



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

FOURTH SECTION

CASE OF NISTAS GMBH v. MOLDOVA

(Application no. 30303/03)

JUDGMENT

STRASBOURG

12 December 2006

FINAL

12/03/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of **Nistas Gmbh v. Moldova**,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr J. ŠIKUTA, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 21 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 30303/03) against the Republic of Moldova lodged with the Court on 4 August 2003 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Nistas Gmbh, a company registered in Germany and having its head office in Frankfurt am Main.

2. The applicant was represented by Engelmann, Kargl & Gorev-Droz, a law firm based in Frankfurt. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Pârlog.

3. The applicant alleged, in particular, that its right to a fair hearing and its right to the peaceful enjoyment of its possessions were breached as a result of the quashing of final judgments in its favour.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 19 May 2004 a Chamber of that Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. On 31 December 1997 the applicant (hereinafter “NISTAS”) concluded a contract with the State-owned Moldovan Railways Company (*Calea Ferată din Moldova*, hereinafter CFM). The initial contract provided for the lending of 128 container-wagons by NISTAS to CFM for a five-year period. The contract was later modified by the parties into a leasing agreement. CFM was to pay in instalments for the use of the wagons. The total price of the contract was 4,675,560 United States Dollars (USD).

8. Until March 2001 CFM paid regularly. However, it did not pay between March and November 2001. The debt accumulated over this period amounted to USD 705,760 and the applicant claimed that the associated contractual penalties were USD 57,166. This constitutes “the first debt”.

9. On 13 October 2001 CFM registered with the National Bank of Moldova the lease contract, as was required by law.

10. From November to December 2001 no payments were made. The debt for this period amounted to USD 386,560 and penalties to USD 29,185 (“the second debt”).

11. From May to September 2002 CFM again failed to make payments. The debt accumulated over that period amounted to USD 416,943 and penalties to USD 25,263 (“the third debt”).

12. NISTAS initiated three sets of court proceedings against CFM, claiming the above debts.

1. Proceedings A (regarding the first debt)

13. On 17 January 2002 the Chişinău Economic Court found in favour of NISTAS. It awarded USD 704,000 in respect of the debt, USD 57,024 in penalties and USD 22,830 in court fees.

14. This judgment was upheld by the Appellate Chamber of the Economic Court of the Republic of Moldova on 28 February 2002, by the Cassation Chamber of the Economic Court of the Republic of Moldova on 8 April 2002 and by the Supreme Court of Justice on 26 June 2002.

15. The latter judgment was final and enforceable and was enforced at an unspecified time before February 2003.

16. The Prosecutor General subsequently filed a request for annulment of all the above judgments and asked for the amounts awarded to be reduced.

17. On 24 February 2003 the Plenary Supreme Court of Justice upheld the Prosecutor General’s request for annulment and quashed all the judgments. It adopted a new judgment whereby it confirmed the award as regards the outstanding debt and reduced to USD 15,000 the award for penalties (a difference of USD 42,024). The court accordingly also reduced the court fees awarded to USD 21,569.

2. Proceedings B (regarding the second debt)

18. On 19 June 2002 the Chişinău Economic Court found in favour of the applicant. It awarded USD 386,560 in respect of the debt, USD 29,185.28 in penalties and USD 12,472 in court fees.

19. This judgment was upheld by the Appellate Chamber of the Economic Court of the Republic of Moldova on 15 October 2002 and by the Supreme Court of Justice on 27 November 2002.

20. The latter judgment was final and enforceable and was enforced at an unspecified time before February 2003.

21. The Prosecutor General subsequently filed a request for annulment of all the above judgments and asked for the amounts awarded to be reduced.

22. On 24 February 2003 the Plenary Supreme Court of Justice (entirely separately from its judgment on the same day in proceedings A) upheld the Prosecutor General's request for annulment and quashed all the above judgments. It adopted a new judgment whereby it confirmed the award as regards the outstanding debt and reduced to USD 10,000 the award for penalties (a difference of USD 19,185). The court also reduced the court fee to USD 11,896.

3. Proceedings C (regarding the third debt)

23. On 20 December 2002 the Chişinău Economic Court found in favour of the applicant. It awarded USD 391,680 in respect of the debt, USD 25,263 in penalties and 171,698 Moldovan lei (MDL) (the equivalent of 11,947.53 euros (EUR) at the time) in court fees.

24. This judgment was partially set aside by the Appellate Chamber of the Economic Court of the Republic of Moldova on 23 April 2003. That court confirmed the award in respect of the debt, but awarded USD 6254 in penalties and USD 10,046 in court fees, based on Article 217 of the Civil Code (see paragraph 30 below).

