

REPUBLIC OF SERBIA
COURT OF APPEAL IN BELGRADE
Gž 5479/16
18 August 2016
BELGRADE

IN THE NAME OF THE PEOPLE

THE COURT OF APPEAL IN BELGRADE, sitting in a chamber comprising Judge Milanka Vukčević, as Presiding Judge, and Judges Vesna Stanković and Vesna Karadžić–Ristić, as members of the chamber, in the case initiated by **Plaintif Ljubiša Diković from Belgrade**, [REDACTED], represented by Đuro Čepić, an attorney from Belgrade, Bulevar Mihajla Pupina no. 10-i/424, against the **Defendants Nataša Kandić from Belgrade**, [REDACTED], and the **Humanitarian Law Center, based in Belgrade**, Dečanska no. 12, with a common representative Vladimir Gajić, an attorney from Belgrade, Kralja Milutina no. 47, **in the case of compensation of non-material damage**, deciding upon the appeals filed by the Plaintiff and the Defendant Humanitarian Law Center, against the judgment of the First Basic Court in Belgrade P.br.14100/13 of 3 March 2016, in a court session held on 18 August 2016, renders the following

J U D G E M E N T

The appeals filed by the Plaintiff and Defendant Humanitarian Law Center, are hereby **DISMISSED** as unfounded and the judgment of the First Basic Court in Belgrade P.br.14100/13 of 3 March 2016 is thus **UPHELD**.

The Plaintiff's request for the compensation of expenses for the second instance proceedings is hereby **DISMISSED** as unfounded.

R e a s o n i n g

In the first paragraph of the disposition of the disputed judgment, the Court allowed for the amendment of the claim made at the main hearing session held on 5 June 2013. In the second paragraph, the Court dismissed the motion for stay of the proceedings. In the third paragraph, the Court partially adopted the Plaintiff's claim and obliged the Humanitarian Law Center based in Belgrade to pay the Plaintiff the amount of 550,000.00 RSD, together with statutory default interest as of 3 March 2016 until the day of the payment, as the compensation for non-material damage caused by the psychological pain suffered due to the violation of dignity and reputation. In the fourth paragraph of the disposition, the Court dismissed the Plaintiff's claim demanding that the Humanitarian Law Center be obliged to pay the compensation of non-material damages caused by psychological pain due to the violation of dignity and reputation exceeding the amount of 550,000.00 RSD, which was granted by the third paragraph of the disposition of the judgment, up to the demanded 1,000,000.00 RSD, that is the amount of 450,000.00 RSD with statutory default interest as of 3 March 2016 until the day of the payment, as unfounded. In the fifth paragraph of the disposition, the Court dismissed the Plaintiff's claim for the Court to oblige Nataša Kandić to be a joint debtor, together with the Humanitarian Law

Center, of the compensation of non-material damage caused by the psychological pain suffered due to the violation of dignity and reputation to the amount of 1,000,000.00 RSD together with the statutory default interest as of 3 March 2016 until the day of the payment, as unfounded. In the sixth paragraph of the disposition, the Defendant Humanitarian Law Center based in Belgrade was obliged to compensate the Plaintiff for the expenses of the litigation proceedings to the amount of 149,000.00 RSD together with the statutory default interest as of the day when the conditions necessary for the enforcement of the decisions were met until the day of the payment, while the amount of statutory default interest calculated for the period from 3 March 2016 until the day when the conditions for the enforcement of the judgment were met, was dismissed as unfounded. In the seventh paragraph 7 of the disposition, the Plaintiff was obliged to compensate the Defendant Nataša Kandić for the expenses of the litigation proceedings to the amount of 96,650.00 RSD.

The Plaintiff and the Defendant Humanitarian Law Center filed timely appeals against the first instance judgment. The Plaintiff appealed the third, fourth, fifth, and seventh paragraphs of the disposition on all legal grounds, whereas the Defendant appealed the first, second, third, and sixth paragraphs of the disposition, also on all legal grounds.

The Defendant Humanitarian Law Center submitted the response to the appeal.

The Plaintiff submitted the response to the appeal filed by the Defendant Humanitarian Law Center.

Analyzing the validity of the appealed judgment in view of Article 386 of the Law on Civil Procedure (“Official Gazette of the RS”, nos. 72/11...55/14), the Court of Appeal found that the appeals filed by both the Plaintiff and the second Defendant were unfounded.

