



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

THIRD SECTION

CASE OF ASITO v. MOLDOVA (No. 2)

(Application no. 39818/06)

JUDGMENT

STRASBOURG

13 March 2012

FINAL

13/06/2012

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

In the case of Asito v. Moldova (no. 2),

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Egbert Myjer,

Ján Šikuta,

Ineta Ziemele,

Nona Tsotsoria,

Mihai Poalelungi, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 14 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 39818/06) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by QBE Asito S.A. (“the applicant company”) on 15 September 2006.

2. The applicant company was represented by Mr E. Șlopac. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicant company complained of an infringement of the principle of legal certainty and alleged a violation of its right to the peaceful enjoyment of its possessions. It also complained that it had not had an effective remedy at its disposal.

4. On 2 June 2009 the Court decided to give notice of the application to the Government. It was further decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a private insurance company registered in Moldova.

6. On 7 May 1999 the applicant company signed an insurance contract with a company, C. The insurance contract covered goods which were to be transported to the Russian Federation.

7. On 9 May 1999 the transported goods were stolen in Ukraine. On 27 July 1999 company C. assigned its insurance claim to a bank, M., which subsequently instituted court proceedings against the applicant company. The bank sought a court order obliging the applicant company to pay it 901,853 Moldovan lei (MDL) to cover the amount of the insured sum, pecuniary damage and costs and expenses.

8. By a final judgment of 14 July 2005, the Supreme Court of Justice ordered the applicant company to pay the bank MDL 882,588 in respect of pecuniary damage (MDL 730,000 for the insured sum and MDL 152,588 for loss of profit). It also ordered the applicant company to pay the bank the amount of MDL 40,584 in court fees. No other claims in respect of costs and expenses were submitted by M. at this or the previous stage of the proceedings.

9. On 4 August 2005 the bank lodged with the Supreme Court of Justice an application under Article 249 of the Code of Civil Procedure seeking an amendment to the final judgment of 14 July 2005. It argued that in its judgment of 14 July 2005 the Supreme Court of Justice had erroneously awarded M. only MDL 882,588, whereas the sum originally in dispute was MDL 901,853. On that occasion it did not submit any claims relating to legal fees. The applicant company disputed the bank's action.

10. On 11 August 2005 the Supreme Court of Justice upheld the bank's application under Article 249 of the Code of Civil Procedure and awarded the bank MDL 901,853.

11. The applicant company appealed against that judgment. It claimed that Article 249 of the Code of Civil Procedure had been misused by the Supreme Court of Justice and that the judicial formation which examined the bank's application under Article 249 was not a tribunal established by law since the rules concerning the formations of judges examining such applications had not been observed. However, its appeal was dismissed on 20 October 2005 by the Supreme Court of Justice. This decision was final.

12. On 9 February 2006 the bank lodged with the Supreme Court of Justice another application under Article 250 of the Code of Civil Procedure, seeking a supplementary judgment which would cover the remainder of the costs and expenses that it had incurred. It referred to previously submitted payment orders confirming the payment of MDL 94,605 in respect of court fees. It asked the Supreme Court to award it MDL 54,021 in addition to the sum of MDL 40,584 awarded by the judgment of 14 July 2005. The applicant company opposed this claim and argued, *inter alia*, that there was no legal ground for delivering a supplementary judgment under Article 250 of the Code of Civil Procedure.

13. On 21 March 2006 company C., which was not a party in the main proceedings, lodged with the Supreme Court of Justice a similar application under Article 250 of the Code of Civil Procedure asking for a supplementary judgment which would cover the costs and expenses allegedly borne by it, amounting to MDL 171,853. It invoked as a legal ground for the application an agreement between the bank and itself, signed on 17 March 2006, by which the bank had assigned to company C. its claim in respect of the legal fees incurred during the proceedings. According to the documents submitted, the bank had paid to a law firm, Z., the amount which it claimed. The applicant company opposed this claim and argued in its written submissions of 23 March 2006 that there was no legal ground for re-examining the case.

14. On 30 March 2006 a panel of the Supreme Court of Justice examined both requests under Article 250 of the Code of Civil Procedure. It found that, on the basis of several payment orders submitted by the bank in the main proceedings, the bank had spent MDL 94,604 on court fees. Accordingly, it upheld the bank's action and awarded it an additional MDL 54,021 (3,246 euros (EUR)). It also found that on 3 March 2006 the bank had paid legal fees to the law firm Z., in respect of the bank's legal representation in the main proceedings, amounting to MDL 171,853. The Supreme Court of Justice upheld company C.'s application in part and ordered the applicant company to pay it MDL 91,000 (EUR 5,886) in legal fees. This decision was final and enforcement warrants were issued.

