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IDENTICAL CASE – DIFFERENT JUDGMENTS

(Analysis of court practice in the application of the Law on Protection against Defamation on the example of two judgments of the Basic Court in Banja Luka)

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INTRODUCTORY REMARKS

In 2020, the Basic Court in Banja Luka passed two judgments in civil proceedings for compensation of damage for defamation, which attracted a lot of attention of the public and, in the second case, objections and protests of journalists.

The reason for both lawsuits was information published by the Belgrade tabloid "Informer", which was transmitted on RTRS and ATV news portals on the same day with identical content and under the same headline ("*Impending coup d'état in Republika Srpska; they don't want elections, they are toppling government on street*"). This content can still be found on the internet¹.

In two separate proceedings, the Basic Court of Banja Luka rendered completely different judgments in a time span of nine and a half months, although the case in both proceedings was completely identical (compensation for non-pecuniary damage due to defamation by the publication of identical content on the defendants' news portals in both cases) and the plaintiff is also the same person (Vladimir Kovačević, journalist). Only the defendants are different (in the first case Radio-Television of Republika Srpska, abbreviated here as RTRS, as well as its responsible person, and in the second case Alternativna Television, ATV, as well as its responsible person). The judges in these two cases are also different.

The subject of this analysis are both first instance judgments.

The first judgment was passed 16 months after the lawsuit was filed and was announced on 10 January 2020 under number: 71 0 P 292122 18 P. The court "*partially accepted the plaintiff's claim*" and ordered the defendants (RTRS and the responsible person Siniša Mihailović) to pay the plaintiff (Vladimir Kovačević, from Banja Luka) jointly and severally the amount of damages for defamation of 5,000 KM with statutory default interest and additional court costs in the amount of 890 KM. The plaintiff's claim for additional litigation costs was rejected as unfounded.

The second judgment was passed 24 months after the lawsuit was filed and was announced on 28 September 2020 under number: 71 0 P 292123 18 P. This time, the court "*completely rejected as unfounded the plaintiff's claim*" and ordered the plaintiff to reimburse the defendants (ATV and responsible person Nenad Trbić) litigation costs in the amount of 2,246 KM with statutory default interest starting from that date.

POLITICAL AND PROFESSIONAL CONTEXT

The internet portals of Radio Television of Republika Srpska and Alternative Television in Banja Luka on 31 August 2018 transmitted an article from the Belgrade-based "Informer" entitled "*Impending coup d'état in Republika Srpska; they don't want elections, they are toppling government on street*"². In the article, journalists – without mentioning names – were accused of being "*servants of a foreign factor*" and actors of "*toppling the government on the street*". Vladimir Kovačević was indirectly, without giving his name, marked as a journalist who "*recently received eighty thousand dollars from USAID for some internet portal.*"

Four days before that, during the night of 26/27 August 2018, two unidentified men had physically attacked journalist Vladimir Kovačević while he was returning home in Banja Luka after completing a professional assignment. He is a journalist of BN Television and that night he had sent a report from Krajina Square in Banja Luka, where one of many protests of citizens gathered in the group "Justice for David" was held.

The next day, 27 August, protests were held by journalists and citizens who make up the "Justice for David" group over the physical attack on Kovačević³. On the same day, the BH Journalists' Association strongly condemned the attack and directly called out Republika Srpska President Milorad Dodik for "*directing his public and political activities too often at journalists and the media and humiliating and insulting them in the most primitive ways; declaring them enemies, spies and foreign mercenaries*", thereby turning them into "*living targets*"...⁴

Four days after the attack on journalist Kovačević and the protest of journalists, Belgrade's "Informer" published the mentioned article ("*Impending coup d'état in Republika Srpska; they don't want elections, they are toppling government on street*"), which was carried on the RTRS and ATV internet portals the same day. The article begins by referring to the attack on this journalist and the journalists' protests in Banja Luka.