The Court found that there were no substantial violations of the litigation procedure referred to in Items 1, 2, 3, 5, 7 and 9 of Article 374(2) of the Law on Civil Procedure (LCP) which the court of the second instance is obliged to consider ex officio pursuant to Article 386(3) of the mentioned Law, and due to the existence of which the contested judgment should be annulled. The disposition of the first instance judgment is clear and in line with the reasons, which are also clear, comprehensive and consistent with the state of facts as established in the case file and the presented evidence relating to the factual conclusions and to the legal provisions applied in the case at hand; therefore, it does not contain any omissions rendering it unfit for reconsideration. Because of this, the Court found that the claims presented in the appeals referring to the commission of substantial violations of litigation procedure provisions referred to in Item 12 of Article 374(2) of the LCP when rendering the first instance judgment are unfounded.

According to the established state of facts, the Defendant Humanitarian Law Center published on its web page www.hlc-rdc.org on 23 January 2012 a document titled “Ljubiša Diković File”, which contained the following allegations: “During 1994 and 1995, Diković was the Commander of the Sixth Border Battalion and in this capacity (...) he participated in the apprehension of Muslims, who were seeking refuge in Serbia while trying to escape the Army of the Republic of Srpska (...) The mortal remains of four out of five of these Muslims, who were returned, have been found and identified in a reliable manner”; “As of May 1998, in the 37th Motorized Brigade under Diković’s command, a number of officers from Military Security (...) trained and exercised groups of killers, criminals, and even several dozens of convicted murderers from the Sremska Mitrovica prison. As of July 1998, they would take these people to Kosovo as volunteers and members of the Yugoslav Army (VJ)”; “On 20 April 1999, Commander Diković ordered Captain Dragan Mitrović and Captain Bora Adžemović to come

and see him upon their return from the front line, and to come together in one vehicle instead of coming individually and cautiously, as the rules demand. Three escort soldiers were inside the vehicle with Mitrović and Adžemović (...) and in the place known as “Istok mahala” (Srbica) it was ambushed by the KLA and, on this occasion, all five soldiers of the VJ were killed”; “On 7 March 1999 (...) Lieutenant Colonel Diković, as the Commander of the 37th Motorized Brigade, took a task force under the Command of Slobodan Stošić and Miodrag Đorđević to Kosovo (TF 37). This task force had approximately 400 members (...) and some 150 were well-equipped and trained volunteers including dozens of convicted persons, common criminals, and war criminals”; “Diković participated in the confiscation of property of Albanians, not only from the area of Drenica, but from the whole of Kosovo. Upon Diković's order, an excavator, which was taken away from an individual (...) was brought to Raška. During the NATO air strikes, with his knowledge, thousands of valuable cars, buses, trucks and tractors were transferred and sold in Novi Pazar and in Raška. He personally kept a valuable US-made ‘Land Rover’ and ‘Mercedes 300’ (...); “There was a rumour spreading among the officers and soldiers that during the NATO bombing, Diković became the owner of thousands of heads of large and small cattle that had been confiscated from Kosovo Albanians.” The sources of the document that was published under the title “Ljubiša Diković File” were the HLC's database, evidence used in cases before the International Criminal Tribunal for the Former Yugoslavia, and military documents of the VJ, and the objective of the publication was the dismissal of the Plaintiff from the position of the Chief of General Staff of the Serbian Armed Forces. No criminal proceedings have been initiated against the Plaintiff; however, during the course of these proceedings, the HLC filed a criminal complaint against the Plaintiff and other individuals alleging that they committed a war crime against a civilian population pursuant to Article 142(1) of the Criminal Code of the Federal Republic of Yugoslavia (CC FRY) as read with Article 22 of the (CC FRY) and an act of crime against humanity regulated by international customary law at the time of its commission in view of Article 16 of the Constitution of the FRY, Article 15 of the International Covenant on Civil and Political Rights and Article 7 of the European Convention on Human Rights, committed on 5 April 1999 in the village of Rezala in Kosovo, into which the Office of the War Crimes Prosecutor is conducting a preliminary investigation. On 25 January 2012 the Politika daily newspapers no. 35278 published an article titled “Kandić Accuses General Diković of War Crimes”, which contained the news on the publication of the document “Ljubiša Diković File” by the HLC and relayed the statement given by the Defendant Nataša Kandić, which, by its content, represents a factual accusation: “Even though his obligation was to prevent crimes, Diković did not do this and there is evidence testifying to the reckless looting of Albanian property in which he personally took part”. On 24 January 2012, Nataša Kandić made a statement to B-92 TV station saying, “People with a stained past cannot hold places and positions which would require that they would be the ones who would restore the lost trust in the institutions of the Republic of Serbia. We need new people, who do not have stains in their professional and human past in relation to the wars and crimes which happened”. The Plaintiff filed a criminal complaint against the Defendant Nataša Kandić for the criminal act of defamation pursuant to Article 171(3) of the Criminal Code of the Republic of Serbia on 9 February 2012 with the First Basic Court in Belgrade in the case K.br.747/12, but it was dismissed, because the alleged criminal act was decriminalized after the filing of the criminal complaint according to the amendments to the Criminal Code of the Republic of Serbia. Upon the order of the Chief of Personal Administration in the General Staff of the Yugoslav Army, no. 5-255 dated 28 July 1994 Ljubiša Diković, an Infantry Major, ID no. VES 31101, born on 22 May 1960, was discharged from his duty and sent to pursue education in the 44th class of the General Staff at the Yugoslav Army Military Schools Center Academy. The order stated that the aforementioned person was the Commander of the 16th Border Battalion of the Užice Corps 2nd Army and that he held the rank of Major, PG 13, as of 18 August 1992, at Bajina Bašta Garrison. The education began on 1 September 1994 and lasted for two years. The order stated that the aforementioned officer should report to the VJ Center for Military Schools on 31 August 1994. On the orders of the PSU of the General Staff of the

