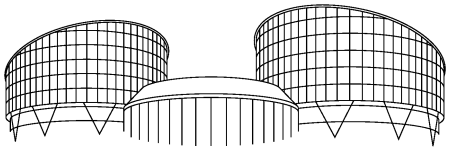

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF VUJOVIĆ AND LIPA D.O.O. v. MONTENEGRO

(Application no. 18912/15)

JUDGMENT

STRASBOURG

20 February 2018

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 Vujović and Lipa D.O.O. v. Montenegro,

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

Robert Spano, *President,*
Paul Lemmens,
Ledi Bianku,
Nebojša Vučinić,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 30 January 2018,

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

PROCEDURE

1. The case originated in an application (no. 18912/15) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Milorad Vujović ("the first applicant"), and a limited liability construction company registered in Montenegro, Lipa D.O.O. ("the second applicant") on 14 April 2015.

2. The applicants were represented by Mr B. Radović, a lawyer practising in Cetinje. The Montenegrin Government ("the Government") were represented by their Agent, Ms Valentina Pavličić.

3. The applicants complained, in particular, about lack of access to court in that the Court of Appeal refused to examine on the merits the second applicant's appeal.

4. On 12 January 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1956 and lives in Cetinje. The second applicant was founded in Cetinje in 1990. The first applicant is the founder, the sole owner, and the executive director of the second applicant. The facts of the case, as submitted by the parties, may be summarised as follows.

6. On 1 July 2013 an insolvency creditor X (*stečajni povjerilac*) requested the Commercial Court (*Privredni sud*) in Podgorica to open insolvency proceedings (*stečajni postupak*) in respect of the second applicant. In the proceedings before the Commercial Court the second applicant was represented by the first applicant and a lawyer duly authorised by the latter. On 27 December 2013 the Commercial Court opened insolvency proceedings in respect of the second applicant and, *inter alia*, appointed an insolvency administrator (*stečajni upravnik*).

7. On 23 January 2014 the second applicant, through the lawyer, lodged an appeal against the Commercial Court decision.

8. On 18 March 2014 the Court of Appeals (*Apelacioni sud*) in Podgorica rejected the appeal (*žalba se odbacuje*) as having been submitted by an unauthorised person, given that the lawyer had not been appointed by the insolvency administrator. The court relied on sections 75 and 76 of the Insolvency Act (see paragraphs 17-18 below). This decision was served on the applicants on 17 April 2014.

9. On 12 May 2014 the applicants lodged a constitutional appeal.

10. On 13 May 2014 the applicants' representative filed an initiative with the Constitutional Court (*Ustavni sud*) seeking the assessment of the constitutionality of section 76 of the Insolvency Act in force at the time. There is nothing in the case-file as to the outcome of that initiative.

11. On 23 July 2014 the Constitutional Court rejected the applicants' constitutional appeal for "not having been lodged by a party to the domestic proceedings or by a person authorised to appeal on behalf of the person whose rights and freedoms were violated". This decision was served on the applicants on 15 October 2014.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Montenegro 2007 (*Ustav Crne Gore*; published in the Official Gazette of Montenegro - OGM - no. 01⁄07)

12. Article 20 provides that everyone is entitled to a legal remedy against a decision on their rights or a legally based interest.

B. Insolvency Act (*Zakon o stečaju*; published in the OGM no. 001⁄11; and the amendments published in the OGM no. 053⁄16)

13. Section 7 provides that the Civil Procedure Act will be applied by analogy to all the issues not regulated by this Act.

14. Section 32 provides, *inter alia*, that an insolvency administrator represents an insolvency debtor.

15. Section 33(5) and (6) provides, *inter alia*, that the insolvency administrator is bound (*dužan*) to initiate proceedings before court, file a claim, hire a lawyer, reach a settlement, withdraw a claim or waive a right to a claim in the proceedings before the court or an administrative body in Montenegro or abroad.

16. Section 40 provides, *inter alia*, that an insolvency administrator is entitled to remuneration and compensation of costs, which are determined by the insolvency judge at the conclusion of the insolvency proceedings (*u vrijeme zaključenja stečajnog postupka*).

17. Section 75 provides that the legal consequences of the opening of insolvency proceedings take effect as of the day when the notice of the opening of these proceedings was displayed on the notice board of the court.

