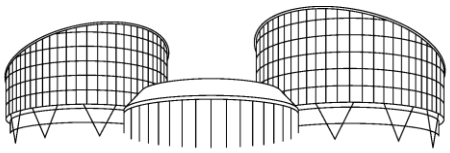

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DOO BROJLER DONJE SINKOVCE v. SERBIA

(Application no. 48499/08)

JUDGMENT

STRASBOURG

26 November 2013

This judgment is final but it may be subject to editorial revision.

In the case of DOO Brojler Donje Sinkovce v. Serbia,

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

Paulo Pinto de Albuquerque, *President,*
Dragoljub Popović,
Helen Keller, *judges,*
and Seçkin Erel, *Acting Deputy Section Registrar,*

Having deliberated in private on 5 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 48499/08) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Holding Kompanija Koka Hybro Komerc DOO Brojler Donje Sinkovce, a limited liability company based in Serbia ("the applicant company"), on 30 September 2008. On 4 May 2012 the applicant company informed the Court that it had changed its name to DOO Brojler Donje Sinkovce.

2. The applicant company was represented by Mr M. Živković, a lawyer practising in Leskovac. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. On 19 October 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The civil proceedings and ensuing enforcement proceedings

5. On 25 April 2005 the Commercial Court (*Trgovinski sud*) in Leskovac ruled in favour of a company "KHK" (at that time the applicant company's mother company – "*matično preduzeće"*), and ordered GP "Rad" (a company based in Grdelica – "the debtor") to pay: (i) RSD 20,403,432.58

(EUR 250,515[1]) plus statutory interest as of 28 February 2001; and (ii) RSD 947,142.00 (EUR 11,630) on account of the costs of civil proceedings.

6. On 26 April 2005 the company "KHK" transferred this entitlement to the applicant company.

7. The Commercial Court judgment became final on 24 November 2005 and enforceable on 27 December 2005.

8. On 27 December 2005 the applicant company filed with the Municipal Court (*Opštinski sud*) in Leskovac requests for the enforcement of the Commercial Court judgment and for an award of the statutory interest on the costs of the civil proceedings in line with Article 35 § 1 of the Enforcement Procedure Act 2004 (see paragraph 25 below).

9. On 19 January 2006 the Municipal Court ordered the enforcement by evaluation and sale of the debtor's immovable assets and the registration of the enforcement order in the real estate registry. In addition, the court awarded the applicant company the statutory interest on the costs of the civil proceedings as of 25 April 2005 and set the costs of the enforcement proceedings at RSD 69,500 (EUR 790). On 3 October 2007 the Municipal Court partially amended the enforcement order in that the enforcement by sale of some of the land plots was terminated and the costs of the enforcement proceedings were set at RSD 267,150 (EUR 3,400). These decisions became final on 14 December 2007.

10. On 3 June 2008 the enforcement order was registered in the Land Registry (*Katastar nepokretnosti*) in Leskovac.

11. By 19 December 2008 the Municipal Court established that the value of the debtor's seized immovable assets was RSD 121,403,430.00 (EUR 1,356,640) and referred a third party, who was disputing the debtor's ownership in respect of certain plots of land, to institute separate civil proceedings in that respect against the applicant company.

12. By 4 February 2009 the Municipal Court suspended the enforcement in respect of certain plots of land the ownership of which was disputed.

13. On 10 February 2009 the Municipal Court partially amended the decision of 19 December 2008 in that it assessed the value of the debtor's seized assets at RSD 108,654,410.00 (EUR 1,214,184). On 5 March 2009 the District Court (*Okružni sud*) in Leskovac quashed this decision and ordered a retrial.

14. On 27 April 2009 the Commercial Court (*Privredni sud*) in Leskovac instituted the insolvency proceedings (*stečajni postupak*) against the debtor.

15. By 11 June 2009 the Municipal Court stayed the enforcement proceedings due to the initiation of the insolvency proceedings.

[1] The amounts in Euro are given for reference only, based on an approximate average value at the relevant time.

