SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos. 3716/09 and 38051/09 by Ljubinka MILUNOVIĆ and Ramiza ČEKRLIĆ against Serbia

The European Court of Human Rights (Second Section), sitting on 17 May 2011 as a Chamber composed of:

Françoise Tulkens, *President,*
David Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above applications lodged on 15 December 2008 and 12 June 2009 respectively,

Having regard to the decision to apply former Article 29 § 3 of the Convention and examine the admissibility and merits of the cases together,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Ljubinka Milunović, formerly Radovanović ("the first applicant") and Ms Ramiza Čekrlić ("the second applicant"), are Serbian nationals who were born in 1952 and 1960. They live in Vladimirci and Novi Pazar, and were represented before the Court by Ms Š. Dolovac and Mr I. Muderizović respectively, both lawyers practising in Novi Pazar. The Government of Serbia were represented by their Agent, Mr S. Carić.

A. The circumstances of the case

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

1. Introduction

3. On 10 March 1999 and 20 March 1995, respectively, the first and the second applicants, both employed with Raška Holding AD, were "placed" by their "socially-owned" employer on "compulsory" paid leave "until such time" when "normal production could be resumed" and the said company's business performance "improved sufficiently" (see paragraph 34 below).

4. On 31 December 2002 the second applicant was granted a disability pension, whilst on 1 October 2003 the first applicant resumed her professional activities.

5. During the said paid leave, in accordance with the relevant domestic legislation, the applicants were entitled to a significantly reduced monthly income, as well as the payment of their pension, disability and other social security contributions.

6. Since the company failed to fulfil these obligations, the applicants brought several separate civil claims before the Municipal Court (*Opštinski sud*) in Novi Pazar (hereinafter "the Municipal Court").

2. As regards the first applicant

(a) The civil and enforcement proceedings

7. On 8 October 2004 the Municipal Court ruled in favour of the first applicant and ordered her employer to pay her:

i. the paid leave benefits due from 5 July 2001 to 1 October 2003, plus statutory interest;

ii. the accrued social security contributions during that period; and

iii. 7,800 Dinars for her legal costs.

8. On an unspecified date thereafter this judgment became final.

9. On 11 March 2005 the first applicant sought enforcement of the above judgment, proposing that it be carried out either by means of a bank account transfer or through the auctioning of the debtor's specified movable and/or immovable assets.

10. On 23 June 2005 the Municipal Court accepted the first applicant's request and issued an enforcement order.

11. On an unspecified date thereafter the first applicant's social security contributions were covered.

12. The remainder of the final judgment rendered in her favour has remained unenforced to date.

13. On 10 October 2006 the first applicant was declared redundant by the debtor and was apparently paid a certain sum on this basis.

(b) The Constitutional Court (Ustavni sud, Už-1499/2008)

14. On 16 December 2008 the first applicant lodged an appeal with the Constitutional Court (*ustavna žalba*), seeking redress in respect of the impugned non-enforcement. In so doing, she referred to the Court's case-law (*R. Kačapor and Others v. Serbia*, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, 15 January 2008) and requested that the State be ordered to pay her the non-pecuniary damage sustained and the specified sums awarded by the final judgment in question.

15. On 16 July 2009 the Constitutional Court held that the first applicant had indeed suffered a breach of her property rights, as well as a violation of her "right to a trial

within a reasonable time", and ordered the Municipal Court to enforce the final judgment as soon as possible. The court, additionally, declared that the first applicant was entitled to the non-pecuniary damages sought, in accordance with Article 90 of the Constitutional Court Act (see paragraph 33 below).

16. The first applicant, however, decided not to file her just satisfaction claim with the Commission for Compensation, as envisaged under this provision, maintaining that the latter could not provide her with adequate compensation.

3. As regards the second applicant

(a) The first set of proceedings

17. On 12 March 1998 the Municipal Court ruled in favour of the second applicant and ordered her employer to pay her the paid leave benefits due from 20 March 1995 to 2 February 1996, plus statutory interest, as well as 258 Dinars for her legal costs.

