REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Case No.:
Up-2940/07-19

Date:
5 February 2009

D E C I S I O N

At a session held on 5 February 2009 in proceedings to decide upon the constitutional complaint of the company DELO, d. d., Ljubljana, represented by Mag. Emil Zakonjšek, lawyer in Ljubljana, the Constitutional Court

d e c i d e d a s f o l l o w s:

Maribor Higher Court Judgment No. I Cp 137/2007, dated 12 June 2007, and Murska Sobota District Court Judgment No. P 272/2002, dated 25 October 2006, are annulled in the part which refers to the second defendant and in this part the case is remanded to Murska Sobota District Court for new adjudication.

R e a s o n i n g

A.

1. In civil proceedings the plaintiff claimed compensation for the non-pecuniary damage which he allegedly sustained due to an interference with his personality rights (by the publication of untrue information in the press). The court of first instance partly granted the claim and ordered the first defendant (the company Večer, d. d., Maribor) to pay compensation of 500,000 SIT (now 2,086.46 EUR) and the second defendant (the company Delo) 800,000 SIT (now 3,338.34 EUR) in addition to late payment interest. It dismissed the remainder of the claim. The Higher Court upheld the decision of the first instance court. The court established that in the period between July 1999 and January 2000 the defendants published several articles which dealt with the suspicion that three police officers (among them also the plaintiff) had committed criminal offences in the course of performing their duties. In the period between 24 July 1999 and 29 December 1999 the second defendant (i.e. the constitutional complainant) published in the Delo newspaper four articles entitled: “Were the Police in League with the Ukrainians?”, “Did a Bribable Police Commander Help Prostitutes?”, “A Police Commander from the Border is Suspended”, and “Losing a Job, Not Retiring?”. The court indisputably established that in the articles

the plaintiff was characterised as the police commander of Hodoš Border Police Station. During the proceedings it was disputable only whether in using the word “police commander” the defendants went beyond the information that was provided by the Murska Sobota Police Station at the press conference and in its public report. The court established that at the press conference the police did not mention the plaintiff's official position (i.e. police commander), but spoke only of “three police officers who are suspected of having committed a criminal offence”. The courts held that by writing “the police commander” the first and second defendants went beyond the information provided at the press conference and characterised the plaintiff in the articles such that he could be clearly recognised as a person who is or is allegedly engaging in criminal activities. The courts held that thereby they inadmissibly (i.e. unlawfully) interfered with the plaintiff's personality and dignity.

2. The complainant claims that by the challenged decision the court excessively interfered with the constitutionally guaranteed right to freedom of expression (Article 39 of the Constitution). The complainant explains that the titles of the published articles must be considered together with the subtitles and with the entire text of the articles, from which it clearly follows that the plaintiff was only suspected of having committed certain criminal offences, which is also reflected in the conditional clause used by the journalist. Moreover, the complainant points out that all the articles concerned a matter which is of great public concern: all the articles namely dealt with the suspicion that police officers (among them also the plaintiff) had committed criminal offences in the course of performing their duties. In the opinion of the complainant, the plaintiff's position is particular, as he was a police officer, and even more so, as he held a supervisory position within the police (i.e. as a commander of the police station). Therefore, his position is allegedly comparable with the position of politicians who are also required to respect laws and whose conduct is closely scrutinized in light of this. The complainant alleges that the court gave absolute priority to the right to privacy (Article 35 of the Constitution), whereby it allegedly overlooked the fact that in the case at issue there existed circumstances which justified the interference with the plaintiff's privacy (i.e. by mentioning his official position). Due to the fact that the case concerns a supervisory position within the police hierarchy, the complainant is of the opinion that the journalist even had a duty to inform the public that there existed a suspicion that criminal offences had been committed and that authority might have been abused. The complainant is furthermore of the opinion that in such cases it cannot be avoided that the involved individuals are recognised, especially in small towns. Moreover, the plaintiff could allegedly be recognised already on the basis of the initials of his name and surname, which were allegedly mentioned by the police at the press conference. The complainant proposes that the challenged judgments be annulled and the case remanded to the court of first instance for new adjudication.