B. The insolvency proceedings

16. On 18 May 2009 the applicant company duly submitted its claim to the Commercial Court within the insolvency proceedings against the debtor, seeking that it be recognized as a secured creditor (*razlučni poverilac*).

17. On 15 June 2009, at the first creditors' hearing, attended also by the applicant company, the Assembly of Creditors agreed that the insolvency proceedings should lead to the debtor's bankruptcy. On 7 September 2009 the Commercial Court initiated the proceedings for the sale of the debtor's assets.

18. On 24 August 2009 the Insolvency Judge (*stečajni sudija*) recognized the applicant company's claim and its secured creditor status. On 24 November 2009 the Insolvency Council (*stečajno veće*), upon an appeal of the Insolvency Administrator (*stečajni upravnik*), quashed this decision and referred the applicant company to institute civil proceedings for determination of its status as a secured creditor.

19. On 29 March 2010 the applicant company instituted civil proceedings in this regard. By 1 June 2012 the Commercial Court dismissed the applicant company's claim as lodged out of time. The applicant company was ordered to pay for the costs of the proceedings in the amount of RSD 485,250.00 (EUR 4,250). It would appear from the case-file that this decision is not yet final.

C. The Constitutional Court proceedings

20. On 15 August 2008 the applicant company lodged a constitutional appeal seeking redress in respect of the impugned non-enforcement. In particular, the applicant company sought that its secured creditor status be recognized and that it be paid the sums claimed in the insolvency proceedings.

21. On 29 March 2012 the Constitutional Court held that the applicant company had suffered a breach of its property right, as well as a violation of the "right to a trial within a reasonable time" with regard to the enforcement proceedings, and dismissed the remainder of the appeal. The court also declared that the applicant company was entitled to non-pecuniary damage in the amount of EUR 600, converted into the national currency at the rate applicable at the date of settlement.

D. The status of the debtor

22. Before the insolvency proceedings the debtor company was entirely socially-owned. It has remained to be registered as such in the relevant public registries throughout the insolvency proceedings.

23. The insolvency proceedings are still ongoing.

II. RELEVANT DOMESTIC LAW

A. The Enforcement Procedure Act 2004 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 125/04)

24. Article 5 provided that the enforcement proceedings were to be conducted urgently.

25. Article 35 § 2 specified that, on a creditor's request, the court would grant the statutory interest on the costs of the proceedings awarded in the final court decision.

26. Article 37 provided that enforcement proceedings were also to be conducted at the request of a claimant not specifically named as the creditor in the final court decision, providing that the former could prove, by means of an "official or other legally certified document", that the entitlement in question had subsequently been transferred to it from the original creditor.

27. Articles 98 – 153 set out details as regards the enforcement by sale of the debtor's immovable assets. Article 99 in particular provided that the enforcement was to be carried out by registering the enforcement order in the real estate registry (*zabeležba*), evaluation and sale of the debtor's immovable property, and paying off the creditors. Article 102 further specified the creditor's right to be compensated from the sale of property in respect of which the enforcement order was registered in the land registry.

B. The Enforcement Procedure Act 2011 (*Zakon o izvršenju i obezbeđenju*; published in the OG RS nos. 31/2011 and 99/2011)

28. On 17 September 2011 the new Enforcement Procedure Act came into force thereby repealing the Enforcement Procedure Act 2004. Article 358 provides that the enforcement proceedings instituted before this Act came into force will be continued pursuant to the provisions of the Enforcement Procedure Act 2011.

C. The Insolvency Act 2004 (*Zakon o stečajnom postupku*, published in the OG RS nos. 84/04 and 85/05)

29. Article 1 specified that the insolvency proceedings were to be conducted against an insolvent debtor with a view to paying off the creditors either through the debtor's bankruptcy or its reorganization.

30. The insolvency proceedings were to be conducted urgently (Article 29), by a competent court (Article 7), through an insolvency judge and a council, while certain competences were granted to an insolvency administrator, as well as to an assembly (*skupština*) and a board (*odbor*) of creditors (Article 9). The assembly of creditors, excluding the secured

creditors, was specifically entrusted with deciding whether the insolvency proceedings should lead to the debtor's bankruptcy or reorganization on the basis of the debtor's financial report and the insolvency administrator's proposal (Articles 22-24). Should the Assembly chose the bankruptcy, the insolvency council would begin with the debtor's sale (Article 23 § 5).

