

Analysis of Defamation Judgment against CIN

Subject of analysis: First-instance judgment by Sarajevo Municipal Court, number: 65 O P 609293 16 P, dated 30 April 2019; Defendant – CIN, Sarajevo

1. Content of the Municipal Court Judgment

Dispositive section of the Judgment:

“The defendant shall pay the plaintiff the amount of 2,000.00 KM in damages for non-pecuniary harm due to violation of honor and reputation, resulting from the publication of articles headlined “*Tužilaštvo istražuje poslovanje Moje klinike* (Prosecutor’s Office investigating business operations of Moja klinika),” issued on 11 August 2016, and on 22 July 2016 headlined “*Skupa patologija Sebije Izetbegović* (Sebija Izetbegovic’s costly pathology),” published on the www.cin.ba website, along with the legally prescribed default interest, starting on 30 April 2019, the day of the Judgment, until payout. The defendant shall publish this Judgment, at its expense, on the website within 30 days of the day this Judgment becomes final. (Note by analysis author: in this section, and in the rest of the Judgment, the headline of the published article is incorrectly written, as it should be “pathohistology,” not “pathology”!)

Each side shall bear its own costs of the proceeding.

Regarding the remaining portion of the claim, in the amount of 3,000.00 KM, as well as legally prescribed interest for that amount, the plaintiff is rejected.”

Brief content of the lawsuit

The plaintiff Emir Talirević, from Sarajevo (the plaintiff is the founder and owner of the private healthcare facility “Moja klinika”), filed a lawsuit with Sarajevo Municipal Court on 2 November 2016 against the defendant, the association “Center for Investigative Reporting” (CIN) from Sarajevo, for damages caused by violation of honor and reputation. The lawsuit states that the defendant (CIN) on 11 August 2016 published an article headlined “Prosecutor’s Office investigating business operations of Moja klinika,” which states, among other things, that the “Prosecutor’s Office launched an investigation after CIN published investigative stories about a contract on the performing of pathohistological analyses, which the General Hospital concluded with the private clinic of Dr. Emir Talirević.”

Further, the defendant had also on its website on 22 July 2016 published an article headlined "Sebija Izetbegović's costly pathology," in which the following is stated (quotes from the lawsuit): "Upon the arrival of (Sebija) Izetbegović in the position of director in 2013, the General Hospital was left without a doctor of pathology. In August of next year, Izetbegović entrusted Talirević's clinic with pathohistological work, with several times higher costs of services, paid from the hospital budget. Before the collaboration with Talirević's clinic, pathohistology had cost the General Hospital on average 168,000 KM. After concluding the contract with 'Moja klinika,' the same services cost the Hospital on average 550,000 KM a year." "In two years, Talirević received 1.1 million marks from the General Hospital. In the five years before concluding the deal with the General Hospital, the costs of paying for employees, reagents and other necessary material for the work of the Department of Pathology had amounted to a total of 840,000 KM."

The lawsuit states that the plaintiff denies all said facts, considering them untrue... The plaintiff particularly points out the pronounced "persistence on the part of the defendant to inflict harm on the plaintiff by defamation, because by its defamatory media reporting it encouraged the activity of the Prosecutor's Office of KS (Sarajevo Canton), which launched an investigation into the contract the General Hospital had concluded with the private clinic of the plaintiff." (All quotes from the lawsuit, according to the Judgment of the Municipal Court).

Statements during the main hearing

The Judgment describes in detail the hearings of all parties and witnesses, among whom are the plaintiff's and defendant's attorneys, testimonies of the plaintiff (Dr. Emir Talirević), CIN journalist (Selma Učanbarlić), as well as other CIN representatives, and also the expert testimony by Dr. Omer Ćemalović.

