IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO.: 10240/2003
DATE: 29/4/2005

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE

APPLICANT

And

DAVID CUNNINGHAM KING	FIRST RESPONDENT
KATIA CHRISTISON	SECOND RESPONDENT
CARMEL TRADING CO LTD	THIRD RESPONDENT
HAWKER AVIATION SERVICES PARTNERSHIP	FOURTH RESPONDENT
HAWKER AIR SERVICES (PTY) LTD	FIFTH RESPONDENT
METLIKA TRADING CO LTD	SIXTH RESPONDENT
THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	SEVENTH RESPONDENT

JUDGMENT

BOTHA. J:

The application was launched on 14 April 2003. It was brought under case number *10240/03.* The applicant is the Commissioner for the South African Revenue Services (SARS).

The first respondent is mr D C King. The second respondent is mrs K Christison, a bookkeeper in the employ of the first respondent or companies controlled by him.

The third respondent is Carmel Trading Co Ltd (Carmel).

The fourth respondent is Hawker Aviation Services Partnership (HASP).

The fifth respondent is Hawker Air Services (Pty) Ltd (HAS).

The sixth respondent is Metlika Trading Co Ltd (Metlika).

The seventh respondent is the South African Civil Aviation Authority (SACAA).

The purpose of the application, according to the original notice of motion, was to commit the first and second respondents for contempt of court for their alleged failure to comply with an order of court made in case 4745/02. The order in case 4745/02 was issued provisionally on 18 February 2002. In the papers this order is sometimes called the first preservation order.

The applicant asked that certain acts of the first and second respondents be declared in contempt of the first preservation order and asked that the first

and second respondents, being natural persons, be committed for contempt of court.

The relief in the first preservation order was sought pending an action to be instituted by the applicant for the piercing of the corporate veil between first respondent and two companies with which he was associated, Ben Nevis Holdings Ltd (Ben Nevis) and Metlika.

Fifteen respondents were cited in application 4745/02 that led to the issue of the first preservation order.

The relevant portions of the first reservation order are the following paragraphs:

> "6.1.1 Interdicting the 1st to 4th and 6th to 9th and 11th to 15th Respondents from ceding, pledging, alienating, disposing or in any way encumbering any of their assets excluding stock-in--trade of businesses which may be sold in the ordinary course of business."

and

"6.1.3 Interdicting Hawker Air Services (Pty) Ltd, the 11th respondent, from selling or ceding the Falcon 900 aircraft Z5-DAV or any rights therein to any person".

To understand the order it is necessary to know that the first respondent was also the first respondent in case 4745/02 and that Ben Nevis was the second respondent, Metlika the third respondent and HAS the eleventh respondent. I shall continue to refer to the Falcon 900 aircraft mentioned in paragraph 6.1.3 of the first preservation order as the Falcon.

The so-called second preservation order in this matter was issued by Hartzenberg J on 18 February 2003 in case number 24869/02. This order was also made pending the action by the applicant for the piercing of the corporate veil between first respondent, Ben Nevis and Metlika. Of relevance in this order is paragraph 2.4, which reads as follows:

"2.4 That the partnership take all the necessary steps to procure the return of the aircraft in South Africa and that it may only thereafter leave South Africa temporarily for *bona fide* charter flights, only with the prior consent of the applicant, which consent will not reasonably be withheld, or with the consent of the Honourable Court."

In case number 24869/02 SARS was the applicant. The aircraft referred to in paragraph 2.4 of the second preservation order was the Falcon. The partnership referred to in paragraph 2.4 was HASP.

Ben Nevis was the first respondent in application 24869/02, Metlika the respondent, HAS the third respondent, HASP the fourth respondent, Carmel the fifth respondent and first respondent the sixth respondent.

The judgment of Hartzenberg J in case 24869/02, which also dealt with other matters, was taken on appeal to the Supreme Court of Appeal, who dismissed the appeal in 1 October 2004. An application for leave to appeal to the Constitutional Court was dismissed on 3 November 2004.

On 10 November 2004 Hartzenberg J, in a rule 49(II) application, made an order in which an undertaking by Metlika and HAS not to apply for the transfer or deregistration of the Falcon at the SACAA was noted. In terms of the same order HASP and Carmel were interdicted from doing what Metlika and HAS had undertaken not to do pending the finalization of the matter. When the order was made the appeal had been disposed of and the Rule 49(II) application had become academic. It was explained to me in argument that this order was made pending Carmel's application for the deregistration of the Falcon, an application that was launched in May 2004.

On 3 December 2004 the applicant filed a supplementary founding affidavit in this application in which he dealt with, *inter alia,* the fact that the appeal against the second preservation order had failed. Later during December 2004 the first and second respondents and HAS and Metlika respectively filed

Rule 30 applications to declare the supplementary founding affidavit an irregular proceeding.