31. The secured creditors, unlike other creditors, had the right to be paid off from the funds obtained by the sale of assets in respect of which they had the security (Article 38). The unsecured creditors were to be paid proportionally and according to the tier in which they were placed. The payments on account of the costs of insolvency proceedings, the guaranteed salaries and related contributions and benefits, as well as public debts, respectively, had priority (Article 35).

32. Article 73 provided that "as of the day of institution of the insolvency proceedings" the debtor could not simultaneously be subjected to a separate enforcement procedure. Any ongoing enforcement proceedings were to be stayed and new enforcement proceedings could not be instituted as long as the insolvency proceedings were pending.

33. Upon the opening of the insolvency proceedings, the creditors had to report their claims to the court (Article 90). Claims that were not disputed by the insolvency administrator or the creditors were to be considered determined (Article 94). The insolvency administrator and the creditors had the right to appeal against a decision (*zaključak*) of the insolvency judge on the list of determined and disputed claims (Article 94).

34. The creditor whose claim was disputed in the insolvency proceedings was instructed to initiate civil or other proceedings requesting a determination of such a claim (Article 96). The claim so determined would have legal effect in respect of the debtor and the creditors (Articles 94 and 97).

D. The Insolvency Act 2009 (*Zakon o stečajnom postupku*, published in the OG RS nos. 104/2009, 99/2011 and 71/2012)

35. The Insolvency Act 2009 entered into force on 24 January 2010, thereby repealing the Insolvency Act 2004. In accordance with Articles 207 however, all insolvency proceedings instituted prior to 24 January 2010 are, in principle, to be concluded pursuant to the legislation which was in force at the relevant time.

E. Other relevant domestic law

36. The remainder of the relevant domestic law is set out in the cases *Marčić and Others v. Serbia*, no. 17556/05, § 29, 30 October 2007; *R. Kačapor and Others v. Serbia*, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, §§ 57-82, 15 January 2008; *Vlahović v. Serbia*, no.

42619/04, §§ 37-47, 16 December 2008; *Crnišanin and Others v. Serbia*, nos. 35835/05, 43548/05, 43569/05 and 36986/06, §§ 100-104, 13 January 2009; and *Marinković v. Serbia* (dec.), no. 5353/11, 29 January 2013.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 AND ARTICLE 1 OF PROTOCOL NO. 1

37. The applicant company complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 thereto about the State's failure to enforce the final judgment at issue. In so far as relevant, these Articles read as follows:

Article 6 § 1

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

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. ..."

A. Admissibility

1. Compatibility ratione personae *(responsibility of the State)*

38. The Government argued that the State could not be held responsible for commercial debts of insolvent companies.

39. The Court has already stated on numerous occasions in comparable cases against Serbia that the State is liable for honouring the debts of socially-owned companies established by final domestic court decisions (see, for example, *R. Kačapor and Others,* cited above, §§ 97-98; *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 96, 20 April 2010; and *Adamović v. Serbia*, no. 41703/06, § 31, 2 October 2012). The Court sees no reason to depart from that jurisprudence in the present case. Consequently, the Government's objection in this regard must be rejected.

2. Compatibility ratione personae *(the applicant company's "victim status")*

40. In the Court's view, although the Government have not raised an objection as to the Court's competence *ratione personae* in this respect, the applicant company's victim status nevertheless calls for its consideration

(see, *mutatis mutandis, Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 71, 28 April 2009).

41. The Court recalls that an applicant's status as a "victim" within the meaning of Article 34 of the Convention depends on the fact whether the domestic authorities acknowledged, either expressly or in substance, the alleged infringement of the Convention and, if necessary, provided appropriate redress in relation thereto. Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 71, ECHR 2006-V; and *Cataldo v. Italy* (dec.), no. 45656/99, ECHR 2004-VII).