3. The panel of the Constitutional Court accepted the constitutional complaint for consideration by Order No. Up-2940/07, dated 27 November 2008. Pursuant to the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA) the Constitutional Court notified Maribor Higher Court of the acceptance of the constitutional complaint for consideration. On the basis of the second paragraph of Article 56 of the CCA, the constitutional complaint was sent to the opposing party in the civil proceedings. In the process of attempting to serve such it was established

that the plaintiff was deceased, therefore the Constitutional Court sent the constitutional complaint to his heirs. The Constitutional Court received their reply to the constitutional complaint, which was filed by their authorised representative. Despite the fact that the Constitutional Court's request for a reply stated that a party must submit an appropriate letter of authorisation if he or she wanted to be represented in proceedings before the Constitutional Court by an authorised representative, the letters of authorisation for representation before the Constitutional Court were not submitted with the reply. Therefore, the Constitutional Court did not consider the reply when deciding the matter, nor did it serve such on the complainant.

B.

4. The principal allegation of the complainant with regard to the challenged judicial decision is that the court therewith excessively interfered with the constitutionality guaranteed right to freedom of expression (Article 39 of the Constitution). The complainant alleges that the court gave absolute priority to the right to privacy (Article 35 of the Constitution), whereby it allegedly overlooked the fact that in the case at issue there existed circumstances which justified the interference with the plaintiff's privacy.

5. The case at issue concerns a collision between the human rights of the plaintiff on one hand and the complainant, on the other. Bearers [of rights] can in such cases exercise their rights to a limited extent, such that the exercise of one's rights should not excessively interfere with other's rights (*Cf*., Decision No. Up-422/02, dated 10 March 2005, Official Gazette RS, No. 29/05 and OdlUS XIV, 36; Decision No. Up-636/07, dated 17 January 2008, Official Gazette RS, No. 28/08 and OdlUS XVII, 22). [1] Therefore, the court must reduce the scope of the exercise of every right that is in collision to the extent that is necessary in order to ensure that the human rights of others are exercised. The evaluation of whether the exercise of one right already excessively limits the exercise of another right requires weighing the significance of both rights and the force of the interference, both in light of all the circumstances of the individual case.

6. Therefore, the Constitutional Court reviewed whether by the challenged decision the courts, as alleged by the complainant, in fact excessively protected the plaintiff's right (to the protection of personality rights and privacy), while the courts did not attach the appropriate significance to the complainant's right (to freedom of expression). With reference to such, the Constitutional Court first had to answer the question of what in the case at issue are the contents of the human rights which are in collision, as well as whether regarding such and taking into consideration all the circumstances of the case at issue, the courts attached appropriate significance to each right.

7. In the first paragraph of Article 39 the Constitution guarantees freedom of expression of thought, freedom of speech and public appearance, and freedom of the press and other forms of public communication and expression. Everyone may freely collect, receive, and disseminate information and opinions. The significance and the role of the freedom of expression are complex. Its function is to protect the freedom to disseminate information and opinions (i.e. the active aspect) and also the freedom

to receive such, thus the right to be informed (i.e. the passive aspect). Within the framework of the right to freedom of expression, freedom of the press has a particularly important role. In Decision No. U-I-172/94, dated 9 November 1994 (Official Gazette RS, No. 73/94 and OdlUS III, 123), the Constitutional Court already pointed out that freedom of the press and the freedom to express opinions helps to establish and create an impartially informed public. In Order No. Up-91/02, dated 12 March 2004, [2] the Constitutional Court held that freedom of speech bears a particular significance in cases concerning expression within the framework of the journalistic profession, as the broad boundaries of freedom of the press is one of the foundations of modern democratic societies. This holds particularly true for reporting on matters for which there exists a general public interest to be informed of such.