18. This judgment became final by 20 April 1998.

19. On 6 July 2004 the second applicant sought enforcement of the above judgment, proposing that it be carried out either by means of a bank account transfer or through the auctioning of the debtor's specified movable and/or immovable assets.

20. On 7 July 2004 the Municipal Court accepted the second applicant's request and issued an enforcement order.

(b) The second set of proceedings

21. On 26 April 2005 the Municipal Court once again ruled in favour of the second applicant and ordered her employer to pay her:

i. the paid leave benefits due from 1 July 2001 to 31 December 2002, plus statutory interest;

ii. the accrued social security contributions from 20 March 1995 to 31 December 2002; and

iii. 7,800 Dinars for her legal costs.

22. This judgment became final on 26 April 2005.

23. On 13 May 2005 the second applicant sought enforcement of the above judgment, proposing that it be carried out either by means of a bank account transfer or through the auctioning of the debtor's specified movable and/or immovable assets.

24. On 23 June 2005 the Municipal Court accepted the second applicant's request and issued an enforcement order.

(c) Other relevant facts

25. On an unspecified date the second applicant's social security contributions were covered.

26. The remainder of the final judgments rendered in her favour has remained unenforced to date.

4. The debtor's status

27. On 2 November 2004 the Privatisation Agency ordered the restructuring of the applicants' debtor, as part of the privatisation process.

28. On 13 December 2006 this privatisation was stayed, but on 14 March 2007 it resumed.

29. On 29 March 2010 the Privatisation Agency amended its decision of 2 November 2004 so as to include all of the debtor's dependent companies.

30. As of April 2010, the applicants' debtor still consisted of predominantly socially-owned and State-owned capital.

B. Relevant domestic law and practice

1. *The Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)*

31. Article 18 § 3 provides, *inter alia*, that human rights guaranteed by ratified international treaties shall be "implemented directly", and, further, that human rights provisions shall be interpreted in accordance with "the practice of international institutions which supervise their implementation."

32. Article 170 provides that a "constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

2. *The Constitutional Court Act (Zakon o Ustavnom sudu; published in OG RS no. 109/07)*

33. The relevant provisions of this Act read as follows:

Article 7 § 1

"The decisions of the Constitutional Court shall be final, enforceable and binding."

Article 82 §§ 1 and 2

"A constitutional appeal may be lodged against an individual decision or an action of a State body or an organisation exercising delegated public powers which violates or denies human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies have already been exhausted or have not been prescribed or where the right to their judicial protection has been excluded by law.

A constitutional appeal may be lodged even if all available remedies have not been exhausted in the event of a breach of an applicant's right to a trial within a reasonable time."

Article 83 § 1

"A constitutional appeal may be lodged by any individual who believes that any of his or her human or minority rights or freedoms guaranteed by the Constitution have been violated or denied by an individual decision or an action of a State body or an organisation exercising delegated public powers."

Article 84 § 1

"A constitutional appeal may be lodged within thirty days of receipt of the individual decision or the date of commission of the actions ... [in question] ..."

Article 89 §§ 2 and 3

"When the Constitutional Court finds that an ... individual decision or action has violated or denied a human or minority right or a freedom guaranteed by the Constitution, it shall annul the ... decision in question or ban the continuation of such action or order the implementation of other specific measures as well as the removal of all adverse consequences within a specified period of time.

The decision of the Constitutional Court accepting a constitutional appeal shall constitute a legal basis for requesting compensation or the removal of other adverse consequences before a competent body, in accordance with the law."

Article 90

"... [An applicant who has obtained a Constitutional Court decision in his or her favour] .., may lodge a compensation claim with the Commission for Compensation in order to reach an agreement in respect of the amount ... [of compensation to be awarded] ...

If the Commission for Compensation does not rule favourably in respect of a compensation claim or fails to issue a decision within thirty days from the date of its submission, the applicant may file a civil claim for damages before the competent court. If only partial agreement has been achieved, a civil claim may be filed in respect of the remainder of the amount sought.