42. In this connection, the Court recalls that in the cases concerning the non-enforcement of final domestic decisions against socially-owned companies, such as the present case, "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" (see *Milunović and Čekrlić* (dec.), 3716/09 and 38051/09, § 62, 17 May 2011).

43. The Court notes, in this respect, that on 29 March 2012 the Constitutional Court held that the applicant company had suffered a violation of its constitutional rights and awarded it the non-pecuniary damages sought (see paragraph 21 above). However, it did not order the State to pay, from its own funds, the pecuniary damages, that is the sums awarded by the final judgment in question, as required by the Court's jurisprudence (see, for example, *R. Kačapor and Others*, and *Crnišanin and Others*, both cited above). Consequently, the applicant company had not obtained the adequate and sufficient redress for the alleged violations.

44. The Court therefore finds that the applicant company has retained its victim status.

3. Exhaustion of domestic remedies

45. The Government submitted that the applicant company had failed to exhaust the domestic remedies as required by Article 35 of the Convention. In particular, since the insolvency proceedings and the constitutional appeal proceedings were still ongoing, the applicant company's complaint was premature.

46. The applicant company disagreed.

47. The Court notes at the outset that the applicant company had a judgment which was final and enforceable, the execution of which was the responsibility of the authorities including, if necessary, the taking of such measures as bankruptcy proceedings (see *Khachatryan v. Armenia*, no. 31761/04, § 60, 1 December 2009). In principle, when an applicant, such as the present one, obtains a final judgment against a State-controlled entity, he

or she is only required to file a request for the enforcement of that judgment to the competent court or, in case of bankruptcy proceedings against the debtor, to report his or her claims to the administration of the debtor (see *mutatis mutandis*, *R. Kačapor and Others,* cited above). Given that the applicant company did that, the Government's objection must be rejected.

48. The Court has already held that in cases such as the applicant company's, a constitutional appeal should indeed be considered as an effective domestic remedy, within the meaning of Article 35 § 1 of the Convention in respect of all such applications introduced against Serbia as of 22 June 2012 (see *Marinković v. Serbia*, cited above § 36). It sees no reason to hold otherwise in the present case and notes that the applicant company had introduced its complaints before the Court on 30 September 2008. In any event, on 29 March 2012 the Constitutional Court issued the decision on the applicant company's constitutional appeal (see paragraph 21 above). The Government's objection in this regard therefore, must also be rejected.

4. Conclusion

49. The Court finds that the present complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

50. The Government maintained that the enforcement proceedings were conducted with due diligence, while the failure to enforce the judgment in question was primarily due to the debtor's indigence. They further argued that the period of non-execution should not include the subsequent insolvency proceedings, which were conducted fairly and expeditiously, having regard to their particular complexity and the delays attributable to the applicant company who pursued its security claim.

51. The applicant company disagreed and reaffirmed its complaints.

52. The Court recalls its settled case-law to the effect that the respondent State has consistently been held responsible for its failure to enforce final court judgments establishing the debt of socially-owned companies (see, for example, *R. Kačapor and Others,* cited above, §§ 97-98; *Rašković and Milunović v. Serbia*, nos. 1789/07 and 28058/07, § 71, 31 May 2011; and *Adamović v. Serbia*, cited above, § 39). In this regard, the Court has also already considered the circumstances relating to insolvent debtors (*R. Kačapor and Others*, §§ 114-115, and *Vlahović*, § 77, both cited above), and held that the lack of funds could not constitute an obstacle to enforcement since "it is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment" (see also *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V). The Court finds no particular

circumstances in the instant case which would require a departure from this case-law.

53. The Court notes that the judgment of 25 April 2005 became final on 24 November 2005, while its enforcement was requested on 27 December 2005. The period of non-enforcement has so far lasted more than seven years and eight months. The Government failed to demonstrate that the responsibility for the delay in the present case could be attributed to the applicant company. The Serbian authorities have thus not taken the necessary measures to enforce the judgment in question and have not provided any convincing reasons for that failure.

54. There has accordingly been a breach of Article 6 of the Convention and Article 1 of Protocol No. 1 thereto.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

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

56. 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."

