



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

THIRD SECTION

CASE OF S.C. PRODCOMEXIM S.R.L. v. ROMANIA (no. 2)

(Application no. 31760/06)

JUDGMENT

STRASBOURG

6 July 2010

FINAL

06/10/2010

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

In the case of S.C. Prodcomexim S.R.L. v. Romania (no. 2),
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Egbert Myjer,

Ineta Ziemeļe,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 15 June 2010,

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

PROCEDURE

1. The case originated in an application (no. 31760/06) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian company, S.C. Prodcomexim S.R.L. (“the applicant company”), on 21 July 2006.

2. The applicant was represented by Mr Gheorghe Ungureanu, its managing director. The Romanian Government (“the Government”) were represented by their Agent, Mr Răzvan-Horațiu Radu.

3. On 23 April 2008 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant company is a joint stock company based in Ploiești.

A. Attempts to enforce the judgment of 24 June 1998

5. On 24 June 1998 the Supreme Court of Justice, by a final decision, ordered the S.C. Safa Impex S.R.L. company (“the S. company”) to pay the

applicant company 533,683,270 old Romanian lei (ROL) as due payment resulting from a contract they had entered into and ROL 21,254,421 for the costs of proceedings. The court based its findings on an expert report which had updated the due amount on the basis of the inflation rate.

6. In August and September 1998 the S. company sold a part of its movable and immovable property to the S.C. Safa Comimpex S.R.L. company, which had as manager the wife of one of the two managers of the S. company.

7. Following refusal of payment by the S. company, on 17 September 1998 the applicant company requested the Prahova County Court to enforce that judgment.

8. On 19 January 1999 the S. company further sold a building to the same SC Safa Comimpex SRL company.

9. On 10 February 1999 the Ploiești District Court decided in private to attach the S. company's assets in the T. bank up to the total due amount of ROL 554,937,691.

10. On 5 April 1999, at the applicant company's request, the Ploiești District Court upheld that attachment and ordered the bank to transfer that amount into the applicant company's account. An appeal by the bank was dismissed as groundless on 12 October 1999.

11. On 3 December 1999 the applicant company informed the Prahova County Court that the debtor had taken its money out of the T. bank and requested to continue enforcement by sale by public auction of debtor's immovable and movable property.

12. On 6 December 1999 the bailiff R. served notice to the S. company to pay the debt. The debtor refused to receive that notice and the bailiff posted it on its door.

13. On 16 December 1999 the bailiff requested information from the public finance office in respect of S company's movable and immovable property. In the absence of an answer by the finance office, the bailiff renewed that request on 15 February 2000.

14. On 6 April 2000 the public finance office submitted to the bailiff the debtor's balance sheet.

15. On 1 May 2000 the S. company sold a vehicle to the wife of one its two managers.

16. On 18 May 2000 the public finance office informed the bailiff about the S. company's assets, which included a building and four vehicles. Therefore, at an unknown date the bailiff R. seized the four vehicles and on 22 September 2000 he put them on sale by public auction. The sale was scheduled for 13 October 2000.

17. However, on 13 October 2000, following a visit to the S. company's premises, the bailiff R. certified in an official record that the debtor had sold the four above-mentioned vehicles to the S.C. Safa Comimpex S.R.L.

company. The debtor also refused to pay, alleging that it had no other assets and had ceased to function.

18. It appears from the file that the proceedings brought for the annulment of those sales were dismissed by the courts.

19. On 9 October 2002, following failure by the bailiff R. to enforce that judgment, the applicant company requested his replacement. The execution file was transferred to the bailiff M.

20. On 30 October 2002 the bailiff M. requested the Ploieşti District Court to authorise the enforcement and the town council to inform him about the debtor's assets. On 12 November 2002 the court approved the enforcement by an interlocutory decision. By a letter of 18 December 2002 the town council informed the bailiff that the debtor was listed as the owner of two vehicles.

21. The S. company made an objection to the execution, alleging prescription of the applicant's right to claim enforcement. Eventually, on 25 April 2006 the Ploieşti District Court found that the action had lapsed.

B. Criminal proceedings against the managers of the S. company

22. On 2 May 2001 the applicant company lodged a criminal complaint against the two managers of the S. company, submitting that they had sold the company's assets and thus prevented the applicant company to recover the debt.

23. On 29 November 2001 the public prosecutor found no reasons to start criminal proceedings.

C. Civil proceedings against the managers of the S. company

24. In 2002 the applicant company brought proceedings against the managers of the S. company, to hold them liable for the company's debts.