"The plaintiff in his statement claimed that in the disputed article it was stated that the prices were increased at said clinic, but actually the situation was opposite, and thus harm was inflicted on the institution itself, and also on the plaintiff as the leading doctor." He also points out that collaboration between the General Hospital and "Moja klinika" started when the director of the Institute of Health Insurance was Dr. Gavrankapetanović, thus even before Professor Izetbegović, as well as that in 2010 the General Hospital had lost the possibility of doing pathology because the only pathologist they had, Dr. Sehović, had gone to work for the plaintiff's facility... The plaintiff also alleged that the CIN journalist had had all of this information at her disposal, as well as "information on the clinic's investment" (the plaintiff claimed he had given the CIN journalist the complete Measurement Book signed by the contractor and clinic with invoices and by the General Hospital as the beneficiary), but she "hid it or wrongly interpreted it with the aim of inflicting harm above all on the plaintiff personally, and secondarily on his institution." Further, it is alleged that the "tendentious reporting of the CIN portal is also reflected in that an investigation was launched into him personally over the business operations of 'Moja klinika,' but actually that was merely a checking of allegations motivated by

the portal's reporting, while another criminal investigation was launched following the plaintiff's lawsuit against CIN, i.e. against the journalist for the criminal offense of unlawful recording..." The plaintiff "pointed out that the telephone conversation with the author Selma had been unlawfully recorded and published on the website from start to end and presented as an interview." The plaintiff also alleges that "upon the publication of the articles he felt tremendous frustration, nervousness, insomnia, had to take days off work, suffered financial losses because he was unable to receive patients, noticed that other institutions with which he had established cooperation had started to avoid him, as a result of which, in addition to personal, he also suffered financial damage."

The witness Selma Učanbarlić in her testimony stated she had conducted an interview with Dr. Talirević in the offices of "Mala klinika" and that she had notified him of the fact that it was her obligation to record all conversations using a tape recorder, which he had accepted. She gathered all the mathematical and financial data she featured in the article from the documentation she received from the General Hospital. She points out that the plaintiff (Dr. Talirević) had never issued any denial, but had contacted her after the published article and praised the article and the professionally done job. During her interview with the doctor (note: refers to the interview before the publication of the story), colleagues Mubarek Asani as cameraman and Dženad Dreković as photographer were present. The journalist Učanbarlić, the cameraman Asani and the photographer Dreković all deny that the Measurement Book was presented to them. Učanbarlić states that she did not receive accurate information on "Moja klinika's" investment in the documentation she received from the General Hospital.

The witnesses Asani and Dreković confirmed the journalist's statements and added that the plaintiff (Dr. Talirević) had been a "good host" during the recording of the interview.

The court expert Dr. Omer Ćemalović stated that "said article by its content has stressogenic potential and the plaintiff experienced a harsh attack on the dignity of his person, i.e. reputation and honor," and that "due to that he suffered mental anguish and agony of a strong degree of manifestation which appeared over a period of approximately ten weeks, of medium degree fifteen weeks, and light degree of manifestation over a period of one month, all together and discontinuously." He also added that the plaintiff "thanks to his intellectual capacity, rich life experience, and healthy adaptation and defense mechanisms, succeeded in processing this extremely stressful and unpleasant event in an adequate way, due to which it did not leave lasting consequences on his mental health. However, there is a lingering unpleasant memory of the event and that is why he wants to achieve satisfaction in court." (quotes from the Judgment)

Explanation of the Court's Judgment

“Upon the presentation of material evidence, and particularly bearing in mind the articles headlined ‘Prosecutor’s Office investigating business operations of Moja klinika’ and ‘Sebija Izetbegović’s costly pathology,’” which the defendant published, the court found that in said material evidence, as well as in the quoted articles, facts were presented which the plaintiff refers to in the allegations of the lawsuit.

Bearing in mind the above, the presented evidence and the established factual situation, the court reached the decision in the dispositive section of the Judgment.

Upon the assessment of the presented evidence and the established factual situation, the court found that the facts presented by the defendant in its articles were not ascertained as completely true. Namely, the journalist of the Center for Investigative Reporting did not present the whole results of her investigation in the disputed articles, nor did she possess sufficient knowledge to ascertain them with certainty, in order to present them to the public. The journalist Selma Učanbarlić stated that she had published the articles based on documentation she received from the General Hospital and that the cost numbers, which she cited in the articles, were a rough estimate, i.e. they did not constitute reliable information. Therefore, the court holds that the defendant wrote arbitrarily and without arguments about the plaintiff’s business with the General Hospital. Further, it is stated in the article that the Cantonal Prosecutor’s Office had launched an investigation against the plaintiff after CIN published investigative stories about a contract on the performing of pathohistological analyses, which the General Hospital had concluded with the private clinic of Dr. Emir Talirević, while during the proceeding the legal representative of the defendant stated that the Prosecutor’s Office had notified them that it was only investigating the information, that is to say an investigation was not underway. It may be concluded that untrue information was written in the article. The plaintiff, as well as all three witnesses, stated during the proceeding that Dr. Talirević had been notified of the audio recording during the interview, but not during the telephone conversation. Based on all of the above, it may be concluded that non-pecuniary harm was done to Dr. Emir Talirević, reflected in mental anguish, which results from the testimony of the plaintiff in the capacity of a party to the proceeding and from the findings and opinion of the medical expert, Dr. Omer Ćemalović.

