CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 68978/01
by Waldemar BATOR
against Poland

The European Court of Human Rights (Fourth Section), sitting on 5 January 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 4 March 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Waldemar Bator, is a Polish national who was born in 1954 and lives in Płock.

A. The circumstances of the case

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

1. First set of proceedings – appointment of a company's liquidator

The applicant was a 19% shareholder in the limited liability company "Capital". Z.B. owned the remaining 81% of shares and was also the owner of an American company. After "Capital" had been dissolved, Z.B. was appointed liquidator of the company on the basis of the shareholders' resolution of 6 November 1995, Z.B. using his majority shareholding to carry the vote. The applicant voted against the resolution.

On 14 November 1995 the applicant lodged a request to dismiss Z.B. and appoint another liquidator. The applicant justified his request on the ground that Z.B. was domiciled in USA and rarely visited Poland and that his many fraudulent actions had included falsifying the company accounts, in order to take over ownership of the company premises. Therefore, the applicant had a justified interest in a proper liquidation of the company and was highly concerned that his financial interests would be put at risk with Z.B. as liquidator.

On 15 March 1996 the Płock District Court found several serious shortcomings and infringements of company law in the conduct of the liquidator. The court established *inter alia* that on 20 January 1996 Z.B. had sold the company's real property by auction, and the buyer turned out to be his wife. The court also made relevant changes in the company register, adding the applicant as the new liquidator and deleting Z.B.'s name.

On 27 May 1996 the District Court, acting *ex officio*, nullified these changes in the register and instituted corrective proceedings, reasoning that the changes effected on 15 March 1996 had been done without a proper court decision.

On 11 July 1997 the court issued a decision appointing the applicant as the liquidator, but failed to order relevant changes in the register. Z.B. appealed.

On 30 October 1997 the Warsaw Regional Court quashed the decision on the basis that Z.B. had not been properly represented.

On 15 October 1998 the Płock District Court for the third time appointed the applicant as liquidator of the company and ordered relevant changes to be made to the company register.

On 16 December 1998 the court deleted those changes for an unknown reason. On 5 September 2000 the court issued a decision to make appropriate changes in the company register, yet again by specifying the applicant as the company liquidator.

Only after this date could the applicant act as the company's liquidator. However, it was already too late to declare null and void some of the

decisions taken by the previous liquidator, Z.B., to the company's detriment. Meanwhile, Z.B. had taken over the company's property (worth about PLN 2,500,000) and had registered a new company, with the same registered office and under a very similar business name.

2. Second set of proceedings – enforcement proceedings

On 12 April 1995 the applicant, who had been apparently employed by the company, lodged an action against "Capital" company for his reinstatement. On 18 August the Płock District Court issued a judgment with an enforcement clause in the applicant's favour awarding him compensation. On 7 November 1997 the applicant filed a motion to start the enforcement proceedings. On 23 March 1998 the Warsaw Regional Court partly amended the judgment.

On 27 March 1998 the applicant submitted the court judgment and an inventory of the company's property to the bailiff.

On 12 April 1999 the bailiff returned the applicant's enforcement title. The applicant appealed. On 19 June 1999 the Płock District Court quashed the bailiff's decision.

According to the applicant, the bailiff has not taken any action since then; he has neither proceeded with the enforcement nor discontinued the proceedings.

3. Third set of proceedings – exemption from court fees and appointment of a legal aid lawyer in cassation proceedings

On 16 March 1999 the applicant lodged a claim for payment against Z.B. (who had formerly been the company's representative and later the liquidator of "Capital") and against the State Treasury for compensation for damages he had suffered due to the court bailiff's conduct described in 2 above.

On 9 May 2001 the Płock Regional Court dismissed his action. On 22 May 2002 the Warsaw Court of Appeal upheld the judgment.

On 28 May 2002 the applicant asked for exemption from the court fees and for the appointment of a legal aid lawyer to assist him in the preparation of a cassation appeal.

On 9 July 2002 the Court of Appeal entirely exempted him from the court costs and asked the District Chamber of Legal Advisers to appoint a lawyer to draft a cassation appeal for the applicant. The appointed lawyer I.K., according to the applicant, informed him that she would only sign the cassation appeal if he wrote it himself. On 5 October 2002 the lawyer informed the applicant that she would not lodge a cassation appeal and that he should ask for the appointment of a new lawyer. The time-limit to lodge a cassation appeal expired on 10 October 2002.

On 17 October 2002 the applicant filed a motion with the Court of Appeal asking for retrospective leave to lodge a cassation appeal out of time and to appoint a new legal aid lawyer to draft the cassation appeal.

On 23 October 2002 the court asked him to submit two copies of a cassation appeal signed by a lawyer. The applicant explained that it was impossible for him to do so before the court granted his motion to have a new legal aid lawyer assigned.

On 27 November 2002 the court asked him whether he wished to waive his right to have a legal aid lawyer. The applicant replied that this had not been his intention. On 14 January 2003 the court asked the applicant whether a new lawyer had been appointed in place of I.K. On 20 January 2003 the applicant enquired about the procedure for changing a legal aid lawyer, as he thought that under legal aid scheme he was not himself entitled to ask another lawyer to represent him.

On 12 February 2003 the court informed the applicant that the District Chamber of Legal Advisers or the District Bar Association were responsible for deciding about changes of legal aid lawyers.

On 26 February 2003 the Court of appeal decided to return the applicant's motion on formal grounds. The written grounds of the decision read as follows:

> On 23 October 2002 the plaintiff was summoned to comply with the formal requirements for a motion for retrospective leave to lodge a cassation appeal out of time by submitting two copies of a cassation appeal drafted by a lawyer. The court summoned the applicant to do so because his legal aid lawyer had refused to lodge a cassation appeal, informing the applicant and the court about this decision. The plaintiff has not complied with the obligation imposed by the summons (...) and has failed to submit a cassation appeal prepared by a lawyer along with his motion. Therefore the motion should be returned ...