Yugoslav Army no. 5-255 dated 28 July 1994, Ljubiša Diković turned over the duty of the Commander of the 16th Border Battalion “A”, Užice Corps, 2nd Army. On 3 November 1998, Ljubiša Diković took over the duty of the Commander of the 37th Motorized Brigade “A” of the Užice Corps, 2nd Army, on the order to the VJ Chief of General Staff no. 4-186 dated 3 November 1998. The objective of the publication of the document at hand was to accuse and discredit the Plaintiff as the person who was appointed to the position of the Chief of General Staff of the Serbian Armed Forces immediately prior to the publication of this document, and not only to inform the public about the violations of human rights committed in Kosovo during the war in Kosovo, which the Defendant Nataša Kandić, as well as Sandra Orlović, as the legal representative of the Defendant HLC, confirmed in their statements.

Considering the state of facts established in the case at hand upon the application of the provisions of the substantive law, that is to say Article 154(1), Article 155, Article 172 and Article 200 of the Law on Contracts and Torts (LCT), as well as Article 232 of the LCP, Article 10 of the European Convention on Human Rights and Article 46 of the Constitution of the Republic of Serbia, the Court found that the factual accusations, the authenticity of which the Defendants failed to prove even though they had to prove these facts, imply the commission of criminal acts and the lack of respect for the rules and regulations of the Serbian Armed Forces, and since value judgments regarding a person implying that this person has “a stained past in relation to the wars and crimes which occurred” bear an offensive connotation and violate human dignity, which is inviolable and guaranteed by the Constitution of the Republic of Serbia, in a situation in which the Plaintiff was not subject to criminal prosecution, and bearing in mind the presumption of innocence, the court of the first instance adopted the compensation lawsuit and obliged the Defendant Humanitarian Law Center to compensate the Plaintiff for the damage, since the damage inflicted is causally linked to the actions taken by the Defendant mentioned herein as reflected in the publication of the document titled “Ljubiša Diković File” on its web page, and by its dissemination to the media in order to spread unverified and unproven allegations. As for the Defendant Nataša Kandić, the lawsuit in her case was dismissed on the grounds of Article 172(1) of the LCT, which prescribes that the legal entity is responsible for the damage its organ causes to a third party in the performance or in relation to the performance of its functions, since she made statements to the B-92 News and “Politika” daily newspapers in the capacity of representative of the second Defendant.

Deciding on the amount of damages, the Court took into account the principle of the individualization of non-material damage, the value of the violated good, the status of the Plaintiff in the society, his function, the seriousness of the accusations published, the nature of the words stated, the general social and political situation in which these words have been stated and the manner in which the Defendant committed the violation, the size of the population which could access the published document, and the fact that the Plaintiff, as the Chief of General Staff of the Serbian Armed Forces, is a person who commands and manages the army of Serbia in line with the law and commanding acts of superior officers, and that he represents an institution with a special role in the society, in the sense of respect for law and order, and bearing in mind the context in which these accusations were presented, and particularly the objective of the publication, the Court obliged the second Defendant to pay the amount of 550,000.00 RSD in damages, while it dismissed the lawsuit in part, as relates to the amount of 450,000.00 RSD, which would have increased the compensation granted to the amount of the 1,000,000.00 RSD originally requested by the Plaintiff, assessing it as estimated too highly.

The Court of Appeal also found that the court of the first instance properly applied the provisions of the substantive law on the properly established state of facts when it adopted the lawsuit in part, and ordered the second Defendant to compensate the Plaintiff for the non-material damage

reflecting in the psychological pain suffered owing to the violation of dignity and reputation.