On 7 February 2005, the applicant filed an urgent application, dated 2 February 2005, in which he asked that the supplementary founding affidavit be admitted and that the notice of motion be amended, *inter alia,* by the replacement of paragraph 1.12 of the notice of motion with the following:

"1.12 By the first respondent and/or the third respondent causing the fourth respondent (the Hawker Aviation Services Partnership) not to comply with the orders of this Honourable Court in matter 24869/02 dated 18 February 2003, despite the appeal procedures against the said orders having been finally exhausted by 3 November 2004, and despite there being no lawful excuse for not taking the necessary steps to comply with the said order".

The effect of the amendment is in other words to rely on non-compliance with paragraph 2.4 of the second preservation order (by not bringing the Falcon back to South Africa) as a ground for committal for contempt.

There is also a prayer for the insertion of three new prayers, numbered 7, 8 and 9.

In prayer 7 it is asked that Carmel be barred from proceeding with the following proceedings until the return of the Falcon to South Africa:

(a) Application 11235/04, launched by it in May 2004 for the deregistration of the Falcon in South Africa.

(b) Its opposition to the piercing of the veil action (case 20827/02) including its opposition to its being joined as a party.

In prayer 8 a written undertaking is required from Carmel, undertaking to comply with prayer 2.4 of the second preservation order (by bringing the Falcon back to South Africa) upon failure of which the applicant may apply for judgment against Carmel in case 20827/02.

In prayer 9 it is asked that the deputy sheriff be authorized to sign all documents on behalf of Carmel, HASP and HAS that may be necessary to obtain the return of the Falcon to South Africa.

On 22 February 2005 the Judge President made an order in which he condoned the applicant's non compliance with the Rules and allowed the amendment of the notice of motion. He also dealt with the issues of costs and the exchange of further affidavits.

This, in broad terms, describes the history of the application itself.

The main issue at this stage is the Falcon which is the property of HASP, which was registered in the name of HAS and which left South Africa on 11 May 2002 on a scheduled flight. It is common cause that the Falcon was

stationed at Basel airport until 4 February 2003, when it was moved to Le Bourget in France, where it is standing in the open.

There is a tax dispute between the applicant and the first defendant and Ben Nevis. The applicant had raised assessments of R1,4 billion against Ben Nevis and R912 million against first respondent respectively. He has also issued summons against first respondent, Ben Nevis and Metlika, for an order to the effect that the separate corporate identity of Ben Nevis and Metlika be disregarded. That summons was issued on 31 July 2002 under case number 20827/02. On 30 November 2004 the applicant filed an amendment which has the effect, *inter alia,* of including Carmel in the list of companies whose corporate identity he seeks to ignore.

The first preservation order also referred to other assets besides the Falcon. In respect of some of these assets the order has been relaxed, as provided in the order.

The Falcon was acquired in 2000 by Ben Nevis. On 18 September Ben Nevis sold it to a partnership also called the Hawker Aviation Services Partnership for R171 110 000,00. The partners in that partnership were HAS, Rand Merchant Bank (RMB) and Hawker Management (Pty) Ltd (Manco). That partnership was referred to in the papers as the old partnership. It was an en commandite partnership with RMB as sleeping partner holding a 98,8% interest. The other 0,2% was held equally by HAS and Manco, which was a subsidiary of RMB.

The purchase of the Falcon by the old partnership was financed by RMB. As security for the loan furnished by a deposit of R171 million, the equivalent of the purchase price, which was made by Ben Nevis with RMB and ceded to it in securitatem debiti. At a stage Ben Nevis ceded all its interests in South Africa to Metlika including its reversionary right in the deposit of R171 million with RMB.

The old partnership was governed by several agreements. In terms of these agreements the undisclosed partner, RMB, would retain its 98,8% share as long as the amount of the loan remained unpaid. Also in terms of these agreements, HAS, then a 100% subsidiary of Ben Nevis, now of Metlika, had the right to obtain a 100% interest in the partnership upon payment of the loan. HAS was entitled to manage the aircraft chartering business of the partnership and to receive 80% of the nett profits of the chartering business. As mentioned above, the Falcon was registered with the SACAA in the name of HAS.

In August 2002 a situation had arisen where RMB decided to exercise its rights upon default of payment in terms of the loan agreement with the (old) partnership. It did in the end exercise its rights and appropriated the deposit of R171 million held by it in securitatem debiti. The balance of its claim in terms of the loan agreement R24,5 million, was paid by Metlika.

On 5 September 2002 the interests of RMB and Manco were sold to Carmel. The result was that a new partnership came into being, the present fourth respondent. Carmel held a 99,9% interest HAS a 0,1% interest.