A. Admissibility

57. The Court notes that these complaints are linked to those examined above and must, therefore, likewise be declared admissible.

B. Merits

58. The Court notes that the Government averred in their preliminary objections that a constitutional appeal was an effective remedy available to the applicant company, which objections were rejected on the grounds described at paragraphs 42, 43 and 48.

59. The Court concludes, for the same reasons, that there has been a violation of Article 13 taken together with Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 thereto on account of the lack of an effective remedy under domestic law for the applicant company's complaint concerning the non-enforcement of a final decision rendered against the debtor (see, *mutatis mutandis*, *Stevanović v. Serbia*, no. 26642/05, §§ 67-68, 9 October 2007; and *Stakić v. Montenegro*, no. 49320/07, §§ 59-60, 2 October 2012).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

1. Pecuniary Damage

61. The applicant company claimed RSD 20,103,432.58 (EUR 182,000) on account of the judgment debt and RSD 122,132,328.20 (EUR 1,100,300) on account of statutory interest accrued between 28 February 2001 and 19 April 2012, as well as RSD 947,142.00 (EUR 11,533) on account of the costs of civil proceedings and RSD 5,754,074.84 (EUR 50,485) on account of statutory interest accrued between 25 April 2005 and 19 April 2012, less RSD 33,671,093.87 (EUR 303,350) which it had expected to receive in the insolvency proceedings.

62. The Government considered the claims unjustified and excessive.

63. Having regard to the violations found in the present case and its own extensive case-law in respect of non-enforcement against socially-owned companies in Serbia (see *R. Kačapor and Others*, §§ 123-126, *Crnišanin*, §§137-139; *Adamović*, § 47; and *Rašković and Milunović*, § 83; all cited above), the Court considers that the applicant company's claim for the payment of the outstanding debt established in the final court decisions must be accepted. The Government must, therefore, pay the applicant company the sums awarded in the Commercial Court judgment of 25 April 2005 (see paragraph 5 above) plus the statutory interest awarded in the Municipal Court enforcement order (see paragraph 9 above), less any and all payments received on those basis in the meantime (see, *mutatis mutandis*, *R. Kačapor and Others*, cited above §§ 123-126; *Crnišanin*, cited above §§ 137-139; and *Kin-Stib and Majkić v. Serbia*, cited above, § 97).

2. Non-pecuniary damage

64. The applicant company claimed an unspecified sum for non-pecuniary damage in its application introduced on 30 September 2008, but has failed to resubmit the claim in this regard at the appropriate stage of the proceedings.

65. As the applicant company has failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, as well as paragraph 5 of the Practice Direction on Just Satisfaction Claims, which, in so far as relevant, provides that the Court "will also reject claims set out on the application form but not

resubmitted at the appropriate stage of the proceedings and claims lodged out of time", its claim for the non-pecuniary damage must therefore be dismissed.

B. Costs and expenses

66. The applicant company also claimed the costs and expenses for: (i) the enforcement proceedings in the amount of RSD 979,180.00 (EUR 8,590); and (ii) the insolvency proceedings in the amount of RSD 970,780.00 (EUR 8,520). In addition, the applicant company claimed RSD 300,000.00 (EUR 2,625) for the costs and expenses incurred before the Court. In this respect the applicant company provided a detailed and itemised calculation.

67. The Government considered these claims excessive.

68. 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 were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

69 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 applicant company the sum of EUR 3,900 covering costs and expenses under all heads.

C. Default interest

70. 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 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

4. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 6 § 1 of the Convention and Article 1 of Protocol No. 1;

5. *Holds*

(a) that the respondent State is to pay the applicant company, within three months, the sums awarded in the final judgment of the Commercial Court of 25 April 2005, plus the statutory interest awarded by the Municipal Court enforcement order of 19 January 2006, less any and all related payments received by the latter in the meantime;

(b) that the respondent State is also, within the same period, to pay EUR 3,900 (three thousand nine hundred euros), to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of the costs and expenses incurred;

(c) 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;

7. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 26 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Seçkin Erel	Paulo Pinto de Albuquerque
Acting Deputy Registrar	President