



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

FOURTH SECTION

CASE OF BANCA VIAS v. MOLDOVA

(Application no. 32760/04)

JUDGMENT

STRASBOURG

6 November 2007

FINAL

06/02/2008

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 Banca Vias v. Moldova,

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

Mr J. CASADEVALL, *President*,

Mr G. BONELLO,

Mr K. TRAJA,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

and Mrs F. ARACI, *Deputy Section Registrar*,

Having deliberated in private on 9 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 32760/04) 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 a Moldovan company, Banca VIAS (in the process of liquidation), (“the applicant”), on 16 July 2004.

2. The Moldovan Government (“the Government”) were represented by their Agent at the time, Mr V. Pârlog.

3. The applicant alleged, in particular, that the failure to enforce the non-enforcement of the final court judgment in its favour dated 26 February 2002 had violated its rights guaranteed by Article 6 § 1 of the Convention. In essence, it also complained about a violation of its rights protected by Article 1 of Protocol No. 1 to the Convention.

4. The application was allocated to the Fourth Section of the Court. On 12 January 2006 the President of that Section decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is registered in Chişinău.

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

1. Background of the case (changes of status of the applicant's debtor)

7. The State company “Vibropribor” (“SCV”) was created on 14 May 1995 and was registered in the State Register of Companies.

8. On 3 July 1996 the “Vibropribor” joint-stock company (“V.”) was registered by the State Register of Companies. V. was the result of the reorganisation of SCV into a joint-stock company, based on a founding contract between the Department of Privatisation (“the Department”) and two private companies.

9. In 1998 the Department initiated court proceedings for the annulment of the contract for the founding of V., alleging that it had been concluded in violation of the law, and for *restitutio in integrum*. On 14 September 1998 the Economic Court of Moldova rejected that request as unfounded. That judgment was upheld by the Appeals Chamber of the Economic Court on 24 May 1999 and by the Supreme Court of Justice on 29 September 1999. That judgment was final.

10. The Department requested the re-opening of the proceedings, invoking an incorrect assessment of the facts and law in the previous judgments.

11. On 22 February 2001 the Economic Court rejected that request on *res judicata* grounds.

12. On 25 June 2001 the Appeals Chamber of the Economic Court accepted the request, ordering the liquidation of V. and *restitutio in integrum*. That judgment was final.

13. In execution of this judgment, on 23 August 2001 the Department ordered the creation of a liquidation commission which was charged, *inter alia*, with determining V.'s debts toward third parties and debts owed to V. and with the payment of V.'s debts following the Department's approval.

14. In 2002 the Prosecutor General requested the Supreme Court of Justice to re-open the proceedings and to quash the 1998-1999 judgments.

15. On 11 March 2002 the Supreme Court of Justice accepted that request and quashed the judgments of 14 September 1998, of 24 May 1999 and of 29 September 1999. The court adopted a new judgment, declaring null and void the contract for the founding of V. The court found that the two private founding companies had not fulfilled their obligations by failing to transfer their contributions to V.'s capital. As a result, V.'s registration in

the State Register of Companies was annulled on 18 May 2002 and SCV was registered instead (“the new SCV”), stating in its statute that the company was created on the basis of “Vibroaparat” company (which existed before V.’s creation). The new SCV’s address mentioned in the statute was 10 Gagarin str. in Chişinău.

16. On 3 April 2002 the Department requested a revision of the final judgment of 25 June 2001. On 24 April 2002 the Appeals Chamber of the Economic Court accepted that request and changed the formulation of the judgment from an order for the liquidation of V. to a declaration that V. had not been lawfully founded and that all its assets should be returned as they were on 3 July 1996. The court relied on the judgment of the Supreme Court of Justice of 11 March 2002 as the basis for the change of formulation, since that judgment had annulled the contract for the founding of V.

17. On 20 November 2002 the Supreme Court of Justice rejected a request for the revision of its judgment of 11 March 2002.

2. The credit issued by the applicant to V. and enforcement proceedings

18. On 8 August 1997 the applicant issued a credit to V. in the amount of 3,472,965 Moldovan lei (MDL). As established by the prosecutor’s office in subsequent criminal proceedings against V.’s president, the money had been used for the purchase of equipment. In accordance with a contract dated 20 August 1997 V. pledged movable property valued at MDL 1,428,000 as a guarantee of complying with the contract. V.’s address mentioned in the contract was 10 Gagarin str. in Chişinău.