25. However, noting that two final judgments in proceedings A and B had already been executed before the Plenary Supreme Court of Justice quashed them on 24 February 2003, the court reduced the sum to be awarded as regards the debt and the court fees by a total of USD 63,045.

26. As a result, the award in respect of the debt made in proceedings C, set by the Court at USD 391,680, was reduced to USD 328,635, taking into account the judgments of 24 February 2003.

27. The court also ordered that the applicant pay court fees of MDL 5,915 (the equivalent of EUR 411.59 at the time) in respect of those of its claims which had been rejected by court.

28. On 12 June 2003 the Supreme Court of Justice partially modified the judgment of the Appellate Chamber of the Chişinău Economic Court, increasing the amount of court fees awarded to the applicant to USD 11,938.

II. RELEVANT DOMESTIC LAW

29. The relevant domestic law is summarised in *Roşca v. Moldova* (no. 6267/02, §§ 16 and 17, 22 March 2005).

30. In addition, the relevant provisions of the Civil Code, in force before 12 June 2003, read as follows:

“Article 217.

If the [penalties] that must be paid largely exceed the damage caused to the creditor, the court has the power to reduce the [penalties]. In such a case the court shall take into consideration:

- 1) the degree of fulfilment of the obligation by the debtor;
- 2) the financial state of the parties to the obligation; ...”

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

31. The applicant complained that the quashing of the final judgments in its favour violated its rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

32. The Court considers that the applicant’s complaints under both these Articles raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other grounds for declaring them inadmissible have been established. The Court therefore declares these complaints admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 5 above), the Court will immediately consider the merits of these complaints.

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

33. The applicant complained that the two judgments of the Supreme Court of Justice of 24 February 2003, which set aside two final judgments in its favour, had violated Article 6 § 1 of the Convention.

The relevant part of Article 6 § 1 reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law...”

34. The Government rejected the applicant's claims and argued that in the proceedings before the Supreme Court of Justice the parties had enjoyed equal procedural rights and that the re-opening was justified.

35. The Court has found violations of Article 6 § 1 of the Convention in numerous cases raising issues similar to those in the present case (see, among other authorities, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII and *Roșca v. Moldova*, no. 6267/02, 22 March 2005, § 29).

36. Having examined the material submitted to it, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

37. Having regard to its case-law on the subject, the Court finds that the quashing of the final judgments in favour of the applicant breached the applicant's right to a fair hearing under Article 6 § 1 of the Convention.

38. Moreover, the reliance by the courts in proceedings C on the outcome of the two annulment proceedings (the judgments of 24 February 2003) as the only reason for reducing the award for the main debt in the applicant's favour tainted the fairness of proceedings C.

39. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO.1 TO THE CONVENTION

40. The applicant complained that the Supreme Court of Justice's judgments of 24 February 2003 had had the effect of infringing its right to the peaceful enjoyment of its possessions as secured by Article 1 of Protocol No. 1, which provides:

"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."

41. The Government submitted that the judgments of 24 February 2003 did not affect the applicant's property right since the two judgments which were quashed by those judgments had already been fully enforced and since the quashing only affected the amount of penalties and court fees and not the principal of the debts. The judgments of 24 February 2003 should be distinguished from cases such as *Roșca v. Moldova*, cited above, since in the present case the annulments did not result in any deprivation of the applicant's property.

42. The applicant submitted that although the judgments of 24 February 2003 did not directly deprive it of any property, they were relied on

expressly in the subsequent judgments to diminish by a specific amount the award given by the judgments of 23 April 2003 and 12 June 2003. There was thus a clear violation of the applicant's property right.

43. The Court recalls its finding in paragraph 38 of a violation of Article 6 § 1 of the Convention also in respect of proceedings C as a result of the courts' reliance on the outcome of the annulment proceedings. It therefore considers that the deduction from the applicant's award made in proceedings C, even assuming that it was carried out with the public interest in mind, could not be justified since a fair balance was not preserved and the applicant was required to bear an individual and excessive burden (cf. *Brumărescu*, cited above, §§ 75-80).

44. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. 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. Pecuniary damage

46. The applicant claimed USD 82,044, which it considered to be the equivalent of EUR 113,300 as a result of currency fluctuations, for pecuniary damage suffered as a result of the quashing of the final judgments in its favour. This amount included the deductions of USD 63,045 as ordered by the courts in proceedings C on the basis of the quashing of 24 February 2003 and the consequent deductions from the penalties by USD 19,009 and of the amounts of court fees (USD 2,506 and 23,098 Moldovan lei, equivalent to EUR 1,393 in June 2003) not returned to the applicant because it was considered "not to have won" the proceedings in respect of the USD 63,045 mentioned above.