8. As is the case regarding other human rights, also the right to freedom of expression is not unlimited. In accordance with the third paragraph of Article 15 of the Constitution, human rights and fundamental freedoms are limited only by the rights of others. Most often the right to freedom of expression (Article 39 of the Constitution) is in collision with the rights in the field of the protection of personality rights and privacy (Article 35 of the Constitution), among which the right to the protection of honour and reputation also belongs. Journalists must undoubtedly be particularly responsible when implementing the right of the public to be informed, with reference to which they act as representatives of the public. They must ensure that information is true, clear, and unambiguous, and they may not and cannot make excuses that they are merely giving the public what the public wants. [3]

9. The Constitutional Court has already adopted the standpoint that the degree to which certain persons must endure what is said or written about them is greater for public persons and even more so for persons who are part of the executive branch of power (*Cf*., Decision No. Up-462/02, dated 13 October 2004, Official Gazette RS, No. 120/04 and OdlUS XIII, 86). What applies in general is that the boundaries of acceptable criticism significantly depend on the social role of the person at whom such criticism is directed. A person who decides to perform a public office or to appear in public generates greater public interest. Therefore, they must take this into account and must be prepared to a greater degree for possible critical and unpleasant words, especially if matters concerning their office are being reported on. The weight of this circumstance also depends on the level of the public office or the nature of such public appearance.

10. A similar standpoint follows from the case-law of the European Court of Human Rights (hereinafter referred to as the ECHR). The conduct of civil servants is in principle always of public interest, although they do not perform a political office. [4] In numerous cases the ECHR reiterated the principled position that the limits of acceptable criticism are broader when the right to freedom of expression is exercised through the media and it concerns matters that are in the public interest. A general conviction of the ECHR is that the press not only has the task of imparting information on all matters of political or other public interest, but also that the public has a right to receive them. [5] In cases of publications based on statements made by other persons (e.g. interviews), a distinction needs to be made according to whether the statements emanate from a journalist or are the quoted words of others. Punishing a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press

to the discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. The position of the ECHR is that in such cases the relevant test is not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis of the allegation can be established, which entails that the journalist had a justified reason to believe that the statements were true and therefore acted in good faith. [6]

11. A finding on the special significance of freedom of expression in cases of journalistic reporting entails that when weighing interests and benefits in a conflict between human rights, freedom of expression must be given greater weight and the above-mentioned circumstances must be considered as strongly leaning in favour of freedom of expression. Therefore, in cases which concern the limitation of freedom of expression regarding journalistic reporting, it must be particularly carefully examined whether there exist constitutionally acceptable reasons for the limitation. Therefore, the Constitutional Court proceeded to review whether the court stated such reasons in order to limit the complainant's right to freedom of expression.

12. In the case at issue the complainant was ordered to pay compensation for the non-pecuniary damage which the plaintiff allegedly sustained due to the interference with his honour and reputation by the publication of the articles entitled: “Did a Bribable Police Commander Help Prostitutes?” and “Bribable Police Commander - Losing a Job, not Retiring?”. As established by the court of first instance, on the basis of the written notice, the press conference, and the interview with the persons in charge of Murska Sobota Police Station, the defendants' journalists reported on the suspicion that criminal offences had been committed by the police, and from a group of suspected police officers the journalists exposed the plaintiff in a manner such that in the disputable articles his official position was mentioned. In accordance with the findings of the court, the police officers at the press conference did not mention the plaintiff's official position (i.e. police commander), but spoke only of “three police officers who are suspected of having committed a criminal offence”. Considering the testimony of the acting director of Murska Sobota Police Station, who provided information on the case at the press conference, the court held that the mention of the plaintiff's official position in the articles came from unofficial sources. With reference to his testimony that he allowed for the possibility that at the press conference he had used the initials of names and surnames of the police officers against whom charges had been filed, the Higher Court pointed out that “such act does not entail that he had used the title of the plaintiff's official position”. The Higher Court upheld the finding of the court of first instance that the journalists had apparently uncovered this piece of information themselves. The courts held that by writing “the police commander” the journalists went beyond the information obtained at the press conference and characterised the plaintiff in the articles so that he could clearly be recognised as a person who is or is allegedly engaging in criminal activities. The courts held that thereby they inadmissibly (i.e. unlawfully) interfered with the plaintiff's personality and dignity.