The composition and operation of the Commission for Compensation shall be regulated by the Minister of Justice."

3. The relevant provisions concerning socially-owned companies

34. These provisions are set out in the case of *R. Kačapor and Others v. Serbia*, cited above, §§ 71-76.

4. The Privatisation Act (Zakon o privatizaciji, published in OG RS nos. 38/01, 18/03 and 45/05)

35. Articles 19-20đ set out the details as regards the restructuring of companies about to be privatised. This restructuring, however, is optional and a company may be sold without having been restructured if the Privatisation Agency so decides.

5. The Amendments and Additions to the Privatisation Act 2005 (Izmene i dopune Zakona o privatizaciji, published in OG RS no. 45/05)

36. Article 31 provides that a company whose restructuring commenced prior to 7 June 2005, as part of an ongoing privatisation, cannot be subjected to an enforcement procedure within one year of that date. If the decision to restructure a company, however, was not adopted prior to 7 June 2005, the relevant time limit shall be two years as of the subsequent adoption of a decision to this effect. Any ongoing enforcement proceedings shall be stayed while new enforcement proceedings shall not be instituted until the expiry of the above time-limits.

6. The Amendments and Additions to the Privatisation Act 2007 (Izmene i dopune Zakona o privatizaciji, published in OG RS no. 123/07)

37. Articles 4 and 5 provide that the privatisation of all remaining socially-owned capital shall commence by 31 December 2008. Should this prove impossible, the companies in question shall be liquidated.

38. Article 10 provides, *inter alia*, that a company undergoing restructuring, as part of the privatisation process, cannot be subjected to an enforcement procedure until the conclusion of this process. Any ongoing enforcement proceedings shall be stayed.

39. These provisions entered into force in January 2008.

7. The Constitutional Court's decision of 21 January 2010 (odluka Ustavnog suda Už 122/09)

40. On 27 January 2009 the claimant in this case lodged an appeal with the Constitutional Court, seeking redress in a matter such as the applicants'.

41. On 21 January 2010 the Constitutional Court held that the claimant had indeed suffered a breach of his property rights, as well as a violation of his "right to a trial within a reasonable time", and ordered the competent court, as well as the other State bodies concerned, to enforce the final judgment as soon as possible. The Constitutional Court also declared that the claimant was entitled to the non-pecuniary damages sought, in accordance with Article 90 of the Constitutional Court Act (see paragraph 33 above), and noted that the enforcement proceedings should not have been stayed between 8 August 2006 and 9 October 2008 since the debtor was not being restructured.

8. The decisions adopted by the High Court in Kragujevac on 19 May 2010 and 10 June 2010 respectively (rešenja Višeg suda Gž 209/10 and Gž 853/10)

42. In these decisions the High Court in Kragujevac referred to, *inter alia*, Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 and affirmed that the enforcement proceedings could not be stayed based on the relevant provisions concerning privatisation and restructuring.

9. The Constitutional Court's decision of 3 June 2010 (odluka Ustavnog suda Už 1416/08)

43. On 2 December 2008 the claimant in this case lodged an appeal with the Constitutional Court, seeking redress in a matter such as the applicants'. In particular, she argued that the State was responsible for its failure to enforce two final judgments rendered against a socially-owned company, and requested that it be ordered to pay her the non-pecuniary damage sustained, plus the specified sums awarded by the judgments at issue.

44. On 3 June 2010 the Constitutional Court held that the claimant had indeed suffered a breach of her property rights, as well as a violation of her "right to a trial within a reasonable time", and ordered the Municipal Court to enforce the final judgment as soon as possible. The court, additionally, declared that the claimant was entitled to the non-pecuniary damages sought, in accordance with Article 90 of the Constitutional Court Act (see paragraph 33 above).

10. The Opinion adopted by the Supreme Court of Cassation on 24 February 2011 with its reasoning of 25 March 2011 (Pravno shvatanje Vrhovnog kasacionog suda)

45. In this Opinion the Supreme Court of Cassation held that enforcement proceedings concerning the payment of all work-related pecuniary claims, which have

been established by final court judgments, shall not be stayed even where the debtor is being restructured as part of the privatisation process.