Contrary to the allegations made in the Defendant's appeal, the first instance court correctly found that the Defendants bear the burden of proof of the veracity of their claims. Namely, in this specific case, it is established without a doubt from the written evidence relevant to the proceedings that the Plaintiff is not subject to criminal prosecution for any of the offenses stated by the Defendants in the document "Ljubiša Diković File". In such a state of facts, by presenting unsubstantiated facts that contain an offensive connotation about the Plaintiff which is conducive to a violation of human dignity, the first instance court correctly obligated the Defendant legal entity to compensate the Plaintiff for the non-material damage due to the violation of reputation and honour to the amount granted. Honour is defined as a subjective category and as an opinion that a person has about himself/herself as a member of a social environment or a social group, and reputation is the opinion that the society and public have of the person, which is an objective category. Monetary compensation for non-material damage belongs to the person who, due to a violation of the sense of honour and social prestige, has suffered psychological pain of a certain intensity and duration, i.e. the monetary compensation provides compensation for secondary consequences in the form of the psychological suffering caused by the violation.

The allegations in the Defendant's appeal that the state of facts has not been completely determined due to the existence of new evidence are without impact. The new evidence was on the official website of the Serbian Armed Forces, and was removed according to the allegations made in the appeal, and it refers to the changes in the Plaintiff's position, that is to say, it confirms the Defendants' claims from the contested document. This is because the Defendants, pursuant to Article 372(1) of the LCP, did not make it seem probable that, through no fault of their own, they could not have presented the indicated evidence, bearing in mind the length of the proceedings, in view of the fact that the proceedings before the first instance court lasted three years.

The appeal of the Humanitarian Law Center points unfoundedly to an incorrect application of the provisions of Articles 199 and 200 of the LCP, which regulate the institute of lawsuit amendment. It is provided by these procedural legal provisions that a lawsuit may be amended until the conclusion of the main hearing (Article 199(1) of the LCP), and that for reasons of expediency the court shall allow the amendment even when the Defendant is opposed to it (Article 199(2) of the LCP). Bearing in mind the provisions of the procedural law, the amendment of the lawsuit in this specific case did not violate the Defendants' rights, and the principle of economy of proceedings provided for in Article 10(2) of the LCP was respected. The fact that the amendment of the lawsuit was introduced at a hearing session, is not contrary to Article 199(5) of the LCP, and so this appeal allegation does not affect the regularity of the contested judgment.

The Plaintiff's appeal unfoundedly alleges that the court of the first instance erroneously established the state of facts, which led to the erroneous application of the substantive law by its decision to dismiss the claim in respect of the Defendant Nataša Kandić, in other words, that it did not oblige the Defendants to have a joint liability for the compensation of non-material damage. This is because the Defendant made a statement to the news programme on "B92" TV station and the "Politika" daily newspapers not on her own behalf, but in the capacity of Director and representative of the Defendant Humanitarian Law Center, in other words, in the capacity of an organ of that legal entity which, according to the law and its Statute, is its legal representative, and therefore cannot be jointly liable for the compensation of damage, in accordance with the cited Article 172 of the LCT.

The appeal of the Defendant legal entity points unfoundedly to the error made by the first

instance court when it dismissed its motion for a stay of the proceedings until the final completion of the proceedings initiated upon the criminal complaint filed against the Plaintiff before the Office of the War Crimes Prosecutor.

Article 223 of the LCP provides that proceedings may be discontinued if the court decides not to resolve a preliminary matter (Article 12) by itself, or if a party is situated in the area out of reach of the court due to extraordinary circumstances.

In this particular case, the competent prosecutor's office stated that the allegations made by the Defendant in the criminal complaint were only being checked by collecting relevant data and information, from which the court concluded that there have been no criminal proceedings initiated against the Plaintiff, i.e. no indictment has been raised and entered into effect, pursuant to which there were no grounds for the stay of the proceedings, even if the decision in the potential criminal proceedings was of significance for the resolution of this litigation.

The allegation made by the Defendant in their appeal which points to the existence of a substantial violation of the provisions of civil procedure referred to in Item 11 of Article 374(2) of the LCP – the exclusion of the public contrary to the law – is without grounds.

When assessing the foundedness of the application of Article 322 of the LCP, the first instance court correctly concluded that for reasons of public order the public should be partially excluded, by which it did in no way suspend the norms of a democratic society, since Milica Kostić, Legal Advisor to the Defendant Humanitarian Law Center, and Anela Jelasijević, Assistant Information Officer at the Embassy of Switzerland in Belgrade, were allowed to attend the main hearing sessions.

