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**

18 November 2014 .....

DATE SIGNATURE

In the matter between:

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

SPILG J;

INTRODUCTION

1. The applicants are Mr H. Lin and his wife R. Weng. They reside in KwaZulu-Natal, having gained rights of permanent residence in 2008. They were each

issued with permanent residence permits on 18 August 2008. They allege that on the same date permanent residents permits were issued to their three children, Xuefeng who is presently 19 years of age, Zhengyu who has just turned 15 years of age and Lili who is 14 years of age.

2. The family's permit numbers are consecutively numbered; from JHB1749 to JHB1753/05. The permit number indicates the year when permanent residence was first applied for; namely in 2005. Each permit also contains a control number. The applicants aver that the initial applications for the family members had been rejected but that the appeals were all successfully upheld during 2008.

3. The applicants claim that they have travelled abroad together with their three children on several occasions since 2008 without experiencing any difficulties with immigration officials upon re-entering the country.

4. On the evening of 25 July 2014 the three children arrived at OR Tambo International Airport ('*OR Tambo*') aboard a Cathay Pacific Airways flight from Hong Kong. The eldest child's permit was recorded on the data base of the Department of Home Affairs ('*Home Affairs*'). However immigration officers refused to allow the two younger children entry into South Africa on the ground that their residence permits were not reflected on its system and also concluded that the permits were fraudulent. The children were then held at a facility within OR Tambo operated by ARM-Analytic Management which is the Fourth Respondent.

5. Although the eldest child's permit was recorded on the system he too was held in the facility. It emerged that he was also denied entry on the ground that he had accompanied two minors who had produced fraudulent permits.

6. 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 from them why the two permits were not currently captured on the Home Affairs' data base.

He appointed attorneys who were not specialists in immigration matters. They attempted to discuss the issue with immigration officers at the airport but were unsuccessful. On advice, the applicants then appointed Mr Essop of Rossouws Attorneys.

7. 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 before the flight's departure. Essop however explained the circumstances and grounds for seeking urgent relief. These included the facts just set out. My learned brother was also informed that all the children held permanent residence permits but the names of the two minor children were not so reflected on the Home Affairs system.

8. Wright J granted an order at about 12H00 interdicting Cathay Pacific from boarding the two children on its flight. The order was notified to a person who claimed to be responsible for boarding the children and who advised that the children had not yet boarded.

9. At approximately 13H00 the court was informed by the applicants' attorney that he had just learnt from Cathay Pacific that the children had been boarded onto the flight which took off at 12H30.

THE APPLICATION AND COUNTER-APPLICATION

10. The applicants seek orders to hold Cathay Pacific and certain individuals who they claim wilfully and with *mala fides* ignored and frustrated the order from being implemented and similarly ignored and frustrated subsequent orders made by the learned judge for the children's return.

11. Wright J issued three orders against Cathay Pacific in relation to the applicants' children. They were;

    a. The order already mentioned which was issued on 26 July at 12H00. It prohibited Cathay Pacific from boarding the two minor children onto the flight in question;

    b. An order issued later on the same day at approximately 16H40 which;

        i. directed Cathay Pacific to return the two minor children on the next available flight from Hong Kong to OR Tambo;

        ii. directed Home Affairs and those who operate the holding facilities at the airport to detain the children on arrival unless the former agrees to release them into the custody of the applicants;

        iii. required all thee respondents, which therefore included Cathay Pacific, to secure attendance of the two minor children before Wright J on Monday 28 July at 14H00;

        iv. postponed the case to that time on the Monday.

c. An order issued on 28 July which;

a. extended the reach of the previous order to include the eldest child who it turned out had also been boarded on the same flight as his siblings;

b. directed Cathay Pacific to return all three children without asking for payment but subject to its rights of recovery;

c. postponed the case to Friday 1 August at 10H00 when it would again be heard before my brother.

12. Cathay Pacific's counter-application seeks to declare null and void and otherwise have set aside all the orders that were granted against them on the 26th and 28th July.

13. The gravity of the allegations made against Cathay Pacific and certain of the imputations made by Cathay Pacific in its affidavit require scrutiny in what otherwise should have been a straight forward matter.

THE APPLICANTS' CASE

The applicants make the averments contained in the following paragraphs to hold Cathay Pacific and two individuals, a Ms Shirley Jones and a Mr Thabo Mashile, in contempt of the court orders granted on the 26th and 28th July 2014.

It turned out much later that the latter's correct name is Thabo Mashoene. In order to maintain the narrative as related by the applicants and by Ms Mlaba who is the registrar to Wright J, the name which they understood had been mentioned to them when they contacted Cathay Pacific's offices to inform it

of the first order made will be retained for the time being. It is the name that was recorded by my learned brother in the reasons furnished and which is mentioned in the *rule nisi* issued in the present application on 15 August.

14. On 26 July at approximately 13H00 the applicants' attorney, Mr Essop, attended court and advised that he had been informed by Ms Zelda Swart, an employee of the airline, that Cathay Pacific's flight CX748 had departed at 12H30 with the children on board.

    In the contempt proceedings Essop states that Swart claimed not to have been told by Mashile of the telephonic court order given at about noon. She also required a copy of the order to be provided in writing. Swart also claimed that she was unable to contact her superior, who was identified as Ms Shirley Jones.

15. The judge was advised by both his registrar and Essop that immediately upon the order being granted each had independently contacted a person who allegedly identified himself as Mr Thabo Mashile and who they said was an employee of Cathay Pacific. They also said that they had advised Mashile of the order that had been granted.

16. According to the judge's registrar Mashile confirmed that he was the person responsible for boarding the children. He had also told her that the children had not yet boarded the flight. Mlaba informed the judge that Mashile appeared generally uncooperative. This was recorded in paragraph 6 of Wright J's written reasons of 26 July.

    In his founding affidavit Essop specifically alleged that Mashile refused to provide the contact numbers of more senior staff and was only prepared to convey the information himself to them. Essop had made the request because Mashile appeared unwilling to comply with the order. Mashile reverted to Essop and provided him with the landline number of the inspectorate division of Home Affairs.

17. Essop then contacted Adv Deon Erasmus, the Chief Director of Legal Services at the Department of Home Affairs.

    Adv Erasmus explained to Essop that once a decision had been made by immigration officials then the passenger became the responsibility of Cathay Pacific. They could do nothing to prevent Cathay Pacific from boarding the children. He also had no other contact numbers for officials at OR Tambo.

