



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 016/05

Reportable

In the matter between

Frans Edward Prins ROOTMAN

Appellant

and

The President of the Republic of South Africa

First respondent

The Minister of Justice and

Constitutional Development

Second respondent

The Director General of Justice

Third respondent

The South African Reserve Bank

Fourth respondent

The Commissioner of the South African

Revenue Services

Fifth respondent

**The Government of the Democratic Republic
of Congo**

Sixth respondent

Before: HOWIE P and CAMERON, NUGENT, LEWIS and JAFTA JJA

Heard: 15 May 2006

Delivered: 00 May 2006

Summary: Where a foreign state does not comply with an order of a South African court the South African government does not have a duty to intercede on behalf of the judgment creditor to assist in ensuring compliance.

**Neutral citation: This case may be cited as Rootman v The President of
the Republic of South Africa [2006] SCA xxx RSA**

JUDGMENT

LEWIS JA

[1] Does the State have a duty to citizens to uphold the dignity of the courts, and give effect to their orders, by taking steps to assist a creditor in ensuring compliance by a foreign government with an order of court against it? The appellant, Mr Frans Rootman, asks for a declaratory order that the first and second respondents, the President of the Republic and the Minister of Justice and Constitutional Development (to whom I shall refer together as 'the State') have a constitutional duty to take all reasonable steps to assist him in securing the execution of a money judgment of the Pretoria High Court issued in September 2003. Rootman does not now ask for relief against any of the other respondents originally sued by him.

[2] The court order in question was made by the Pretoria High Court on 2 September 2003 against the Government of the Democratic Republic of Congo ('the DRC'): it was for payment to Rootman of substantial sums of money in terms of a contract between Rootman and the DRC. The total amount of the claims awarded, plus interest, is in excess of \$15 000 000. The contract on which Rootman relied was entered into in 1998 by a company known as 'Moneyline', represented by Rootman, and the DRC. The contract mandated Rootman, on behalf of Moneyline, to investigate the theft and illegal importation of cobalt from the DRC. The company was to be paid commission on the value of cobalt recovered as a result of Rootman's work. The contract was subsequently changed and Rootman became a party to it, earning a fee rather than commission for his work. The DRC persistently refused to pay either Moneyline or Rootman despite his having traced stolen cobalt worth many millions of dollars. Rootman, having acquired Moneyline's claims against the DRC, eventually sued for payment in the Pretoria High Court. The action was defended. But in the end, after numerous postponements and changes in the DRC's lawyers, the order sought was granted by default.

[3] Rootman asserts that the DRC has refused, intentionally, unlawfully and in flagrant disregard of the court's authority, to make the payment due to him. He has tried in vain to execute the judgment. Now he asks this court for an order that the State take reasonable steps to assist him in ensuring

compliance with the court order. He asks also for an order that he be advised in due course what steps the State has taken.

[4] In the court below the relief sought was of a different nature, in effect a structural interdict, directing the President, the Minister and the Director General of Justice to take reasonable, effective and appropriate steps to effect compliance with the court order. Second, Rootman sought an order that they indicate by affidavit, within three months of the date of the order, what steps they had taken to ensure that the court order be given effect. In essence, what Rootman sought was an order that the respondents ensure execution of the order for payment. Botha J in the court below refused the relief sought, finding that there was no duty on the State to ensure execution of an order of court against the DRC. The appeal to this court lies with his leave.

[5] Rootman argues that the State's duty to assist him is founded on various provisions of the Constitution. He invokes, first, s 165(4) and (5) which deal with judicial authority. Section 165(4) provides:

'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

Section 165(5) provides:

'An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

The argument is that the DRC has, in ignoring, indeed flouting, an order of a South African court by refusing to make payment to Rootman, undermined the dignity and effectiveness of the court, which the State has a duty to uphold.

[6] Second, s 34 of the Constitution, which provides that everyone 'has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court' is invoked as the basis for arguing that Rootman has the right to execute the judgment granted in his favour, a right that he has been effectively unable to exercise. The State should vindicate this right too, it is argued. Thirdly, the provisions of the

Constitution relied upon are underpinned by s 7(2) which requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

[7] Although Rootman has taken several steps to have the order executed he has been largely unsuccessful. He has had property of the DRC attached in Belgium and in Israel, and he has received the proceeds of the sale of parts of an aircraft that was in South Africa. (Rootman contends that the purchaser was in fact the DRC itself, represented by a front company, but nothing can turn on this for present purposes.) If he is left with an ineffective order, he argues, the dignity and effectiveness of the courts will be affronted, and the State will be failing in its duty to protect his rights as a citizen.

[8] The efficacy of court orders is ordinarily ensured through execution procedures. These are given effect by legislation, rules of court, and officers of the court who enforce execution in respect of a debtor's property. Rootman's ability to enforce the order against the DRC in his favour is circumscribed, however, by s 14(1)(b)(ii) of the Foreign States Immunities Act 87 of 1981. The section provides that the property of a foreign state shall not be subject to any process for the enforcement of a judgment. Section 14(3)(b) creates an exception in respect of property 'in use or intended for use for commercial purposes'. Rootman has attached and has had sold in execution the only commercial property of the DRC in South Africa – the aircraft sold in 2003.

