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

FIRST SECTION

DECISION

Application no. 17795/15
Polizena CONEVA
against North Macedonia

The European Court of Human Rights (First Section), sitting on 29 September 2020 as a Committee composed of:

Pere Pastor Vilanova, *President,*
Jovan Ilievski,
Raffaele Sabato, *judges,*

and Renata Degener, *Deputy Section Registrar*,

Having regard to the above application lodged on 31 March 2015,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Polizena Coneva, is a Swiss national and Macedonian/citizen of the Republic of North Macedonia who was born in 1954 and lives in Lachen, Switzerland. She was represented before the Court by Mr S. Dukoski, a lawyer practising in Skopje.

2. The Government of North Macedonia ("the Government") were represented by their Agent, Ms D. Djonova. The Swiss Government, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), did not indicate that they wished to exercise that right.

A. The circumstances of the case

1. Background to the case

3. On 10 June 1993 company A. lodged a civil action against companies K. and S. seeking to annul a sales agreement between those companies dating from 1992 concerning a factory in Kratovo ("the property").

4. On 20 November 2001 the Kumanovo Court of First Instance (*Основен суд Куманово*) upheld the claim, ruling that the title to the

property belonged to A. and therefore it could not be subject to a sales agreement between K. and S. That judgment was upheld on appeal and by the Supreme Court in a final judgment of 23 April 2003.

2. The insolvency proceedings

5. On 16 May 2002 insolvency proceedings before the Shtip Court of First Instance (*Основен суд Штип*) were opened in respect of company A. The insolvency panel (*стечаен совет*) of that court appointed N. as insolvency trustee (*стечаен управник*).

6. On 4 September 2003 a meeting of the board of creditors was held before the court. The board adopted a final report in respect of the assets of company A. and vested N. with the authority to "continue all activities with the aim of distributing additional assets". By a separate decision of the same date, the insolvency panel closed (*се заклучува*) the insolvency proceedings and decided to strike A. off the register of companies (decision published in the Official Gazette of 18 September 2003).

7. Upon N.'s request, on 16 October 2003 the insolvency panel ordered her to continue the distribution of newly discovered assets belonging to A. (namely the property – see paragraph 3 above).

8. The property was put up for sale by public auction. The applicant made an offer of 175,000 euros (EUR), which was accepted by both the insolvency panel and N., and on 9 December 2003 N. sold the property to the applicant, as authorised by the board of creditors. The applicant paid the money on 26 April 2004, and on the same date she was given factual possession of the property (*предавање во владение*). She was also recorded in the land register as the owner of the property.

3. Subsequent developments

9. In the meantime, namely on 13 November 2003, company S. requested the reopening of the civil proceedings (see paragraphs 3-4 above).

10. The proceedings were reopened on 13 May 2004 by a decision of the Skopje Court of Appeal (*Апелационен суд Скопје*), which also set aside the judgment of 20 November 2001 (paragraph 4 above) holding that company A. had not been properly represented in the original proceedings.

11. On 7 September 2004 a hearing was held as part of the reopened proceedings before the Kumanovo Court of First Instance. The court established that N. had refused to receive the summons for the hearing and that A. (the plaintiff in those proceedings) had been struck off the register of companies. The court accordingly terminated (*се прекинува*) the proceedings on the basis of section 197 of the Civil Proceedings Act, which provides that proceedings are to be terminated if a legal entity that is a party to them has ceased to exist.

4. Civil proceedings against the applicant

12. Meanwhile, on 2 July 2004 company S. lodged a civil claim against the applicant claiming title to and factual possession of the property.

13. The claim was upheld on the basis of the sales agreement of 1992 (see paragraph 3 above). The court also declared the sales agreement of 9 December 2003 (paragraph 8 above) null and void. The judgment (16 October 2006) was upheld on appeal on 6 December 2007 and became final.

5. Compensation proceedings by the applicant against the State

14. On 17 May 2010 the applicant, represented by a lawyer, lodged a civil claim against the State seeking damages of EUR 175,000, the amount that she had paid for the property, together with other expenses incurred during the purchase. She argued that she had been deprived of the property (and the money that she had paid for it) which she had bought in a public auction that had been approved and executed by the insolvency panel and the insolvency trustee, respectively. Relying on the courts' findings in the proceedings against her (paragraph 13 above), she argued that in the insolvency proceedings regarding A. the insolvency panel and the trustee unlawfully had disposed of the property in question.