B. Relevant domestic law and practice

1. Provisions regarding company in liquidation

The provision of the Code of Commercial Companies, Title III Section I "Limited Liability Company", provide as far as relevant:

Article 227

> §1. Liquidators shall be members of the management board unless the articles of association or a resolution of shareholders provide otherwise.
>
> ...
>
> §4. At the request of persons having a legal interest, the court may, for important reasons, remove the liquidators and appoint others to replace them.

Article 277

§1. The opening of liquidation proceedings in respect of a company, full names of the liquidators, their addresses, the manner of representation of the company by the liquidators, and any changes in the above respect shall be notified to the registry court

...

§3. Liquidators appointed by the court and those removed by the court shall be entered in and struck off the register ex officio.

Article 280

The provisions applicable to members of the management board shall apply to the liquidators ...

Article 181

§1. Liquidators shall draw up a balance sheet as at the date of opening of the liquidation. Such balance sheet shall be submitted by the liquidators to the shareholders' meeting for approval.

Article 282

§1. Liquidators shall close the current business of the company, collect receivables, fulfil obligations and liquidate the company's assets (liquidation actions). New business may be undertaken only when this is necessary in order to close the current business. Real property may be disposed of through a public auction or unrestricted sale conducted only pursuant to a relevant resolution of the shareholders, at a price not lower than that set by the shareholders.

Article 283

§1. Liquidators shall have the right to conduct the company's affairs and represent the company within the scope of their powers set forth in Article 282 §1.

...

§3. Actions undertaken by liquidators shall be deemed liquidation actions in relation to third parties acting in good faith.

Article 286

...

§2. The assets [remaining after satisfying or securing creditors] shall be distributed among the shareholders in proportion to the shares held.

2. Provisions regarding appointment of legal assistance.

The Polish Code of Civil Procedure lays down the principle of "compulsory assistance of an advocate" in cassation proceedings.

Article 113 § 1 of the Code of Civil Procedure provides that a party to the proceedings may ask the court competent to deal with the case to grant him or her an exemption from court fees provided that he submits a

declaration to the effect that the fees required would entail a substantial reduction in his and his family's standard of living.

Pursuant to Articles 117 of the Code, persons exempted from the court fees may ask for legal aid. The court will then request the relevant District Bar Association or the District Chamber of Legal Advisers to assign an advocate or a legal advisor to the claimant's case.

Pursuant to Article 169 of the Code, a party to the proceedings may ask for retrospective leave to perform a procedural measure outside the prescribed time-limit; this measure shall be performed simultaneously with lodging the request.

On 21 September 2000 the Supreme Court (*Sąd Najwyższy*) adopted a resolution (no. (III CZP 14/2000) in which it ruled that a legal aid lawyer may refuse to draft a cassation appeal if he or she considers it would be inadmissible or manifestly ill-founded.

3. Provisions regarding proceedings against actions of court bailiff

Pursuant to Article 767 of the Code of Civil Procedure any person concerned is entitled to lodge a complaint with a District Court against actions or omissions (lack of action) of a court bailiff.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the excessive length of the first set of proceedings. He argues that due to lack of diligence on the part of the court in the proceedings in which he sought to have the company's liquidator replaced and to be appointed himself as a liquidator he was unable to secure the interests of the company of which he was a shareholder. This was so because the previous liquidator acted to the applicant's detriment, disposing of the company's assets for his own benefit. Thus, the applicant's 19% shareholding in the company has lost all value as a result of the protracted character of the proceedings.

2. The applicant further complains about the unfairness of the court decision regarding his request for the appointment of a new lawyer and granting leave to lodge a cassation appeal out of time. He argues that at first the court granted his request to appoint a legal aid lawyer. However, later on, the lawyer refused to prepare a cassation appeal and the applicant requested leave to appeal out of time and, at the same time, to have a new legal aid lawyer assigned to the case. The court ordered that the application for retrospective leave to appeal out of time be accompanied by a copy of the appeal itself, prepared by a lawyer. In the circumstances of the case, this was impossible for the applicant, precisely because at the same time he was requesting the court to assign a new legal aid lawyer to the case.

3. Lastly, the applicant complains that the fact that the bailiff was ineffective and did not issue a decision to discontinue the proceedings constituted a breach of his right of access to a court, as without the relevant decision he was unable to appeal against it and was deprived of judicial control over the bailiff's actions.

THE LAW

1. The applicant complains that the first set of proceedings in his case were not conducted within a reasonable time, in breach of Article 6 § 1 of the Convention.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

2. The applicant further complains about unfairness of the court decision regarding his motion for the appointment of a new lawyer and granting leave to lodge a cassation appeal out of time. The court ordered that the retrospective leave to appeal out of time be accompanied by a copy of the appeal itself, prepared by a lawyer. In the circumstances of the case, this was impossible for the applicant, because at the same time he was requesting the court to assign a new legal aid lawyer to the case.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

3. The applicant also complains in essence about the lack of a domestic remedy against the conduct of the court bailiff.

The Court observes that under the provision of Article 767 of Code of Civil Procedure, the applicant had a remedy to challenge the conduct of the bailiff. He could have lodged a complaint about the actions of court's bailiff, provided for by this provision. The applicant has not shown that he had recourse to this remedy.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning excessive length of the first set of proceedings and unfairness of the proceedings concerning the appointment of a legal aid lawyer for the purpose of lodging the cassation appeal,

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President