In April 2003 the Falcon was grounded by the SACAA, its registration having lapsed. The SACAA has not, however, taken any steps to deregister the Falcon, that is to terminate the registration of the Falcon in the name of HAS.

Hartzenberg J in case 24869/02 found that that the transaction whereby Carmel obtained a 99,9% interest in the new partnership, was not a *bona fide* transaction and that it in fact amounted to an infringement of the first preservation order. See p421 and 422. That finding was confirmed in the judgment of the Supreme Court of Appeal. See paragraph 33 at pp 2587-2588.

The basis on which the applicant held the first respondent liable for the alleged acts of contempt of court was that he was the only director of HAS and the South African representative of Metlika. The second respondent was held liable on the basis that she was appointed the only director of HAS during a period when the first respondent was subject to a provisional sequestration order (7 June 2002 to 3 September 2002). On 24 September 2004 the first respondent resigned as the sole director of HAS. On 23

October 2004 a Mr Maldini was appointed the sole director of HAS.

The applicant has continued to present a case that the first respondent was instrumental in the decision not to bring the Falcon back to South Africa. The applicant annexed an affidavit by mr Dunlop, the pilot of the Falcon, who testified that he was given instructions by the first respondent to remove the Falcon from the Republic, and to have it deregistered in South Africa.

To the supplementary affidavits were annexed by mr Kinghorn and mr Steyn of Execujet Aircraft Sales (Pty) Ltd to the effect that the first respondent considered the Falcon as his property, that he made decisions about it and that he wanted to deregister it in South Africa. All these allegations were hotly contested by the first respondent.

The first respondent has cast some doubt on the credibility of mr Dunlop, denying much of his evidence and attributing personal motives to some of the steps taken by him. It was revealed that he had been misleading his ex wife about his income and that he had reasons to be earning all, if not most, of his income outside South Africa. Then the first respondent has also for the first time ventured to offer an explanation for the fact that Carmel ostensibly paid nothing, or not more than R24,5 million, for its share in HASP. In paragraph 279.4 of his answering affidavit he explained that the payment of R24 million to RMB was part of a larger transaction.

Whatever the case may be, after the refusal of leave to appeal by the Constitutional Court on 3 November 2004, the first and second respondents and HAS have indicated their preparedness to submit to prayers 7, 8 and 9 of

the amended notice of motion. They are in fact displaying a willingness to co-operate in bringing about the return of the Falcon to South Africa. Their attitude is obviously based on an acceptance of the finality of the preservation orders; their right of appeal having been exhausted. Whatever their motive may be, the present attitude of these respondents makes a committal of the first and second respondents for contempt of court inappropriate.

Carmel has at first in correspondence and in an affidavit by its attorney, mr Hendey, created the impression that it had no objection to the return of the Falcon to South African. The impression that Carmel conveyed was that it was only opposed to an unlawful return of the Falcon to South Africa that is without its registration papers being in order.

Its latest attitude, expressed by its authorized officer, mr O'Farrell, in an affidavit dated 25 March 2005, seems to be that the first preservation order is not binding on it and that the amended prayers, presumably 7, 8 and 9, amount to an abuse of process. It has also expressed the attitude that its application for the deregistration of the Falcon, application 11235/04, should be heard together with this application.

In a pre-trail conference held on 13 April 2005 Carmel agreed that this application should be heard before its application for the deregistration of the Falcon. It insisted on deregistration and reregistration of the Falcon and contended that the applicant's insistence on a South African registration was misplaced.

Mr van der Merwe SC, who, with mr Snyman and ms Tshombe, appeared for the applicant, submitted a draft order in terms of which he asked that first respondent be committed for contempt for 5 years on condition that he would be released if the Falcon returned to South Africa or if he gave an irrevocable undertaking facilitating its return and in terms of which relief analogous to prayers 7, 8 and 9 of the amended notice of motion should be granted against the third, fourth and fifth respondents. That was the first draft order submitted to me. He submitted that the third respondent should be barred from pursuing its application for deregistration and its opposition to the piercing action as a result of its contempt of court.

When asked whether the original relief claimed was aimed at the return of the Falcon, he referred at the original prayer 1.12.

Dealing with the nature of contempt proceedings, he referred to *Nel v Le Roux NO and Others* 1996 (3) SA 562 CC at 571 B - F as authority for the proposition that the first and second respondents could not be regarded as accused persons and therefore entitled to all the constitutional rights enjoyed by accused persons.

He argued that to the extent that there was a dispute of fact the court should consider referring the matter for evidence besides making an order against the third respondent.

He referred the court to the United States case of *Hicks v Feiock* 485 U.S. 624 as authority for the proposition that a distinction should be made between contempt proceedings aimed at punishment and contempt proceedings aimed at remedying a failure to obey a court order.

