



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ELCOMP SP. Z O.O. v. POLAND

(Application no. 37492/05)

JUDGMENT

STRASBOURG

19 April 2011

FINAL

19/07/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Elcomp sp. z o.o. v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Sverre Erik Jebens,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 29 March 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37492/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Elcomp sp. z o.o. (“the applicant company”), a limited liability company with its seat in Warsaw, on 7 October 2005. The applicant company was represented by the president of the management board, Mr Feliks Sujkowski.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant company alleged that it had been deprived of its right of access to a court.

4. On 31 August 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 10 March 2003 the applicant company lodged a claim for payment of 153,977.48 Polish zlotys (PLN) (EUR 38,500) against a company R. with the Warsaw Regional Court. The case was to be examined by way of a summary procedure.

6. On 18 March 2003 the court ordered the applicant company to pay PLN 2,337.30 (EUR 580) in court fees for lodging its claim.

7. On 25 March 2003 the applicant company filed a motion for exemption from court fees. It argued that its revenue in previous years had decreased significantly and that it had had to pay overdue taxes and debts to its creditors. The applicant company further indicated that it did not own any property of significant value. On 1 April 2003 it submitted to the court its financial report for 2002, tax declarations CIT-8 for 2001 and CIT-2 for 2002, its bank account statements and information concerning its property and the number of employees.

8. On 25 April 2003 the Warsaw Regional Court dismissed the application for exemption. It found that the applicant company had generated substantial gross income (*przychód*) in 2001 (PLN 4,892,956.09) and 2002 (PLN 1,144,221.34) and would be able to pay PLN 2,300 in court fees.

9. On 15 May 2003 the applicant company appealed. It submitted that on 13 February 2003 it had filed a motion for insolvency. However, the motion had been rejected because the company had insufficient assets to cover the costs of the insolvency procedure.

10. On 17 October 2003 the Warsaw Court of Appeal dismissed the appeal. It underlined that the documents produced by the applicant company indicated that from January to April 2003 it had spent the amount of approximately PLN 800,000 and it had still possessed cash in its cash desk. The court also stressed that commercial entities should have set aside the resources necessary to fund potential litigation.

11. On 30 December 2003 the applicant company paid PLN 2,337.30 in court fees.

12. On 19 January 2004 the Warsaw Regional Court issued an order for payment as sought by the applicant company. The defendant company filed an objection to the order and subsequently the applicant company's claim was to be examined by way of the ordinary procedure.

13. On 13 February 2004 the Regional Court ordered the applicant company to pay a further PLN 7,011.70 (EUR 1,750) in supplementary court fees.

14. On 11 March 2004 the applicant company filed an application for exemption from supplementary court fees. It submitted copies of the following documents concerning its financial situation: a financial report for 2003, a tax declaration CIT-2 for 2003, bank account statements, VAT-7 declaration for 2003, cash reports for 2003 and information on its property and the number of employees.

15. On 18 March 2004 the Warsaw Regional Court dismissed the application for exemption. It found on the basis of the documentary evidence that from 1 January to 30 November 2003 the applicant company had generated PLN 5,611,522.45 in gross income. The court noted that the

applicant company had sustained a loss, but that that was not a sufficient ground to exempt it from court fees. It emphasised that as the applicant company had carried out commercial activity on a large scale, it should have earmarked funds for litigation purposes. On 5 April 2004 the applicant company appealed.

16. On 19 May 2004 the Warsaw Court of Appeal dismissed its appeal, concurring with the reasons given by the Regional Court. It found that in 2003 the applicant company had generated gross income and had possessed enough funds to pay court fees. The Court of Appeal underlined that the applicant company had not demonstrated that it had been in a difficult financial situation; on the contrary, in its appeal it admitted to having funds to pay its debts to the State Treasury.

17. On 29 June 2004 the applicant company paid PLN 7,011.70 in court fees.

18. On 8 November 2004 the Warsaw Regional Court gave judgment. It dismissed the applicant's company claim against the company R. on the grounds that the relevant limitation period had expired.

19. On 6 December 2004 the applicant company lodged an appeal against the Regional Court's judgment. On 16 December 2004 it applied for exemption from court fees for pursuing its appeal in the amount of PLN 9,348.90 (EUR 2,330). The applicant company submitted that the current state of its accounts had proved its disastrous financial situation.

20. The Warsaw Regional Court instructed the applicant company to submit, on pain of dismissal of its motion, copies of the following documents: the financial report for the period from 1 January to 31 October 2004, the tax declaration CIT-9 for 2003, the tax declaration CIT-2 for the period from 1 January to 30 November 2004, information about all bank accounts of the applicant company and extracts thereof, information on all transactions made on each account within the last three months, tax declaration VAT-7 for the period from 1 January to 30 November 2004 and information on its property and the number of employees.

21. On 10 January 2005 the applicant company submitted the following declarations: tax declaration CIT-2 for the requested period, declaration CIT-8 for 2003, extract from a bank account of 12 August 2004 and a declaration of the Cooperative Bank in Wyszaków of 24 November 2004. It also stated that it did not own any real property.