46. This Opinion was adopted in respect of the Amendments and Additions to the Privatisation Act 2007 (see paragraphs 37-39 above), in response to, *inter alia*, the Government Agent's request, and with reference to the need to undertake general measures aimed at complying with the "judgments of the European Court of Human Rights rendered against Serbia". In this context, the Opinion recalled the Court's findings in a number of cases involving the Serbian authorities' liability for the non-enforcement of judgments rendered against companies predominantly comprised of socially-owned capital (see *R. Kačapor and Others v. Serbia*, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, 15 January 2008; *Vlahović v. Serbia*, no. 42619/04, 16 December 2008; and *Crnišanin and Others v. Serbia*, nos. 35835/05, 43548/05, 43569/05 and 36986/06 (Sect. 2) (Eng)).

COMPLAINTS

47. The applicants complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the respondent State's failure to enforce the final judgments at issue.

48. The applicants further complained, under Article 13 of the Convention, about the absence of an effective domestic remedy in respect of the impugned non-enforcement.

THE LAW

A. Joinder of the applications

49. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

B. The applicants' complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1

50. As noted above, the applicants complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the non-enforcement of the final judgments rendered in their favour, respectively.

51. The relevant provisions of these Articles read as follows:

Article 6 § 1

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

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] 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."

1. Compatibility ratione temporis

52. The Government implied that the applications were partly incompatible *ratione temporis* with the provision of the Convention and Protocol No. 1 thereto.

53. The applicants did not comment.

54. The Court observes that, in accordance with the generally accepted principles of international law, a Contracting Party is only bound by the Convention or one of its Protocols in respect of events occurring after their entry into force. It further notes that Serbia ratified the Convention and Protocol No. 1 on 3 March 2004 and that some of the events referred to in the applications in the present case had indeed taken place before that date. The Court shall therefore have jurisdiction *ratione temporis* to examine the applicants' complaints in so far as they concern events as of 3 March 2004, whilst merely noting the state of the case on the date of ratification (see, *mutatis mutandis*, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

55. The Government's objection must therefore be dismissed (see, *mutatis mutandis*, *Ilić v. Serbia*, no. 30132/04, §§ 52-54, 9 October 2007).

2. Exhaustion of domestic remedies

56. The Government maintained that the second applicant had not made use of the constitutional remedy at all, whilst the fist applicant had not exhausted this avenue of redress in a manner prescribed by the relevant domestic law. Specifically, having obtained a Constitutional Court decision in her favour, the first applicant had failed to pursue her damages claim before the Commission for Compensation and thereafter, if needed, in separate proceedings before the civil courts (see paragraphs 15 and 33 above). In addition or in the alternative, she should have pursued her claims before the enforcement court, as envisaged by the Constitutional Court's decision, in which respect the Government provided the Court with domestic jurisprudence indicating that the restructuring of a debtor was no longer considered to be a legal impediment in the enforcement context (see paragraphs 40-42, 45 and 46 above).

57. The second applicant argued that the constitutional appeal, as well as any related procedures, could not be considered effective since they offered no prospects of compensation for the pecuniary damage suffered, i.e. the payment by the respondent State itself of the sums awarded in the final judgments at issue. The first applicant, for her part, recalled that she had attempted to obtain comprehensive redress by means of a constitutional appeal but to no avail.

58. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting

right the violations alleged against them before those allegations are submitted to it (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

59. In terms of the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003).

60. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, the Court notes that, in principle, it is incumbent on the aggrieved individual to test the extent of that protection (see *Vinčić and Others v. Serbia*, nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, § 51, 1 December 2009).