    The statement by Adv Erasmus is most disconcerting and may well have repercussions in relation to Home Affairs and its involvement. It is disconcerting because a decade ago the Constitutional Court made it clear that immigration officers continue to remain responsible even after the declaration has been issued and the person has been handed over to the airline within the international zone of the airport. See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (7) BCLR 775 (CC) per Yacoob J at para 40. See also *Abdi and another v Minister of Home Affairs and others* [2011] 3 All SA 117 (SCA) per Bertelsmann AJA and more recently the detailed discussion by Davis J in *Mukhamadiva v Director-General, Department of Home Affairs and another* [2013] JOL 30525 (WCC) at paras 14 to 20.

    It is again cause for judicial comment that despite the court in *Mukhamadiva* making its decision available to Home Affairs "*with the objective that an adequate policy reflecting the Department's commitment to the Constitution and the rule of law be followed in the future*" (at para 21) even in-house counsel fail to adopt or comply with the court's decision.

18. I return to the applicants' narrative of events. After Essop had spoken to Adv Erasmus he again contacted Cathay Pacific, no doubt to convey what had been told to him. He was able to speak to Swart who informed him that the flight had departed at 12H30.

19. Wright J noted the alleged lack of co-operation by Mashile. Due to the court's expressed concern regarding the two minor children who were now *en route*

to Hong Kong the judge contacted Cathay Pacific and spoke directly to Swart. The speaker phone function was used which enabled those present in the judge's chamber to also hear the conversation.

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. Swart referred the judge to her supervisor who was identified as Ms Shirley Jones. Wright J furthermore informed her that unless the judge's registrar was told to the contrary an order would be granted against Cathay Pacific in the proposed terms.

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

20. A draft order was emailed purportedly to the addresses of both Swart and her superior Ms Shirley Jones.

21. There was again contact with Swart. She said that she was still unable to reach Jones. The court gave her a further opportunity to contact a person in authority at Cathay Pacific .

22. By 16H40 no response had been received from Cathay Pacific and the court made the following order;

    1. *The third respondent, 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 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.*

23. This order was also sent by email to the same addresses for Jones and Swart as previously.

    It is evident that the emails were incorrectly addressed as they were sent to both Jones and Swart "@cathypacific.com", not "@cathaypacific.com".

24. The matter was 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 left with the two younger children on the flight to Hong Kong. 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 G62074973.*
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 Zhengyu Lin, born 18 August 1999 with passport number G34605379 and the child Lili Lin, born 22 November 2000 with passport number G34605382 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.*

25. The court also handed down written reasons.

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

The written reasons also indicated the court's concern that either Mr Mashile 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 flights 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 initial order had been conveyed.

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

27. Jones confirmed that she was the most senior official in charge at Cathay Pacific. A copy of the court order and reasons were then left on Swart's desk. Essop also wrote 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 for the Minister and the Department.

    On 30 July the attorney also emailed the court orders and reasons to all the respondents . Once again they were sent to the incorrect email address for Cathay Pacific.

28. Despite service of the order none of the respondents filed an answering affidavit or appeared in court on 1 August 2014. Moreover Wright J was informed that the children had not been flown back to South Africa as directed in the court order.

29. The applicants sought a *rule nisi* calling on Cathay Pacific and Mr Thabo Mashile to show cause why they should not be held in contempt of the court orders already issued.

Wright J declined to do so on the ground that the orders had been granted without a notice of motion or any founding affidavits. The court considered it preferable that a formal application be served on the respondents setting out

the history of the case and the grounds upon which a contempt of court order would be sought. .

The court was however prepared to grant a punitive costs order 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.

30. On 12 August 2014 the applicants launched the present urgent application which was set down on Friday 15 August 2014. The application was served at just after 09H00 on Wednesday 13 August on Mr Rangagah at Cathay Pacific's offices at OR Tambo International Airport. Mr Rangagah identified himself as a supervisor. The application was also served on ARM-Analytical management, on the Airport Company of South Africa ('*ACSA*') and on both the Minister of Home Affairs and the Department of Home Affairs at the offices of the State Attorney.

31. The papers were served on Cathay Pacific at 09H10 on 13 August for hearing at 16H00 on the same day. The State Attorney had been served on the previous afternoon. The respondents were required to file their answering affidavits by no later than 16:00 on the same day.

32. In Part A of the application the applicants sought a *rule nisi* calling on Cathay Pacific, Shirley Jones and Thulani Mashile to show cause why they should not be held in contempt of the court orders granted on 26 and 28 July 2014.Warrants were also sought to arrest and detain Jones and Mashile in custody until they were brought before a court to explain why they should not be imprisoned for being in contempt of the two court orders.

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 and alternative forms of relief.

The urgent court only had to consider the contempt of court orders sought in Part A against Cathay Pacific, Jones and Mashile.

33. The matter came before me on 15 August. Despite service of the application upon Cathay Pacific it did not appear at court. It is however evident that the airline had little opportunity to file an affidavit. After hearing *Mr Waner* for the applicant I made the following order;

    1. *That a rule nisi be and is hereby issued, returnable on the 09th day of September at 10h00 as soon thereafter as the matter may be heard, in terms whereof the third respondent, Shirley Jones, (' Jones') and Thulani Mashile (' Mashile') be and are hereby called upon to show cause, if any, why a final order should not be made in the following terms:*

        i. *That the Third Respondent, jones and Mashile, be held in contempt of the orders of this court made on the 26th July 2014.*

        ii. *That a Writ of Arrest is hereby issued in terms whereof the sheriff or his deputy, be and is hereby directed to take into custody Jones, and Mashile and thereafter hand them over to the officer commanding the goal in which they be held, who shall detain them and thereafter cause them to be brought to this court, as soon thereafter as reasonably possible, whereupon they shall explain to this court why a period of imprisonment, the duration of which shall be determined by the court, should not be imposed upon them for her being in contempt of the orders of this court, dated 26th July 2014.*

        iii. *That the Third Respondent, Jones and Mashile, be held liable to pay the Applicant's legal costs on an attorney and client scale, jointly and severally, the one paying, the others to be absolved.*

    2. *That , and in the event of either the Third responded, its manager alternatively, and in his/ her absence, the deputy manager of the Third*

respondent, Jones/ Mashile(individually or collectively) failing to appear on the 09th September 2014, then and in such event the judge presiding over the matter on that day, may issue a writ of arrest directing the sheriff or his deputy, to take into custody such persons, who shall be called upon to show cause why a period of imprisonment , the duration of which shall be determined by the court, should not be imposed upon them for her being in contempt of the orders of this court, dated 26th July2014, and 28th July 2014.

