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

FOURTH SECTION

DECISION

Application no. 53257/13
SAZAS
against Slovenia

The European Court of Human Rights (Fourth Section), sitting on 10 October 2017 as a Committee composed of:

Vincent A. De Gaetano, *President,*
Georges Ravarani,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 12 August 2013,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant association, Sazas, is a Slovenian copyright-protection organisation based in Trzin. It was represented before the Court by Mr J. Sladič and Ms P. Sladič-Zemljak, lawyers practising in Ljubljana.

2. The Slovenian Government ("the Government") were represented by their Agent, Ms B. Jovin Hrastnik, State Attorney.

A. The circumstances of the case

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

4. On 1 October 2009 the Ljubljana District Court dismissed the applicant association's claim against D.M.H. for payment of 450 euros

(EUR) in fees for the use of nondramatic musical works which fell under the area of performing rights (*male avtorske pravice*).

5. Following an appeal by the applicant association, on 10 March 2010 the Ljubljana Higher Court quashed the first-instance judgment and remitted the case to the District Court for reconsideration.

6. On 22 June 2010 the Ljubljana District Court granted the applicant association's claim in part, ordering the defendant to pay copyright fees in the amount of EUR 212.94 with statutory interest.

7. The applicant association again appealed and on 24 November 2010 the Ljubljana Higher Court overturned the lower court's ruling. The defendant was ordered to pay the applicant association EUR 403.79 with statutory interest. The judgment was final and as the amount claimed by the applicant association in the proceedings at issue did not exceed the threshold of EUR 2,000, the parties themselves were prevented from appealing on points of law (see paragraph 13 below).

8. On 21 February 2011 the Office of the State Prosecutor General (hereinafter "the State Prosecutor"), which had not been a party to the first- and second-instance proceedings, lodged an application for the protection of legality with the Supreme Court on the basis of section 385 of the Civil Procedure Act (see paragraph 14 below) in order to ensure a uniform application of the legislation concerning performing rights.

9. On 3 April 2011 the applicant association, which was represented by a lawyer, replied to the said application for the protection of legality, arguing for a different interpretation of the relevant provisions from the one proposed by the State Prosecutor. The applicant association also noted in general terms that the conditions for the application had not been met and suggested that the application be dismissed as unfounded.

10. On 15 September 2011 the Supreme Court granted the application for the protection of legality, overturned the second-instance judgment and confirmed the first-instance judgment. The core legal issue in which the Supreme Court departed from the Ljubljana Higher Court's decision was whether the applicant association could unilaterally change the rates in respect of copyright fees.

11. On 22 December 2011 the applicant association lodged a constitutional complaint against the Supreme Court's judgment, arguing that the involvement of the State Prosecutor in its case had constituted a violation of its right to a fair trial and that the impugned position of the Supreme Court had violated its right to property. The applicant association also lodged an application for a review of the constitutionality (hereinafter "the constitutionality-review application") of those provisions of the Civil Procedure Act which had enabled the State Prosecutor to lodge an application for the protection of legality against final judicial decisions. For such a constitutionality-review application to have been admissible the applicant association would have been required to show its legal interest,

by, for instance, having submitted an admissible constitutional complaint (see paragraphs 15 and 18 below).

12. On 31 January 2013 the Constitutional Court rejected both the constitutional complaint and the constitutionality-review application. The Constitutional Court held that the applicant association had not exhausted the available remedies, as it had failed to put forward in its reply to the State Prosecutor's application for the protection of legality the relevant argument of the alleged unconstitutionality of the impugned legislation. Therefore, it had not given the Supreme Court a chance to address that issue. According to the Constitutional Court, the applicant association had failed to exhaust the available remedies in substance and the constitutional complaint was in the part concerning the State Prosecutor's intervention inadmissible. As a consequence, the constitutionality-review application was rejected (see paragraph 11 above).

B. Relevant domestic law and practice

1. Civil Procedure Act

13. Pursuant to section 367(4) of the Civil Procedure Act (Official Gazette no. 73/07 with further amendments) an appeal on points of law should not be allowed if the value of the contested part of the final judgment does not exceed EUR 2,000.

14. An application for the protection of legality – an extraordinary remedy which can only be lodged by the State Prosecutor – is regulated in section 385 of the Civil Procedure Act, which reads, in so far as relevant, as follows:

> "The State Prosecutor may submit an application for the protection of legality against a final judicial decision within a period of three months.
>
> The application for the protection of legality may only be lodged against a final judicial decision in respect of which leave to appeal on points of law cannot be granted (fourth paragraph of section 367).
>
> ..."

2. Constitutional Court Act

15. Section 24(1) of the Constitutional Court Act (Official Gazette no. 15/94 with further amendments) provides that an application for a review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority may be submitted by anyone who demonstrates a legal interest. Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority, the review of which has been requested by the constitutionality-review applicant, directly interferes with his or her rights, legal interests, or legal position (section 24(2)). If the procedural conditions set out in, *inter alia*,

section 24 of the Constitutional Court Act have not been fulfilled, the Constitutional Court must reject the application (section 25).

16. Pursuant to the fifth subsection of section 55b(1) of the Constitutional Court Act the Constitutional Court must reject the constitutional complaint if all legal remedies have not been exhausted.