In respect of the form of contempt proceedings, he submitted that even if there was a criminal component, there was not one form of proceedings that could bring about a fair trial. In this regard he referred the court to S *v Dzukudu and Others* 2000 (4) SA 1078 CC at 1091, paragraph 10.

To the extent that the first respondent may be exposed to pending criminal proceedings he submitted, with reference to *Davis v Tipp NO and others 1996* (1) SA 1152, that the first respondent had no right to object to these proceedings taking precedence.

He submitted that even if a committal could not be ordered, the applicant was entitled to declaratory orders declaring certain conduct of the respondents as acts of contempt as prayed because such declaratory orders could have a wholesome persuasive effect.

He submitted that Carmel was clearly in contempt of court and referred to the fact that there was never a meeting of the partnership to consider the implication of the refusal of leave to appeal by the Constitutional Court. He also referred to the lack of information about the business of Carmel and the individuals behind it. He also contended that the first respondent was behind

Carmel and referred to his involvement in the movements of the Falcon after 5 September 2002, the fact that he made a payment to Carmel, and the vagueness of the greater transaction to which he referred in paragraph 279.4 of his answering affidavit.

In respect of the second defendant he only asked for relief in the form of a declaratory order.

He submitted that the costs of the application be borne by HASP.

The argument on behalf of the first and second respondents was presented by Mr Levin SC, Marcus SC and mr Chaskalson.

Mr Levin pointed out that order 2.4 did not specify what the necessary steps were to bring the Falcon back to South Africa. The applicant did also not in the supplementary affidavit set out what these steps were. It was only later that those steps were set out by HAS and the applicant and the result was a morass of confusion. He made the point that the applicant could not prove a contempt against the first respondent without piercing the corporate veil. As far as that was concerned he submitted that the case of the applicant was based on circumstantial evidence. The evidence of mr Dunlop, he submitted, was suspect. The allegations of messrs Kinghorn and Steyn were dealt with in an answering affidavit to which they did not reply.

He submitted that the applicant should pay the costs of the first respondent on a punitive scale in view of the fact that the effect of the application was vexatious. In this regard he referred the court to *In re Alluvial Creek Ltd 1929* CPD 532 at 535.

Mr Marcus focused his argument on the requirements for a committal for contempt of court.

He submitted that so-called civil contempt had a criminal component and referred to S *v Beyers* 1968 (3) 70 a AT 80 C - H. He referred to several South African cases in which it was followed, notably *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 SCA.

The judgments in *Laubscher v Laubscher* 2004 (4) SA 350 T and *CCII Systems (Pty) Ltd v Fakie NO and Others* (TPD case 16195/2003, unreported) he considered to be out of step.

He referred to a number of cases in foreign jurisdictions in which it was held that the criminal standard of proof should be applied in contempt proceedings, *inter alia Whitman v Holloway* (1995) 131 ALP 401, *re Bramblevale Ltd [1969]* 3 ALL ER 1062 (CA).

He submitted that any committal in respect of the first preservation order could only be punitive and should therefore not be allowed. In this regard he referred to *Naude v Searle* 1970 (1) SA 388 O.

In view of the criminal component of contempt proceedings, he submitted that certain requirements of a fair trial, like the right to be informed of the charge and the right to silence, had to be accommodated. In particular he stressed the need to inform the respondent of the alleged acts of contempt. In this regard he referred to *Harmsworth v Harmsworth* [1987] 3 All ER 878 at 820 j - 321 e. In this case, he argued that no particulars were given in the supplementary founding affidavit of the necessary steps the respondents had failed to take in order to comply with order 2.4. He also stressed the need to respect a respondent's right to silence by allowing him to argue that the applicant had made out no case. In this regard he referred to *In re* B [1996] 1 WLR 627. He accepted, however, that a fair hearing could be achieved through proceedings by way of notice of motion.

He submitted that where the applicant had himself identified an alternative remedy, any recourse to a committal would be of a punitive nature. In this regard he referred to *Cape Times v Union Trades Directories* & *Others 1956* (1) SA 105 N at 120 D - E.

He also referred to *Halsbury 4th edition volume* 9 (1) *paragraph 466,* according to which a supplementary order should be obtained if a court order does not contain a time limit for compliance with it.

Mr Chaskalson sketched the history of the allegations against the second respondent and argued that the case against her should have been withdrawn

when the applicant realized that she was no longer the sole director of HAS. He submitted that the only purpose of relief against her was punitive. He also referred to requests that the case against her be withdrawn and and the applicant's responses. He referred to the latest relief claimed against her, as embodied in a draft order submitted by applicant's counsel, and submitted that it was required for ulterior purposes.

He submitted that the application against the second respondent should be dismissed with costs on an attorney and client scale, and that the costs should also include the costs of three counsel.