3. *That this order be served by way of the Sheriff of this court or his deputy on the manager of the Third Responded alternatively, and in his/ her absence, the deputy manager of the Third Responded, Jones and Mashile.*

34. On 19 August the sheriff served the orders. The returns in respect of Jones and Mashile are instructive. They both reflect that Thabo Mashoene accepted service at Cathay Pacific's offices at OR Tambo. 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. This was the first time that it became clear that the person who Essop and the judge's registrar identified as Thabo Mashile was in fact Thabo Mashoene. Essop claims that he did not hear incorrectly and contends that Mashoene mispronounced his name deliberately. In my view it is irrelevant whether they heard incorrectly or that Mashoene did not identify himself clearly. Although the issue is disputed I do not believe that anything need turn on it.

The court file does not reflect a return of service on Cathay Pacific itself. However they had notification and opposed the application.

THE AIRLINE'S AFFIDAVIT

35. I again presided in court on 9 September 2014. Cathay Pacific filed an answering affidavit deposed to on the previous day by its Country Manager for South Africa, Mr Rakesh Raicar. It also filed the counter-application mentioned earlier to declare null and void or otherwise set aside the three orders granted on the 26th and 28th of July.

    Mr Raicar corrected the citation of the airline to Cathay Pacific Airways Ltd.

36. Cathay Pacific acknowledged in the answering affidavit that it is a leading international airline based in Hong Kong which services 47 international destinations (with landing rights at 188 airports).

37. In order to deal fully with the issues and explain the penal nature of the order I made on 11 November it is necessary to set out in some detail the contents of Cathay Pacific's affidavit.

38. Mr Raicar is the country manager for Cathay Pacific in South Africa and the Indian Ocean region. He was appointed to the position on 18 August 2014.

    His affidavit states that the first time lawyers were engaged on behalf of Cathay Pacific for advice or for any other reason in relation to the court orders of 26 and 28 July was "*approximately during the week of the 18th of August 2014"* .

    If any of the three court orders granted on the 26th and 28th of July were communicated to Cathay Pacific then this statement is significant for two reasons. Firstly it demonstrates that its local management did not consider it appropriate to engage attorneys before refusing to comply with the second order or before deciding not to appear in court on Friday 1 August. It also follows that the legal defences now relied upon were not present to the minds of Cathay Pacific's officers and staff at the time it decided to ignore the

orders. Whether this is to be regarded as reflecting Cathay Pacific's attitude towards orders issued by this court will be considered later.

39. Despite only engaging attorneys much later, Mr Raicar claims that Cathay Pacific's personnel believed that there was "*no basis*" for complying with the court orders because they were obliged to obey the instructions given by the immigration officials at the airport. He avers that Cathay Pacific's stance is not to avoid or wilfully disobey the court orders or processes of any country and avers that: *"More importantly, it is imperative that* (it) *complies with the immigration laws of a foreign country and obviously respects the aforesaid laws."*

40. The main submissions made by Cathay Pacific, Jones and Mashoene are the following;

    a. prior to receiving legal advice they did not believe that they were obliged to comply with the court orders and were "*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.*

    b. after about 18 August, they could not have acted wilfully or with *mala fides* because they were relying on legal advice. The advice received was that Cathay Pacific;

        "*was not bound by any of the orders …as these orders were in fact null and void and should not have been granted in the first instance. Accordingly the Third Respondent was entitled to ignore the orders and not comply with them. This was in fact in accordance with the instructions which I received from the Third Respondent's attorney of record, namely Mr Peter Assenmacher*
        "

41. The airline therefore contends that even if it is bound by the court orders any non-compliance was not wilful or *mala fide*, requirements that must each be established beyond a reasonable doubt if the individual staff members or Cathay Pacific itself is to be held in contempt of court. See *Fakie NO v CCII Systems(Pty) Ltd* 2006 (4) SA 326 (SCA) at para 9.

42. The affidavit which is supported by Jones and Mashoene sets out how all three children were refused entry into South Africa after disembarking from the Cathay Pacific flight. Once the children were declared illegal foreigners by the Department of Home Affairs its immigration officers instructed Cathay Pacific to detain the children and ensure that they board the next Cathay Pacific flight from OR Tambo to Hong Kong .

43. The written instructions to detain all three children were given by way of a declaration issued by Home Affairs to the commander of Cathay Pacific flight CX749. The officials were also in possession of the actual notices issued to each child. The declarations were in the old standard form and issued under the provisions of sections 34(8) and (9) of the Immigration Act 13 of 2002 (*'the Immigration Act'*) as read with Regulation 39(13) promulgated under that Act.

    Although each declaration was stamped and signed by an immigration officer no one signed for acknowledgement of receipt on behalf of the master in the designated block. The failure to do so in the circumstances of the present case where Cathay Pacific admittedly uses agents is cause for concern and requires comment.

44. The grounds for refusing all three children entry into the country have been dealt with earlier. Each child was also informed that the decision could be appealed or reviewed within 20 days. The concerns expressed by Yacoob J in *Lawyers for Human Right* regarding the inability of many of those affected to protect their rights or engage the system from a position of vulnerability is exemplified by these events. That little has been done to demonstrate a change of attitude pursuant to the Constitutional Court decision is of great

concern. Reference will be made later to our international obligations under the United Nations Convention on the Rights of the Child.

In terms of the notices the cost of detaining, maintaining and removing the children to Hong Kong was to be borne by Cathay Pacific. The notices as well as the separate notifications of rights of review by the Minister were signed by the immigration officer. However it does not appear that an interpreter was used as the appropriate certificate was not filled out or signed. Moreover each child did not sign receipt although in some instances a note was made that the child refused to do so.

45. Although the declaration is directed at the commander of the flight on which the children had arrived its effect was to direct Cathay Pacific to board the children on the return leg of the flight to Hong Kong. This was flight CX748 departing from OR Tambo on the following day, Saturday 26 July, at 12H30.

46. Mashoene admits that he was contacted telephonically by Attorney Essop and was informed that Cathay Pacific must not put the children on the flight. The answering affidavits explain that Mashoene answered the call because he was in Cathay Pacific's offices at the airport handling calls relating both to lost baggage and enquiries.

47. Earlier in the same affidavit Raicar explains that Mashoene is not an employee of Cathay Pacific but of Menzies Aviation (Pty) Ltd 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 Tambo ….and 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"*

Cathay Pacific states that by virtue of these facts and circumstances Mashoene had no authority to give effect to that 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.

48. It will be observed that there is a contradiction between the two statements contained in the answering affidavit. In the one it is claimed that Mashoene was answering the phone to deal with baggage claims *and* enquiries while later it is claimed that he was only dealing with baggage claims issues. Moreover the affidavit is silent on the "*certain functions"* that Menzies Aviation performs for and on behalf of Cathay Pacific.