25. By an enforceable decision of 10 February 2005 the Prahova County Court allowed that action and ordered the two managers to pay the debt out of their personal property. The court based its findings on an accounting expert report which had found that the two managers of the S. company were at fault for its insolvency and that they had transferred its assets to another company, managed by the wife of one of them. Moreover, the value of those assets had not been updated to their market value and the payment ordered by the judgment of 24 June 1998 had not been recorded in the company's book of accounts. The court concluded that the aim of their entire activity was to avoid paying the debt to the applicant company.

26. On 7 December 2007 the applicant company requested the bailiff T. to enforce that judgment. According to the applicant, one of the two managers is retired and they also have sold their personal assets.

27. Two invoices of 26 September and 28 October 2008 certified payment of two instalments of 117 new Romanian lei each.

D. Compulsory liquidation of the S. company

28. On 8 November 2002 the applicant company presented a winding-up petition against the S. company.

29. On 11 December 2002 the Prahova County Court authorised the compulsory liquidation and appointed a trustee. That judgment became final on 24 February 2003.

30. On 9 February 2005 the S. company was declared bankrupt by the Prahova County Court. The court appointed the same trustee.

31. The trustee drew up a final report in which she certified that the S. company had no movable or immovable property to be sold. She therefore proposed the court to terminate the bankruptcy proceedings.

32. On 23 January 2006 the Prahova County Court, by an enforceable decision, terminated the bankruptcy proceedings and ordered that the S. company be struck off the trade register. The court also held that the enforcement of the judgment of 10 February 2005 (see paragraph 25 above) would be carried out according to the Code of Civil Procedure.

33. According to the applicant company, the amount to which it was entitled was recorded in its book of accounts and thus it had to pay corresponding taxes to the State.

II. RELEVANT DOMESTIC LAW

34. The relevant domestic law is described in *Topciov v. Romania* ((dec.), no. 17369/02, 15 June 2006) and *Elena Negulescu v. Romania* (no. 25111/02, §§ 20-22, 1 July 2008).

THE LAW

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

35. The applicant company complained that that the non-enforcement of the judgment in its favour had infringed its rights guaranteed by Article 6 § 1 of the Convention, which, in so far as relevant, 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...”

A. Admissibility

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

37. The Government invoked the case of *Topciov v. Romania* ((dec.), no. 17369/02, 15 June 2006) and argued that neither the bailiffs nor the authorities were at fault for the non-enforcement. They considered that the bailiff had taken measures to enforce that judgment and to identify the debtor's assets, but the latter had no pecuniary resources. Eventually the Government submitted that the applicant had had the possibility to request enforcement of the judgment of 10 February 2005, but remained passive.

38. The applicant company alleged that the bailiff's failure to carry out his tasks in due time had made possible for the debtor company to transfer its assets and thus to prevent enforcement of the judgment in its favour. It considered the present case as being similar with the case of *Ruianu v. Romania* (no. 34647/97, 17 June 2003).

39. 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 of the Convention (*Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). However, the right of “access to court” does not impose an obligation on a State to execute every judgment of civil character without having regard to particular circumstances of a case (*Sanglier v. France*, no. 50342/99, § 39, 27 May 2003). 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 undue delay (*Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005). When the authorities are obliged to act in order to enforce a judgment and they fail to do so, their inactivity can engage the State's responsibility on the ground of Article 6 § 1 of the Convention (*Scollo v. Italy*, 28 September 1995, § 44, Series A no. 315-C).

40. The Court is not called upon to examine whether the internal legal order of the State is capable of guaranteeing the execution of judgments given by courts. Indeed, it is for each State to equip itself with legal instruments which are adequate and sufficient to ensure the fulfilment of

positive obligations imposed upon the State (*Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003). The Court's only task is to examine whether the measures applied by the Romanian authorities in the present case were adequate and sufficient. In cases such as the present one, which necessitate actions by a debtor who is a private person, the State, as the possessor of the public force, has to act diligently in order to assist a creditor in execution of a judgment (*Fociac v. Romania*, no. 2577/02, § 70, 3 February 2005).

41. In the present case the Court notes that the applicant company was entitled to recover a certain amount of money from another company, which had deliberately provoked its insolvency in order to avoid payment (see paragraph 25 above). Even though the courts ordered the managers of the debtor company to pay the debt out of their personal property, the applicant company has not recovered so far the amount of money to which it was entitled and thus the judgment of 24 June 1998 remains unenforced. Therefore, the Court will examine whether the authorities have acted diligently in order to assist the applicant company in execution of that judgment.

42. In this respect, the Court notes the inconsistencies between, on the one hand, the situation on paper in respect of the debtor's movable and immovable assets and the fact that the bailiff had seized some of those goods and, on the other hand, the fact that in reality the debtor had sold those goods (see paragraphs 16 and 17 above). Moreover, it appears from the file that no further action was taken by the bailiff R. between 13 October 2000 and 9 October 2002, when the applicant company requested his replacement. Therefore, the Court concludes that the bailiff R. did not act diligently in order to assist the applicant company in execution of the 1998 judgment.