By dismissing certain exhibit proposals of the Defendants, the Court did not violate in any way the rights of the Defendants to dispute before the court.

Article 7(1) and Article 228 of the LCP provide the parties with the right, and establish their responsibility to propose evidence in order to prove their own claims and refute their opponent's allegations, but the decision about which evidence will be used to establish the relevant facts, pursuant to Article 229(2) of the LCP, is under the jurisdiction of the court.

By applying the stated procedural provisions, the first instance court exhibited all the submitted evidence that was relevant for the establishment of the essential facts, and with their assessment, pursuant to Article 8 of the LCP, the facts, as a basis for the application of substantive law, were correctly and completely established.

The Defendant's appeal pointing out that, according to the case law of the European Court of Human Rights, there is a right to impart information on matters of public importance even when it includes damaging statements about individuals, because of which the mentioned Court took the view that pointing out the criminal responsibility of state officials to the public represents the journalists' right to freedom of expression, has no impact on the validity of the first instance judgment.

Freedom of expression, even when the expressed opinion refers to state officials, persons exercising public authority or persons who are public figures because of other positions that they occupy, is not an unrestricted right, and especially cannot be considered as such when information imparted, and, in a legally prescribed procedure, unproven assertions, are presented as true and undoubtedly established facts, which is the case in question. The Defendants filed a criminal complaint

with the competent prosecutor's office, pointing to certain incorrect and illegal actions involving the Plaintiff, in the capacity of an army officer of the Republic of Serbia. These allegations did not result in an indictment against the Plaintiff, and even if it had been raised and entered into effect before the contested information was released in public, the indictment as an act provided by the Criminal Code of the Republic of Serbia is based only on a reasonable suspicion as to the existence of elements of the offense which the Defendant is charged with, but in no way does it mean that the act itself and the guilt of the accused person are established with certainty.

Accordingly, regardless of the public function that the Plaintiff performed, or the fact that he is a public figure, qualifications presented by the Defendants cannot be considered admissible and acceptable from the standpoint of the freedom of expression, which is not an absolute, unrestricted right in any society.

The Plaintiff's allegations made in the appeal that this particular information was published not only in the newspapers and on television, but also on the website of the second Defendant, has no impact on the validity of the contested first instance judgment regarding the joint liability of the Defendant Nataša Kandić, because the information imparted by the, as the first instance court correctly concluded and as has already been explained by the second instance judgment, represent her public appearance in the capacity of legal representative of the Defendant legal entity, whose Director she was, regardless of the medium through which they were presented to the public, and they are not a result of her appearance in the capacity of an individual, regardless of whether or not her personal opinion was identical.

Contrary to the Plaintiff's allegations in the appeal, when deciding on the amount of compensation for non-material damage, and considering all the circumstances of the case at hand (the status of the Plaintiff in the society, his function, the seriousness of the allegations which have been published, as well as the size of the population to which the information was available) the first instance court correctly applied the provision of Article 200 of the LCT when it granted the amount stated in the third paragraph of the disposition of the contested judgment.

The decision on the expenses of the first instance proceedings was upheld, because it was made by the proper application of the provisions of Articles 150, 153(2), 154 and 163(1) and (2) of the LCP, according to the success of the disputing parties in the litigation. The amount of costs is properly calculated by applying the Tariff Scale on premium and reimbursement fees for the official counselor and the fee tariff from the Law on Court Fees, applicable at the time of the handing down of the judgment.

Accordingly, the Plaintiff's allegations that the expenses for the Defendant Nataša Kandić should not have been granted to the full amount are unfounded since she was the first Defendant in this litigation, and pursuant to the Lawyers Tariff, the amount of costs reduced by 50% belongs to each subsequent Defendant, in other words to second or third Defendants.

The decision on the costs of the appeal proceedings was made by the application of the provision of Article 165(2) of the LCP, according to the Plaintiff's success achieved in the appeals proceedings and because the costs for the composition of the response to the appeal is not necessary for the conduct of the appeals proceedings, since the allegations stated in the first instance proceedings are only being repeated in the appeals proceedings.

On the basis of everything stated above and since the validity and legality of the contested first

instance judgment was not challenged by any other appeal claims, the Court of Appeal dismissed the appeals as unfounded and upheld the first instance judgment as stated in the disposition of this judgment, by the application of the provision of Article 390 of the LCP.

PRESIDENT OF THE APPEALS CHAMBER – JUDGE

Milanka Vukčević (place for signature)

Person guaranteeing accuracy of the copy

Head of the Clerk's Office

Jasmina Đokić