15. On 3 and 30 May 2006 the judgments were enforced.

II. RELEVANT DOMESTIC LAW

16. Article 96 of the Code of Civil procedure, in so far as relevant, provides as follows:

“The court shall order the party who lost the case to pay legal costs to the successful party ...”

Articles 249 and 250 of the same Code, in so far as relevant, provide as follows:

Article 249. Correction of errors in a judgment

“(1) After a judgment is delivered, the tribunal which adopted it cannot annul or change it.

(2) The tribunal can, of its own motion or upon the parties' application, correct errors or omissions in the judgment concerning [...] any other material error or obvious calculation errors.”

Article 250. Supplementary judgment

“(1) A court which has delivered a judgment may, of its own motion or at the request of the parties, deliver a supplementary judgment where:

(a) it has failed to decide on a claim in respect of which the parties to the proceedings have submitted evidence and given explanations;

(b) while making a determination on the disputed right, it has failed to indicate the sum awarded, the assets to be transferred or the action which the defendant is required to undertake;

(c) it has failed to determine the allocation of costs and expenses among the parties or has failed to take a decision on the requests of witnesses, translators or representatives in respect of the fees which are due to them.

(2) An application for a supplementary judgment shall be lodged within the period of enforcement of the judgment. The court shall, after an examination of the application, deliver a supplementary judgment, which may be challenged by the means specified in the present Code.

...

(4) The dismissal of a decision in respect of such an application may be challenged by means of an appeal on points of law.”

THE LAW**I. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION**

17. The applicant company complained that the judgment of 11 August 2005 had not been delivered by a tribunal established by law since the rules concerning the formations of judges examining such applications had not been observed. It further complained that both this judgment and the supplementary judgment of the Supreme Court of Justice of 30 March 2006 had breached the principle of legal certainty as guaranteed by Article 6 § 1 of the Convention, which reads as follows:

Article 6 § 1

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

18. The applicant company also claimed that it did not have at its disposal an effective remedy by which it could challenge the supplementary

judgment of 30 March 2006. It relied on Article 13 of the Convention, which reads as follows:

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

19. The Court points out that, even assuming that the complaints concerning the alleged unfairness of the judgment of the Supreme Court of Justice of 11 August 2005 are meritorious, it cannot examine them since the applicant company has not complied with the six-month rule. Accordingly, the complaints related to the judgment of 11 August 2005 must be rejected as being out of time, pursuant to Article 35 §§ 1 and 4 of the Convention. The Court further notes that the remainder of the complaints, in so far as they relate to the judgment of the Supreme Court of Justice of 30 March 2006, are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

20. The applicant company argued that even though the supplementary judgment had not quashed the judgment of 14 July 2005, which was final under Article 254 of the Code of Civil Procedure, it had varied the judgment in that it had reconsidered the sum to be paid by the applicant company in costs. It pointed out that company C. had not been a party to the main proceedings either before the Economic Court of Appeal or the Supreme Court of Justice. Finally, it argued that both the bank and company C. could at any time lodge an action under Article 250 of the Code of Civil Procedure, thus undermining the principle of legal certainty.

21. The Government contended that, in the judgment of 14 July 2005, the Supreme Court of Justice had failed to address all the claims concerning costs. In the Government's view, this was a legal ground for upholding the request made by the bank under Article 250 of the Code of Civil Procedure. They argued that by varying the final judgment of 14 July 2005 the supplementary judgment of 30 March 2006 had not modified the Supreme Court's previous findings on the merits. They observed that the action under Article 250 of the Code of Civil Procedure could be lodged only as long as

the enforcement of the judgment to be varied was pending. Thus, the Government submitted that there had been no violation of the applicant company's right to a fair hearing.

2. *The Court's assessment*

(a) **General principles**

22. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Roșca v. Moldova*, no. 6267/02, § 24, 22 March 2005).

23. Legal certainty presupposes respect for the principle of *res judicata*, that is, the principle of the finality of judgments. This principle provides that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see *Macovei and Others v. Moldova*, nos. 19253/03, 17667/03, 31960/03, 19263/03, 17695/03 and 31761/03, § 42, 25 April 2006).

24. Higher courts' powers of review should be exercised to correct judicial errors and miscarriages of justice, not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Roșca*, cited above, § 25).

