



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

SECOND SECTION

CASE OF MERČEP v. CROATIA

(Application no. 47880/20)

JUDGMENT

STRASBOURG

11 February 2025

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

In the case of Merčep v. Croatia,

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

Jovan Ilievski, *President*,

Péter Paczolay,

Davor Derenčinović, *judges*,

and Dorothee von Arnim, *Deputy Section Registrar*,

Having regard to:

the application (no. 47880/20) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 19 October 2020 by a Croatian national, Mr Ivan Merčep (“the applicant”), who was born in 1967, lives in Split and was represented by Mr M. Bekavac-Basić, a lawyer practising in Zagreb;

the decision to give notice of the complaint concerning access to a court to the Croatian Government (“the Government”), represented by their Agent, Ms Š. Stažnik, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 21 January 2025,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the decision of the domestic courts to declare the applicant’s civil action for defamation inadmissible because he had failed to report his compensation claim in pre-bankruptcy settlement proceedings (*postupak predstečajne nagodbe*, hereafter “PBS proceedings”) opened against the defendant company.

I. LEGAL BACKGROUND TO THE CASE

2. PBS proceedings were regulated by the Financial Operations and Pre-Bankruptcy Settlement Procedure Act (hereafter “PBS Act”), which entered into force on 1 October 2012.

3. The proclaimed aims of PBS proceedings were (i) enabling debtors who experienced financial difficulties to undergo financial restructuring with a view to becoming solvent again, and (ii) providing creditors with more favourable conditions for the settlement of their claims compared to (ordinary) bankruptcy proceedings.

4. PBS proceedings could be instituted only at the proposal of the debtor and were conducted before the domestic payments agency FINA and the relevant commercial court. Underlying principles of PBS proceedings were, *inter alia*, the principle of good faith and the principle of voluntariness.

5. Creditors had to report their claims within thirty days from the publication of the announcement on FINA's website that PBS proceedings had been opened against the debtor. The debtor also had to make a list of its obligations to creditors.

6. Reported claims which the debtor accepted and those included in its list of obligations were to be examined in PBS proceedings. Reported claims which the debtor opposed during PBS proceedings (unless established by a final judgment or in an equivalent document) could be pursued in civil or other proceedings.

7. The debtor and the creditors had to agree on a financial restructuring plan, which served as a basis for a future settlement. The plan was considered accepted if it was voted for by creditors whose claims exceeded half of the value of the claims for each group of creditors, or by creditors whose claims exceeded 2/3 of the value of all claims. If approved by the relevant commercial court, the plan became a judicial settlement with the force of *res judicata* and was binding even for those creditors who had not accepted it.

8. Section 70(1) of the PBS Act provided that civil proceedings instituted against the debtor before the opening of PBS proceedings had to be stayed at the debtor's request. Section 70(3) provided that stayed civil proceedings could be resumed at the creditor's request after the conclusion of the PBS proceedings but only in respect of claims which had been opposed in the PBS proceedings (see paragraph 6 above).

9. Section 71 provided that the opening of PBS proceedings produced legal effects in respect of all creditors' claims against the debtor generated before the opening of those proceedings, save for the claims of the so-called segregation and secured creditors and priority claims (*tražbine izlučnih i razlučnih vjerovnika i prioritetne tražbine*).

10. Section 81(2) provided that after the settlement became final it was no longer possible to bring a civil action to pursue claims generated before the opening of PBS proceedings which had not been reported in those proceedings by the creditors or listed by the debtor as its obligations.

II. CIVIL PROCEEDINGS

11. On 10 December 2009 the applicant brought a civil action for defamation against the publishing company EPH-M (later renamed HM) in the Zagreb Municipal Civil Court. He sought compensation for non-pecuniary damage sustained by the publication of an article in the daily newspaper published by the defendant company. The article suggested that he, as the head of Police Department, obstructed the investigation in a specific case.

12. On 31 July 2013 the domestic payments agency FINA opened PBS proceedings against the EPH-M company and invited the creditors to report their claims by 30 August 2013.

13. On 4 October 2013 the company informed the Municipal Court that PBS proceedings had been opened against it. Accordingly, on 14 February 2014 the court stayed the civil proceedings (see paragraph 8 above).

14. The applicant reported his claim for compensation in the PBS proceedings only on 20 February 2014.

15. After the conclusion of the PBS proceedings, on 9 June 2015 the Municipal Court resumed the civil proceedings. The defendant company asked the court to declare the applicant's action inadmissible because he had not reported his claim in the PBS proceedings in time.

16. On 17 September 2015 the Municipal Court declared the applicant's civil action inadmissible for having belatedly reported his claim in the PBS proceedings. It acknowledged that the PBS Act did not have a specific provision on legal consequences for the creditors who had pursued their claim in civil proceedings before PBS proceedings against the debtor had been opened, but who had later failed to report that claim in the PBS proceedings. The court therefore applied section 81(2) of the PBS Act *mutatis mutandis* (see paragraph 10 above).

17. Following an appeal by the applicant, on 3 May 2016 the Zagreb County Court quashed the first-instance decision and remitted the case. It held, *inter alia*, that:

(i) the second aim of PBS proceedings (see paragraph 3 above) suggested that creditors did not have to report their claims if they did not want to benefit from more favourable conditions for their settlement,

(ii) both creditors and the debtor had a duty to report their claims/obligations in PBS proceedings (see paragraph 5 above),

(iii) in a situation where neither of them had done so, attaching negative consequences to the creditor alone by declaring his civil action inadmissible meant imposing a disproportionate burden on him (the court referred to *Ismeta Bačić v. Croatia*, no. 43595/06, 19 June 2008),

(iv) this applied *a fortiori* to the civil proceedings in question where the defendant company had contested the applicant's claim, which suggested that the company would have opposed it even if he had reported it in time in the PBS proceedings, which further meant that the claim would have anyway had to be determined in the present civil proceedings (see paragraph 8 above).