49. The answering affidavit proceeds to set out that Mashoene, on being informed by Essop that a court order had been granted stopping the children from boarding the flight, responded that he was unable to assist and would refer it to Cathay Pacific's employees. He then contacted Ms Zelda Swart who is the airline's airport service officer.

50. Swart was already at the boarding gate for the flight which is hardly surprising if the flight was to depart at 12H30; this is confirmed elsewhere in the answering affidavit as the scheduled departure time for the flight.

51. According to Mashoene and Swart, she told him to inform the applicants' attorney that the children had been refused entry into the country, that the airline was obliged to ensure that they board the flight departing at approximately 12H30 and that he, Mashoene;

> "*could inform the attorney .. to telephone the Second Respondent* (ie; the Department of Home Affairs officials) *at a telephone number which Swart had furnished Mashoene. Swart informed Mashoene further that it was only on the instructions of the Second Respondent that the Third Respondent could give effect to an order that the minor children were*

not to be placed on the departing aircraft and that without such an instruction from the Second respondent, the hands of the Third Respondent were tied"

52. Mashoene states through Raicar's affidavit that Essop then told him that if the children boarded the flight he would be arrested for contempt of court.

53. Raicar then makes the proposition that Cathay Pacific cannot be expected to adhere to a telephonic instruction "*purportedly emanating from a Court order in the face of a specific instruction from the Second Respondent* (ie; Home Affairs) *that the minor children had to depart on the next flight out of the country and in contravention of the Immigration Act"*

The proposition will be tested later.

54. Almost as an aside Raicar then concedes that Mashoene also informed Swart that *"a certain lady whose details he did not know of, had also spoken to him informing him that there was an order not to allow the children to depart…. This was only communicated to Swart … after the aircraft had already departed the Republic of South Africa."*

It is significant that Mashoene does not commit himself to when he received this call or whether the person identified herself. Accordingly there is no challenge to the contents of the founding affidavit that;

a. Mlaba had identified herself to Mashoene;

b. when Mlaba contacted Mashoene he had informed her that the two children had not yet boarded the flight and that he was responsible for their boarding. The claim that this was not his function (even if correct) is not buttressed by either a denial that he had made these statements to the judge's registrar (or Essop for that matter) or by any evidence as to who in fact was responsible at Cathay Pacific for

the children while in its care, which individual was responsible for boarding the children if it was not him and who in fact had boarded the children if it was not him;

c. Mashoene refused to provide the contact numbers of any supervisory staff in authority at Cathay Pacific but said that he would speak to the responsible person himself.

In any event the contents of the reasons provided by Wright J on 26 July 2014 are clear on this score and the third respondent cannot go behind them at this stage.

55. Since Cathay Pacific had not received any instructions from immigration officials to the contrary the three children were boarded onto the flight.

The deponent does not state when the children were actually boarded or who on behalf of Cathay Pacific was responsible for their boarding. It is however clear that Cathay Pacific does not attempt to justify its position on the basis that the children had already boarded or that any of their luggage had already been stowed on the flight by the time either Essop or the judge's registrar had spoken to Mashoene confirming that an order had been granted.

56. Essop telephoned Cathay Pacific at approximately 13H15 and spoke to Swart. He referred to the telephonic court order that had been granted. Swart claimed that she told Essop about being contacted earlier by Mashoene and having informed him to provide Essop with the number for Home Affairs since Cathay Pacific was obliged to obey their instructions. She claimed to have explained to Essop that Cathay Pacific was obliged to obey the instructions from immigration officials and that there was nothing it could do until immigration instructed it not to board the children on the flight.

57. The version put up by Swart of this conversation does not mention that she had informed Essop that the flight had already departed at 12H30 with the children on board or that Essop had not mention, at some stage during the conversation, that according to the senior legal adviser at Home Affairs whom

he had just contacted it was outside their jurisdiction once the children had been handed over to Cathay Pacific.

58. It was also averred that Mashoene "*was simply a lost property agent and was in no position to adhere to a telephonic order that the minor children should not board the aircraft. It was not possible for anyone to expect Mashoene to comply with such a telephonic instruction".*

59. A short while later at approximately 14H38, Essop again contacted Swart to request that Cathay Pacific agree to return the minor children on the next available flight once they had disembarked in Hong Kong. Swart claimed to have told Essop that she was not in a position to agree as this would "*depend on the persons in charge of the Third Respondent or responsible for making such a decision".* She claimed to have repeated to Essop that this was exclusively a matter between the applicants and Home Affairs.

At this stage Swart mentions that Essop was extremely rude and aggressive. He insisted that the children be returned to Johannesburg and once that was done Cathay Pacific could explain its side to the judge. She claims that Mashoene also told her that Essop displayed the same temperament towards him.

60. Swart then confirms that shortly before 14H50 Wright J contacted her telephonically and informed her that the court was considering an order directing the return of the minor children by Monday morning 28 July. The affidavit proceeds to make certain remarks regarding the tone adopted by Wright J and continues: *I have been informed in this regard that it was not incumbent upon a Judge of a High Court to force an employee of the Third Respondent to agree to such an order. In this regard, I have been further advised that it is highly imperative that Judges of a High Court do not get involved personally in the facts of any particular case."* More follows much in the same vein.

61. It is evident that Mr Assenmacher who was responsible for giving this advice wishes to ignore that it was by reason of Cathay Pacific's South African office's failure to adhere to the initial court order that the children's expedited return was first being requested and, failing which would be ordered unless Cathay Pacific could show reason to the contrary. It should have been clear that the judge must have made his decision as upper guardian of minor children in a matter which concerned the constitutional rights of minors whose parents were not accompanying them but who are living in South Africa.

62. It is relevant when assessing Cathay Pacific's and Jones' conduct to refer to another passage in Swart's affidavit concerning her discussion with Wright J. Swart claims to have explained to the judge that since she could not agree to place the children on a return flight it would be necessary for the judge to contact Jones who was her superior. However when the judge requested Jones' cellphone number she admits saying that "*she was not able to give the number out but Swart informed Judge Wright that she would phone Jones and would request Jones to contact Judge Wright. Judge Wright then informed Swart that she had two minutes to revert to him, failing which Judge Wright would issue an order.*"

This is the first occasion, and one would trust the last, where a person who is asked by, or on the authority of, a judge sitting in an urgent matter to provide a contact number to decline to do so. In itself it fails to respect the judicial office. No one is entitled to refuse providing a contact number to a presiding judge when he or she is dealing with an urgent matter, irrespective of company policy. The consequences of such a policy is to remove accountability and responsibility for corporate actions at the critical time.

