



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

FIFTH SECTION

CASE OF VOSTOKMASH AVANTA v. UKRAINE

(Application no. 8878/03)

JUDGMENT

STRASBOURG

20 September 2007

FINAL

20/12/2007

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 Vostokmash Avanta v. Ukraine,

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

Mr P. LORENZEN, *President*,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 28 August 2007,

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

PROCEDURE

1. The case originated in an application (no. 8878/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the company Vostokmash Avanta (“the applicant”), on 1 November 2001.

2. The applicant was represented by Mr Mikhail Aleksandrovich Kapustin, its director. The Ukrainian Government (“the Government”) were represented by their Agent, Mrs Valeriya Lutkovska.

3. On 30 May 2005 the Court decided to communicate the complaint concerning the non-enforcement of the judgment in its favour 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

4. The applicant is a Ukrainian-Kazakh company located in the city of Zaporizhzhya.

5. In 2000 the applicant instituted proceedings against the Joint Stock Company “Dniprovsky Metallurgical Kombinat” (hereinafter “the JSC”), in which the State held 98.81 % of the shares, for failure to pay under a contract for delivery of iron ore.

6. On 29 August 2000 the Arbitration Court of the Dnipropetrovs'k Region awarded the applicant UAH 1,139,560.09¹ in compensation against the JSC for failure to comply with the contractual obligations. The court also attached the defendant's accounts. It issued two orders in this respect: one for the recovery of property worth a total of UAH 800,541.26² and another for the recovery of the sum of UAH 339,018.83³.

7. On 5 September 2000 the Bailiffs' Service initiated the enforcement proceedings.

8. Between 2000 and 2005 numerous bankruptcy proceedings were initiated against the JSC by at least eight companies:

- On 28 August 2000 by the “Kryukivsky Vagonobudivnyy Zavod” – terminated on unspecified date;
- On 7 March 2001 by the “Afilia” company – terminated on 16 October 2001 as the JSC paid the debt;
- On 19 October 2001 by the “Kristal” company – terminated on 18 March 2002 as the plaintiff failed to have the bankruptcy announcement published;
- On 19 March 2002 by the “Intermet” company – terminated on 28 January 2003 as the JSC paid the debt;
- On 29 January 2003 by the “Nezalezhnist” company – terminated on 18 September 2003 as the plaintiff withdrew his claim;
- On 22 September 2003 by the “Ukrstalkonstruktsiya” company – terminated on 27 May 2004 as the plaintiff failed to have the bankruptcy announcement published;
- On 27 May 2004 by the “Rolikon” company – terminated on 16 May 2005;
- On 17 May 2005 by the “Tsesiya” company – the bankruptcy proceeding are pending to date.

9. The respective court's rulings on opening these bankruptcy proceedings ordered suspension of the enforcement proceedings against the JSC and introduction of the moratorium on a payment of debts to its creditors.

10. Between 30 November 2000 and 18 April 2005 the Arbitration Court of the Dnipropetrovs'k Region (as of June 2001 - the Commercial Court of the Dnipropetrovs'k Region) rejected the applicant's numerous requests to initiated bankruptcy proceeding against the JSC as such proceedings were already pending upon other companies' requests.

11. On 11 July 2001 the Commercial Court of the Dnipropetrovs'k Region, upon the applicant's request, modified the modalities of enforcing the judgment of 29 August 2000. In particular, it decided to attach the debtor's property.

1. EUR 232,698.

2. EUR 163,470.

3. EUR 69,227.50.

12. On 23 August 2001 the Bailiffs' Service resumed the enforcement proceedings and suspended them due to the application of the moratorium.

13. On 4 February 2002 the Commercial Court of the Dnipropetrovs'k Region rejected the applicant's request to initiated bankruptcy proceeding against the JSC. On 15 May 2002 and 24 April 2003 the Higher Commercial Court and the Supreme Court, respectively, rejected the applicant's cassation appeal.

14. On 6 February 2004 the State Property Fund sold the State-owned shares of the JSC to private persons. Under the terms of the sales, the latter undertook to pay all the outstanding debts of the JSC.

15. The judgment of 29 August 2000 in the applicant's favour remains unenforced.

II. RELEVANT DOMESTIC LAW

16. The relevant domestic law is summarised in the judgment of *Sokur v. Ukraine* (no. 29439/02, § 17-22, 26 April 2005).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

17. The applicant complained under Article 6 § 1 of the Convention about the lengthy non-enforcement of the judgment of 29 August 2000 and about a violation of its right to the peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1. The Articles invoked, in so far as relevant, provide as follows:

Article 6 § 1

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

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

18. The Government raised objections, contested by the applicant, regarding exhaustion of domestic remedies similar to those already dismissed in a number of the Court's judgments regarding non-enforcement against the State-owned companies (see e.g. *Sokur v Ukraine* (dec.), no. 29439/02, 16 December 2003 and *Trykhliv v. Ukraine*, no. 58312/00, §§ 39-43, 20 September 2005). The Court considers that these objections must be rejected for the same reasons.