13. The Constitutional Court held that in the case at issue two circumstances are essential for the court's decision, which when weighing between the relevant opposing human rights strongly leaned in favour of the right to freedom of expression, and namely: 1) it was a case of journalistic reporting that was of great public concern: the articles dealt with the suspicion that police officers (among them

also the plaintiff) had committed criminal offences in the course of performing their duties and therefore the public had the right to be informed thereof; and 2) the plaintiff held a public office – a supervisory position in the police hierarchy – and therefore his conduct was subject to greater scrutiny in the public and in the press. The court of first instance did hold that it is expected from the commander of the police station as a leader that his tolerance threshold to the reactions of the public is higher than usual, and therefore the protection of his privacy with reference to carrying out such work is lower than in matters of a private nature. Regardless of the exposure of the plaintiff due to his official position, the court of first instance held that his honour and reputation must be respected when reporting. This was upheld by the Higher Court, which based its decision on the standpoint that when the public is informed of facts and circumstances from a person's life and a person is described so that they are recognisable in their surroundings, this entails a violation of privacy. In the opinion of the Constitutional Court, such a standpoint is not acceptable from the viewpoint of the right to freedom of expression and the right to be informed. When informing the public of a certain event, the possibility that a certain circle of people (by making a smaller or greater effort) will recognise individual persons involved can namely not be eliminated even by substantially curtailing or leaving out the personal data necessary for a person to be recognisable. If the case concerns reporting on events in a small town (as in the case at issue) it is even more difficult to avoid that the persons involved are recognised. The factual findings of the court according to which the complainant's journalist published the disputable articles on the basis of information obtained from the Murska Sobota Police Station and that at the press conference the initials of the names and surnames of the police officers involved were, *inter alia*, also stated, suffice in the opinion of the Constitutional Court for the conclusion that the journalist had a sufficiently correct and reliable factual basis for the written information.

14. With regard to the above-mentioned, the Constitutional Court holds that the courts excessively protected the plaintiff's right to the protection of personality rights and privacy, whereas they did not contribute the proper weight to the complainant's right to freedom of expression or to the right of the public to be informed. Therefore, the Constitutional Court decided that the challenged judgments in the part which refers to the complainant (in civil proceedings the second defendant) are annulled and the case is hereby remanded in this part to the court of first instance for new adjudication.

C.

15. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr. Ciril Ribičič, Vice President, and Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, and Jan Zobec. The decision was reached unanimously.

Dr. Ciril Ribičič
Vice President

[1] *Cf*., F. Testen, 15. člen (Uresničevanje in omejevanje pravic) in: L. Šturm (Editor), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske in državne študije, Ljubljana 2002, p. 195.
[2] The Order is published on the website of the Constitutional Court http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/337420EAE19D4F8BC1257172002967D2.
[3] *Cf*., Supreme Court Judgment No. II Ips 131/2000, dated 24 August 2000.
[4] See also, A. Teršek, Svoboda izražanja v sodni praksi Evropskega sodišča za človekove pravice in slovenski ustavnosodni praksi, Informacijsko dokumentacijski center Sveta Evrope pri NUK v Ljubljani, Ljubljana 2007, p. 99.
[5] In the Case of Dyundin v. Russia (No. 37406/03, Judgment dated 14 October 2008), the ECHR established a violation of freedom of expression (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms). In the reasoning, it, *inter alia*, pointed out that although it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do, civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. In the cited decision, as in numerous other prior decisions, the ECHR emphasized the key role of the press in democratic societies. In matters of public interest, not only do journalists have the task of imparting information and ideas, but the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".
[6] See also, A. Teršek, *ibidem*, p. 48 *et sub.* and p. 98 *et sub*.