Therefore, the defendant had an obligation to verify the stated facts and to have evidence backed by arguments for them, and only then if it is established that they were true to present them to the public...” (All quotes from the Judgment of the Municipal Court.)

2. Analysis of the Judgment

European Convention and protection by the European Court

The first-instance Judgment of Sarajevo Municipal Court is an obvious example of failure to understand the role of the press/media in a democratic society, which is

guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and protected in a number of judgments of the European Court of Human Rights.

"The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'." (European Court Judgment Thoma v. Luxembourg, 2001, point 5)

The European Court also took a stand in favor of very strong statements that expose official offences or corruption (case of *Cihan Ozturk v Turkey*, 2009, point 32):

"... The Court observes that, although Article 10, paragraph 2, of the Convention recognizes that freedom of speech may be restricted for protection of the reputation of others, laws and proceedings on defamation cannot be justified if their aim or effect is to prevent the legitimate criticism of public officials or the exposure of official offences or corruption."

Journalists, therefore, are called upon to inform the public about all important information of public interest, even at the cost of some information being sensationally interpreted. In the Judgment *Prager and Oberschlick v. Austria*, 1995, paragraph 38, the European Court concluded that media are allowed to use some strong wording in reporting:

"Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."

Freedom of media, however, is not absolute. It is particularly *"subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism"* (European Court, Judgment *Bladet Tromsø and Stensaas v. Norway*, 1999, point 65). This basically means that journalists enjoy the protection of Article 10 of the European Convention as long they act in accordance with professional standards, even when they express strong, even untrue, criticism.

Acting in accordance with the ethics of journalism

The main question in this specific case (*Sarajevo Municipal Court Judgment against CIN*) regards the conclusion of the Court, which *"found that the facts presented by the defendant in its articles were not ascertained as completely true."*

How did the Court reach this conclusion? It is stated in the Judgment that the Court found this "upon the assessment of the presented evidence and the established factual situation." The presented evidence, as can be seen from the Judgment, is the conflicting data of the plaintiff and the defendant; during the trial neither was a process of obtaining professional expertise from a person with an economics background carried out, which is not even essential, nor was the journalist's professional conduct examined. The Court, without clear ground, accepted the explanation of the plaintiff and his attorney, although the CIN journalist and CIN as a media organization had in this, as in many other cases, acted in accordance with the highest professional standards (obtaining and checking information from all protagonists in the story, recording the interview with the consent of the interviewee – in this specific case the plaintiff – and even the plaintiff's praise upon the publication of the story in a telephone conversation with the CIN journalist). The Law on Protection against Defamation in Article 7, paragraph 2 (clauses 3 and 4) specifies that there is no responsibility for defamation particularly in the following circumstances/cases: when there exists "*good faith and adherence to generally-accepted professional standards by the person who allegedly caused the harm*" and "*consent by the allegedly injured person,*" which the plaintiff himself confirmed in this case.

It is unclear based on what the Court concluded that the "facts presented by the defendant in its articles were not ascertained as completely true." Even more questionable is the Court's conclusion ("*The journalist of the Center for Investigative Reporting did not present the whole results of her investigation in the disputed articles, nor did she possess sufficient knowledge to ascertain them with certainty, in order to present them to the public*"). Neither the Municipal Court, nor the plaintiff, in any way tried to determine in what way the CIN journalist and CIN had checked and verified the received information. Therefore, the Court's conclusion is a grave assault on the professional norms and practices of journalism, which has been rejected by the European Court of Human Rights.

