



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF BUSINESS ȘI INVESTIȚII PENTRU TOȚI v. MOLDOVA

(Application no. 39391/04)

JUDGMENT

STRASBOURG

13 October 2009

FINAL

13/01/2010

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 Business Și Investiții Pentru Toți v. Moldova,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 22 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 39391/04) 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 company registered in Moldova, Businessbank S.A., which was subsequently renamed Business Și Investiții Pentru Toți (“the applicant company”), on 1 November 2004.

2. The applicant company was represented by Ms T. Eremciuc, a lawyer practising in Chișinău. The Moldovan Government (“the Government”) were represented by their Agent, Mr V. Grosu.

3. The applicant company alleged, in particular, that the court action which it had initiated against a company and a State institution had not been examined by the domestic courts and that the courts had examined another action, which had affected the applicant company's rights even though it had not been party to those proceedings.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 28 November 2007 the President of that Section decided to give notice of 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 company is registered in Moldova.

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

7. In 1987 a State-owned company started construction of an apartment building, with the ground floor reserved for office space. After several changes of ownership of the unfinished building, another State company (L.) was designated as its owner. A subsequent administrative decision allowed a third State company (M.) to become a co-owner of the building.

8. In 1997 L., with the apparent approval of the Department of Privatisation (“the Department”), concluded a contract with a private company (I.). The latter undertook to finish the construction works in exchange for a share of the office space on the ground floor of the building.

9. On 19 October 2000 I. concluded a contract with the applicant company, under which the applicant company would finance the construction work and in exchange become the owner of a part of the office space in the building.

10. On 27 March 2001 M. initiated court proceedings against L., I. and the Department for annulment of the 1997 contract, as interfering with its right to a part of the building.

11. On 19 November 2001 the applicant company initiated court proceedings against I., claiming damages for I.'s failure to fulfil its part of the contract in time. On 29 November 2001 the applicant company requested I. to transfer the office space to which it had rights under the contract concluded in 2000.

12. On 6 February 2003 the applicant company initiated court proceedings against I., M., the Department of Privatisation and the Chișinău municipality, requesting confirmation of its property right over the office space claimed from I. under the contract of 19 October 2000. It noted that it had invested more than a million United States dollars (USD) in the construction of the building under that contract and that it was using the relevant office space, but that it was still unable to exercise all rights over that property as its rightful owner. It added that “due to I.'s actions, [the applicant company] was dragged into court proceedings against M., the Department, etc.” The applicant company asked the court to recognise its property right over specifically identified office space in the relevant building.

13. On 27 April 2004 the applicant company asked the court to discontinue the proceedings it had initiated against I. because the latter had

accepted its claims and transferred the relevant office space. On the same day the Chișinău Court of Appeal allowed the applicant company's request.

14. Also on 27 April 2004 the Chișinău Court of Appeal rejected the claims of M. as unfounded.

15. On 8 July 2004 the Supreme Court of Justice quashed that judgment and adopted a new one, allowing M.'s claims in full.

16. The applicant company asked for a revision of the judgment of 8 July 2004. It complained that it had not been joined as a party to the proceedings, even though its property rights had been affected. Moreover, its court action lodged on 6 February 2003 had not been examined and the judgment of 8 July 2004 had prejudged the outcome of those proceedings. The applicant company emphasised that it had withdrawn only its court action against I. and not that against M. and the Department for recognition of its property right over the part of the building which it had been occupying throughout the proceedings.

17. On 16 September 2004 the Supreme Court of Justice rejected the applicant company's request for revision. It found that the applicant company was not the owner of the disputed part of the building. It also found that on 19 October 2000 I. had concluded the contract with the applicant company in bad faith, since it had been aware of the ongoing legal dispute with M. in respect of the building and of the court prohibition on continuing any construction work. The proceedings which had ended with the judgment of 8 July 2004 did not affect the applicant company's right to claim damages from I. for its actions in bad faith.

18. The court also considered that by withdrawing its claims on 27 April 2004 the applicant company had sought to have the proceedings discontinued in their entirety. It added that "since the applicant company had withdrawn the totality of its claims, but the court decided to discontinue the proceedings only in respect of one such claim, the parties have the right to ask for an additional decision discontinuing the proceedings in respect of the recognition of the property right".

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Article 37 of the Code of Civil Procedure, in force before 12 June 2003, reads as follows:

"...

If the legally protected rights and interests of persons not participating in the proceedings may be affected by a court judgment because of the nature of the legal relationship or applicable legal provisions, the court is obliged to join such persons to the proceedings as co-defendants or to inform them of their right to join as co-plaintiffs".

20. Article 449 of the Code of Civil Procedure reads as follows:

“A request for revision shall be granted if:

...

(g) the court has adopted a judgment affecting the rights of persons who were not parties to the proceedings;

(h) the judgment adopted prevents the taking of a lawful decision in other proceedings; ...”.