Mr van der Nest SC, who, with Mr Harris, appeared for the fifth and sixth respondents, went through all the steps taken by the fifth respondent since 8 November 2004, as reflected in correspondence, and submitted that there was no basis to find that the fifth respondent had failed to take steps to comply with order 2.4 during that period.

In respect of the transaction of 5 September 2002, he submitted that a declaratory order relating to it would have no tangible advantage.

He analysed the various declaratory orders asked in the draft order, (prayer 1.1 to 1.7) and submitted that they did not amount to infringements of the first preservation order.

He submitted that the court should make an order authorizing the deputy sheriff to sign all necessary documents on behalf of HASP, HAS or Carmel.

Mr Labuschagne, who appeared for the third respondent associated himself with the arguments advanced by the other respondents regarding the issue of contempt.

He explained, with reference to the Avation Regulations, what the third respondent's problem was. **It** amounted to this, that in view of the grounding of the Falcon, the Commissioner of Civil Aviation was compelled to cancel the registration of the Falcon. Thereafter it could, on the application of the owner, that is HASP, be registered in the name of an entity nominated by the owner.

He did not offer serious opposition to an order authorizing the deputy sheriff to take the necessary steps on behalf of HASP, HAS or Carmel to bring the Falcon back to South Africa but resisted punitive measures like barring Carmel from pursuing its application or striking out its defence in the piercing of the veil action.

He submitted that Carmel's attitude throughout was *bona fide,* being based on legal advice about the effect of the Regulations.

He asked that the applicant pay the costs of Carmel on a punitive scale.

In reply the question of the formulation of the order authorizing the deputy sheriff was settled. For the rest mr Van der Merwe addressed the question of costs. He went through the correspondence and contended that HAS was obstructive and unco-operative with regard to issues like supplying an affidavit to support applicants opposition to Carmel's application, and the provision of a mandate to a third party to bring about the return of the Falcon.

In respect of the original notice of motion he submitted that the conduct of HAS amounted to an infringement of the first preservation order. He described the attitude of Carmel to the return of the Falcon as one of obstinacy.

He submitted that costs be awarded against HASP.

I know that the applicant does not believe that Carmel has a *bona fide* separate existence, and in fact regards the ostensible cooperativeness of the first and second respondents and HAS in the face of the attitude of Carmel as a supreme example of cynicism, but I cannot, on the papers, resolve a dispute that eventually will have to be resolved in the action for the piercing of the corporate veil. It must be remembered that inasmuch as the applicant asked for a committal of the first and second respondents or asked for certain conduct of the various respondents to be declared acts of contempt, it was asking final relief. Even though I was invited to do so, I cannot on the papers reject the allegations of the respondents to the effect that Carmel is an independent legal entity.

Accordingly I must accept the preparedness of the first and second respondents and HAS to comply with paragraph 2.4 of the second preservation order on face value and decide how to deal with Carmel.

In the end Carmel did not provide serious resistance to an order authorizing the deputy sheriff to take all the necessary steps that may be required to achieve the return of the Falcon to South Africa. The ultimate draft order prepared by mr Van der Merwe also accommodated Carmel's obsession with the deregistration of the Falcon. It was made clear, however, that Carmel did not consent to the order.

I am satisfied that an order should be made in terms of the ultimate draft which I shall mark "X". It provides for the Falcon to remain on the South African register. *Pace* mr Labuschagne, I am of the view that the Falcon should remain registered in South Africa *pendente lite.* It is an extra precaution that I deem necessary to give effect to the preservation orders.

The upshot is thus that an order will be made that will hopefully have the effect of bringing the Falcon back to South Africa.

What this application was really about in the end, was the issue of costs. The merits are relevant as the determinant of the issue of costs.

The main argument centred around contempt of court proceedings, whether they were appropriate and, if so, the form the proceedings had to take, the standard of proof, and whether the applicant had proved a case.

Before the judgment in *Uncedo Taxi Service Association v Marinjwa and Others* 1998 (3) SA 417 E it was accepted that in civil proceedings contempt of court could be proved on a balance of probabilities. It went further. The authorities were to the effect that once non-compliance with an order of court was proved, it was for the respondent to rebut the inference of wilfulness on a balance of probabilities. See *Putco Ltd v TV and Radio Guarantee* Co *(Pfy) Ltd* 1985 (4) SA 809 AD at 836 D - E. In the *Uncedo Taxi Service Association* case *supra,* the court found that although notice of motion proceedings were permissible in civil contempt proceedings, (see 429 C - D), the right of a respondent to remain silent had to be respected (see 428 G) and that the contempt had to be proved beyond a reasonable doubt (see 428 A to B).

