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

CASE NO.: 29087/04

In the matter between:

FRANS EDWARD PRINS ROOTHMAN	**APPLICANT**
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 SERVICE	**FIFTH RESPONDENT**
THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF THE CONGO	**SIXTH RESPONDENT**

JUDGMENT

BOTHA, J:

The applicant is mr F E P Rootman.

The first respondent is the President of the Republic of South Africa.

The second respondent is the Minister of Justice and Constitutional Development.

The third respondent of the Director General of Justice.

The fourth respondent is the South African Reserve Bank.

The fifth respondent is the Commissioner of the South African Revenue Service.

The sixth respondent is the Government of the Democratic Republic of the Congo.

All six respondents entered appearance to defend. Affidavits were filed on behalf of the first, second, third and fifth respondents. The fourth and sixth respondents in due course withdrew their opposition.

The applicant only asks relief against the first three respondents.

The relief he asks is (a) a mandamus ordering them to take steps to ensure compliance by the sixth respondent with a judgment granted in this court in case 23702/2001 and (b) an order compelling the said respondents to indicate on affidavit within three months what steps they had taken to ensure compliance with the said order.

The applicant states that he is aware of the fact that the sixth respondent intends taking steps to have the judgment rescinded, but he contends that such an application would be out of time and would have no chance to succeed.

The applicant obtained the judgment against the sixth respondent pursuant an application in terms of Rule 35 (7).

The applicant had sued the sixth respondent for $11 043 744,08 in respect of commission (claim 1), $85 000,00 in respect of remuneration (claim 1), R122 569,89 in respect of monies lent (claim 2), and $96 000,00 in respect of remuneration ceded (claim 3).

The claims arose from an agreement the applicant alleged he had concluded with the sixth respondent. In terms of the agreement he would be entitled to locate and seize illegal cobalt being exported from the Democratic Republic of the Congo (DRC), sell it on behalf of the sixth respondent and its mining arm, Gecamines, and receive 30 % of the net proceeds.

The action in case 23702/2001 was instituted in October 2001. The sixth respondent submitted itself to the court's jurisdiction and filed a plea.

The action was preceded by an application under case number 28027/2000 for an attachment *ad confirmandam iurisdictionem*. A Falcon jet, allegedly the property of the sixth respondent, was attached at the premises of Execujet at Lanseria Airport.

Thereafter the applicant reached a settlement with the sixth respondent embodied in a written settlement agreement, in terms of which the aircraft would be sold under an international tender process.

In the mean time the sixth respondent had instituted proceedings to prevent the applicant from selling the aircraft. Interim relief was granted to the sixth respondent. The sixth respondent also launched a substantive application to have the attachment of the aircraft set aside.

The applicant, again, launched proceedings to have the interim relief granted to the sixth respondent set aside. After the sixth respondent had filed lengthy affidavits in this application, the applicant decided to resile from the settlement agreement and to fall back on his original cause of action. That is when the summons was issued.

The sixth respondent filed a special plea and pleaded over. In the special plea it was alleged that the applicant had abandoned his original cause of

action by concluding a settlement. The sixth respondent brought an application to have the special plea adjudicated separately. That application was dismissed.

The Rule 35 (7) application also has a history. The sixth respondent had changed attorneys. At a stage the sixth respondent was given 20 court days in which to make discovery. When the matter was heard in the unopposed court on 2 September 2003, a ms Maria Mboya, allegedly a legal advisor of the sixth respondent, made submissions to the court. In the end an order was granted, ordering the sixth respondent to satisfy all three claims of the applicant together with interest and costs.

The applicant has set out all the steps he had taken to obtain satisfaction of the judgment. They include:

(a) the issue of writs.

(b) a sale in execution of the aircraft, which yielded $1,9 million.

(c) the attachment and sale in execution of a consignment of cobalt which yielded R50 000,00.

(d) steps to have the judgment recognized in Israel in order to have an aircraft attached there.

(e) the issue of a writ in Belgium in order to attach funds in a Belgian bank.

(f) steps to have the judgment recognized in Zambia in order to attach property of the sixth respondent situated in Zambia.