21. In the case of Soroca mining company (see *Baroul Partner-A v. Moldova*, no. 39815/07, § 49, 16 July 2009), the Supreme Court of Justice, after annulling the contract for the privatisation of the mining company, also annulled all subsequent legal acts adopted on the basis of that privatisation such as the issuing of shares.

THE LAW

22. The applicant company complained under Article 6 § 1 of the Convention that its property rights had been affected by court judgments in proceedings to which it had not been a party, thus depriving it of the right to have its position heard by the courts. The relevant part of Article 6 § 1 of the Convention reads:

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

I. ADMISSIBILITY

23. In its initial application the applicant also complained of a violation of its rights guaranteed under Article 1 of Protocol No. 1 to the Convention. However, in its observations on the admissibility and merits it asked the Court not to proceed with the examination of this complaint. The Court finds no reason to examine it.

24. The Court considers that the applicant's complaint under Article 6 § 1 of the Convention raises questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and no other grounds for declaring it inadmissible have been established. The Court therefore declares this complaint 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 the complaint.

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

A. Arguments of the parties

25. The applicant company submitted that the domestic courts' failure to involve it as a party to the proceedings involving I., M. and the Department amounted to a violation of its rights guaranteed under Article 6 to the Convention. In particular, it argued that the domestic courts had never prohibited I. from concluding investment agreements. Thus I. had had the right to conclude such an agreement with the applicant company, despite a court injunction against selling the property concerned. Moreover, the law did not require the applicant company to register its contract with I. with the real estate authority, but merely gave it the right to do so.

26. Moreover, it was not for the Government to decide whether, in light of the absence of its *prima facie* property right, the applicant company's participation in court proceedings initiated by it had been "necessary". It was precisely in order to assert the existence of such a right that the proceedings had been initiated. It was clear from the case file examined by the Supreme Court of Justice that the applicant company had become the owner of a part of the building which was disputed in the proceedings initiated by M. against I. and the Department. The court was obliged to involve the applicant company in the proceedings, given the clear consequences for its property right over the building. Moreover, the Supreme Court of Justice failed to deal with the contracts concluded by I. in respect of the building, contrary to its own jurisprudence in cases of annulment of the original title, as exemplified by the annulment of the privatisation and subsequent sale of the Soroca limestone mine (see paragraph 21 above).

27. The Government submitted that the applicant company had never had a property right in respect of the disputed building. I. could not legally dispose of the disputed building because of a court injunction, and thus the investment contract which it concluded with the applicant company was null and void *ab initio*. Accordingly, the applicant company had no right to intervene in the proceedings initiated by M. against I. and the Department and its participation was not necessary for the courts to be able to fully examine the case. The fact that the contract between I. and the applicant company was not registered with the relevant real estate authorities only confirmed the unlawfulness of the entire deal. Moreover, the applicant company was fully aware of the situation, and took the risk of concluding an unlawful contract.

28. In addition, by withdrawing its court action on 27 April 2004 the applicant company had agreed to withdraw from the proceedings voluntarily. In its judgment of 8 July 2004 the Supreme Court of Justice did

not therefore decide on the rights and lawful interests of the applicant company, as had been explained in that court's decision of 16 September 2004 (see paragraphs 17 and 18 above). Finally, the judgment of 8 July 2004 did not prevent the applicant company from claiming damages from I.

B. The Court's assessment

29. The Court notes that the parties disagree on whether the applicant company had a property right in respect of a part of the disputed building. It considers that it is not necessary to determine this point, in light of the following. At the moment when the Supreme Court of Justice examined the case on 8 July 2004, two companies claimed to have a property right in respect of a part of the same building. One of them was M., the plaintiff, which had been found by the first-instance court not to have any valid claims to the building. The other was the applicant company, which obtained its right over a part of the building from I., the company which had won at first instance. The contract between I. and the applicant company was valid at the relevant time. It follows that the applicant company's claim, which had been based on the contract with I., was not *prima facie* devoid of a factual or legal basis. The domestic courts did not mention any other circumstance preventing them from examining the applicant company's claim. In such circumstances, the applicant company's claim could not be left unexamined or otherwise disregarded without a formal examination.

30. The Court considers that issues such as whether the applicant company's claim had any chance of success in view of the alleged nullity of the contract with I. was a decision which only a court could take. At the same time the Supreme Court of Justice, which was fully aware that two companies (M. and the applicant company) each claimed to have property rights over a part of the same disputed building (see paragraph 12 above), could not deal with the claim of one of those companies without prejudging the other company's rights. It follows that, in accepting M.'s claims over the disputed part of the building, the Supreme Court of Justice had prejudged the outcome of the proceedings initiated by the applicant company against M. and the Department.