15. On 30 May 2012 the Shtip Court of First Instance, describing the sequence of events as noted in paragraphs 3-13 above, dismissed the applicant's claim, holding that any damage suffered by the applicant could not be attributed to the insolvency panel for its actions and decisions taken in the insolvency proceedings and that therefore the State could not be held liable. In this connection it held that at the material time the insolvency panel had ordered the sale of the property, as newly discovered assets belonging to A.; the insolvency trustee had advertised the public auction of the property; it had been sold to the applicant as the best bidder. That the property belonged to A. at that time had been confirmed by a final court judgment upheld further by the Supreme Court (paragraph 4 above). The court noted that those proceedings had been subsequently reopened and terminated. That the insolvency trustee had not attended the hearing when the court had terminated those proceedings did not mean that the insolvency panel unlawfully had sold the property (paragraph 11 above). Lastly, the court held that the judgments conferring the title to the property to S. had post-dated the impugned sale of the property to the applicant (paragraph 13 above). Accordingly, it concluded that the insolvency panel had acted in accordance with the law.

16. These findings were upheld by the Shtip Court of Appeal and the Supreme Court (*Врховен суд*) on 28 January 2013 and 19 June 2014 respectively. Both courts further dismissed the applicant's subsequent allegations (raised in the appeals before those courts) that the panel had

failed to instruct the trustee (the latter admitted to that fact during the proceedings) to take part in the civil proceedings regarding the title to the property after they had been reopened (paragraph 11 above), as a result of which A.'s assets (and indirectly, the applicant's legal interests) had remained unrepresented in those proceedings. They held that the insolvency trustee had been required, under sections 25 and 26 of the Insolvency Act (paragraph 17 below), to participate in proceedings on behalf of A. Furthermore, such a duty had derived from the instruction of the insolvency panel of 4 September 2003 (paragraph 6 above).

B. Relevant domestic law and practice

*The Insolvency Act (*Закон за стечај, *Official Gazette no. 55/97, with subsequent amendments, as applicable at the time)*

17. Under section 18 (2) of the Insolvency Act, the insolvency judge monitors the work of the insolvency trustee and gives him or her binding instructions.

18. Section 23 of the Insolvency Act provides that an insolvency trustee is appointed by the insolvency panel of a first-instance court (*стечаен совет*). Section 24 provides that the board of creditors can replace the trustee at its first meeting. Section 25 provides that the insolvency trustee has the responsibilities of a representative body of the debtor. Section 26 sets out the rights and duties of insolvency trustees, which include the duty to act diligently when distributing the assets of the debtor to the creditors and to continue any related matters in order to avoid any damage on the part of the debtor. Section 27 provides that the work of the insolvency trustee is supervised by the insolvency panel and the board of creditors.

19. Section 29 provides that an insolvency trustee is responsible for any damage that he or she may cause to parties to the insolvency proceedings except for damage caused in relation to actions approved or taken upon an instruction by the insolvency judge. This section also prescribes an obligation for insolvency trustees to be insured against professional liability. Section 30 provides that the trustee is entitled to remuneration for his or her work in the insolvency proceedings. Section 68 provides that the funds collected by the insolvency trustee are distributed among the creditors and serve to cover the expenses in the proceedings.

THE LAW

20. The applicant complained under Article 1 of Protocol No. 1 that she had been unlawfully deprived of both the title to the property and the money that she had paid for it.

21. Article 1 of Protocol No. 1 reads:

> "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."

A. The parties' submissions

1. The Government

22. The Government submitted that the insolvency trustee was not a State body, but an independent professional who was hired by the creditors of the company being wound up. Therefore, given the lack of a causal link between the complaint and the State, the complaint should be declared inadmissible *ratione personae*.

23. The Government submitted that under domestic law, the insolvency trustee was completely independent from the State and was personally liable for any damage that he or she might cause (he or she could be held criminally liable, domestic jurisprudence submitted in support). The power of the insolvency panel was limited to supervising the lawfulness of the procedure and it was not entitled to give any instructions to the trustee as to the insolvency proceedings.

24. Alternatively, the Government requested that the application be declared inadmissible for failure to exhaust domestic remedies, given that the applicant had failed to seek compensation from the insolvency trustee or to lodge a criminal complaint against her.

25. Finally, the Government invited the Court to conclude that in any event the State had discharged its positive obligations in that the domestic legal system provided for adequate avenues through which the applicant could protect her rights, as described above. The fact that she had failed to make use of them could not be attributed to the State.

2. The applicant

26. The applicant submitted that the damage sustained had been the result of errors committed mainly by the insolvency panel. It had failed to authorise N. to continue the reopened proceedings (see paragraph 11 above), which had resulted in those proceedings being terminated. The panel had also failed to categorise the property in question properly, and had erroneously listed it as "newly discovered assets".