63. When Swart phoned Wright J at about 14H55 she claimed that she was unable to reach Jones. Wright J then afforded her literally another five minutes to revert to him as he was not prepared to wait further, failing which

an order would be issued and the matter could be dealt with in court on Monday 28 July.

64. Swart claims that she was unable to contact Jones and claims that it is for this reason that she did not revert to Wright J. She accepts that the order was only granted some 25 minutes later at 15H20.

65. The deponent to Cathay Pacific's affidavit proceeds to deal with Wright J's reasons for granting the two orders on the 26th of July. He does so as if he is responding to an affidavit by a litigant.

66. Firstly Cathay Pacific's opportunity to deal with any incorrect statements or submissions that had been made to the judge was on 28 July when the matter was to be heard, assuming that they were aware of the hearing. Secondly the airline cannot address the reasons for a judgment as if it is an affidavit. A party must be circumspect in such cases. While a litigant is entitled to challenge the correctness of what had been reported to the judge, or whether service in a particular form had in fact occurred, it does not lie in that party's mouth to question a recordal by the court that it received a report at a particular time.

    By way of illustration Wright J recorded in the reasons that Mlaba had contacted him at 11H52 to advise that Essop wished to apply for an urgent order relating to two children who apparently were being deported on a Cathay Pacific flight leaving OR Tambo at 13H00 for Hong Kong and that the judge asked Mlaba to provide his cellphone number to Essop.

    Raicar decides to deal with this paragraph of the judge's reasons by stating that save for acknowledging that the flight was leaving at 12H30 he has no knowledge of the contents of this paragraph.

67. While the attorneys are responsible for allowing this, Raicar is not immune from censure. He holds a very senior position covering a large region in which there are a number of sovereign states each with its own judiciary. I

would find it difficult to accept that with such responsibilities he is unable to bring an independent mind to bear on the inappropriateness of querying or otherwise treating with circumspection a recordal by a judge of what occurred before him or her. It displays a lack of respect for the judiciary. Whether this is isolated or systemic will be considered later.

68. Raicar also attempts to explain Cathay Pacific's non-appearance on 15 August when this matter was first set down on the grounds that it *"did not seek to oppose the orders sought by the Applicants in Part A, notwithstanding the fact that the Third Respondent is not in contempt of any of the orders.*

It is not possible to fathom from the answering affidavit any credible explanation for Cathay Pacific's non-appearance on 15 August. Part A of the order seeks to hold a major international airline in contempt of court together with a senior employee who appears to have been in charge of the South African operations before the arrival of Raicar. The fact that the airline wished to demonstrate that the orders had not been served and that they are to be set aside aside for want of jurisdiction does not explain the non-appearance on 15 August. On the contrary these reasons support a need for it to have attended court.

Accordingly there is no acceptable explanation for Cathay Pacific's non-appearance before the court where it had the opportunity to state its position. One would expect that where a party believes that an adverse order has no validity it would make use of the first available opportunity to bring it to the court's attention rather than let the court continue to make further orders based on the earlier ones that had been granted, as occurred on 15 August.

69. Cathay Pacific contends that;

a. the first order granted at noon on 26 July is a nullity or otherwise falls to be set aside because the Immigration Act precluded the court from

competently directing that Cathay Pacific not board the minor children unless immigration officials informed it that the children were no longer illegal foreigners. Reliance is placed on the provisions of sections 8(1)(a) and (2)(a) read with 34(1) and (8) of that Act;

b. the subsequent order granted on 26 July and the order of 28 July were not competent because;

i. they amount to mandatory orders over which the court has no control since Cathay Pacific is a foreign company and the order is to be performed in a foreign jurisdiction; namely to return the children from Hong Kong;

ii. there is no valid legal *causa* for making the order.

These grounds are set out both as a defence to the contempt application and as founding the basis for the counter-application to declare the three orders a nullity. It is therefore advisable to consider these issues first.

JURISDCTION TO INTERDICT THE MINORS BEING BOARDED ON FLIGHT

70. Cathay Pacific relies on sections 8(1) and (2) as read with 34(8) and (9) of the Immigration Act to contend that only an immigration officer can countermand the removal of a person once the airline has received a declaration to do so and that a court has no jurisdiction to interfere. The provisions read;

8 Review and appeal procedures

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and-

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision-

(a) in a case contemplated in subsection (1) (a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1) (b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

34 Deportation and detention of illegal foreigners

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.

71. Nowhere in these provisions, or anywhere else in the Immigration Act is there an ouster of this court's jurisdiction to interdict either immigration officers or, in the parlance of the Act, a master of the ship or in this case the commander of an aircraft, from boarding persons onto a flight. The Act, as with all other pieces of legislation assumes lawful conduct. It remains open for a person to challenge the actions taken by immigration officials on grounds such as the exercise by an immigration officer of his powers being *ultra vires* the enabling legislation (eg; *Lan v OR Tambo International Airport*

Department of Home Affairs Immigration Admissions and another 2011 (3) SA 641 (GNP) *per* Du Plessis AJ at paras 45 to 53).

72. South Africa passed into its second decade of democracy and so too has our Constitution and its Bill of Rights[1]. This is a democratic country governed under law, of which the Constitution is the supreme law.

73. Section 165(5) which deals with the judicial authority in South Africa expressly states that an " *order or decision issued by a court binds all persons to whom and organs of state to which it applies*."

74. The question regarding the original order, in this leg of the enquiry, is not whether the decision can survive the scrutiny of on appeal but whether the court had the jurisdictional competence to issue it having regard to the wording of the Act. In the present case, there can be no doubt that the court was concerned with the constitutional rights of minor children. Wright J was at pains to set this out in the reasons provided.

75. In *Lawyers for Human Rights* the Constitutional Court expressly dealt with the courts' reach in such cases and said:

> *[26] The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in*

[1] Initially the interim Constitution, 200 of 1993.

South African waters is not liable to prosecution in a South African court.

[27] Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why "everyone" in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country. (emphasis added)

76. The Supreme Court of Appeal in *Abdi* unequivocally affirmed at para 28 that

The argument that a South African court has no jurisdiction over the Inadmissible Facility by virtue of the fiction that it does not form part of the Republic's territory is wrong.

77. In view of these decisions and many others including the recent comprehensive re-assertion of the position in *Mukhamadiva* it is not open to any individual, involved with airlines and international passenger arrivals and departures, to believe that the court has no jurisdiction and act in defiance of a court order.

78. We have already reached the milestone in our nations journey since democracy where a conscious decision, taken by a person holding a responsible position, that an administrative direction can trump a court order interdicting the implementation of that direction pending a hearing is *per se* one taken in bad faith. It is inimical to the core principles of the Constitution. To hold otherwise will open the floodgates of professed ignorance by any given authority whether in the private or public sector.