19. In 1999 the applicant went into liquidation, proceedings which still continue. On 18 September 2001 the Department informed the applicant about the initiation of V.’s liquidation proceedings (see paragraph 13 above). On 2 October 2001 the applicant asked V.’s liquidation commission to be listed as one of V.’s creditors, mentioning the amount of the credit debt. It is unclear what the commission’s response was.

20. The applicant initiated court proceedings against V. On 26 February 2002 the Chişinău Economic Court awarded the applicant MDL 3,383,991 (the equivalent of 294,623 euros (EUR) at the time). There was no appeal and the judgment became final 15 days later. On 14 March 2002 the court issued an enforcement warrant.

21. On 25 March 2002 the bailiff gave the opportunity to V. to pay its debt to the applicant. Following its refusal, on 2 April 2002 the bailiff seized two of V.’s building situated at 10 Gagarin str. in Chişinău in order to sell them at an auction. According to an expert report dated 30 April 2002 and filed at the Centru District Court’s request, one of those buildings (“D”) had a total surface of over 5,400 m² and at the time its market value was MDL 4,800,000 or 358,200 United States Dollars (USD). The bailiff made an auction announcement in the local press for the sale of V.’s “D” building,

setting the initial price at MDL 4,800,000. The first auction was declared invalid due to the lack of potential buyers.

22. Following V.'s complaint (under its new name of SCV as a result of becoming again a State company following the judgment of the Supreme Court of Justice of 11 March 2002, see paragraph 15 above), on 2 July 2002 the Centru District Court stayed the enforcement proceedings pending the outcome of SCV's complaint against the actions of the bailiff.

23. On 18 July 2002 the applicant appealed against the decision of the State Register of Companies of 18 May 2002 to annul V.'s registration (see paragraph 15 above) on the grounds that it had been taken in violation of the law, the authorities having failed to properly liquidate V. and to pay its debt to the applicant.

24. On 23 July 2003 the applicant requested a change in the method of enforcement of the final judgment of 26 February 2002, leaving it to the court to choose the most appropriate way of enforcement. The applicant referred to V.'s building seized in 2002 for sale at an auction and to the impossibility of enforcing the judgment by selling that building in view of the removing of V.'s name from the State Register of Companies. They claimed that the applicable legal provisions dealing with the manner of liquidating a company, including the payment of its debts, had not been followed in V.'s case.

25. On 11 December 2003 the Economic Court rejected that request. The court found, in particular, that the applicant had not proved that the new SCV was V.'s successor since no act for the transfer of assets between these two companies had been submitted to the court.

26. On 29 January 2004 the Appeals Chamber of the Economic Court upheld that judgment. That judgment was final. The court found that the applicant had not submitted proof that the assets, rights and obligations of V. had been transferred to SCV after the annulment of the contract for the founding of V.

II. RELEVANT DOMESTIC LAW

27. The relevant domestic law has been set out in *Prodan v. Moldova* (no. 49806/99, ECHR 2004-III (extracts)).

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

“Article 38

A legal person ceases to exist through liquidation or re-organisation (merger, division and acquisition)...

The process of liquidation is established by [...] law.

Article 39

In the case of the merger or division of legal persons, their property (rights and obligations) are transferred to the newly created legal persons.

If a legal person is acquired by another legal person, its property (rights and obligations) are transferred to the acquiring legal person.”

THE LAW

29. The applicant complained about a violation of its rights guaranteed under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention resulting from the failure to enforce the final judgment of 26 February 2002.

Article 6 § 1 of the Convention, in so far as relevant, provides:

“1. In the determination of his civil rights and obligations ... everyone is entitled to a fair hearing ... within a reasonable time...”

Article 1 of Protocol No. 1 to the Convention reads as follows:

“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.”

I. ADMISSIBILITY

30. The Court considers that the applicant's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No 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 4 above), the Court will immediately consider the merits of these complaints.

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

31. The applicant complained that the non-enforcement of the final judgment in its favour had violated its rights under Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention. It submitted that it had asked the courts to request the documents relating to V.'s liquidation, but allegedly the courts considered that unnecessary. The Government did not comment on this latter claim.

32. The Government submitted that the authorities had taken all reasonable steps to ensure the enforcement of the judgment and that enforcement became impossible in view of the complex legal situation created by the annulment of the creation of V.

33. The Court reiterates that “execution of a judgment given by any court must ... be regarded as an integral part of the “trial” for the purposes of Article 6” (see *Hornsby v. Greece* judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510, § 40, and *Prodan*, cited above, § 52). The Court also recalls that a “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention if it is sufficiently established to be enforceable (see *Prodan*, cited above, § 59).