Quote from the disputed article: "*The latest events regarding the attack on the journalist of the opposition-friendly BN television and the 'spontaneous' gathering of journalists in front of the Palace of the Republic in Banja Luka further fuel claims that an impending coup d'état is taking place and that a foreign factor actively supporting the Alliance for Change has placed all cards on the instrumentalized 'Justice for David' group, which, targeting the emotions of ordinary people, is growing into a kind of 'Resistance' seen in Serbia during the October 5 coup...*"

The article quotes an unnamed "retired intelligence officer" who claims that "*this journalist is known to have recently received eighty thousand dollars from USAID for some internet portal and that, since that money was pumped in, these portals have been sprouting like mushrooms after rain*". The unnamed author of the article refers to the President of the Republika Srpska, who, as it is stated, "*in a recent address at a press conference in Banja Luka, warned of such actions by the American Embassy and USAID.*" And he continues: "*Then he (referring to the President of the RS) showed a facsimile of an agreement between the Council of Ministers of B&H and the American Embassy, which states that in the months before the elections, USAID will give as much as eight million dollars for strengthening the media and civil society*".

The above press conference was held by RS President Milorad Dodik on 21 August 2018, during which he stated that the agreement between the Council of Ministers and USAID "*regarding the alleged fight against crime and corruption*" has "*concealed and corrupt intentions*"⁵ and "*undermines the constitutional order in B&H*"⁶.

BRIEF OVERVIEW OF LAWSUITS AND JUDGMENTS

Both lawsuits have essentially identical content and claim – compensation for non-pecuniary damage in the amount of 9,950 KM because "*the disputed expression violated and ruined the professional reputation of the plaintiff, disputing his objectivity and impartiality, labeling him indirectly as a foreign mercenary, and directly calling him a pro-opposition journalist*".

The plaintiff completely denies that he received any money from USAID and further adds: "*When in such a tense situation (the lawsuit specifies: pre-election atmosphere, constant protests on Krajina Square, frequent arrests, political threats and incidents) you label a journalist just coming out of the hospital after an assassination attempt as someone who takes money from foreign organizations to overthrow the government on the street, it is not an accidental transmission of someone's opinion, but a deliberate and planned attempt to intimidate a journalist and discredit him through defamation*".

The lawsuit also points out that the plaintiff "*tried to mitigate the damage by sending a denial, but instead a short article was published stating that he denies the Informer's allegations.*"

In response to the lawsuit, the defendants completely rejected the claim and pointed out that the article was published on the web portal of the “*independent daily newspaper Informer*”, that it was “*transmitted with unchanged content*” and that it was also transmitted by many other web portals in the Republika Srpska, B&H and the region. In the response, the defendants also point out that the article is “*substantively, temporally and logically*” related to other information published at the time which “*relates to the financing of part of the media in B&H and the RS by USAID*” and that “*the public has the right to receive such information and the primary defendant an obligation to disclose it*”. The designation of the plaintiff as a “*pro-opposition journalist*” is interpreted in the response “*exclusively as the opinion, i.e. the value judgment of the author of the disputed article*”.

At the main hearing, the defendants also challenged the “active legitimacy” of the plaintiff because he “*is not identified anywhere in the article*” and, therefore, “*none of the media even asked for a comment from the plaintiff*”.

How do the defendants explain the information provided in the article that the plaintiff allegedly received \$80,000? “*Even if it is untrue, it does not have the quality that allows causing fear and pain to the plaintiff because the plaintiff stated in his statement that he would have continued writing for web portals even if he had known that they received money from USAID*” and that “*from the aforementioned statement of the plaintiff, it is obvious that the plaintiff himself in his statement sees nothing negative in the financing of media by USAID.*” (Quote from RTRS's response to the lawsuit, first judgment, page 4).

During the main hearing in the first case (defendant RTRS), the evidence proposed by the plaintiff and his attorney was presented, as well as part of the evidence of the defendant. Evidence proposed by the defendant RTRS (pictures of websites confirming that an article with the same content was also published in other media, as well as evidence that the “*plaintiff wrote articles directed against the authorities*”) was not presented because, according to the court’s conclusion, “*it is not of influence to the making of a decision.*”

During the second proceeding (respondent ATV), evidence proposed by the defendant was also presented, including articles on the attack on journalist Kovačević and on the support he received from journalist organizations, as well as information related to USAID grants awarded to various media in B&H.

COMPARATIVE ANALYSIS OF JUDGMENTS

During both court proceedings at the Basic Court in Banja Luka and in the judgments, it is clear that attention was paid to the arguments of all parties to the proceedings, that high standards of the right to freedom of expression were taken into account and that elements of defamation were analyzed accordingly, but in the end opposite conclusions were nevertheless adopted.