22. On 11 January 2005 the Warsaw Regional Court dismissed the application for exemption. It found that the applicant company had failed to substantiate its assertion that it had been unable to pay the court fees. It noted that the applicant company had failed to submit all requested documents concerning its financial standing. The court stressed that the applicant company had still carried out its commercial activity on a large scale and that in the period between 1 January and 30 November 2004 it had

generated a significant gross income in the amount of PLN 632,655.34 (EUR 158,163).

23. Moreover, the court noted that the applicant company had produced only the cash report for one day (30 November 2004) despite the court's request to submit all reports for the period between 1 January and 30 November 2004. In the court's view, that failure might indicate the applicant company's intention to hide profits that had been actually made. The court had also regard to the declaration of the Wyszków Cooperative Bank that for a long period of time there had been no financial operations on the applicant company's bank account. In this connection, the court found that the applicant company must have carried out its financial operations in cash since it had been obliged to keep a record of all income and expenses. The court underlined that a commercial entity should not claim that the refusal to exempt it from payment of court fees had constituted a limitation of its rights when it had not earmarked any funds for potential litigation and had carried out its financial operations in such a manner as to avoid the payment of court fees.

24. On 27 January 2005 the applicant company appealed. It argued that the losses in the relevant period had exceeded the company's gross income and pointed to a significant debt owed to the tax office.

25. On 6 April 2005 the Warsaw Court of Appeal dismissed the appeal. The court found that the applicant company had incurred substantial costs and expenses exceeding its generated gross income, which showed that it had not been properly managed. It also found that since the beginning of the proceedings the applicant company should have put aside money for the costs of future proceedings as it had been still carrying out its commercial activity.

The Court of Appeal noted that the applicant company had failed to produce all the requested documents (*inter alia*, the financial report for the period from 1 January to 31 October 2004 and the VAT-7 declaration for the relevant period). In this connection, it stressed that it was impossible to evaluate the financial situation of the applicant company. Furthermore, the cash report concerned one day only (30 November 2004), while the Regional Court had specifically requested a report for the period between 1 January and 30 November 2004. In respect of the declaration of the Cooperative Bank, the court noted that the company must have carried out its operations in cash or have had accounts in other banks.

26. On 13 July 2005 the Warsaw Regional Court rejected the applicant company's appeal against the first-instance judgment of 8 November 2004 for failure to pay court fees required for proceeding with its appeal.

Other facts as submitted by the applicant company

27. According to the certificate of the tax office of 24 June 2005, the applicant company owed PLN 300,000 to the tax office.

28. On 29 July 2005 the applicant company was exempted from court fees in civil proceedings instituted against it by another company.

29. On 24 April 2003 and 8 March 2005 the Warsaw District Court dismissed the applicant's company's requests to institute insolvency proceedings because its assets had been considered insufficient to cover the costs of proceedings, not to mention the debts that the company had accumulated. In the most recent of these decisions the court established that the applicant company had owed money to four companies and the tax office. The liabilities due from its creditors were unenforceable in spite of several sets of proceedings instituted by the applicant company. The company's assets deposited in its bank account amounted to PLN 2,000; in addition, the company owned old forms for production of vacuum cleaners worth a total amount of PLN 1,300. In sum, the court considered that the applicant company would not be able to satisfy any of its debtors; thus, the insolvency proceedings would be devoid of purpose.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The legal provisions applicable at the material time and questions of practice are set out in paragraphs 23-33 of the judgment delivered by the Court on 19 June 2001 in the case of *Kreuz v. Poland* (no. 28249/95, ECHR 2001-VI; see also the judgment delivered by the Court on 10 January 2006 in the case of *Teltronic-CATV v. Poland*, no. 48140/99, §§ 20-33).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. The applicant company complained under Article 6 § 1 of the Convention that the court fees required for pursuing its appeal against the Regional Court's judgment had been excessive and in effect had deprived it of the right to a court. The relevant part of Article 6 § 1 provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

32. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant company's submissions

33. The applicant company argued that it had had no funds to pay PLN 9,348.90 in court fees for pursuing its appeal and that it had duly presented to the courts its financial situation. It indicated that there had been no operations on its bank account since the account had been attached by the Tax Office. In respect of gross income in the amount of PLN 632,655.34 reported for 2004, the applicant company submitted that its gross income should have been distinguished from net profits. Having regard to the amount of losses for the same period, the net profits of the applicant company at the relevant time had been nil.

34. The applicant company submitted that the possibility of exemption from court fees provided by the domestic law had been illusory. The domestic courts had not examined the financial situation of companies or had done so improperly. The judges had had no training in the area of accountancy and finance, and had not called experts in order to properly examine their financial situation, which meant that requests for the exemptions had been decided arbitrarily. In this connection, the applicant company submitted that the Warsaw Regional Court ruling at about the same time and on the basis of identical documents, had dismissed its application for exemption in the present case and had exempted it from court fees in the amount of PLN 40 for lodging an interlocutory appeal in respect of a different case.