61. Turning to the present case and without prejudging its merits, the Court recalls its settled case-law to the effect that the respondent State has consistently been held responsible *ratione personae* for the non-enforcement of judgments rendered against companies predominantly comprised of socially-owned capital (see, for example, *R. Kačapor and Others v. Serbia*, cited above; and *Grišević and Others v. Serbia*, nos. 16909/06, 38989/06 and 39235/06, 21 July 2009), it being understood that the Serbian authorities may, *a fortiori*, also be found responsible in respect of such companies where there has been a subsequent change to their share capital structure resulting in the predominance of State-owned and socially-owned capital. Further, in the Court's above-cited jurisprudence, whenever violations of the Convention and/or Protocol No. 1 have been established, the applicants have been granted pecuniary and non-pecuniary damages, the former requiring the respondent State to pay, from its own funds, the sums awarded in the final domestic judgments at issue.

62. It follows, therefore, that in a case such as that of the applicants, comprehensive constitutional redress, in addition to a finding of a violation where warranted, would have to include compensation for both the pecuniary and the non-pecuniary damage sustained.

63. On 16 July 2009 the Constitutional Court held that the first applicant had suffered a violation of her constitutional rights and declared that she was thus entitled to the non-pecuniary damages sought (see paragraph 15 above), but did not order the State to pay her, from its own funds, the pecuniary damages, i.e. the specified sums awarded by the final judgment in question, as required by the Court's above-cited jurisprudence.

64. The first applicant thereafter never filed a claim with the Commission for Compensation in accordance with Article 90 of the Constitutional Court Act (see paragraph 33 above). Nevertheless, since the Constitutional Court had acknowledged that she was only entitled to the recovery of the non-pecuniary damages sought and had failed to order the payment of the sums at issue, opting instead to merely urge the Municipal Court to enforce the final judgment as soon as possible, it is this Court's opinion that the first applicant would have had no realistic chances of obtaining pecuniary damages before the Commission for Compensation or, for that matter, in any subsequent proceedings before the civil courts. The Government have certainly offered no case-law to the contrary, and on 21 January 2010 and 3 June 2010, in two separate matters involving the same issue, the Constitutional Court reaffirmed its approach of 16 July 2009, rendering practically identical rulings in all relevant aspects (see paragraphs 41 and 44 above).

65. In such circumstances, it is clear that notwithstanding the fact that "a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced [against Serbia] as of 7 August 2008" (see *Vinčić and Others v. Serbia*, cited above, § 51), this particular avenue of redress cannot be deemed effective as regards cases involving complaints such as the ones put forth by the applicants.

66. The Court, therefore, noting that the first applicant attempted to make use of the constitutional avenue whilst the second applicant did not, rejects the Government's objection in respect of both. However, the Court might in future cases reconsider its view as regards the remedy in question if there is clear evidence that the Constitutional Court has subsequently harmonised its approach with the Court's relevant case-law (see paragraphs 31 and 61 above).

67. Lastly, as regards the Government's suggestion that the first applicant should have reasserted her claims before the enforcement court based on the Constitutional Court's decision of 16 July 2009 (see paragraph 15 above), it is observed that the debtor in those proceedings was not the State and, further, that to accept this argument now would mean that the first applicant would once again find herself in essentially the same situation which had already given rise to her complaints domestically, as well as in the proceedings before this Court. The apparent evolution in the domestic case-law as regards the conduct of enforcement proceedings in respect of companies undergoing restructuring, therefore, while a commendable attempt to comply with this Court's jurisprudence (see paragraphs 40-42, 45 and 46 above), does not give effect to its specific requirement that the State itself should pay, from its own funds, the sums awarded by the final judgments in question. It follows that the Government's objection in this respect must also be dismissed.

3. Conclusion

68. The Court finds, moreover, that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established. They must therefore be declared admissible.

C. The applicants' complaints under Article 13 of the Convention

69. Finally, the applicants complained, under Article 13 of the Convention, about the absence of an effective domestic remedy as regards the non-enforcement in question.

70. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

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

For these reasons, the Court unanimously

Decides to join the applications;

Decides to discontinue the joint consideration of the admissibility and merits of the applications in accordance with Article 29 § 1 of the Convention;

Declares the applications admissible, without prejudging the merits of the case.

Stanley Naismith	Françoise Tulkens
Registrar	President