25. In *Roșca v. Moldova* (cited above) the Court found that the request for an annulment procedure, under which a final judgment could be challenged indefinitely by the Prosecutor General, was in breach of the principle of legal certainty. A violation was found on the same grounds in *Popov v. Moldova (no. 2)* (no. 19960/04, 6 December 2005), where a final judgment was quashed following an abusive revision procedure. In both cases the Court held that the "loss" by a litigant of a favourable judgment was incompatible with the Convention. The same general principles were applied by the Court in the case of *Istrate v. Moldova* (no. 53773/00, 13 June 2006), where it found a violation of the rule of finality of judgments on account of misuse of appeal proceedings.

(b) Application in the present case

26. Turning to the circumstances of the present case, the Court notes that the applicant company lost in the main domestic proceedings and was obliged to pay to M. the sum of MDL 882,588 in respect of pecuniary damage and MDL 40,584 in respect of costs and expenses. This judgment was final and enforceable. However, by a supplementary judgment concerning the costs and expenses, the applicant company was ordered under Article 250 of the Code of Civil Procedure of 30 March 2006 to pay MDL 54,021 to the bank in addition to the sum of MDL 40,584 awarded by the first judgment, and MDL 91,000 to company C., which was not a party to the main proceedings.

27. The Court further notes that, under Article 250 of the Code of Civil Procedure, a Moldovan court may deliver a supplementary judgment if the following requirements are met: it failed to decide on a claim in respect of which the parties to the proceedings had submitted evidence and had given explanations, or it failed to decide on the allocation of costs among the parties. The Court is ready to accept that such a procedure does not in itself contradict the principle of legal certainty where it is used to correct miscarriages of justice (see *Pravednaya v. Russia*, no. 69529/01, §§ 27-28, 18 November 2004, and *Popov v. Moldova (no. 2)*, no. 19960/04, § 46, 6 December 2005). However, the Court must determine whether it has been applied in a manner compatible with Article 6 of the Convention.

28. In this regard, the Court observes that when lodging its application under Article 250 of the Code of Civil Procedure the bank relied on evidence which was already in the domestic case file, indicating the pages of the case file on which the relevant evidence was to be found. Thus, it is apparent that, as far as the application of the bank is concerned, by delivering a supplementary judgment the Supreme Court of Justice did not make a fresh determination on the costs in a manner which would be incompatible with the principle of legal certainty enshrined in Article 6 of the Convention. Therefore, the Court finds that there has been no violation of Article 6 of the Convention in that regard.

29. As to company C.'s application, the Supreme Court of Justice awarded it MDL 91,000 despite the fact that company C. was not a party to the proceedings in question and thus could not have incurred any legal costs in those proceedings. The Court is not convinced that this award can be justified by a representation contract between the bank and a law firm and by the assignment of the debt by the bank to company C. (see paragraph 13 above). The Court also notes that the question of these costs has never been raised before the domestic tribunals in the main proceedings.

30. In the Court's view, the supplementary judgment of 30 March 2006, in so far as it concerned company C.'s application, was in fact a determination of the case in respect of new claims which had not been made before. Thus, the amendment in question went beyond the ordinary

correction of judicial errors and miscarriages of justice and had an effect which was incompatible with the principle of legal certainty as guaranteed by Article 6 of the Convention, frustrating the applicant company's reliance on a binding judicial decision.

There has accordingly been a violation of Article 6 § 1 of the Convention in that regard.

31. The Court does not consider it necessary to rule on the complaint under Article 13 because Article 6 § 1 is the *lex specialis* in relation to the applicant company's complaint, and the requirements of Article 13 in this context are absorbed by those of Article 6 § 1 (see, *mutatis mutandis*, *Popov v. Moldova* (no. 2), no. 19960/04, § 55, 6 December 2005).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

32. The applicant company also complained of a violation of its right to the peaceful enjoyment of its possessions as a result of the judgment of 30 March 2006. It relied on Article 1 of Protocol No. 1, which reads as follows:

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 parties' submissions*

34. The applicant company complained under Article 1 of Protocol No. 1 that the situation created by the supplementary judgment of 30 March

2006 amounted to a violation of its right to the peaceful enjoyment of its possessions.

35. The Government justified the need for the supplementary judgment by submitting payment orders which confirmed that the bank had paid an overall amount of MDL 94,604. In their view, by awarding only MDL 40,584 in costs and expenses, the Supreme Court of Justice had committed a miscarriage of justice which warranted a re-examination under Article 250 of the Code of Civil Procedure. The Government further relied on the arguments contained in their observations on the alleged violation of Article 6 § 1 of the Convention submitting that, for the same reasons, there was no violation of Article 1 of Protocol No.1.