79. It is trite that superior courts are empowered under the Constitution as read with legislation envisaged under it to interdict the implementation of any

decision or power conferred on immigration officers or obligations imposed on other persons such as the master of a ship or commander of an airline under the Immigration Act. *Mr Waner* on behalf of the applicants readily identified the provisions of section 28(2) of the Constitution which provide:

> "*A child's best interests are of paramount importance in every matter concerning the child"*

80. An indication of the store the Constitution places on the protection of children's rights appears from the specific protections enumerated in subsection (1), which are also illustrative of the purposive constitutional intent of the section as a whole. In this context regard may also be had to section 28(1)(g) which protects a child against detention except as a measure of last resort and section 28(1)(g) which respects a child's right to family or parental care, or to appropriate alternative care.

81. More specifically , as pointed out by Mr Waner, section 8(2) of the Children's Act 38 of 2005 requires that:

> *'All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.'*

The court also exercises powers as the upper guardian of all minor children within its jurisdiction.

82. Whereas the Immigration Act provides for certain procedures of review and appeal, the courts regularly issue interim interdictory orders preventing deportation pending the outcome of such processes or to enable the review process to be initiated prior to the individual being removed from the country. In the present case the court simply ordered that the two minor children not be boarded onto the flight pending a hearing before it. The effect was that the children would remain in detention until a court hearing. This is readily apparent from the subsequent order made on the same day.

83. Moreover, no person can simply ignore a court order because of a personal view that it could not have been competently given. In such cases the order must be complied with unless set aside. See *The Master of eth High Court (North Gauteng High Court, Pretoria v Motala and another* 2013 (3) SA 325 (SCA) At no stage has it been suggested that the court usurped a power it did not have. That it had such power is a given for at least the reasons provided earlier in relation to minor children. It clearly also enjoys such powers under section 33 of the Constitution as read with the Promotion of Administrative Justice Act 3 of 2000. The *Lawyers for Human Rights* case at para 20 also referred to the potential infringement of the rights to dignity and freedom.

84. The point taken by Cathay Pacific is therefore devoid of merit.

It should be added that South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995. It can be distilled from articles 3, 9, 10 and 37 [2] of the Convention that there are significant procedures that

[2] United Nations Convention on the Rights of the Child

Article 3

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or*

Article 9

1. *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child' s place of residence.*
2. *In any proceedings pursuant to paragraph 1, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*
3. *States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child' s best interests.*

Article 10

1. *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the applicants and for the members of their family.*

are recommended to be adopted and requirements met before a State Party takes a decision which has the effect of separating a child under 18 years from his or her parents or preventing their re-unification.

In particular detention should be used as a measure of last resort. The fundamental consideration remains the welfare of the child. In a case where both parents are permanent residents within South Africa the basis for justifying the forced separation of minor children from their parents touches a raw nerve in our collective consciousness.

JURISDICTION OVER CATHAY PACIFIC

85. Cathay Pacific argues that it is a Hong Kong registered company and therefore a *peregrinus* over which the court has no jurisdiction . It also appears to argue that the court is effectively directing Cathay Pacific in Hong Kong to arrange for the return tickets to be booked since the children are currently there.

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2. A child whose parents reside in different States shall have the right to maintain on a regular basis save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties

Article 37
States Parties shall ensure that:
(a) …
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of their age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child' s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

86. *Mr Pincus* for Cathay Pacific appeared to abandon the first point when the provisions of section 23 of the Companies Act 71 of 2008 ('*the Companies Act'*) were pointed out. He also withdrew the second point when asked whether his client was contending that Cathay Pacific's offices in South Africa or elsewhere in the world could not book a one way return ticket from Hong Kong to the destination serviced by that office if the sponsor was located outside Hong Kong (such as a parent or spouse).

87. Nonetheless the following appears evident. A foreign company which conducts business in South Africa is subject to this court's jurisdiction in respect of any cause of action which arose out of its activities here. This has been a settled part of our law even when foreign companies could trade freely in South Africa through branch offices without having to be registered under local company law legislation. The authoritative case regularly cited is *Appleby (Pty) v Dundas Ltd* 1948(2) SA 905 (E). The decision concerned a foreign English company with its head office in Portsmouth and one of its branch office in Johannesburg. It had concluded contracts within the jurisdiction of the Port Elizabeth Circuit Local Division and was sued in that court for a money judgment.

88. The court was required to consider the meaning of the words '*resided in the Union'* for the purposes of section 5 of the Administration of Justice Act 27 of 1912, which later was re-enacted as section 19 of the Supreme Court Act 59 of 1959, in order to render a person or legal entity amenable to the jurisdiction of a superior court within South Africa. Hoexter J held at 912 that;

> *the defendant, by virtue of the business which it carries on at its branch in Johannesburg, is sufficiently resident in the Union to make it amenable, in respect of any cause of action arising out of such business, to the jurisdiction of any Division of the Supreme Court which is competent to adjudicate upon that cause of action.*

89. The authority relied upon in *Appleby* included the following statement by Innes JA (at the time) in *Beckett Ltd v Kroomer Ltd* 1912 AD 324 at 338 which, as pointed out by Hoexter J (at 911) accepted the principle as far as foreign companies are concerned but refrained from deciding whether it applied to domestic companies:

> *'With regard to the contracts of local branches, the balance of convenience would probably be in favour of their being enforced by local tribunals competent to adjudicate upon the subject-matter. But whether it would be found possible in such cases to apply to domestic companies the principle recognised in regard to foreign corporations in Wallis v Gordon Diamond Co., and also laid down by an American Court in Aldrick v Anchor Coal Co. (41 Am. State Rep. 831), is a point which does not arise in these proceedings.'*(emphasis added)

90. A significant consequence of finding that a foreign company resides in South Africa, even if only because it carries on business within the courts area of jurisdiction and a recognised jurisdictional ground (*ratio juirsdictionis)* exists within its jurisdiction, was that it precluded the attachment of a person or property to found (or confirm) jurisdiction by reason of the express provisions of section 28 (1) of the repealed Supreme Court Act 59 of 1959 [3]

The current Superior Courts Act 10 of 2013 is to similar effect by reason of the provisions of sections 21(1) and 28 which read:

> "*21(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance …. "*

[3] Section 28 (1) provided: *"No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident in the Republic"*

> *28 <u>Prohibition on attachment to found jurisdiction within Republic</u>*
> *No attachment of property to found jurisdiction shall be ordered by a Division against a person who is resident in the Republic.*

91. Accordingly multinational companies carrying on business within South Africa cannot elect to become opaque for certain purposes. In this regard the following passages in *Appleby* bear repeating (at 911)

> *"In the American case cited the principle was stated in the following terms:*
>
> > *'Where a corporation created in one jurisdiction is permitted to do business in another, it is to be deemed to be a resident and subject to the jurisdiction of the courts of the latter, in all matters founded upon contracts made or causes of action arising there.'*
>
> *The same principle was stated by Lord St Leonards in a slightly different form in the case of Carron Iron Co v Maclaren (5 H.L.C. 416 at p. 450):*
>
> > *'The corporation cannot have the benefit of a place of business here without yielding to the persons with whom it deals a corresponding advantage.'"*

The judgment provides further illustrations of the point.