18. Section 76 provided at the relevant time that by opening insolvency proceedings all the rights in respect of company representation and management (*zastupnička i upravljačka prava*) of the executive director, legal representative and counsel (*zastupnika i punomoćnika*) ceased and were transferred to the insolvency administrator. By amendments in August 2016 this section was amended so as to provide that by opening insolvency proceedings all the rights in respect of company representation and management of the executive director, legal representative and counsel cease and are transferred to the insolvency administrator except for the right to lodge an appeal against the decision on the opening of insolvency proceedings.

C. The Civil Procedure Act 2004 (*Zakon o parničnom postupku*; published in the Official Gazette of the Republic of Montenegro nos. 022⁄04, 028⁄05, 076⁄06 and in the OGM nos. 073⁄10, 047⁄15, 048⁄15 and 051⁄17)

19. Section 3 provides that for a claim or any other procedural action (*za tužbu i svaku drugu parničnu radnju*) a party to the proceedings should have legal interest.

20. Section 371 provides that the court shall reject an appeal submitted by a person who was not authorised to lodge an appeal.

D. Domestic case-law

21. Between 19 June 2012 and 25 September 2014 the Court of Appeal ruled on the merits of a number of appeals lodged by insolvency debtors against decisions on opening insolvency proceedings (Pž.br. 505/2012, Pž.br. 663/2012, Pž.br. 682/12, Pž.br. 733/12, Pž.br. 310/2013, Pž.br. 344/13, Pž.br. 465/2013, Pž.br. 659/14).

22. On 7 May and 17 July 2015 the Court of Appeal rejected two appeals submitted by insolvency debtors (Pž.br. 371/15 and Pž.br. 545/15)

on the grounds that the lawyers were not authorised by the insolvency administrators.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicants complained under Articles 6 and 13 of the Convention about the Court of Appeal's refusal to examine their appeal on the merits. The Court considers that this complaint falls to be examined under Article 6 only (see *Sukhorubchenko v. Russia*, no. 69315/01, § 60, 10 February 2005; see also, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 187, ECHR 2004-II; and *Popov v. Moldova (no. 1)*, no. 74153/01, § 58, 18 January 2005). The relevant Article reads as follows:

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

24. The Government contested that complaint.

A. Admissibility

1. The parties' submissions

25. The Government submitted that the application was incompatible *ratione personae* in respect of the first applicant. It was undisputable that he was the founder and the sole owner of the second applicant. However, in order to be able to claim to be a victim a person must be directly affected by the disputed measures, whereas in the present case all the proceedings were conducted in respect of the second applicant only.

26. The Government also submitted that the application had not been submitted within the six-month time limit. Notably, a constitutional appeal was not an effective domestic remedy at the time, and the last domestic decision was therefore the one issued by the Court of Appeal on 18 March 2014. That decision was served on the applicants on 17 April 2014, whereas the application was lodged on 14 April 2015.

27. The applicants contested the Government's submissions. In particular, their making use of a constitutional appeal could not be interpreted as unnecessary and inadequate, and taken to their detriment.

2. The Court's conclusion

a. Compatibility *ratione personae*

28. The relevant principles in this regard are set out in, for example, *Ankarcrona v. Sweden* (dec.), no. 35178/97, 27 June 2000.

29. Turning to the present case, the Court notes that the first applicant is the sole owner of the second applicant. Consequently, and contrary to what was the situation in, for example, *Agrotexim and Others v. Greece* (24 October 1995, § 65, Series A no. 330-A, where the applicant companies owned only about half of the shares in the company in question), there is no risk of differences of opinion among shareholders or between shareholders and a board of directors as to the reality of infringements of the rights protected under the Convention and its Protocols or concerning the most appropriate way of reacting to such infringements (see *Ankarcrona* (dec.), cited above).

30. Having regard to the absence of competing interests which could create difficulties, and in the light of the circumstances of the case as a whole, the Court considers that the applicants are so closely identified with each other that it would be artificial to distinguish between them in this context, and that even though the party to the domestic proceedings was the second applicant only, the first applicant can also reasonably claim to be a victim within the meaning of Article 34 of the Convention (see *Ankarcrona*, cited above; see also *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, no. 16163/90, § 21, 31 July 2003; and *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 74, 20 April 2010). The Government's objection in this regard must therefore be dismissed.

b. Six months

31. The relevant principles in this regard are set out in *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 258-260, ECHR 2014 (extracts). In particular, the six-month period runs from the final decision in the process of exhaustion of domestic remedies (see *Mocanu and Others*, cited above, § 259). The Court reiterates in this regard that Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached (*Mocanu and Others*, cited above, § 260).