2. The Court's assessment

36. The Court observes that as a result of the supplementary judgment of 30 March 2006 in the present case the applicant company lost ownership of a sum amounting to MDL 145,021 (EUR 9,268), consisting of MDL 54,021 (EUR 3,246) to be paid to the bank in court fees and MDL 91,000 (EUR 5,886) to be paid to company C. in legal fees. Therefore, it considers that the applicant company had a "possession" for the purposes of Article 1 of Protocol No. 1.

37. The Court refers to its finding in paragraph 28 above that in so far as the bank's application is concerned, the Supreme Court of Justice did not make a fresh determination regarding costs in a manner which would be incompatible with the principle of legal certainty as guaranteed by Article 6 of the Convention. Accordingly, the Court concludes that the interference with the applicant company's right to the peaceful enjoyment of its possessions was legal and justified in so far as the payment of MDL 54,021 (EUR 3,246) was concerned. For these reasons, the Court finds that there has been no violation of Article 1 of Protocol No. 1 to the Convention in this respect.

38. The Court further refers to its finding in paragraph 30 above that the use of Article 250 of the Code of Civil Procedure in respect of company C.'s application amounted to an appeal in disguise and that in upholding company C.'s claims the Supreme Court of Justice upset the principle of legal certainty. Even though the outcome of the main proceedings was unfavourable to the applicant company, the supplementary judgment of 30 March 2006 altered a legal situation which was final and resulted in a further loss of property by the applicant company. In such circumstances the Court cannot but find that the partial upholding of company C.'s claims constituted an unjustified interference with the applicant company's right to property. The applicant company was ordered to pay amounts of money in legal fees in addition to those determined by the final judgment delivered in the main proceedings. Even assuming that such an interference may be regarded as serving a public interest, the Court

finds that it was not justified since a fair balance was not preserved and the applicant was required to bear an individual and excessive burden (see, *mutatis mutandis*, *Brumărescu v. Romania* [GC], no. 28342/95, §§ 75-80, ECHR 1999-VII; *Roșca*, cited above, § 32; and *Popov (2)*, cited above, § 58).

For these reasons, the Court finds that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

40. The applicant company claimed MDL 613,777 (EUR 39,145) in respect of pecuniary damage, consisting of the amount it had unduly paid and of an amount of MDL 468,756 on account of lost profit, according to calculations taking into account its return on investment for the period from May 2006 to December 2010 plus compound interest. It also claimed MDL 500,000 (EUR 31,888) in respect of non-pecuniary damage.

41. The Government disagreed with the amounts claimed by the applicant company. In respect of the pecuniary damage, they argued that there was no causal link between the alleged violation and the amount claimed. Furthermore, the company had not proved that it had actually sustained that damage. Thus, it considered that the applicant company was not entitled to receive compensation in respect of pecuniary damage. In respect of the non-pecuniary damage, the Government argued that the amount claimed was excessive in the light of the case-law of the Court.

42. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 72). In the present case the reparation should aim to put the applicant company in the position in which it would have found itself had the violation not occurred.

43. The Court considers that the applicant company must have suffered pecuniary damage as a result of the breach of its Convention rights.

However, the Court is unable to accept the approach taken by the applicant company in assessing the loss suffered.

In so far as the non-pecuniary damage is concerned, the Court takes the view that the applicant company has suffered some non-pecuniary damage as a result of the violations found which cannot be made good by the mere finding of a violation. The particular amount claimed is, however, excessive.

Taking into account the circumstances of the case under consideration and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant company the overall amount of EUR 15,000 in respect of both pecuniary and non-pecuniary damage.

B. Costs and expenses

44. The applicant company also claimed MDL 5,400 (EUR 345) for the costs and expenses incurred before the Court.

45. The Government disagreed. They pointed out that this claim was unsubstantiated.

46. The Court notes that the applicant company has not submitted any document in support of its claim. Regard being had to its case-law, according to which it must be established that the costs were actually and necessarily incurred and are reasonable as to their quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII), the Court rejects the claim for costs and expenses for the proceedings before the Court.

C. Default interest

47. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the judgment of 11 August 2005 inadmissible and the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 in so far as the Supreme Court of Justice delivered a supplementary judgment in respect of company C's claims;

3. *Holds* that there has been no violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 in so far as the Supreme Court of Justice delivered a supplementary judgment in respect of the bank's claims;
4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) to cover both pecuniary and non-pecuniary damage, to be converted into Moldovan lei at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President