43. In addition, the Court notes the delay of five months in which the public finance office responded to the bailiff's request for information regarding the debtor's assets (see paragraphs 13 and 16 above). Moreover, the bailiff had to ask twice for that information (see paragraph 13 above). Therefore, the Court cannot consider that the finance office acted with due diligence.

44. The Court finally observes that the debtor company was eventually declared bankrupt and that the courts ordered its former managers to pay the debt out of their personal property.

45. Therefore, the Court considers that the authorities did not act diligently and in due time in order to assist the applicant company in execution of the judgment in its favour. This failure by the authorities to act promptly allowed the managers of the debtor company to transfer all its assets, to drive it into bankruptcy and thus to prevent the applicant company from recovering its debt (see paragraph 25 above).

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

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

47. The applicant company further complained that as a result of the non-enforcement of the judgment in its favour it had been deprived of its property and suffered pecuniary losses in violation of Article 1 of Protocol No. 1.

48. Having regard to the findings in the paragraphs 41-46 above, the Court concludes that this complaint must be declared admissible, but that it is not necessary to examine it on the merits (see, *mutatis mutandis*, *Laino v. Italy* [GC], no. 33158/96, § 25, ECHR 1999-I; *Canea Catholic Church v. Greece*, 16 December 1997, § 50, *Reports* 1997-VIII, and *Ruianu*, cited above, § 75).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicant company claimed 234,711 euros (EUR) in respect of pecuniary damage, namely EUR 183,555 for the updated debt, on the basis of an accounting expert report from June 2008, and EUR 51,156 for the loss of profit, representing interest in accordance with Government Ordinance no. 9/2000 regarding the legal level of interest for pecuniary obligations. The applicant company also claimed EUR 50,000 in respect of non-pecuniary damage.

51. The Government submitted that the applicant company had requested enforcement of the judgment of 10 February 2005, but that it had not proved that the former managers of the S. company had no financial assets to pay the debt. They considered that the applicant company may claim only the sum of money provided by the 1998 judgment, updated in accordance with the inflation rate, which amounted to 608.52% for the period of June 1998-November 2008. As for the loss of profit representing the legal interest, that would lead to a second updating of the debt and would turn into unjust enrichment. Further, they considered that the finding

of a violation would constitute in itself sufficient just satisfaction for any non-pecuniary damage which the applicant company might have suffered.

52. The Court first notes that the judgment in favour of the applicant company has been partially enforced (see paragraph 27 above). It is therefore still entitled to receive the outstanding amount. It further points to the fact that following the debtor company's bankruptcy, the domestic courts ordered by an enforceable decision of 10 February 2005 the former managers to pay the debt out of their personal property (see paragraph 25 above). The Court, therefore, notes that the State's outstanding obligation to ensure the effective enforcement of the judgment in the applicant company's favour is not in dispute. Accordingly, the applicant company is still entitled to recover the remaining part of its judgment debt in the domestic proceedings. The Court reiterates that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that the applicant as far as possible is put in the position he would have been in had the requirements of Article 6 not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85). Having regard to the violation found, the Court finds that in the present case this principle applies as well. It therefore considers that the Government must secure, by appropriate means, the enforcement of the judgment of 24 June 1998, as provided by the subsequent judgment of 10 February 2005 (see, *mutatis mutandis*, *Cebotari and Others v. Moldova*, nos. 37763/04, 37712/04, 35247/04, 35178/04 and 34350/04, § 55, 27 January 2009). The Court takes note, in this respect, of the Government's allegations that it has not been proved that the former managers of the debtor company had no financial assets to pay the debt.

53. As regards the amount of money alleged by the applicant company for the loss of profit, the Court notes that the applicant company did not submit any supporting documents to substantiate its claim. In the absence of any evidence, the Court will not speculate as to the loss of profit and, therefore, will not make an award under this head (see *Dragne and Others v. Romania* (just satisfaction), no. 78047/01, § 18, 16 November 2006).

54. The Court considers that the serious interference with the applicant company's right of access to a court caused moral prejudice to the applicant company. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards it EUR 4,800 in respect of non-pecuniary damage.

B. Costs and expenses

55. The applicant company did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

56. 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 is no need to examine on the merits the complaint under Article 1 of Protocol No. 1;
4. *Holds*
 - (a) that the respondent State shall secure, by appropriate means, the enforcement of the domestic court's judgment of 24 June 1998, as provided by the subsequent judgment of 10 February 2005;
 - (b) 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 4,800 (four thousand eight hundred 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;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President