32. Turning to the present case, the Court notes that a constitutional appeal in Montenegro can be considered an effective domestic remedy as of 20 March 2015 (see *Siništaj and Others v. Montenegro*, nos. 1451/10 and 2 others, § 123, 24 November 2015). Before that date it was considered to be ineffective only in respect of length of proceedings, conditions of detention and lack of medical care, given that there was no "individual

decision" against which such an appeal could have been lodged (see *Bulatović v. Montenegro*, no. 67320/10, § 109, 22 July 2014); the Court had not pronounced on its effectiveness in respect of other issues. It is observed that the present case does not relate to the length of proceedings, conditions of detention or lack of medical care, and that there was a decision against which such an appeal could be lodged. Even though they were not required to do so at the relevant time, the applicants made use of a constitutional appeal, on which the Constitutional Court ruled on 23 July 2014. As the relevant decision was served on the applicants on 15 October 2014, and the present application was lodged on 14 April 2015, the Court considers that the applicants' complaint was submitted within the six-month time-limit (see, *mutatis mutandis*, *Siništaj and Others*, cited above, § 130). The Government's objection in this regard must therefore also be dismissed.

c. The Court's conclusion

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

B. Merits

1. *The parties' submissions*

a. The applicants

34. The applicants reaffirmed their complaint. In particular, the Court of Appeal's decision to reject their appeal because the legal representative was not authorised by the insolvency administrator was a precedent as in all previous cases, as well as in some cases afterwards, it had examined on the merits appeals submitted by insolvency debtors. They submitted the relevant domestic case-law in this regard (see paragraph 21 above).

35. They further submitted that sections 32 and 33(5) and (6) did not provide for an obligation of an insolvency administrator to lodge an appeal against the decision on insolvency proceedings. As of 2011, when the Insolvency Act entered into force, there was not a single case where an insolvency administrator appealed against the decision on opening the insolvency proceedings. Given that it was only after these proceedings were terminated that he or she was entitled to remuneration (see paragraph 16 above), it was in his/her best interest that the insolvency proceedings continue. Section 7 of the Insolvency Act refers to the application of Civil Procedure Act, and the relevant provision thereof provides that any legal action can be undertaken by a person having a legal interest, which the insolvency administrator lacked.

b. The Government

36. The Government submitted that there was no violation of Article 6 as the applicants could appeal, only not through the executive director or a representative authorised by him, but through the insolvency administrator. They referred to sections 32, 75, and 76 of the Insolvency Act (see paragraphs 14 and 17-18 above). Given that the appeal was lodged by an unauthorised person, it was accordingly rejected pursuant to section 371 of Civil Procedure Act (see paragraph 20 above).

37. The Government acknowledged that the practice of the Court of Appeal had been indeed divergent until 2015, but that as of then the Court of Appeal had consistently rejected appeals lodged by lawyers not having been authorised by insolvency administrators. They submitted two decisions of the Court of Appeal issued in 2015 (see paragraph 22 above).

38. The applicants' submission that the insolvency administrators lacked legal interest was irrelevant as they were obliged to abide by the law and comply with principles of integrity and professional competence.

2. The Court's conclusion

39. The relevant principles with respect to the right of access to a court are set out in a long line of case-law starting with *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18, and finding recent expression in *Baka v. Hungary* [GC], no. 20261/12, § 120, ECHR 2016 and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, §§ 84-90, ECHR 2016 (extracts).

40. In particular, the Convention does not compel the Contracting States to set up courts of appeal in civil cases. However, where such courts do exist, the guarantees of Article 6 must be complied with, *inter alia*, by ensuring to litigants an effective access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, § 44, *Reports of Judgments and Decisions* 1996-V, and *Poitrimol v. France*, 23 November 1993, §§ 13-15, Series A no. 277-A). The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to

such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid.; see also *Cordova v. Italy (no. 1)*, no. 40877/98, § 54, ECHR 2003-I; the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B; and *Lupeni Greek Catholic Parish and Others*, cited above, § 89).