(g) an attempt to attach the sixth respondent's shareholding in a company called Miba, which is registered as an external company in South

Africa. That attachment was set aside on the basis that the attachment should have been effected in the DRC.

In the end, it is alleged that apart from the amounts of $1,9 million and R50 000,00, the balance of the judgment debt is still outstanding. The balance, inclusive of interest and costs, amounts to more than $15 million. It has cost the applicant almost R2 million to execute the judgment.

It is alleged that the sixth respondent makes use of evasive tactics. When the sixth respondent acquires assets in other countries, it makes use of fronts, individuals or companies. It is alleged that the South African authorities, like the fourth and sixth respondents, have the power to pierce the veil of the ownership of the sixth respondent in goods and funds passing through South Africa.

Then it is alleged that the rule of law is not firmly established in the DRC and that it would not be possible to enforce the applicant's rights in the DRC.

It is contended that it is untenable for the South Africa Government to maintain diplomatic relations with the sixth respondent whilst the applicant's judgment remains unsatisfied.

It is submitted that the sixth respondents should be prevented from using the infrastructures and systems of the Republic as long as the judgment remains unpaid.

With reference to a report of the United States Central Intelligence Agency, it is submitted that the sixth respondent has the ability to satisfy the judgment.

In a letter dated 12 July 2004, the applicant's attorney set out his predicament to the first respondent and asked for his assistance and guidance in the matter. On 13 July 2004 the office of the first respondent acknowledged receipt of the letter. It was stated that the matter was receiving attention and that the attorney (incorrectly stated to be the sixth respondent's attorney) would be advised of the outcome.

On 14 September 2001, the applicant's attorney addressed a second letter to the first respondent in which the first respondent was asked to use his influence to arrange a meeting between the sixth respondent and the applicant's legal advisers. No reply has been received to this letter.

The applicant bases the relief claimed on the following:

(a) that there is a valid and binding judgment in his favour that remains unfulfilled.

(b) that the sixth respondent submitted to the jurisdiction of the court and was at all times represented by competent legal advisors.

(c) that as a citizen of the Republic he is entitled to demand that the first and second respondents in particular, assist him in collecting payment from the sixth respondent.

(d) that the first and second respondents are bound by section 85 (2) read with section 165 (4) of the Constitution of the Republic, 1996 (Act 108 of 1996) (the Constitution) to maintain the independence, dignity and effectiveness of the courts, and therefore to assist him in collecting payment from the sixth respondent.

(e) that the duty of the first and second respondents to assist him is also underpinned by the rule of law, which is a foundational value, not only of the Constitution but also of the Constitutive Act of the African Union of which both South Africa and DRC are members.

(f) that the failure of the respondents to demand compliance with the judgment from the sixth respondent, amounts to a violation of the applicant's fundamental right in terms of section 34 of the Constitution to have disputes resolved by a court of law.

The applicant filed a supplementary affidavit in which he alleges that the sixth respondent acted in *fraudem creditorum* at the execution sale where the Falcon aircraft was sold. It is cited as an instance of the sixth respondent's disregard for the rule of law and orders of court. It is alleged that the sixth respondent colluded with other parties to ensure that what was sold at the execution sale was not much more than an empty shell. At the auction the applicant was informed by the sheriff that what had been attached by him was only the hull of the aircraft and one and a half engine. The aircraft was in a dismantled state.

Reference is also made to an Anton Piller application brought by the applicant on 6 December 2004 which allegedly yielded proof that it was not the ostensible purchaser, Airlease Africa (Pty) Ltd, but the sixth respondent, who bought the aircraft at the sale in execution.

The conclusion that is drawn from this is that the sixth respondent is a rogue government that will stoop to any level op deviousness to frustrate the execution of the judgment of this court.

It is alleged that the sixth respondent is given a semblance of respectability by the diplomatic recognition it enjoys in South Africa.

It is contended that where the judiciary does not have the inherent power to enforce its judgments, the applicant is entitled to seek assistance from the other two arms of government, not only to assist him, but also to preserve the dignity and sanctity of the court.