These are the facts that confirm this assessment. In both cases, the court took the identical position that the so-called active legitimacy of the plaintiff was undisputed. Although his name (Vladimir Kovačević) is not mentioned in the published article (“*Impending coup d’état in Republika Srpska; they don’t want elections, they are toppling government on street*”), the court in both cases rightly concluded that this objection was “*completely unfounded*” (first

judgment) and that "*in the opinion of the court, the plaintiff...has been sufficiently identified*" and that "*it is clear to every average reader that it is him*" (second judgment).

In both cases, the court rejected the defendants' objection regarding the so-called passive legitimacy of the second defendants (Siniša Mihailović from RTRS and Nenad Trbić from ATV), because at the time of publishing the disputed article they were the responsible persons of the programs of the two media outlets.

In both cases, the court rightly rejected the defendants' objection on the non-existence of their liability because it was a matter of transmitting an article from another media outlet ("Informer"), which was "*transmitted in full, without any changes*" and was also published by other media. Although the court did not elaborate this conclusion, it was important in these proceedings, just as it may be in all future ones that could invoke the same objection ("*others published, we just transmitted*").

Transmitting (in whole or in part) from other media does not absolve journalists and editors who decide to make such a move, especially if the media outlet they transmit from is not credible and is known to the public as a tabloid (such as the "Informer"), which publishes false information and serves certain propaganda. On the other hand, liability for transmitting information from other sources, such as news agencies, reputable newspapers and media outlets, is incomparably lesser, although even then it is not completely excluded and is generally assessed in court proceedings on a case-by-case basis taking into account all circumstances.

In the reasoning of both judgments, the court referred to the Law on Protection against Defamation of the RS⁷ and extensively interpreted certain provisions and standards (on the right to freedom of expression, on defamation, on exemptions from liability for defamation, etc.). However, in the two proceedings, two different positions of the court were taken on the request for correction sent by the plaintiff to the media (RTRS and ATV portals) which had published the disputed information. The first judgment states that the plaintiff stated in the lawsuit that he "*sent a request for correction (in practice also known as a denial) to the primary defendant (note: RTRS) and that he did not present the same as evidence in this proceeding*" and the court thus concluded that "*it is considered that he did not even submit the request*".

This position of the court is not a surprise and only emphasizes the importance of knowing the Law on Protection against Defamation, as well as the Law on Civil Procedure and the Law on Obligations. However, this court referred to court practice and stated that "*failure to comply with the provision of Article 8 of the Law on Protection against Defamation prior to filing a lawsuit does not mean loss of the right to judicial protection*" (in cases where no request for correction was made) and added that "*courts as a rule award a lower amount of damages than the one made by the plaintiff in the claim*".

During the second proceeding (defendant ATV), the plaintiff submitted evidence of a request for correction. The court, as well as the defendants, did not dispute that. But that fact did not affect the final judgment in which the plaintiff's request for compensation for non-pecuniary damage was completely rejected.

Why are the court's decisions different in these two proceedings? There are several reasons for this:

1. In both judgments, the court accepted the argument by the plaintiff (Vladimir Kovačević) that the plaintiff had not received any money (\$80,000) from USAID. But, there is a difference that is not small in relation to this fact in the wording in these two court proceedings.

The first judgment (defendant RTRS) stated that the court concluded that "*this particular case is about facts whose truthfulness or untruthfulness is eligible for argumentation and the defendants in this proceeding did not prove that this information/facts are true.*" In addition, it is emphasized: "*The defendant (RTRS) was obliged to verify the truthfulness of the information in question in order to inform the public.*" "*Since, in the court's view, this information as untrue represents an unlawful violation of the plaintiff's reputation, in the opinion of the court it led to damage...which is reflected in non-pecuniary damage, mental suffering due to harm to reputation and honor...*" This court therefore found that RTRS had not acted in accordance with the professional norms ("*verification of the truthfulness of the information in question*"), intentionally or negligently, which is one of the essential elements of defamation.

