A notice of motion is always desirable and can be insisted upon by the presiding judge. But, as practice and reality demonstrate, there may be no time even for that.

14. Ultimately the judge presiding in the urgent court decides what procedures may be dispensed with and the extent to which and from whom hearsay evidence may be received; even where the entire facts are conveyed over the telephone by counsel and even where the entire proceedings take place over a telephone conversation between the legal representative and the judge because there is insufficient time to physically appear before that judge.

    The court does so in order to enforce a right or protect an interest in circumstances where, having regard to when the invasion or transgression may occur, time may not permit the preparing of a notice of motion and any order would be a *brutum fulmen*. Child abduction cases, unlawful detention and cases brought on behalf of others who, because of the alleged invasion of rights, cannot themselves appear come readily to mind.

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[4] At 304H
[5] At 305A

The courts have coped thus far without the need to be unduly prescriptive precisely because every possible exigency cannot be anticipated; and there is the risk of undue fettering in what remains the necessary exercise of judicial discretion.

15. In the present case had a notice of motion been prepared and brought to the judge (on the assumption of immediately available facilities to the attorney or counsel and the urgent court– which appears to be far from the case on the facts) there is the possibility that the children would have been boarded before the order could be conveyed. And this would have been through no fault of the respondents because immigration officials had incorrectly advised that the flight was departing at 13h00, whereas it in fact took off at 12.30.

It is evident that Wright J considered time of the essence and feared that the flight would depart before the order could come to Cathay Pacific's attention. Even if another court is entitled to second guess that decision (which I unhesitatingly discount) then the applicants have not set out a legal basis for challenging the court's exercise of its discretion.

16. I am unaware of any case where an order is rendered nugatory if it is only conveyed telephonically to the respondent. Adv Stockwell did not refer to any. On the contrary the urgent court regularly directs its order to be served by way of a telephonic communication where that is the only means of ensuring immediate knowledge on the part of the respondent.

17. In the present case the applicants do not dispute that they were aware of the contents of each of the court orders when conveyed to them. As Adv Waner points out, Cathay Pacific attempted to explain its failure to comply on the ground that it *bona fide* believed that the order was a nullity, not that it was unaware of the contents. The applicants cannot approbate and reprobate. They are confined to their papers.

18. The first order was very clear- Cathay Pacific was interdicted from boarding the children on the flight. Aside from immigration officials, who it is common

cause claimed that the matter was out of their hands and the responsibility of Cathay Pacific, Cathay Pacific and those under its control and authority were the only ones who had *de facto* control over the children. In this regard the applicant's latest submission, from the bar, is a red-herring- namely that the pilot of the aircraft was the proper person to be cited in the initial application if regard is had to the terms of the directive issued by immigration.

Cathay Pacific were in *de facto* control of the children *(*albeit, unbeknown to the respondents and the court until agreements were called for at the penalty stage, that it was through their agent and nominee Menzies Aviation)

19. Another ground not raised before is whether the order must be physically served at some stage for it to be effective. The applicants contend that the failure to prepare an order renders it a nullity and impacts on all the other orders, collapsing them as if a pack of cards.

20. Since an order takes effect immediately, and in this case it had to be complied with forthwith, there is an intrinsic difficulty in arguing that unless it is typed it is a nullity. The reality is that the volume of orders granted daily by this court and a possible break with the central computer server may result in a substantial backlog of court orders being typed by its registry. Accordingly in many cases an order would not be capable of being served before the required time for compliance with the judge's pronouncement.

    The absurdities that would follow are self-evident: For instance if the telephonically advised order of the court is respected then a failure to follow up with an official typed version restores the *status quo ante* the decision. It would mean that a return date can be ignored if there is no official typed order, despite the judge's registrar informing the respondent or sending an email where facilities permit.

21. The requirements of contempt of court are clear and are satisfied provided the part of the order that is willfully ignored comes to the knowledge of the affected party who has acted *mala fides*. Even in cases where the court has

not issued an order but the affected party is aware that court proceedings have been instituted, and has pre-emptively frustrated an order that might be granted will be held in constructive contempt of court. See generally *Roberts v Chairman, Local Road Transportation Board and others (2)* 1980 (2) SA 480 (C) and the cases there cited.

22. In this case the applicants repeatedly stated in their papers that they were aware of the orders to which they have now been called on to answer. Accordingly the foundational facts to support the contention sought to be advanced is wanting.

23. The other difficulty facing Cathay Pacific is that it is indirectly seeking to do what it did not do directly, attempt to either have the court reconsider its orders under rule 6(12)(c) or set them aside when it had an opportunity to do so.

24. Adv Stockwell argued that the orders were final without Cathay Pacific being afforded a hearing and therefore no point would be served by attending court on any of the three dates to which the matter was postponed (and in the one case being a date by when certain of the respondents which included Cathay Pacific were to produce the children in open court).

    The first order was granted *ex parte* and even assuming that it is found that Wright J did not afforded Cathay Pacific an opportunity to be heard before issuing the second order (contrary to my finding) then it appears that counsel has overlooked the provisions of rule 6(12)(c) which state that;

> *"A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order"*

25. A reconsideration in terms of this rule means a re-determination of the matter (see *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (T) at 290D and its application in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 487D and *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269H-270B).

    This was the obvious route to follow at any of the hearing dates to which the case was postponed (which included the date reflected in the papers that

were physically served at its offices) if Cathay Pacific genuinely believed in its position and was not acting *mala fides*.

GROUNDS ARISING FROM THE JUDGMENT

26. There are certain facts which it is claimed either Wright J or I was not entitled to take into account. These are irrelevant since even if they are ignored, the remaining facts are overwhelming.

27. I have again considered my judgment in light of the balance of the grounds raised by the applicants.

28. I am satisfied that in respect of all the grounds raised and persisted with neither Cathay Pacific not Jones have a reasonable prospect of success and there is no other compelling reason why the appeal should be heard.

29. The present respondents were entitled to consider the application for leave to appeal and assist the court with the submission of heads of argument and to argue the matter before me.

ORDER

30. Accordingly leave to appeal is refused with costs.

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SPILG, J

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Date of hearings: 10 November 2015

Date of judgment: 11 November 2015

(Revised 12 November 2015)

Legal representatives

For applicants:	Adv R Stockwell SC and Adv S Pincus
	Assenmacher Attorneys
For respondents:	Adv H Waner
	Rossouws Attorneys