31. The Court notes the Government's argument that only I. had the right to participate in the proceedings, the applicant company not having any legal standing in them. However, it reiterates that, in principle, a new owner of property acquired can claim in courts all the rights which the old owner could have raised (see, *mutatis mutandis*, *Anghelescu v. Romania*, no. 29411/95, §§ 49 et seq. and §§ 66 et seq., 9 April 2002; *Mihailescu v. Romania* (dec.), no. 32913/96, 22 June 2004; and *Moldovahidromas v. Moldova* (dec.), no. 30475/03, 4 April 2006). In the present case, I. transferred its rights to the applicant company in respect of the disputed

building. It follows that the applicant company had a right to intervene in any proceedings concerning I.'s rights over the disputed building.

32. The Government further submitted that, as found by the Supreme Court of Justice, the applicant company had withdrawn all of its claims on 27 April 2004 (see paragraph 18 above). However, the Court finds no reason to believe that the applicant company asked for the discontinuation of the proceedings against all defendants which it had designated in its court action of 6 February 2003 other than I. (see paragraph 12 above). On the contrary, the applicant company expressly asked for the discontinuation of the court action initiated against I., while not stating anything about its intentions concerning the other defendants. Moreover, not only was the court action against I., M., the Department and the Chișinău municipality initiated more than a year after the initial action against I., but it had a different subject matter. The applicant company's initial claim was to obtain from I. damages for the delay in honouring its obligations under the contract, followed by an additional request to transfer into its property the relevant office space (see paragraph 11 above). By contrast, the second action was aimed at the recognition of the applicant company's property right over the office space already transferred to it by I. (see paragraph 12 above), and was directed against all those legal persons and authorities which could have a claim or a legal interest in respect of the disputed building.

33. The Court concludes that the applicant company's court action against M., the Department and the Chișinău municipality was never examined. At the same time, its claim that it had a property right in respect of a part of the disputed building was prejudged when the Supreme Court of Justice accepted M.'s claims for the recognition of its right over the same building, without involving the applicant company as a party to the proceedings. Moreover, even though examining a case which may affect the rights and interests of a third party without involving that party is an express ground for reopening the proceedings (see paragraph 20 above), the Supreme Court of Justice rejected the applicant company's request based on that legal provision.

34. In the light of the above, the Court concludes that the applicant company's right of access to court was breached. There has, accordingly, been a violation of Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. Referring to the Court's case-law in *Sovtransavto Holding v. Ukraine* (just satisfaction) (no. 48553/99, § 79, 2 October 2003), and *Oferta Plus S.R.L. v. Moldova* (just satisfaction) (no. 14385/04, § 74, 12 February 2008), the applicant company claimed 50,000 euros (EUR) in respect of non-pecuniary damage caused as a result of the violation of its rights guaranteed under Article 6 of the Convention. It submitted that the company's administration had suffered anxiety and uncertainty as to their own and their company's future.

37. The Government considered that the applicant company's submissions were unsubstantiated and that the amount claimed was exaggerated. They invited the Court to reject the applicant company's claims as unsubstantiated or to decide that the finding of a violation constituted sufficient just satisfaction.

38. The Court recalls that legal persons can, in principle, claim damage for non-pecuniary damage caused and reiterates that “[n]on-pecuniary damage suffered by such companies may include heads of claim that are to a greater or lesser extent 'objective' or 'subjective'. Among these, account should be taken of the company's reputation, uncertainty in decision-making, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team” (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV). In the present case, the Court considers that the management of the applicant company must have been caused a certain amount of uncertainty and disruption of the company's plans as a result of the violations of its rights guaranteed under Article 6 of the Convention. However, it considers that the claim made is excessive. Deciding on an equitable basis, the Court awards it EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

39. The applicant company claimed EUR 2,500 for legal representation and EUR 50 for translation services. It relied on a contract with

V. Nagacevschi from Lawyers for Human Rights, a non-governmental organisation based in Chișinău, regarding the drafting of observations in the present case. According to an annex to the contract, the applicant company confirmed that Mr Nagacevschi had worked fifteen hours on the case and was paid the equivalent of EUR 2,500.

40. The Government submitted that the applicant company had not proved its legal costs claim. They referred to the fact that the applicant company had been represented before the Court by Ms Eremciuc and not by Mr Nagacevschi, and that there was no relation between the alleged number of hours worked on the case by Mr Nagacevschi in the absence of any mandate from the applicant company to do so.

41. The Court notes that the applicant company did not submit a power of attorney to be represented by Mr Nagacevschi in the proceedings before it. However, it also notes that the applicant company concluded a contract with that lawyer for drafting observations to be submitted to the court, and that those observations were submitted in time. The Court finally observes that the applicant company did not make a separate claim for legal expenses of the lawyer designated by it as its official representative before the Court. In these circumstances the Court awards the applicant company EUR 1,550 for costs and expenses.

C. Default interest

42. 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*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 1,550 (one thousand five hundred and fifty euros) 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President