If the Municipal Court reached the conclusion ("*the facts were not ascertained as completely true*") based on "judicial discretion," how can the Court dispute the professional conduct of journalists who acted in accordance with the norms of journalism and in good faith, which in this case was confirmed in multiple ways, as explained above. Neither the standards laid down in judgments of the European Court for Human Rights, nor the Law on Protection against Defamation of the Federation of B&H, specify or demand from journalists the professional expertise of another profession (economic for example), because that would be contrary to Article 10 of the European Convention, which grants not only journalists, but everyone else (the public, citizens) as well, the right to freedom of expression.

Moreover, the European Court (in the case of *Handyside v. United Kingdom*, 1976, paragraph 49) concluded that the right to freedom of expression "*is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.*" (Note: this wording is also contained in Article 2, paragraph b) of the Law on Protection against Defamation of FB&H). The European Court concluded that "*such*

are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society” (European Court, above Judgment).

Sarajevo Municipal Court in this Judgment totally disregarded Article 3 of the Law on Protection against Defamation, which emphasizes that *“this Law shall be interpreted so as to ensure that the application of its provisions maximizes the principle of the freedom of expression”* (Law on Protection against Defamation of FB&H).

Attempt to create a “balance”

The plaintiff during this court proceeding disputed the published data and claimed the published information received from the General Hospital was “not true.” But the fact is that he never officially denied the data and did not demand a correction. Quite the contrary; upon the publication of the article, he telephoned the CIN journalist and praised what was published.

The plaintiff in a telephone conversation with the CIN journalist, which took place on 22 July 2016 (the same day CIN published the first article, *“Sebija Izetbegović’s costly pathohistology”*), praised said item (*“This is a very fair article”*).

Two days after that, the plaintiff (Dr. Emir Talirević) on his FB profile, on 24 July 2016 and then on 26 and 27 July, wrote articles containing a number of insults about the journalist and about the CIN organization (among other things, he wrote that “CIN is funded by gifts, the same as prostitutes” and “the price for which they spread their legs is unknown”). Despite the journalist and CIN’s request to withdraw these articles and issue a public apology, the plaintiff did not do that. This public act by Dr. Talirević was met with strong condemnation by the public and a number of non-governmental organizations and media.

After the journalist and CIN’s lawsuit, filed on 20 September 2016, Sarajevo Municipal Court in a separate proceeding on 12 July 2018 passed a first-instance judgment against Dr. Emir Talirević and required him to pay, in damages for non-pecuniary harm, 3,000 KM to the primary plaintiff (CIN journalist Selma Učanbarlić) and 1,000 KM to the secondary plaintiff (CIN). Forty-three days later, on 2 November 2016, Emir Talirević filed his defamation lawsuit against CIN, which is the subject of this analysis. One gets the impression that it was an attempt to use the counter-lawsuit to create a “balance” – in favor of the plaintiff.

3. Criminal report against CIN

Unlawful recording of telephone conversation

The plaintiff notified the Court, and the Court accepted as a valid argument, that he had filed a criminal report against the CIN journalist and CIN itself for "unlawful recording of a telephone conversation" which took place on 22 July 2016. The Sarajevo Cantonal Prosecutor's Office opened an investigation in this case and in the meantime interviewed some people.

The plaintiff bases the criminal report on the Penal Code of FB&H (Article 188), which stipulates criminal liability and a jail sentence for "*whoever by use of special devices without authorization taps or records a conversation or a statement which was not intended for him, or enables an uninvited person to have knowledge of a conversation or a statement...*" (Article 188 of the Criminal Code of FB&H).

As is evident, this provision refers to "*a conversation or a statement which was not intended for him,*" which does not apply in this case, because the conversation took place upon the telephone call of the plaintiff (E. T.) with the journalist (S. U.), to whom the call was made. Second, the plaintiff had been informed during the first conversation that CIN procedures require the interviewee, at first contact, to be informed that all conversations carried out with CIN journalists are recorded and that any part of the conversation that the person does not want to be in the interview must be explicitly emphasized and it will not be considered. Also, if the person does not give their consent to the recording, the conversation will not take place at all. The telephone conversation was recorded because that is also provided for in CIN's internal code in order to protect journalists from any abuse of this kind of communication. The conversation was published on the CIN website only after the plaintiff (E. T.) published insulting articles on his FB profile about the journalist and CIN.

Sarajevo Municipal Court in this civil proceeding for damages had no legal ground to take the fact of submission of the criminal report to the Cantonal Prosecutor's Office as a valid argument for proof of defamation.