47. The applicant also claimed lost profits, which amounted, according to it, to at least 7% a year from the above amounts.

48. The Government contested the exchange rate used to convert USD 82,044 into euros. In addition, the applicant did not present evidence of its intentions to obtain the losses claimed. According to their calculations, the amount of penalties deducted from the three awards in favour of the applicant as a result of the quashing was USD 42,024. The reduction of the court fees by USD 1,260.72 was in favour of the applicant since it had to pay smaller fees as a result.

49. The Government also contested the claim of 7% a year in lost profits as unsubstantiated: the applicant had not submitted any calculations or

evidence to support its claims in this respect, contrary to Article 60 of the Rules of Court.

50. The Court recalls its finding of a violation of Article 6 § 1 of the Convention in proceedings C (see paragraph 38 above). It notes the divergent calculations of the parties regarding the amount of deductions from the award made in those proceedings as a result of the quashing. It also notes that in proceedings C the courts expressly stated that they had deducted from the award to which the applicant was entitled (in respect of the main debt, penalties and court fees) the total amount of USD 63,045 based on the judgments of 24 February 2003. This sum included the deductions from both the penalties and the court fees awarded in proceedings A and B. It follows that, for the purposes of *restitutio in integrum*, this amount has to be returned to the applicant, at the rate of exchange on the date of making the claims, which equals EUR 53,346.

51. The Court notes that the reduction of penalties from USD 25,263 to USD 6,254 during proceedings C was not ordered with any reference to the judgments of 24 February 2003 but rather on the basis of general legal provisions (Article 217 of the Civil Code in force at the time, see paragraphs 24 and 30 above). The Court does not discern a causal link between the quashing of the final judgments in favour of the applicant and this deduction, which accordingly does not have to be returned. The same applies to the court fees not returned in respect of the part of the applicant's claims which were so rejected.

52. The Court notes that the applicant has claimed lost profits in the amount of 7% a year from the amounts it was not able to use since June 2003. However, it does not accept the applicant's method of calculation. Taking into consideration the average interest rate as indicated by the National Bank of Moldova for the period in question (see *Roșca v. Moldova*, cited above, § 37) and the circumstances of the case under consideration, the Court awards the applicant the sum of EUR 7,251.

53. It follows that the total amount of pecuniary damage to be paid to the applicant equals EUR 60,597.

B. Non-pecuniary damage

54. The applicant claimed EUR 3,000 for the non-pecuniary damage suffered as a result of the quashing of the final judgment favourable to it. It argued that the quashing caused it anxiety and humiliation.

55. The Government disagreed with the amount claimed by the applicant, arguing that it was unsubstantiated and that the mere fact of finding a violation could be considered to be sufficient just satisfaction.

56. The Court considers that, as a result of the quashing of final judgments in its favour, the applicant was placed in a state of uncertainty regarding the level of compensation, if any, still to be received from its counterpart, and regarding the future of its property – 128 wagons. It could

thus not fully plan its activity as a result. The Court awards the applicant EUR 2,000 for non-pecuniary damage (cf. *Roşca v. Moldova*, cited above, § 41; *Sovtransavto Holding v. Ukraine* (just satisfaction), no. 48553/99, §§ 78-82, 2 October 2003).

C. Costs and expenses

57. The applicant also claimed EUR 24,700 for the costs and expenses incurred before the Court, which constituted payment of the legal fees of the law firm at its normal rate of EUR 300 per hour for 72 hours worked on the case.

58. In support of its claims regarding representation fees the applicant sent the Court copies of several requests by the applicant's representative to make the transfer of representation fees.

59. The Government did not agree with the amounts claimed. They noted that the applicant had failed to annex invoices confirming payments to the representative and that the documents submitted did not prove that the representative had in fact been paid. The documents were, moreover, not submitted in one of the official languages of the Court.

60. The Government contested the amount of time spent in preparing the case and submitted that it had not been proven that the expenses claimed had been necessary and reasonable as to quantum. They asked the Court to reject the applicant's claim for legal expenses in their entirety.

61. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (*Roşca v. Moldova*, cited above, § 45).

62. In the present case, regard being had to the legal representation provided by the applicant's lawyer, the above criteria and the complexity of the case, as well as the failure to submit evidence regarding the extent of the applicant's obligation to pay its lawyer or an itemized list of hours worked on the case, the Court awards the applicant EUR 2,400 for costs and expenses.

D. Default interest

63. The Court considers it appropriate that the default interest 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 application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 60,597 (sixty thousand five hundred and ninety seven euros) in respect of pecuniary damage;
 - (ii) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - (iii) EUR 2,400 (two thousand four hundred euros) in respect of costs and expenses;
 - (iv) any tax that may be chargeable on the above amounts;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President