In *Laubscher v Laubscher supra* at 357 H - 358 A the court found, in effect, that although it might infringe a respondent's constitutional rights to be committed for civil contempt on a balance of probabilities, it was a reasonable and justifiable limitation in terms of section 36 (1) of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996) (the Constitution). The motivation given was that it would be reasonable to expect of an applicant who is not the State, to prove what he has to prove on a balance of probabilities. Earlier in the judgment the court referred to the striking

difference between criminal proceedings, where an individual has to face the giant machinery of the State and civil proceedings, where the applicant does not dispose of similar resources.

I am not convinced that the fact that the State is not the applicant in civil proceedings is a sufficient reason to determine the standard of proof. In this case the applicant happens to be the State, not as the prosecuting authority, but as the fiscus. If a distinction must be made in civil contempt proceedings in order to justify a limitation of fundamental rights, it must be done on other grounds.

It is trite that the non-compliance with a court order also constitutes a criminal offence. See S *v Beyers supra* at 80 E - H. That in itself would not, in my view, warrant the conclusion that in civil contempt proceedings the criminal standard of proof should apply. It is a common phenomenon that the same conduct may give rise to criminal proceedings, where a case must be proved beyond a reasonable doubt, or civil proceedings, where proof on a balance of probabilities is sufficient.

I am also not convinced that a respondent in civil contempt proceedings can be described as "an accused" so as to be entitled to the whole gamut of rights afforded by section 35 (3) of the Constitution. In this regard the distinction made in *Nel v Le Roux NO and Others* 1996 (3) SA 562 CC at 571 B - F, seems to be applicable.

I must accept, however, that to the extent that civil contempt proceedings are avowedly aimed at incarceration, even with the respondent having the keys of the prison in his own pocket, there is a potential deprivation of the liberty of the respondent which has to be justified in terms of section 36 (1) of the Constitution.

Cases like *Re Bramblevale Ltd supra* and *Witham v Holloway supra* are strong support for the proposition that civil contempt should be proved beyond a reasonable doubt.

On the other hand there is the approach in the United States of America where a distinction is drawn between coercive sanctions and punitive sanctions. Only in the latter case is proof beyond a reasonable doubt required. The law in the United States was expounded at length in *Mineworkers v Bagwell* 512 US 821 (1994), and although it was stated that the distinction between civil and criminal contempt cases is somewhat elusive, it was accepted that where civil contempt proceedings are non-punitive, fewer procedural protections are required.

I find the American approach attractive, coming as it does from a jurisdiction with an honourable human rights culture. It can fit in with section 36 (1) of our Constitution. That is all the more so because in our law, civil contempt proceedings for purely punitive purposes are not allowed and civil contempt proceedings should only be used as a last resort. That was the position even before the judgment in *Uncedo Taxi Service Association supra.*

It is because of these two requirements that I am of the view that the original application was doomed. For that reason I do not find it necessary to make any conclusive finding as to the standard of proof in civil contempt proceedings.

I say that according to our law civil contempt proceedings should be brought in order to bring about compliance with an order of court and not purely for the sake of punishment. As it was put in *Cape Times v Union Trades Directories & Others* 1956 (1) SA 105 N at 121 C - D, if the coercive element is lacking, the applicant has no *locus standi* to ask for a committal. See also the case of *Naude v Searle supra* at 392 F - 393 B.

It is also a requirement of our law that civil contempt proceedings should be used as a last resort. See the *Cape Times* case *supra* at 120 C - E, *Naidu and Others v Naidoo and Another* 1993 (4) SA 542 D at 545 G - J and *Bannatyne v Bannatyne* 2003 (2) SA 359 SCA at 362 F - 363 A. It would, for instance, not competent for a purchaser to commit a recalcitrant seller, who refuses to give transfer of an immovable property in terms of a court order for contempt, because he can ask the court to authorize the deputy sheriff to sign all the necessary documents on behalf of the seller in order to effect transfer. The analogy with what happened in this case is obvious.

In this case the original notice of motion was aimed at punitive incarceration. Although it was stated in the founding affidavit that the object of the

application was to bring about the return of the Falcon to South African, the prayers were not tailored accordingly. Twelve acts of contempt were alleged, the first being the permanent removal of the Falcon from South Africa. In view of the fact that the applicant at that stage only relied on the first preservation order, which did not prohibit the removal of the Falcon from South Africa, this act of contempt could not be the basis of a committal. See also in this regard the finding of the Supreme Court of Appeal in paragraph 33, p2588 of the papers. The other alleged acts of contempt referred to various steps like the removal of the Falcon from Basel, an attempt to have it deregistered in South Africa, the transaction of 5 September 2002 and the prelude to it, and the conduct of the respondents in court proceedings All these acts could not form the basis of a committal because it was not asked, and in some cases could not be asked, that the acts be undone so as to avert incarceration. The applicant's main complaint is the transaction of 5 September 2002 which resulted in Carmel stepping into the shoes of RMB and Manco. There was never a suggestion by the applicant that Carmel should divest itself of its share in HASP in favour of, say, HASP. Without such a prayer any reliance on the transaction of 5 September 2002 must be punitive, if it is not simply irrelevant.