2. In the second judgment (defendant ATV), however, the court does not state clearly and precisely that the information in question is untrue, nor does it refer to the existence of intent or negligence. The information is labeled as untrue only in passing at the end of the reasoning, while on several occasions it is referred to as "*unconfirmed news*" which "*in the opinion of the court does not constitute a violation of the reputation of the plaintiff.*"

How did this court justify such a stand? Completely ignoring the political and professional context (public warnings by the RS president, campaign against journalists, attack/assassination attempt on the plaintiff), the court passed political judgments on the character and legitimacy of US donations to the media in B&H. The court concluded that "*receiving funds from USAID does not constitute a disgrace to anyone who receives such funds*" and that "*such persons, in the opinion of the court, should not be subjected to hatred, contempt or ridicule...*" And, finally, it concluded: "*Although the information transmitted by the defendant about the allocation of funds to the plaintiff's portal by USAID was not proven to be true, such information does not lead to harm to the plaintiff's reputation.*" The court also remains in the realm of politics when it concludes that "*the fact that USAID finances independent media is not defamation because it constitutes legally permitted media financing.*"

Only in the final part of the reasoning of the judgment, the court states that (this) "*untrue information, as well as the information that the plaintiff is a journalist of an opposition-friendly media outlet (note: BN TV) and that such media are receiving USAID assistance, in the opinion of the court is not of such nature that would harm the plaintiff's reputation in society.*"

3. While the court in the first judgment (defendant RTRS) does not refer to an important element of the disputed article which speaks of an "*impending coup d'état*", the court in the second judgment (defendant ATV) pays some attention to it. But in doing so it takes a negative stand.

Namely, this court (defendant ATV) concluded that "*there is no ground in the allegations that the plaintiff in the disputed article is being directly associated with a potential coup in the Republika Srpska, because it follows from the disputed article that some media with which the*

media outlet of the plaintiff may be associated are disseminating news that discredits families in power” (quote from the judgment, page 7). So, this is about "*some media with which the media outlet of the plaintiff may be associated*". Everyone is associated, including the "*media of the plaintiff*" – except the plaintiff. This position of the court is questionable in multiple ways from a logical and legal point of view.

4. In addition to the claim for compensation for non-pecuniary damage due to harmed reputation, the plaintiff sought compensation for mental pain and fear suffered.

In the first judgment, the court rejected the objection of the defendants (RTRS) that the plaintiff "*did not prove that he suffered non-pecuniary damage in the form of mental pain and fear*". The court pointed out that from the evidentiary proceedings and the hearing of the parties and especially the plaintiff "*it follows that as a journalist...he experienced inappropriate insults by the primary defendant (RTRS)...which affected both him and his immediate family members.*" The court adds that the plaintiff "*was judged on social media*", that he "*felt fear...and avoided going out in the city with his wife and children, and in rare situations when he did go out he felt discomfort and fear, afraid of verbal communications*".

5. In the second judgment (defendant ATV), the court sets the framework for determining compensation for damage for fear and then takes the opposite view.

Quote from that judgment (pages 7 and 8): "*Fear does not need to leave lasting consequences in the psyche of the injured party, but it is important to reliably determine the intensity of that fear and whether it left at least temporary consequences*" because "*fear of a stronger intensity, but which is instantaneous and without consequences, is not a basis for awarding compensation. It is also completely clear that when determining compensation for fear suffered, the personality of the injured party must be taken into account, as well as other subjectivities related to the injured party, because this is a subjective category in which not everyone can be expected to suffer fear of the same intensity and duration in the same or similar circumstances*". The court assessed the claim for compensation for non-pecuniary damage due to fear suffered as "*unfounded*" because "*in the specific case the plaintiff did not prove that he suffered fear*" and "*did not prove the intensity and duration of any fear*".

The court additionally disassociated itself with the conclusion that the court "*does not possess the expert knowledge which, without prior expert examination carried out by a relevant medical expert, could determine whether a person suffered fear and determine the degree of intensity and duration of that fear, as well as the consequences fear leaves on the victim's body and psyche*".

CLOSING REMARKS

Although in these two separate proceedings the subject matter of the dispute was identical (defamation in an article published on two web portals) and the court in both cases referred to the RS Law on Protection against Defamation⁸ and high international standards on the right to freedom of expression, two completely different judgments were rendered.