19. The Court concludes that the applicant's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 raise issues of fact and law under the Convention, the determination of which requires an examination of the merits. It finds no ground for declaring these complaints inadmissible. The Court must therefore declare them admissible.

B. Merits

20. In their observations on the merits of the applicant's complaints, the Government put forward arguments similar to those in the cases of *Romashov v. Ukraine* and *Voytenko v. Ukraine*, contending that there had been no violation of either Article 6 § 1 of the Convention or Article 1 of Protocol No. 1 (see *Romashov v. Ukraine*, no. 67534/01, 27 July 2004, § 37 and *Voytenko v. Ukraine*, no. 18966/02, 29 June 2004, § 37).

21. The Government further maintained that, although the debtor company was a State-owned enterprise before 6 February 2004, it was a separate legal entity and the State could not be held responsible for its debts under domestic law. Moreover, on 6 February 2004 the State Property Fund sold its 98.81% of the share capital of that company to private persons. Accordingly, the enforcement of the judgment given in the applicant's favour could not be conducted at the expense of the State.

22. The applicant disagreed.

23. The Court recalls that it has already held that the State was liable for the debts of a State-owned company, despite the fact that the company was

a separate legal entity, and, therefore, the State was responsible for the ultimate failure to pay to an applicant the amounts awarded to him in the judgments against such company (see, for instance, *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, §§ 43-46, ECHR 2004-XII).

24. Furthermore, the Court considers that the fact that the State sold its share in the company to private persons could not release the State from its obligation to honour a judgment debt which had arisen before the shares were sold. If the State transfers such an obligation to a new owner of the shares, as it was in the present case (see paragraph 14 above), the State must ensure that the new owner complies with the requirements, inherent in Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, that a final, binding judicial decision does not remain inoperative to the detriment of a party. In view of the above considerations, the Court finds that the State is responsible for the enforcement of the judgment in the applicant's favour throughout the duration of the enforcement proceedings (see *Solovyev v. Ukraine*, no. 4878/04, § 21, 14 December 2006).

25. The Court notes that the judgment of 29 August 2000 remains unenforced for six years and eleven months.

26. The Court recalls that it has already found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in cases raising issues similar to the present application (see, for instance, *Romashov*, cited above, §§ 42-46, and *Voytenko*, cited above, §§ 53-55).

27. Having examined all the material in its possession, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

28. There has, accordingly, been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

II. OTHER COMPLAINTS

29. The applicant further complained under Article 6 § 1 of the Convention about the refusal of the domestic courts to institute bankruptcy proceedings upon its requests.

30. However, in the light of all the materials in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

31. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. The applicant claimed the unsettled judgment debt owed to it and UAH 580,692¹ of inflation and interest rate as well as 42,514 euros (EUR) in respect of non-pecuniary damage.

34. The Government maintained that the State was not liable for non-enforcement of the judgment in the applicant's favour, that the applicant should have claimed compensation at the domestic level and that its claim for pecuniary and non-pecuniary damage were unsubstantiated.

35. In so far as the applicant claimed the amount awarded to it by the judgment at issue, the Court considers that the Government should pay it the outstanding debt (see paragraph 6 above) in settlement of its pecuniary damage.

36. As regards the applicant's claim concerning the inflation losses, the Court notes that the applicant's calculations are not supported by any official documents, which would enable the Court to determine the amount. Consequently, it rejects this part of the claim (see e.g., *Glova and Bregin v. Ukraine*, nos. 4292/04 and 4347/04, § 29, 28 February 2006). In so far as the applicant claimed the interest rate, the Court considers that the applicant remains entitled to claim this compensation in the course of domestic proceedings.

37. As to the remainder of the applicant's just satisfaction claim, the Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, awards the applicant EUR 2,000 (two thousand euros) in respect of non-pecuniary damage.

B. Costs and expenses

38. In the present case the applicant failed to submit any claims; the Court therefore makes no award.

1. Approximately EUR 81,500.

C. Default interest

39. 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 complaint concerning the non-enforcement of the judgments given in the applicant's favour admissible and the remainder of the application inadmissible;
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;
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 unsettled debt owed to it under the judgment of 29 August 2000, as well as EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (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 20 September 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President