27. The fact that the applicant had failed to seek compensation from N. as the insolvency trustee had no effect on the admissibility of her

application to the Court because she had exhausted all domestic remedies in pursuing her claim for damages against the State.

B. The Court's assessment

28. The Court takes note of the Government's objections, but it does not consider it necessary to examine these issues because the application is in any event inadmissible for the following reasons (see, *mutatis mutandis*, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 270, ECHR 2012 (extracts)).

29. The Court observes that the domestic courts carefully examined the applicant's compensation claim against the State based on the premise that in the insolvency proceedings in respect to A. the insolvency panel and trustee had made errors when selling the property to her. The first-instance court dismissed such claim explaining why no responsibility could be attributed to the insolvency panel (see paragraph 15 above). Both the Appeal and Supreme Courts upheld those findings and further dismissed the applicant's subsequent grievances that the panel had not instructed the trustee to take part in the reopened proceedings and accordingly protect A.'s interests (see paragraph 16 above). Having regard to the information before it and considering that it has only limited power to deal with alleged errors of fact or law committed by the national courts (see *García Ruiz v. Spain [GC]*, no. 30544/96, § 28, ECHR 1999-I, and *Kopp v. Switzerland*, 25 March 1998, § 59, Reports of Judgments and Decisions 1998-II), the Court considers that it cannot substitute its view for that of the national courts, which does not appear unreasonable or manifestly arbitrary.

30. In addition, both superior courts held that the insolvency trustee had been required to participate in the reopened proceedings regarding the title to the property in view of her statutory position as a legal representative of A. In the impugned proceedings, which concerned alleged errors in the insolvency proceedings, the courts made no findings of any responsibility on the part of the insolvency trustee for her inaction in the resumed proceedings concerning the title to the property. Neither any conclusion has been made whether that inaction had any bearing on the subsequent developments that led to the applicant being disposed of the property.

31. The Court further takes note of the statutory provisions and the Government's arguments regarding the competencies and duties of the bodies (insolvency panel, judge and trustee) in the insolvency proceedings, including the issues of liability of the insolvency trustee for any damage caused to the parties to the insolvency proceedings (see paragraphs 19, 22 and 23 above), which it finds convincing. Having regard to the above findings of the domestic courts in the compensation proceedings against the State and the fact that the interference with the applicant's possessions was

carried out by company S., a private party, the Court will examine whether the State breached any of its positive obligations in the instant case.

32. The general principles with regard to States' positive obligations under Article 1 of Protocol No. 1 were summarised in *Broniowski v. Poland* ([GC], no. 31443/96, §§ 143-44, ECHR 2004-V) and, more recently, in *Kotov* (cited above, §§ 112-15). In particular, in certain circumstances Article 1 of Protocol No. 1 may require "measures which are necessary to protect the right of property ..., even in cases involving litigation between individuals or companies" (§ 112). Also, as regards the remedial measures required of the State under Article 1 of Protocol No. 1 in cases involving disputes between private parties they include an appropriate legal mechanism allowing the aggrieved party to assert its rights effectively (§ 114).

33. The Court notes that the applicant did not lodge a compensation claim against the insolvency trustee for any error (inaction) on her part that was not approved by the insolvency panel and the judge and that might have had a direct bearing on the applicant's property rights obtained in the context of the insolvency proceedings regarding A. The Insolvency Act, which provides for personal liability of the insolvency trustee in such circumstances (see paragraph 19 above), seems to provide for such a possibility. The applicant did not put forward any reason why such a remedy would not have been available to her, or would not have had a reasonable prospect of success (see, for example, *S.C. Service Benz Com S.R.L. v. Romania*, no. 58045/11, § 42, 4 July 2017).

34. Moreover, in so far as relevant for the Court's assessment, it should be noted that the applicant could also have lodged a civil claim for unjust enrichment against the creditors of company A. seeking the reimbursement of the funds that she had paid for the property, which she failed to do (see *Sulejmani v. the former Yugoslav Republic of Macedonia*, no. 74681/11, § 41, 28 April 2016).

35. In view of the foregoing, the Court cannot but conclude that the law provided for compensatory remedies which were available to the applicant, but which she failed to make use of (see *Kotov*, cited above, § 132; *Boyadzhieva and Gloria International Limited EOOD v. Bulgaria*, nos. 41299/09 and 11132/10, § 46, 5 July 2018; and *Service Benz Com S.R.L.*, § 42, cited above). It follows that the State complied with its positive obligations under Article 1 of Protocol No. 1 to provide an appropriate legal mechanism enabling the applicant to vindicate her claims.

36. In view of the above, the Court finds that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 22 October 2020.

Renata Degener Deputy Registrar	Pere Pastor Vilanova President