35. The applicant company disagreed that companies should secure funds in advance for business-related litigation as part of the risk involved in running a business as it was impossible to know beforehand the level of the necessary funds.

2. The Government's submissions

36. The Government submitted that the applicant company had been required to pay court fees for pursuing its appeal. The fees were determined pursuant to the Ordinance of the Minister of Justice of 17 December 1996 and were calculated according to the value of the claim. It was hardly probable that the applicant company would have problems to pay the fees at issue considering that its gross income between 1 January and 30 November 2003 had amounted to PLN 5,611,522.45 (EUR 1,402,880).

37. Pursuant to Article 113 of the Code of Civil Procedure a court which examined a motion for exemption from court fees enjoyed a margin of discretion and it was incumbent on a party seeking exemption to prove that it was unable to pay court fees. The Government argued that the domestic court had rightly concluded that the applicant company had been in fact able to pay the court fees and that it had not submitted all the requested documents concerning its financial situation. By doing so the applicant company had tried to misuse the institution of exemption from court fees. The Government underlined that parties to judicial proceedings had an obligation to cooperate faithfully with the courts.

38. The Government underlined that each company should have secured in advance funds for potential business-related litigation and that standards in relation to possible exemption from court fees in respect of commercial companies should have been more demanding by comparison to natural persons. Concurring with the domestic courts' position, the Government submitted that court fees could be regarded as inevitable expenditure since resolving disputes was part of the commercial risk.

As the applicant company was engaged successfully in a commercial activity, *inter alia*, on the growing real estate market, the amount of court fees complained of should not be seen as disproportionate. There was no risk of winding-up or any serious, long-term perturbation of the applicant company's cash flow (contrast *Teltronic-CATV v. Poland*, no. 48140/99, 10 January 2006).

39. The Government strongly disagreed that the amount of court fees had prevented the applicant company from pursuing its claim or had deprived it of the right of access to a court. They argued that the domestic courts, when refusing the exemption from court fees for pursuing the applicant company's appeal, had not exercised their power of appreciation in an arbitrary manner. The relevant court decisions had been given in accordance with the law, had pursued a legitimate aim and had been proportionate. The Government concluded that there had been no violation of Article 6 § 1.

3. *The Court's assessment*

40. The Court observes that in its judgment in *Kreuz v. Poland* (cited above, § 60) it dealt with the question of whether the requirement to pay substantial fees to civil courts in connection with claims could be regarded as a restriction on the right of access to a court. In this connection the Court held that the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the stage of the proceedings at which that restriction had been imposed were factors which were material in determining whether or not a person had enjoyed his right of access and had "a ... hearing by [a] tribunal".

41. The Court has to determine whether, in the particular circumstances of the present case, the fees actually required constituted a restriction that impaired the very essence of the applicant company's right of access to a court. It notes that in the instant case the applicant company appeared to have sustained losses resulting from a breach of contract and had been obliged to seize a civil court to enforce payment from another business entity (see, *Teltronic-CATV v. Poland*, cited above, § 7). The Court considers that a party seeking exemption from court fees should act with requisite diligence when presenting to the courts evidence concerning his financial standing and is under an obligation to cooperate faithfully with the courts in this matter. The level of diligence expected from an entity engaged in a commercial activity may be higher than that required from a natural person.

42. The Court firstly notes that at the early stages of the civil proceedings the applicant company filed two applications for exemption from court fees totalling PLN 9,349 (EUR 2,337). The first application was filed on 25 March 2003 and eventually dismissed on 17 October 2003. The second application was lodged on 11 March 2004 and ultimately dismissed on 19 May 2004. In both applications the applicant company claimed that it did not have sufficient funds to pay the necessary fees. However, the domestic courts refused both applications on the grounds that the applicant company had not proved that it had been unable to pay the required court fees. The Court notes that following those negative decisions the applicant company did in fact pay the court fees at issue and its claim was examined on the merits by the Warsaw Regional Court. It considers that such conduct of the applicant company casts doubt on the credibility of its assertions about its difficult financial standing.

43. Secondly, the Court observes that on 6 December 2004 the applicant company applied for exemption from court fees in the amount of PLN 9,348.90 for pursuing its appeal against the Warsaw Regional Court's judgment. That application was dismissed on the grounds that the applicant company had not demonstrated that it had been unable to pay those fees (see paragraph 22 above). The principal reason for the refusal was the applicant company's failure to produce to the courts all requested documents which made it impossible to evaluate comprehensively its financial situation. For the Court that decision indicates that the applicant company fell short of the requisite diligence when applying for exemption from court fees. In this connection, the Court sees no reason to contest the domestic authorities' assessment of the applicant company's financial standing which was based on the incomplete material produced by the applicant company (see, *mutatis mutandis*, *Felix Blau sp. z o.o. v. Poland*, no. 1783/04, § 38, 19 January 2010).

44. In the circumstances, and with regard being had to the foregoing considerations, the Court finds that the amount of fees required from the

applicant company to pursue its appeal in the present case cannot be considered as disproportionate and therefore the applicant company's right of access to a court was not impaired.

45. The Court concludes that there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 19 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President