92. *Appleby* has been consistently followed and approved in respect of the application of the *forum conveniens* regarding external companies which conduct business within this court's jurisdiction and where there is another jurisdictional ground present. See particularly *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) especially at 497B-C and 498B and most recently Fabricius J in *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) especially at para 16.

93. The case of *ACL Group (Pty) Ltd and others v Qick Televentures FZE* 2013 (1) SA 508 (FB) is the only recent case which has not followed *Appleby*. With respect to the learned acting judge the reliance on the judgment of *Joseph and Another v Air Tanzania Corporation* 1997 (3) SA 34 (W) as authority for the proposition that *Appleby* is no longer good law appears to take the reasoning of Streicher J (at the time) out of context.

94. In *ACL Group* the court said at para 20 that;

> *"The question posed in this matter is simply whether a foreign company, which has been duly registered as an external company in terms of the Companies Act and which conducts business in the Republic, is resident in the Republic for the purposes of s 28(1) of the Supreme Court Act. For the reasons that follow, I am of the opinion that a duly registered external company, conducting business in the Republic, cannot be said to be resident in the Republic for purposes of s 28(1) of the Supreme Court Act, regardless that the cause of action (dispute) arises from the business activities of the external company in the Republic."*

95. In my respectful view the reasoning in *ACL Group* is not in conformity with that of my brother Fabricius J in *Multi-Links.* I am bound by the latter decision unless I find it clearly wrong. I do not. On the contrary it sets out in compelling terms the adoption of the *ratio* in the line of cases progressing from *Appleby* and *Bisonboard* to the application of the decision in *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA). I respectfully adopt the reasoning.

96. In addition it appears to me, and with respect to the decision in *ACL Group,* that there is a fundamental difference between an external company as defined under the provisions of the old Companies Act 1973 and the present Companies Act 2008.

97. Under the old Act the foreign company only had to establish a place of business to qualify as an external company whereas under the new Act it must conduct business within the country[4]. This is not a simple change of

[4] Compare:

Under the 1973 Act:

> Section 1: 'external company' means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property;

Under the 2008 Act:

> Section 1: *'external company' means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23 (2);*
>
> Section 23 reads:
>
> (1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic-
>
> (a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or
>
> (b) as an external profit company, in any other case.
>
> (2) For the purposes of subsection (1), and the definition of 'external company' as set out in section 1, a foreign company must be regarded as 'conducting business, or non-profit activities, as the case may be, within the Republic' if that foreign company-
>
> (a) is a party to one or more employment contracts within the Republic; or
>
> (b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.
>
> (2A) When applying subsection (2) (b), a foreign company must not be regarded as 'conducting business activities, or non-profit activities, as the case may be, within the Republic' solely on the ground that the foreign company is or has engaged in one or more of the following activities:
>
> (a) Holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within the Republic;
>
> (b) establishing or maintaining any bank or other financial accounts within the Republic;
>
> (c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company's own securities;
>
> (d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;

wording. It indicates a significant change of intention borne out by a comparison between the way the two Acts treat the acquisition of property in South Africa. Under the old Act the acquisition of immovable property by a foreign company was alone sufficient to establish a place of business within the Republic whereas that is not enough to constitute the carrying on of business under the new Act. The new Act expressly excludes the simple acquisition of immovable property as amounting to conducting a business (section 23(2A)).

98. The reason for the change of legislative intent appears to arise because under the old Act the establishment of a business was not enough to determine residence. In addition the external company would have to demonstrate that it was actually carrying on business in South Africa to satisfy one of the jurisdictional links, the other being the existence of a jurisdictional ground such as the cause of action arising within the court's jurisdiction; in the sense that legal proceedings duly arose under the common law within the court's jurisdiction. See *Bisonboard Ltd* at 468C-D and the analysis of other leading cases by Fabricius J in *Multi-Links* at para 13.

99. By contrast, under the present Act an external company must in fact carry on business within the Republic to qualify. Prof Delport in *The New Companies Act Manual* at 8 ftn 18 suggests that the term "*carrying on business"* in the section 1 definition of an external company bears a different meaning to the phrase "*conducting business"* in section 23. In my view the terms are interchangeable and reflect no more than a stylistic variation to suit the context. Although the English text was signed, the Afrikaans text supports this; the section 1definition adopts the phrase " '*n buitelandse maatskappy wat in die Republiek sake doen*" , section 23(1) the phrase "n *buitelandse maatskappy moet …. begin sake doen*" and section 23(2) also speaks of "'*n*

(e) securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or
(f) acquiring any interest in any property within the Republic.

vreemde maatskappy geag word een te wees wat sake …. in die Republiek doen"

100. Under the present Act an external company is obliged to register if it actually conducts business (or non-profit activities) as defined under subsection (2) unless such activities are limited to those set out in subsection (2A)

101. As pointed out in *Bisonboard* at 499E-F the enquiry does not end if there is a recognised ground of jurisdiction. The doctrine of effectiveness must also be satisfied in the sense that the court is able to give effect to the judgment sought although the degree of effectiveness required may have been diluted over time (and see also *Multi-Links* at para 15)

102. In the present case it is clear that Cathay Pacific conducts business in South Africa. It has a staff contingent which includes local employees, a booking office as well as a dedicated local reservation hotline. It has concluded contracts with Menzies Aviation (Pty) Ltd for ground handling requirements including access to its premium lounge facility at OR Tambo and according to its web-site, international transit passengers proceed to the Menzies Aviation Service transit desk. This information is also readily ascertainable from its own webpages.

103. The requirement of effectiveness is also satisfied as Cathay Pacific and its local personnel are amenable to the court's jurisdiction without the need to attach its aircraft or the airfares due to it from local airline agents.

104. The second point regarding the alleged extra-territorial nature of the order(to provide the children with seats on a flight from Hong Kong) also appeared to be conceded. It is clear that one can enter Cathay Pacific's office or telephone its number in South Africa to book a one way ticket to South Africa from Hong Kong. A simple illustration is a parent purchasing a one way ticket for a child who has completed her studies abroad.