In an answering affidavit on behalf of the first, second and third respondents, made by a Director, Law Enforcement, in the Department of Justice and Constitutional Development, it is accepted that the background of the dispute between the applicant and the sixth respondent is not relevant to the application. Only the following legal points are raised:

(a) that the relief claimed is vague and not capable of enforcement.

(b) that the relief claimed does not conform to the requirements of a mandamus.

(c) that the Minister of Foreign Affairs should have been joined.

(d) that the matter is governed by private international law and that the applicant has not made out a case under that law.

(e) that the applicant has not exhausted all his remedies, whether provided by the South African government or by private international law.

An affidavit was filed on behalf of the fifth respondent in which the point is made that the fifth respondent cannot interfere with legitimate trade. The applicant could, however, enquire about the ownership of goods transported through South Africa that are stored in licensed customs warehouses. Attention is drawn to the secrecy provisions of the Customs and Excises Act, 1964 (Act 91 of 1964) which only allows the disclosure of information if certain conditions are met.

Mr Katz, who, with mr du Plessis, appeared for the applicant referred to section 165 (4) of the Constitution, in terms of which the first and second respondents, by virtue of their executive authority, are obliged to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". Then there was the duty imposed by section 41 (1) (e) of the Constitution on all spheres of government to co-operate and to co-ordinate their actions.

He relied on the applicant's status as a citizen of the Republic and referred to **Kaunda and Others v President of the Republic of South Africa and Others 2004 (10) BCLR 1009 CC paragraphs 177 and 178** as authority for

the proposition that a citizen has a right to be accorded the rights of citizenship.

With reference to **De Lange v Smuts NO and Others 1998 (3) SA 785 CC paragraph 31** he contended that the State has the duty to assist litigants to enforce their rights, including the enforcement of their civil claims against debtors. This duty, he submitted, is derived from the rule of law. In this regard he referred to sections 1, 2, 7 (1) and 237 of the Constitution. He submitted that the guarantee of the rule of law in section 1 (c) of the Constitution was justiciable.

He pointed out that in terms of article 4 (m) of the Constitutive Act of the African Union, the sixth respondent, being a member state, is also subject to the rule of law.

He also relied on section 34 of the Constitution, which guarantees the right of access to courts. In this regard he referred to **Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 CC** at **paragraphs 11 and 12** where the need to institutionalize disputes was stressed, lest parties have recourse to self help. He submitted that by failing to assist the applicant, the respondents concerned have rendered his rights in terms of section 34 nugatory. In this regard he referred to **Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 TK** at **453 A-C**.

In view of the fact that the sixth respondent was no ordinary litigant, but a sovereign state he submitted that the State, as a co-equal sovereign state, had a special duty to come to the assistance of the applicant.

He pointed out that if the sixth respondent had been an ordinary litigant contempt proceedings would have been available to the applicant. In terms of section 2 (3) of the Foreign States Immunities Act, 1981 (Act 87 of 1981) that avenue was closed to the applicant. Therefore the applicant had no alternative remedy. He also referred to the non-availibility of insolvency proceedings as a means of execution.

In view of section 14 (3) of Act 87 of 1981 he disavowed any intention on the part of the applicant to levy execution on any assets of the sixth respondent not used or intended to be used for commercial purposes.

He cited an article by professor Gerhard Erasmus, Proceedings against Foreign States, the South African Foreign States Immunities Act, in which at p105, it is stated that the drawbacks relating to execution in Act 87 of 1981 may in the final instance necessitate diplomatic pressure.

He referred extensively to the judgment of the Constitutional Court in **President of the Republic of South African and Another v Modderklip (the Modderklip case) Boerdery (Pty) Ltd and Others (case CCT 20/04 decided on 13 May 2005)** and *inter alia* pointed to the following features:

(a) that there was a problem which the State failed to solve (paragraph 33)

(b) that it was held that the State had a duty to do more than to provide mere mechanisms and institutions (paragraph 43)

With respect to the relief claimed, he submitted that it was appropriate and relied, *inter alia*, on **Minister of Health v Treat Action Campaign (No 2) 2002 (5) SA 721 CC** and the as yet unreported judgment of the Constitutional Court in **Sibiya and Others v Director of Public Prosecutions and Others (case CCT45/04 decided on 25 May 2005)** at **paragraph 62**.