18. In the fresh proceedings, on 28 May 2018 the Municipal Court ruled for the applicant and ordered the defendant company to pay him 20,000 Croatian kunas (HRK; i.e. 2,654 euros (EUR)) as compensation for non-pecuniary damage sustained. That court acknowledged that, in the meantime, the case-law had evolved and that on 30 March and 2 June 2017 the Constitutional Court and the Supreme Court had expressed the view that if the plaintiff had not reported his or her claim in the PBS proceedings his or

her civil action had to be declared inadmissible. It however held that, in view of the County Court's reasoning (see paragraph 17 above), this new case-law was not applicable in the applicant's case.

19. Following an appeal by the defendant company, by a decision of 15 January 2019 the Zagreb County Court reversed the first-instance judgment and declared the applicant's action inadmissible. It held that it had departed from its previous decision because of the new case-law of the Supreme Court and the Constitutional Court (see paragraphs 17-18 above).

20. On 24 June 2020 the Constitutional Court dismissed the applicant's subsequent constitutional complaint, and on 13 July 2020 notified his representative of its decision. It held, without giving any reasons, that the Court's findings in the *Ismeta Bačić* case (cited above) were not applicable in the applicant's case.

III. COMPLAINT

21. The applicant complained, under Article 6 § 1 of the Convention, that the Zagreb County Court's decision of 15 January 2019 declaring his civil action inadmissible because he had not reported his claim in time in the PBS proceedings (see paragraph 19 above) had been in breach of his right of access to a court.

THE COURT'S ASSESSMENT

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

23. The relevant principles emerging from the Court's case-law concerning the right of access to a court and, in particular, the situations in which a restriction of that right amounts to "excessive formalism" are summarised in *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-79 and 90-99, 5 April 2018). Excessive formalism usually occurs in cases of a particularly strict construction of a procedural rule, preventing an action from being examined on the merits (*ibid.*, §§ 78 and 97).

24. The Government raised a number of arguments to the effect that under the PBS Act there had been no shared responsibility between the creditors and the debtor for reporting/listing their claims/obligations in PBS proceedings, and that the case therefore had to be distinguished from the *Ismeta Bačić* case (cited above).

25. The Court considers that, for the reasons set out below, it may leave open that issue and the issue whether the restriction of the applicant's right of access to a court was foreseeable.

26. From the totality of the provisions of the PBS Act (see paragraphs 2-10 above) it seems evident that the purpose of the PBS

proceedings was to settle only consensual and other incontestable debts rather than all existing or potential debts between the debtor and its creditors. The Court therefore finds force in the Zagreb County Court's argument made in its first decision in the case – and reiterated by the applicant in his application to the Court – that the defendant company would have opposed the claim even if the applicant had reported it in time in the PBS proceedings (see point (iv) in paragraph 17 above). This indeed follows from the fact that the defendant company did not include the applicant's claim in the list of its obligations in the PBS proceedings and opposed it throughout the civil proceedings.

27. Thus, in any event, the applicant's claim would have ultimately had to be determined in the civil proceedings in question (see paragraph 8 above). In those circumstances, declaring the applicant's civil action inadmissible for failing to report his claim in the PBS proceedings in time amounted to excessive formalism which impaired the very essence of his right of access to a court.

28. The Government submitted that ruling on the merits of the applicant's claim in the civil proceedings would have frustrated the aim of the PBS proceedings (see paragraph 3 above) which implied giving a debtor in financial difficulties more control over its destiny.

29. The Court finds the Government's argument unconvincing. Had the defendant company wished the applicant's claim to be determined in the PBS proceedings, it could have simply included that claim in the list of its obligations. In that regard it must also be noted that under the PBS Act civil proceedings instituted against the debtor before the opening of PBS proceedings could be stayed only at the debtor's request (see paragraph 8 above), and that in the present case the defendant company asked the Municipal Court to stay the civil proceedings only after the time-limit for reporting the creditor's claims had already expired (see paragraphs 12-13 above). This means that the company had full control as to whether the applicant's claim would be examined in the civil or PBS proceedings.

30. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. The applicant claimed 16,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 9,000 in respect of costs and expenses incurred before the domestic courts and before the Court.

32. The Government contested these claims.

33. The Court reiterates that under domestic law the applicant may request reopening of the civil proceedings in respect of which the Court has found a violation of the Convention and considers that in the given circumstances this is the most appropriate way for him to obtain compensation for the pecuniary

damage alleged. Therefore, there is no call to award the applicant any sum on that account.

34. On the other hand, the Court awards the applicant EUR 8,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

35. As regards the costs and expenses, the Court considers it reasonable to award the applicant EUR 830 for the costs incurred before the Constitutional Court and EUR 830 for those incurred before the Court, plus any tax that may be chargeable to him. The remainder of his claim for costs and expenses incurred before the domestic courts must be rejected, given that he will be able to have them reimbursed should the proceedings complained of be reopened (see, for example, *Stojanović v. Croatia*, no. 23160/09, § 84, 19 September 2013).

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*,
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
 - (i) EUR 8,500 (eight thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,660 (one thousand six hundred and sixty euros), plus any tax that may be chargeable to the applicant, 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 February 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim
Deputy Registrar

Jovan Ilievski
President