While the first court (note: judgment against RTRS) took into account the actual circumstances that affected/may have affected the plaintiff and his social reputation (The

court points out that the plaintiff "*was judged on social media*", that "*he felt fear...and avoided going out in the city with his wife and children*"), including the context of the events, the second court did not attach importance to that. The second court (lawsuit against ATV) based its decision on two of its conclusions – that the plaintiff "*did not prove the intensity and duration of any fear*" and disassociating itself with the view that the court "*does not possess the expert knowledge...*"

Instead of taking into account all social circumstances – the political persecution of part of the opposition and journalists carried out by the top authorities of that entity, also the forced division into "patriots" and "traitors" among politicians and journalists and, of course, the fact that an assassination attempt had already been made on the plaintiff (journalist Vladimir Kovačević), which sparked the disputed article – this court made political assessments on the nature of American support for independent media in B&H and concluded that "*it constitutes legally permitted media financing.*"

Why did the court engage in such assessments? The explanation is simple. It did it so that these assessments (quote: "*receiving funds from USAID does not constitute a disgrace to anyone who receives such funds*"; "*such persons, in the opinion of the court, should not be subjected to hatred, contempt or ridicule...*" “) would justify the decision on the unfoundedness of the claim.

The subject of these lawsuits is not a USAID program but a transmitted disputed article ("*Impending coup d'état in Republika Srpska; they don't want elections, they are toppling government on street*"), which contains the false information that journalist Vladimir Kovačević received \$80,000 from USAID, as well as accusations aimed at journalists in general and directly at the plaintiff, journalist Kovačević, that they "*serve a foreign factor*", that they are toppling the Republika Srpska and with part of the opposition are "*toppling the government on the street*". The article includes all important facts that make up the political and social context of the case (assassination attempt, journalists' protests, Dodik's warnings about the USAID program, accusations of national treason, etc.), which should not have been ignored. When we add to that the messages of the President of the Republika Srpska uttered just a few days before the attack on the plaintiff and the publication of the controversial article in which the President claims that USAID has "*concealed and corrupt intentions*"⁹ and "*undermines the constitutional order in B&H*"¹⁰, then a complete picture is painted of the negative atmosphere that contributed to such an ambience and the series of events that followed.

In this regard, one can notice the unusual stand taken by the second court (defendant ATV), which in one case refers to "*every average reader*" and in another disassociates itself by saying that it "*does not possess the expert knowledge*". In the case of identifying the plaintiff in the disputed article, the court does not hesitate and concludes with reason that "*it is clear to every average reader that it is him*" (note: it is the plaintiff – journalist Kovačević), while at the same time it ignores the social and personal context of these events when it is deciding on whether the plaintiff suffered harm and fear and disassociates itself by saying that the court "*does not possess the expert knowledge*".

There is no explanation why the court in the latter case did not again refer to "every average reader and citizen" – a common standard in similar court proceedings – which, even without expert knowledge, connects all social circumstances and does not deny that the victim of the attack suffered very obvious harm and fear after an assassination attempt that no one is

denying. The knowledge of a medical expert can be helpful only when the court needs to determine the intensity of the fear suffered and significant consequences it had on the injured party.

¹ <https://lat.rtrs.tv/vijesti/vijest.php?id=308926> (visited on 15 October 2020)

² [ibid](#)

³ <https://zurnal.info/novost/21379/novinarski-protest-zbog-napada-na-vladimira-kovacevica>

⁴ <https://bhnovinari.ba/bs/2018/08/27/saopcenje-povodom-premlacivanja-vladimira-kovacevica-novinara-bntv/>

⁵ <https://www.oslobodjenje.ba/vijesti/bih/sporazum-vijeca-ministara-i-usaid-a-ima-skrivene-i-koruptivne-namjere-387350>

⁶ <https://www.klix.ba/vijesti/bih/dodik-tvr-di-da-sporazum-vijeca-ministara-s-usaid-om-urusava-ustavni-poredak-bih/180821055>

⁷ <https://bhnovinari.ba/wp-content/uploads/2001/08/zakonozastitiodkleveters.pdf>

⁸ [ibid](#)

⁹ <https://www.oslobodjenje.ba/vijesti/bih/sporazum-vijeca-ministara-i-usaid-a-ima-skrivene-i-koruptivne-namjere-387350>

¹⁰ <https://www.klix.ba/vijesti/bih/dodik-tvr-di-da-sporazum-vijeca-ministara-s-usaid-om-urusava-ustavni-poredak-bih/180821055>