34. Moreover, “the State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without any undue delay” (*Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005). When the authorities fail to act in order to enforce a judgment despite their legal obligation, their inactivity can engage the State's responsibility (see *Scollo v. Italy*, judgment of 28 September 1995, Series A no. 315-C, § 44; *Istrate v. Moldova*, no. 53773/00, §§ 55 and 61, 13 June 2006).

35. The Court notes that in the present case the applicant has a final court judgment which the authorities failed to enforce. The reason for the non-enforcement is the “non-existence” of the debtor and its assets. It is plain, however, that this non-existence resulted from the judgment of 24 April 2002 (see paragraph 16 above), annulling V.'s creation.

36. The Court also notes that the applicant does not contest the reasons for annulling V.'s creation, but only the manner in which its property was dealt with thereafter. While the first order for V.'s liquidation (see paragraph 12 above) was followed by the creation of a liquidation commission which was charged with the payment of debts owed by V. to its creditors (see paragraph 13 above), no such procedure appears to have been followed after the order for the annulment of the creation of V. There was nothing in the courts' judgments or other authorities' decisions regarding the fate of V.'s assets apart from the court order of 24 April 2002 to return the assets to where they were on 3 July 1996 (see paragraph 16 above). This order can

only be interpreted as the transfer of V.'s assets back to the State company which existed before it was transformed into V. (see paragraphs 7 and 8 above), given that the two other companies which had participated in the creation of V. could not claim any of its assets, following the finding by the courts that they had not made any contribution to V.'s property (see paragraph 15 above).

37. The Court observes that, following the annulment of V.'s founding, the applicant asked the competent authorities and the courts to ensure the enforcement of the judgment in its favour and asked a court to determine whether V. had been properly liquidated, including whether it had previously paid all its debts (see paragraphs 23 and 24 above). Apparently, the court did not consider it necessary to make such a determination (see paragraph 31 above).

38. The Court does not have to decide whether the domestic law had been followed in the present case. It also finds it unnecessary to determine whether it was the new SCV which obtained V.'s property as a result of the judgment of 24 April 2002 or any other person or company. What matters is that V. ceased to exist and its entire property was alienated without the payment of its debts. The Court considers that it is contrary to basic principles of fairness for the authorities to allow the liquidation of a company, by whatever means, and the transfer of its property to any third party, without having paid its debts, within the limits of any assets it may have at the time of liquidation. However, this is what, in essence, resulted from the various judgments adopted in the present case. As a result, V. no longer exists, nor does it have any assets and the judgment in favour of the applicant cannot be enforced. The Court concludes that the impossibility to enforce the judgment is directly attributable to the State.

39. The Court has found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention in numerous cases concerning the failure to enforce final judgments (see, among other authorities, *Prodan*, cited above, and *Lupacescu and Others v. Moldova*, nos. 3417/02, 5994/02, 28365/02, 5742/03, 8693/03, 31976/03, 13681/03, and 32759/03, 21 March 2006).

40. Having examined the material submitted to it, and in view of its finding of the State's responsibility for the impossibility to enforce (see paragraph 38 above), the Court notes that the file does not contain any element which would allow it to reach a different conclusion in the present case.

41. Accordingly, the Court finds, for the reasons given in those cases, that the failure to enforce the judgment of 26 February 2002 constitutes a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed EUR 320,477 for pecuniary and non-pecuniary damage. It relied on the average National Bank's base interest rates for the relevant period.

44. The Government submitted that in view of the absence of any liability of the State, the applicant could not claim any damages. However, should the Court consider that such damages were to be paid, the calculation should be based on the specific National Bank's base interest rates for each period and not taken as an average. Moreover, the practice of the commercial banks in Moldova did not provide, as a rule, for compound interest to be calculated. They considered also that the applicant had not proved that any non-pecuniary damage had been caused to it.

45. The Court considers that the applicant must have been caused pecuniary and non-pecuniary damage as a result of the failure to enforce the final judgment in its favour. Judging on an equitable basis, it awards the applicant EUR 301,000.

B. Costs and expenses

46. The applicant claimed EUR 95 for costs and expenses. It submitted copies of bills for translation and postal expenses.

47. The Government considered that this amount was excessive and not supported by relevant evidence.

48. On the basis of the materials of the case, the Court accepts this claim in full.

C. Default interest

49. 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, EUR 301,000 (three hundred and one thousand euros) in respect of pecuniary and non-pecuniary damage, and EUR 95 for costs and expenses, 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 6 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş ARACI
Deputy Registrar

Josep CASADEVALL
President