41. Turning to the present case, the Court notes that sections 32 and 76 of the Insolvency Act, in force at the time, provided that once the insolvency proceedings were opened all rights in respect of company representation were transferred to the insolvency administrator and that he or she represented the insolvency debtor (see paragraphs 14 and 18 above). On the other hand, Article 20 of the Constitution provides that everyone is entitled to a legal remedy against a decision on their rights or a legally based interest (see paragraph 12 above). It is further observed that section 33 of the Insolvency Act does not explicitly provide for a duty of an insolvency administrator to lodge an appeal, and the Government, for their part, failed to submit any domestic case-law whatsoever where an insolvency administrator had actually filed an appeal against the decision on opening the insolvency proceedings. Moreover, section 40 of the Insolvency Act provides that the insolvency administrator is entitled to remuneration only once the insolvency proceedings are concluded (see paragraph 16 above), thus indeed raising a question as to whether he or she has an interest in appealing against the opening of insolvency proceedings. Lastly, the right of access to a court as enshrined in Article 6 implies, among other things, the possibility for a person whose civil rights have been interfered with to bring proceedings directly and independently (see *Capital Bank AD v. Bulgaria*, no. 49429/99, § 118, ECHR 2005-XII (extracts)) and not via third parties. In the present case, however, the applicants could not have appealed directly and independently against the decision which directly affected them but only through an insolvency administrator.

42. The Court further observes that the Court of Appeal had consistently examined the merits of appeals lodged by insolvency debtors (see paragraph 21 above) until the applicants' appeal. The applicants submitted, and the Government offered no evidence to the contrary, that the decision in their case was actually the first one where the Court of Appeal ruled differently and rejected an appeal for not having been submitted by an insolvency administrator or a lawyer authorised by him. Even if the Court of Appeal started rejecting such appeals consistently as of 2015, as submitted by the Government, that was more than a year after it had rejected the applicants' appeal and at a time when the relevant practice was clearly different.

43. Even assuming that the impugned limitation was lawful, the Government offered no argument whatsoever as regards the aim thereof or

as to the proportionality between the means employed and the aim pursued, whatever it might have been. The Court notes in this regard that the legislator, too, apparently considered that section 76 was not proportionate given that in 2016 it was amended so as to preserve the right of the executive director of the company and/or its representative to file an appeal against a decision to open insolvency proceedings (see paragraph 18 above).

44. In view of the above, the Court considers that the applicants' loss of the possibility of using a remedy which they had reasonably believed to be available, amounted to a disproportionate hindrance (see, *mutatis mutandis*, *Maširević v. Serbia*, no. 30671/08, § 50, 11 February 2014). There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

45. The applicants make the same complaint under Article 1 of Protocol No. 1, which 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."

46. The Government contested that argument.

47. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

48. However, having regard to its finding under Article 6 § 1 of the Convention and its finding that the applicants were unduly prevented from obtaining a judicial determination of their appeal concerning the opening of the insolvency proceedings, the Court considers that it cannot speculate as to what the situation would have been had the applicants had effective access to a court. Consequently, it does not consider it necessary to rule on the applicants' complaint based on Article 1 of Protocol No. 1 (see *Chakalova-Ilieva v. Bulgaria*, no. 53071/08, § 47, 6 October 2016, and the authorities cited therein).

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 first applicant claimed 82,752.22 euros (EUR), for loss of income due to the insolvency proceedings, and the second applicant claimed EUR 349,782 for unfulfilled construction contracts, in respect of pecuniary damage. The first applicant also claimed EUR 250,000 for non-pecuniary damage.

51. The Government contested the applicants' claim as too high.

52. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the Court accepts that the first applicant has suffered some non-pecuniary damage which would not be sufficiently compensated by the finding of the violation alone. Making its assessment on an equitable basis and having regard to the circumstances of the case, the Court awards him EUR 3,600 under this head.

B. Costs and expenses

53. The first applicant claimed EUR 35,100 for costs and expenses incurred before the domestic courts and the Court.

54. The Government contested the applicants' claim as too high.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the first applicant the sum of EUR 2,500 covering costs under all heads.

C. Default interest

56. The Court considers it appropriate that the default interest rate 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 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 1 of Protocol No. 1 to the Convention;

4. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to him, in respect of costs and expenses;
   (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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 February 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President