105. In insofar as the jurisdictional ground is concerned, Cathay Pacific failed to comply with a court order when it boarded the children within the area of this court's jurisdiction. The admitted violation of the court order occurred here and this court is the proper court to be seized of jurisdiction, even if it only does so under the *forum conveniens* doctrine(see *Bisonboard*). Cathay Pacific does not claim that its office here lacks the capacity or authority to make a booking for a flight leaving Hong Kong for South Africa. Finally this court has the ability to continue to fine the airline and attach assets here in execution if it does not pay.

106. These constitute sufficient criteria to have enabled Wright J to grant a mandatory order. In *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA) Leach JA on behalf of the court held at para 10 that

> *The issue is really one of effectiveness, and while I accept that a court of this country should not grant an interdict against a peregrinus where the act sought to be interdicted would take place outside its area of jurisdiction, this is not such a case. This is a matter involving a contract concluded in this country, which is to be performed in this country, which the respondents threaten to breach in this country, and which the appellant, an incola, seeks to enforce in this country. In these circumstances a court of this country will be able to enforce an interdict if granted, even if contempt proceedings are not available (about which I express no opinion).*

In my view the present case is on an equal footing. The obligation to comply with the first court order arose within this court's jurisdiction, it had to be complied with here and was breached here. The subsequent order, for reasons already stated, can be readily complied with by Cathay Pacific's office in this country and there is no fact placed before the court in the affidavit of Cathay Pacific to say that it cannot. It has been particularly silent on that score.

CONTEMPT OF COURT

107. The test and the threshold evidential requirement for making a finding of contempt of court has been set out earlier.

108. It is common cause that the first order could not have been delivered in written form prior to the expected time of the flights departure on 26 July. It is common cause that Mashoene was informed of the order and despite Swart's protestations to the contrary to the judge's registrar and to Essop it is clear from Cathay Pacific's affidavit that she would have been aware of the order before the children, on Cathay Pacific's version, were in fact boarded onto the flight. In any event Cathay Pacific cannot claim that Mashoene is not a responsible person acting as its agent, even if not its employee. There are a number of reasons for this;

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, being at the very least Ms Swart. That being the case he was given the trappings of authority to receive notification of the court order on its behalf. It is not possible to have it both ways;

b. Mashoene is employed by Menzies Aviation yet he accepted service of the court orders as the administration officer at Cathay Pacific's offices at OR Tambo. A sheriff's return constitutes *prima facie* evidence.

c. Menzies Aviation, as appears earlier, does not perform only baggage clearance on behalf of Cathay Pacific. The case reported in SAFLII where it challenged a tender award demonstrates that it provides both passenger and baggage clearing services for major airlines (*Menzies Aviation South Africa (Pty) Ltd v South African Airways (Pty) Ltd and others* [2009] ZAGP JHC 65 at para 7). This is also borne out by what is stated earlier. It appears that Raicar

has not been entirely open with the court as to the services provided by Menzies Aviation and the functions Mashoene has actually performed on its behalf as an employee of Cathay Pacific's service agent.

109. This court has no hesitation in finding that notification of the order to him was notification to Cathay Pacific and that Swart had actual knowledge before the flight departed.

110. It is also common cause that Swart refused to comply with the first order. 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.

111. I have found that it is not possible to act *bona fide*, having regard to the pronouncements of the Constitutional Court and the Supreme Court of Appeal over an extended period, when deliberately refusing to comply with a court order . In this case the failure to obtain advice despite knowing that the order emanated from the High Court and the failure to immediately approach immigration officials and advise them of the court order further demonstrates *mala fides* and a complete disrespect for the writ of this court. The contempt was committed by Cathay Pacific through its officials.

112. However I am unable to find that Mashoene acted wilfully since he was obliged to obtain instructions from and was under the authority of Swart.

113. The failure to comply with the subsequent court orders of 26 July and 28 July were similarly wilful as a deliberate decision had been taken. Moreover Jones' conduct as set out earlier demonstrates that she was not prepared to accept that the failure to comply with the first court order required to be remedied immediately because of the invasion of the minor children's rights. While the orders may not have been emailed , the content was known

and yet, having the most senior position at the time, she deliberately chose to ignore the fact that a judge had gone so far as to personally call the airline to secure the children's rights. I have no hesitation based on the facts set out earlier to find that Jones acted *mala fide* and displayed lack of concern and disrespect for the authority of the court. This is further demonstrated by her refusal to sign for the court order and her failure to attend court on both the 1st and the 15th August despite the alleged claim that the orders were a nullity. I should add that the eldest child had been returned to Hong Kong because the siblings were.

114. A finding that Jones is in contempt *a fortiori* results in the airline being in contempt.

115. At this stage the appropriate sanctions appear to be the imposition of fines . However it will be necessary to hear submissions on the amounts that should paid.

116. Finally it is necessary to express this courts disquiet at the manner in which Cathay Pacific and its attorney chose to engage this court with regard to the attempts made by Wright J to secure the protection of the children and effect compliance with the first order. The airline's averments regarding the appropriateness of the judge's actions, as set out earlier, are themselves inappropriate. There is little doubt that any judge would have intervened to secure the implementation of an order to repatriate minor children to the country of residence of their parents (see the steps taken by the Du Plessis AJ in *Lan* at paras 16 and 27 where the imminent deportation and then continued detention of an adult were in issue) . In this regard the court takes its responsibilities as upper guardian of minor children seriously. The actions taken by Wright J in this matter speak eloquently to that. Rather than suggest that the steps taken by the court appear inappropriate, Cathay Pacific's management and its attorney should reflect on the former's disobedience of the court order and failure to take the simple remedial steps advocated by the judge as an immediate solution. There is no reason why they failed to comprehend why a judge in the urgent court found it necessary to engage

directly with the airline when it disobeyed the court order relating to the minor children.

ORDER

117. It is for these reasons that I made the following order last week, although certain of the dates for filing affidavits have now been changed:

1. *The Third Respondent 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 CX748and 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 2014and 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 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 Thursday 11 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 Thursday 11 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 Wednesday 3 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 Friday 5 December 2014;*

11. *The Third Respondent and Jones shall file any affidavit in reply by no later than Tuesday 9 December 2014*

12. *The Third Respondent shall index, paginate and bind the papers by no later than Wednesday 10 December 2014*

Date of hearings:	15 August and 12 September 2014
Date of order:	11 November 2014
Date of judgment:	18 November 2014
Legal representatives	
For applicants:	Adv H Waner
	Rossouws Attorneys

For Third Respondent:	Adv S Pincus
	Assenmacher Attorneys