Mr Puckrin SC who, with Ms Ellis, appeared for the first, second, third and fifth respondents, submitted in the first place that the relief sought by the applicant was vague and incapable of enforcement. He submitted that there was no obligation on the respondents to do anything more than to provide the existing statutory and procedural machinery for the enforcement of judgments.

He pointed out that the applicant freely entered into a contract with a foreign state, thus making him subject to international law. He referred to the case of **Kuanda and Others supra** at **paragraph 172**, and contended that the enforcement of the applicants rights as a citizen is in general territorially confined to the borders of the Republic.

He referred the court to the provisions of Act 87 of 1981 as well as the provisions of the Diplomatic Immunities and Privileges Act, 2001 (Act 37 of 2001) which incorporated the 1961 Vienna Convention on Diplomatic Relations. He submitted that article 32 of the Vienna Convention, which

provided that a waiver of immunity from jurisdiction in respect of civil proceedings shall not be held to imply a waiver of immunity in respect of execution of a judgment, regulated the position in respect of execution against a foreign state.

With regard to the letters of the applicant's attorney dated 12 July 2004 and 14 September 2001, he submitted that they did not ask for the relief now claimed. The letter dated 12 July 2004 in fact showed that the applicant was still in the process of pursuing other remedies. The letter dated 14 September 2004 only asks for a meeting to be arranged.

He dealt with the Modderklip case at length and argued that it was distinguishable in several respects.

He denied that the applicant's rights in terms of section 34 of the Constitution would be infringed if no relief was granted. He pointed out that the applicant could for 30 years execute enforce his judgment in any country where the sixth respondent had commercial property.

He submitted that the applicant had not shown that he had exhausted alternative remedies, beginning with proceedings in the DRC itself, where no proceedings had even been attempted.

On behalf of the fifth respondent he referred to section 93 of Act 19 of 1964 and submitted that the fifth respondent had no power to interfere with legitimate trade.

In my view section 14 (3) of Act 87 of 1981 applies to execution against a foreign state in Republic. Article 32 of the 1961 Vienna Convention which was incorporated by Act 37 of 2001, relates to diplomatic agents and members of their families and households.

It is clear that in terms of section 14 (3) of Act 87 of 1981 execution can only be levied on commercial assets of a foreign state. Mr Katz did not claim that the applicant had any right to levy execution on any other assets of the sixth respondent. It is obvious that the applicant can in this court only obtain relief in respect of assets that are situated in South Africa.

Purely as a matter of enforcing execution, I do not understand the basis of the application. It is not stated that there are commercial assets of the sixth respondent available for execution in the Republic and that the assistance of the first and second respondents are required to levy execution on them. The sale of the Falcon aircraft took place on 16 October 2003. The sale of the consignment of cobalt took place on 24 June 2004.

What is said is that there was an aircraft, that the applicant was led to believe that the whole aircraft had been attached and that the sixth respondent had fraudulently bought the aircraft through a front. If a fraud had

been perpetrated on the applicant it is not clear to me why there is a duty on the first respondents to come to the assistance of the applicant. Collusion between the sixth respondent and Airlease Africa (Pty) Ltd is alleged. It is not alleged that the sheriff was a party to the fraud attaching to the sale.

It is correct that section 34 of the Constitution guarantees access to courts in the sense that everyone has the right to have any dispute resolved before a court. In terms of section 165 (4) of the Constitution organs of the State must through legislative and other measures assist the courts to ensure *inter alia*, their dignity, accessibility and effectiveness. That is generally done through the creation of courts and a legal system. See **De Lange v Smuts NO and Others supra**, **paragraphs 31 and 32**. It is also so that access to the courts would be illusory if judgments cannot be enforced. See **Mjeni's case supra** at **453 C**.

The legal system allows for a process of execution of civil judgments. In this case the applicant has followed the procedure available, but with limited success.

It is not alleged that the procedure of execution is flawed or unfair.

The applicant has not spelt out precisely what assistance he requires from the first five respondents, but the suggestion is strong that the exertion of diplomatic pressure is indicated. See paragraph 6.35 and 6.36 of the founding affidavit.