As the application was formulated originally it simply did not afford a basis for an order for committal for contempt as a coercive measure.

When the notice of motion was amended by introducing a reliance on paragraph 2.4 of the second preservation order, the prayers were not

amended to make it clear that imprisonment was only asked if the Falcon was not brought back to South Africa. I am prepared to accept, however, that prayers 2 and 3, which refer to the first and second respondent respectively, which both contain the phrase "committed to imprisonment for a period of time, and on conditions to be determined by this Honourable court", by implication refer to conditional imprisonment, that is imprisonment suspended on conditions aimed at compliance.

The problem is, however, that the amended notice of motion, by introducing prayer 9, effectively killed the application as an application for a committal for contempt, however much coercive it might otherwise have been. Prayer 9 provided the alternative remedy which made a recourse to a committal unnecessary, in fact impermissible.

After the amendment of the notice of motion the applicant was indeed asking competent relief, essentially the relief that I intend to grant.

Mr van der Merwe embarked in an analysis of the correspondence in order to show that HAS was in fact not as cooperative as it pretended in its answering affidavit dated 1 February 2005. In my view the *bona fides* of HAS's attempts to ascertain what had to be done to effect the return of the Falcon, as set out in that affidavit, must be accepted. The correspondence was in my view, a fruitless sparring about issues like whether it was a complex matter to return the Falcon, whether HAS should furnish applicant with an affidavit in Carmel's application for deregistration of the Falcon, whether an independent third

party should be appointed, whether such party should be an aviation expert, an attorney or a liquidator, the form of the mandate of such party etc .. What the applicant was trying to do was to extract more from HAS than it was claiming. It must be remembered that in view of the attitude of Carmel the appropriate relief was an order to authorize the deputy sheriff to take the necessary steps to bring the Falcon back. To the extent that it was applicant's case that HAS was playing a game because it was, just like Carmel, being manipulated by the first respondent, I must repeat that I cannot make such a finding, that being something that will have to be determined in the main action.

For the purposes of making an order for costs the matter must divided into two: the application as it was originally and as it was after the supplementary founding affidavit was filed. In my view the application would have resulted in no order being made if the supplementary affidavit had not been filed and if the notice of motion had not been amended. It seems to me obvious that the applicant will have to pay the costs of what I will call, for the sake of convenience, the original application. The only issue is whether punitive costs should be awarded.

There is another issue: the costs of the second respondent.

I want to deal with the costs of the second respondent first. It was acknowledged in the applicant's replying affidavit, filed on 19 January 2004, that the second respondent had ceased to be director of HAS before this

application was launched. She was retained as a respondent for purely punitive purposes. She was no decision maker who could in her own right take any remedial steps. My clear impression is that the applicant refrained from withdrawing the case against her, in spite of requests to do so, in order to keep pressure on her. An example is the first draft order in which it was stated that the second respondent should be committed for imprisonment for a period of two years subject to being released, *inter alia,* if she made a full disclosure on affidavit relating to the transaction of the 5 September 2002, the subsequent control of the Falcon and the whole issue of Carmel.

In my view this attitude of the applicant towards the second respondent was reprehensible and should be visited with an order that her costs be paid on a scale as between attorney and client. I can also not see why the costs of three counsel should not be allowed. It was convenient that she should employ the same counsel as the first respondent. It will of course remain a matter of taxation to determine what time and how many counsel were devoted to the case of the second respondent at each stage.

As far as the costs of the other respondents are concerned, that is in respect of the original application, I do not think that punitive costs should be awarded. There was a preservation order and the applicant had every reason to be perturbed about the removal of the Falcon from South Africa and the fact that it remained in Europe. I can also not find that his suspicions about the transaction of 5 September 2002 are farfetched. Then there is the fact that even before the amendment of the notice of motion, after the final

dismissal of the appeal against the second preservation order, some of the respondents did show a willingness to cooperate towards the return of the Falcon. In my view that had something to do with the fact that this application was pending. In the end I cannot find that the application in its original form was vexatious, not even in its effect.

I have considered ordering Carmel to pay the costs of the amended application in view of the fact that it was owing to its attitude that HASP, on which the duty lay in terms of the second preservation order to bring the Falcon back to South Africa, could not take any effective decision to that end. Carmel's attitude was, however, based to an extent on its view that the Falcon should first be deregistered, a point of view which, on the face of it, may be correct. As it is, that view of Carmel is now embodied in the draft that I shall make an order of court.