[9] Rootman, as I have said, no longer asks the State to ensure execution of the order in his favour: he requests no more than a declaratory order that the State has a duty to take steps to assist him in achieving compliance with the court order. The duty to him, Rootman argues, is based on what he contends are four incontrovertible propositions. The flagrant refusal by the DRC to comply with an order of a South African court erodes the rule of law. Second, the rule of law requires the State to assist a citizen to enforce his or her rights. Third, the right of every citizen to have a dispute determined by a court (s 34 of the Constitution) entails that the State must ensure the

effectiveness of court orders. And fourth, s 165(4), set out earlier, requires that the State take measures to ensure the efficacy of the courts.

[10] Rootman contends that it is insufficient for the State merely to pass legislation and put mechanisms in place for ensuring compliance with court orders: it must take other measures, as envisaged in s 165(4). No submission was made, however, as to what other measures the State must take in so far as the rights of ordinary commercial creditors are concerned. It was not argued that the State should do more, in order to give effect to its duties to citizens under the Constitution, to ensure the dignity and effectiveness of the courts, than create the court structures, procedures and mechanisms for enforcement that already exist. There does not appear to me to be any reason why a citizen who enters into a commercial contract with a foreign state should be treated differently, and preferentially, especially given the provisions of the Foreign States Immunities Act.

[11] The argument for the State is that the Constitution, including the Bill of Rights, does not have extra-territorial effect. This is so even in so far as citizens are concerned. In *Kaunda v President of the RSA*¹ the court held that the Constitution does not bind anyone outside South Africa. Chaskalson CJ said:²

‘[T]he Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders.’

Further:³

‘The bearers of the rights [under the Bill of Rights] are people in South Africa.’

That case was concerned with the rights of South African citizens elsewhere in Africa. Chaskalson CJ continued:⁴

‘There may be special circumstances where the laws of a State are applicable to nationals beyond the State’s borders, but only if the application of the law does not interfere with the sovereignty of other States.’

A fortiori the laws of South Africa do not, as a general rule, bind persons outside of the country’s borders.

¹ 2004 (10) BCLR 1009 (CC).

² Para 36.

³ Para 37.

⁴ Para 44.

[12] In my view the essential difficulty with Rootman's case is that the DRC, as a debtor outside the border of the country, is not bound by the South African Constitution. The fact that it submitted to the jurisdiction of the court in a commercial matter does not impose on the DRC a constitutional duty to respect the dignity of the courts. It is not bound, outside of South Africa, to respect the rule of law either. And if the DRC has no duty, how can the court be asked to order the State to request that it comply with one? Rootman recognizes that the DRC is bound neither by the South African Constitution nor by the rule of law in South Africa. Hence he does not ask for direct relief against it. He nonetheless argues that the evasion by the DRC of its commercial debt undermines the rule of law in such a way as to oblige the State to intercede on his behalf. The flaw in the argument is that the DRC's evasive conduct is no more damaging to the rule of law than is non-compliance with a court order by any other commercial debtor, in respect of whom, as pointed out (para 10), it is not claimed that the State has failed in its duties.

[13] At most, the State can engage in diplomatic negotiation with the DRC through diplomatic channels but it cannot be ordered to do so. Courts are reluctant in any event to interfere with diplomatic engagement: see *Kaunda* where Chaskalson CJ said⁵ that a decision as to whether protection should be given to a South African citizen outside the Republic is

'an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.'

[15] Counsel for Rootman conceded that his request for an order that the State take reasonable steps to assist him in obtaining compliance with the

⁵ Para 77. See also the judgment of Ngcobo J in *Kaunda* para 172.

court order would be met simply by the State's writing a letter, or making a telephone call, to the President of the DRC, or other appropriate person representing it, requesting compliance with the order. In my view, this court should not make any order requesting the State or any other person simply to request a debtor to comply with a court order. Courts should not make orders where it is known that they cannot be enforced. Relief must be effective.⁶

[14] For these reasons I consider that this court should not make the order sought by Rootman, and the appeal must fail. As to costs, Rootman argues that should the appeal fail, a costs order should not be made against him since he has been seeking to vindicate a constitutional right. It is by now trite that where a litigant does ask for the enforcement of a constitutional right, but does not succeed, he or she should not be visited with a costs order. In my view, however, Rootman was attempting to enforce a commercial contract and costs should follow the result.

[16] The appeal is dismissed with costs including those occasioned by the use of two counsel.

C H Lewis
Judge of Appeal

Concur:

Howie P

Cameron JA

Nugent JA

Jafta JA

⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69 and *Minister of Home Affairs v NIKRO* 2005 (3) SA 280 (CC) para 74.