3. Constitutional Court's case-law

17. The Government submitted a number of decisions in which the Constitutional Court had explained what remedies had had to be exhausted before the constitutionality-review application and the constitutional complaint could have been lodged in view of the requirements set out in the Constitutional Court Act (see paragraphs 15 and 16 above).

18. In particular, in the submitted decisions the Constitutional Court had consistently found that when the impugned legislation had not had a direct effect on the individual, the constitutionality-review application could have been lodged only together with a constitutional complaint demonstrating the individual's legal interest. The Constitutional Court had further held that an individual had had to raise an issue of unconstitutionality of legislation before the trial courts to be in a position to later complain of it in his or her constitutional complaint and, in turn, to demonstrate his or her legal interest for the purposes of a constitutionality-review application (see decisions U-I-325/05 of 27 September 2007; U-I-330/05, U-I-331/05 and U-I-337/05 of 18 October 2007; and U-I-275/07 of 22 November 2007).

19. The Constitutional Court had further consistently found that as part of the process of exhaustion of legal remedies an individual had been required to raise his or her complaints, intended to be later relied on before the Constitutional Court, in his or her remedy before lower courts or in a reply to such a remedy lodged by another party (see decisions Up-364/09 of 19 May 2009; Up-43/10 of 7 April 2011; Up-3072/08 and Up-104/10 of 19 April 2011; Up-1025/12 of 16 December 2013; and U-I-65/15 and Up-312/15 of 20 October 2015).

COMPLAINT

20. The applicant association complained under Article 6 § 1 of the Convention that the reversal of the final enforceable judicial decision of 24 November 2010 following an application for the protection of legality by the State Prosecutor, which had not been a party to the case, had breached its right to a fair trial.

THE LAW

21. The applicant association complained that the decision to reverse the final judgment of 24 November 2010 had violated the *res judicata* principle and the principle of legal certainty. It relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

22. The Government objected that the applicant association had failed to exhaust domestic remedies because it had not raised the complaint in substance in its reply to the State Prosecutor's application for the protection of legality in accordance with the applicable domestic legislation and established case-law. In support of their argument, they relied on the Constitutional Court's case-law (see paragraphs 17-19 above).

23. The applicant association contested the Government's arguments, emphasising firstly that it had in fact raised the complaint in substance in its reply to the State Prosecutor's application for the protection of legality (see paragraph 9 above), and secondly, that it would have been ineffective to raise the complaint *expressis verbis* in a preventative way before the Supreme Court. The applicant association also contended that the Constitutional Court's case-law submitted by the Government referred to factually different cases and did not apply to the cases, such as the current one.

24. The Court reiterates that in order to exhaust domestic remedies as required by Article 35 § 1 of the Convention, applicants should use the remedies available in compliance with the formal requirements and time-limits laid down in domestic law, as interpreted and applied by domestic courts (see *Lawyer Partners a.s. v. Slovakia*, nos. 54252/07 and 14 others, § 39, ECHR 2009).

25. The Court notes that in the present case the applicant association claimed in its constitutional complaint and its constitutionality-review application a violation of the fair trial principles by reason of the involvement of the State Prosecutor (see paragraph 11 above). However, the Constitutional Court did not examine this alleged violation on the merits but rejected the constitutionality-review application and found the constitutional complaint in this part inadmissible on account of non-compliance with the rule of exhaustion of legal remedies (see paragraph 12 above). In particular, the Constitutional Court found that the applicant association should have raised the issue of the involvement of the State Prosecutor in its reply to the application for the protection of legality but had failed to do so.

26. The Court observes that according to domestic legislation complainants are in general required to exhaust all legal remedies before lodging a constitutional complaint (see paragraph 16 above). The Court

further observes on the basis of the numerous decisions submitted by the Government, many of which predate the application for the protection of legality lodged in the present case (see paragraphs 17-19 above), that it has been the Constitutional Court's established practice to require complainants and constitutionality-review applicants to raise the alleged violations of the Constitution in their submissions before the lower courts, either in legal remedies or in their replies to such remedies lodged by other parties to the proceedings. Based on the legislative provisions and the settled case-law of the Constitutional Court, the Court finds, contrary to the applicant association's assertion, that this had been a general requirement and that it was reasonably and foreseeably applied in the present case. The applicant association, which was represented by a qualified lawyer, therefore knew or ought to have known that in order to have its constitutional complaint or constitutionality-review application examined on the merits by the Constitutional Court it should have raised the impugned issues before the Supreme Court.

27. In view of the above the Court finds that by not raising the complaint in substance in its reply to the State Prosecutor's application for the protection of legality the applicant association failed to lodge both the constitutionality-review application and the constitutional complaint in accordance with the formal requirements of domestic law, as interpreted and applied by the Constitutional Court. Thus, through its own fault, it did not provide the Slovenian courts with the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against the State (see, *mutatis mutandis*, *Azinas v. Cyprus* [GC], no. 56679/00, § 41, ECHR 2004-III).

28. It follows that the applicant association failed to properly exhaust domestic remedies. The application should thus be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 November 2017.

Andrea Tamietti
Deputy Registrar

Vincent A. De Gaetano
President