I have therefore come to the conclusion that the costs of the amended application should be treated like the costs of an interim interdict. They should be costs in the main action, that is the action for the piercing of the corporate veil. The problem that I have here, however, is that Carmel is not yet a party to the main action and, for all I know, may never become a party to it.

For that reason I have come to the conclusion that the costs of the amended application should be ordered to be costs in the main action with the proviso

that if Carmel is not joined as a party to the main action, the issue of those costs may be argued separately.

For the purposes of determining what is the original application and what is the amended application I think that the 3rd November 2004, the date when leave to appeal was refused by the Constitutional Court, should be the dividing line.

The application was heard over five court days. For the purposes of taxation I should make an allocation of the time devoted to the original application and the time devoted to the amended application. In my view it would be fair to say that one day was devoted to the amended application and four days to the original application.

In the result the following order is made:

1. The draft order marked "X" is made an order of court.
2. It is ordered that the applicant must pay the costs of the second respondent on a scale as between attorney and client, which costs are to include the costs of three counsel, where applicable.
3. The applicant is to pay the costs of the first, third, fourth, fifth and sixth respondents up to the 3rd November 2004 as well as the costs of four court days, which costs shall include the costs of three counsel.
4. The costs of the application incurred after 3 November 2004 as well as the costs of one court day, which costs shall include the

costs of three counsel, shall be costs in case 20827/02 provided that if the third respondent is not joined as a party to that case, those costs may be argued separately.

C BOTHA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

"X"

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 10240/2003

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
and	
DAVID CUNNINGHAM KING	First Respondent
KATIA CHRISTISON	Second Respondent
CARMEL TRADING CO LTD	Third Respondent
HAWKER AVIATION SERVICES PARTNERSHIP	Fourth Respondent
HAWKER AIR SERVICES (PTY) LTD	Fifth Respondent
METLIKA TRADING CO LTD	Sixth Respondent
THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Seventh Respondent

DRAFT ORDER

Having heard counsel for the parties and having read the Notice of Motion and other documents filed of record it is ordered that:

1. The Deputy Sheriff be authorised hereby to sign all documentation on behalf of the third, fourth and fifth respondents, which may be required in order to obtain the return of the Falcon aircraft with registration number ZS-DAV to the Republic of South Africa (Lanseria airport).

2. The Deputy Sheriff is authorised to take all such steps as may be necessary or expedient in order to effect the expeditious return of the aircraft to South Africa on behalf of the aforementioned respondents as if he has been duly authorised by them so to do.

3. It is declared that the Deputy Sheriff, in exercising his duties in terms of this order, is entitled to apply to the seventh respondent for the deregistration of the Falcon and the simultaneous re-registration thereof on the South African civil aircraft register of the seventh respondent, in the name of the fifth respondent. This is without prejudice to any right which the third respondent, or the fourth respondent, may possibly have, to approach this Honourable Court after return of the Falcon to South Africa (whether in any existing application or any further application) for permission to register the Falcon in such other name as may be expedient.

4. The Deputy Sheriff will be entitled to approach this Honourable Court for directions in performing his duties in terms of the order.

5. It is declared that pending the finalisation of the action under case number 20827/02 the Falcon must remain registered in South Africa on the South African civil aircraft register of the seventh respondent, subject to the applicable provisions of the existing preservation orders dated 18 February 2002 and 18 February 2003. This order supercedes orders 2 and 3 of this Honourable Court granted under case number 24869/2002 on 10 November 2004.

THE COURT **THE REGISTRAR**

DATUM AANGEHOOR:	18 - 22 APRIL 2005
REGTER:	C BOTHA
PROKUREUR VIR APPLIKANT:	THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES C/O Staatsprokureurs Attorneys for the Applicant Old Mutual Centre 8th Floor 167 Andries Street Pretoria Tel. 012 310-2754 Ref: Ms Balim 6/2001/05724/J9 Tel. 012 309 1500/1568 **ADV MAC VAN DER MERWE** S.C. **ADV H SNYMAN** **ADV N TSHOMBE**
PROKUREUR VAN RESPONDENTE:	MOSS COHEN & PARTNERS 1 st Respondents' Attorneys Ref: Mr D Cohen Tel: 011 728 5277 c/o JACOBSON & LEVY ATTORNEYS SAAU Building 10th Floor Cnr Andries & Schoeman Streets Pretoria Ref. Mr Bernard Levy Tel. 012 320 2202 **ADV. B LEVIN** **ADV MARKUS** **ADV. STEIN** **ADV.CHASKELSON** KATIA CHRISTISON Second Respondent No.2 Buchner Crescent, Lonehill, Sandton 2146

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AUTHORITY
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DATUM VAN UITSPRAAK: 29 April 2005