It is clear that in a situation where a plaintiff is confronted with a recalcitrant peregrinus defendant who flouts an order of court, there could be no basis for invoking the assistance of the State to exert extra-judicial pressure on the defendant in order to achieve compliance with the order. It may even be improper for the State to comply with such a request. I fail to see why it should be otherwise just because the recalcitrant defendant happens to be a foreign government.

Diplomatic influence, persuasion, pressure even, is something of a very sensitive nature. See **Kaunda and Other supra, paragraph 172**. The court has, however, in that case found that extending diplomatic protection, being an exercise of public power, is justiciable. See paragraph 78. What was at stake in that case, however, was the extending of diplomatic protection outside the Republic to citizens of the Republic who were in distress. That does not mean that a citizen has a right to demand the exercise of diplomacy inside the Republic when he is engaged in civil litigation with a foreign power in a commercial matter and has been unable to obtain satisfaction of a judgment.

In the normal run litigation against a peregrinus defendant is fraught with the risk that a successful plaintiff will not be able to recover his claim in full. In most cases the plaintiff will be dependant on such assets as he has been able to attach *ad fundandam et confirmandam irurisdictionem*. If the outcome is that satisfaction of the judgment was only partial and limited to the value of

the assets attached, one can hardly say that it is an affront to the dignity of the court or that the court has been shown to be ineffective. It is simply what happens in litigation against a peregrinus defendant whose attachable assets are not enough to secure the amount of a possible judgment.

In this case it seems to be that the problem was not that the value of the asset attached was not sufficient, but that the applicant was defrauded in the process of execution. I cannot see how the applicant can have a right to invoke the assistance of the first respondents to rectify that. Seen from the perspective of the first and second respondents, I cannot see how they have a duty in the circumstances of this case, to exert pressure on the sixth respondent to effect payment of the balance of the judgment. They were not responsible for the predicament of the applicant. They are not in any way the guarantors of civil judgments.

For that reason also I find this case on a totally different footing from the Modderklip case. There a situation had developed for which the state was partially responsible. For that reason it was said that the State had the key to the solution of the problem. The crisis had arisen through a failure to provide housing and eviction could not be granted until alternative housing, which is also a responsibility of the State, had been provided. In this case the State can in no way be blamed for the fact that the execution process has yielded such meagre proceeds.

In a way it seems to me that the applicant's case is that because his debtor is a state with representation in the Republic, the South African state is obliged to utilise its diplomatic ties and whatever other leverage it has in order to obtain satisfaction of the judgment. I fail to see how the applicant can have more rights to obtain satisfaction of his judgment than the execution procedure allows.

For all these reasons I am of the view that the application must fail.

Before I conclude, I must deal with the letter of the applicant's attorney dated 14 September 2004 that remained unanswered. It was bad form not to have answered it. The officials in the first respondent's office who have left it unanswered have not served him well. The fact is, that what the applicant claimed, was not an answer to that letter, but assistance to obtain payment of his claim. Mr Katz conceded that the two letters sent to the first respondent were only relevant to justify the bringing of an application. For that reason the fact that the last letter remained unanswered cannot be the basis of any substantive relief, not even in the form of a deprivation of costs.

In the result the following order is made:

The application is dismissed with costs, which costs shall include the costs of two counsel.

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C BOTHA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATUM AANGEHOOR:	7 June 2005
REGTER:	C BOTHA
PROKUREUR VIR APPLIKANT:	c/o Fridland, Hart Inc Van der Strel Building 2nd Floor 179 Pretorius Street Pretoria Ref: Mr G Painter
ADVOKATE VIR APPLIKANT:	ADV A KATZ ADV M DU PLESSIS
PROKUREUR VAN RESPONDENTE:	The State Attorney Old Mutual Centre 8th Floor 167 Andries Street Pretoria Private Bag X91 Ref: KMM/zh 897/2004/04991/Z5
ADVOKAAT VIR RESPONDENTE:	ADV C PUCKRIN SC ADV I ELLIS
DATUM VAN UITSPRAAK:	9 Junie 2005