

THE ADMISSIBILITY OF THE EXCEPTION REGARDING THE LACK OF ACTIVE PROCEDURAL LEGITIMACY IN VIEW OF ART. 906 CODE OF CIVIL PROCEDURE

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ABSTRACT

The present article aims to analyze the different solutions pronounced by the courts in relation to the admission, respectively the rejection of the exception regarding the lack of active procedural legitimacy, in disputes having as object the application of delay penalties under art. 906 Code of Civil Procedure, in the situation where the request for the enforcement was initiated by an association established under Government Ordinance no. 26/2000 on associations and foundations. Consequently, we will be considering the argument that the applicable legislation does not establish a right of representation of the association towards its members, as it happens in the case of trade unions founded on the basis of the Social Dialogue Law no. 62/2011.

KEYWORDS: *active procedural legitimacy, association, delay penalties, creditor, representation.*

INTRODUCTION

In recent judicial practice, some divergences have been observed with regard to resolving the exception of lack of active procedural legitimacy, considering a number of arguments, such as: the right to represent a person before enforcement bodies and courts (including enforcement courts), respectively to whom belongs the attribute to initiate a request for enforcement and, subsequently, the right to initiate a litigation having as object the application of delay penalties for the non-execution of the obligation to perform by the debtor.

Thus, the debtor was obliged to proceed with the reconstitution of the accounting documents attesting the gross incomes on component elements for all the plaintiffs, during the entire period in which they held the status of employees. The enforceable title was obtained following the initiative of an association to bring such an action before the courts, on behalf of all its members.

Irrespective of the reason for non-compliance with the obligation that the debtor should have fulfilled, it is perfectly justified for the sanction of the obligation to intervene. Specifically, “the sanction of the obligation consists in the creditor's right to sue the debtor and to proceed with the forced execution of his property in order to realize his claim¹”.

However, since the obligation we have in question is to perform, modern law has maintained the concept that it cannot be realized in kind (in nature)², this being, moreover, the reason why the provisions of art. 906 Code of Civil Procedure have found application, namely the attempt to compel the debtor to perform the obligation he/she is required to do, in order to avoid the establishment of penalties for the delay in this respect.

¹ See in this respect **Liviu Pop, Ionuț-Florian Popa, Stelian Ioan Vidu**, *Tratat elementar de drept civil: Obligațiile*, Universul Juridic Publishing House, Bucharest, 2012, p. 18.

² *Idem*, p. 729.

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If the debtor persists in refusing to perform the obligations, the court, at the request of the creditor, has the possibility to establish a global amount of money, which is obviously easier to enforce, compared to the enforcement of an obligation to perform.

It should also be noted that these disputes do not benefit from the double degree of jurisdiction, being definitive, final, from the first ruling³. Having in view the fact that each creditor requested the debtor to pay a penalty in the maximum amount of 1000 RON per day of delay, from the debtor's point of view, the mere possibility of not having the case dismissed equals a potential case of bankruptcy.

Considering the way in which the creditors from the enforceable title understood to initiate the litigations based on the provisions of art. 906 Code of Civil Procedure, the debtor defended itself by invoking a series of arguments, the latter being both accepted and rejected by the courts that had to resolve disputes of such nature.

It is interesting to point out that the litigations brought before the courts were resolved approximately in the same period of time, and by the same court (only the trial panels were different), hence the increased interest in the diametrically opposed views established by the sentences, being definitive rulings.

In the following paragraphs, we proceeded to analyze the arguments of the debtor, but also those retained by the different trial panels of the court, in order to outline an overview of the situation and reach a logical conclusion based on the applicable legislation.

1. THE ARGUMENTS BROUGHT BY THE DEBTOR, THROUGH THE OBJECTIONS FORMULATED, IN SUPPORT OF THE EXCEPTION OF LACK OF ACTIVE PROCEDURAL LEGITIMACY.

As already mentioned, the enforceable title was obtained as a result of the dispute initiated by an association, on behalf of its members, each of them being natural persons.

From our point of view, the fact that the matter of the association being legally able to represent its members or not has not been called into question in the litigation that ended with the pronouncement of the enforceable title, does not equate in any way with the idea that, from that moment, the association gained the legal possibility to introduce any actions on behalf of its members, recognizing its capacity to represent "with the power of *res judicata*".

After all, in any legal dispute, regardless of its object, among other conditions, it is absolutely necessary that the active legitimacy of the plaintiff⁴, respectively the legitimacy of the person representing the plaintiff, where required, to be proven.

Therefore, analyzing logically and grammatically the provisions of art. 906 Code of Civil Procedure, we note the following wording: "*the court notified by the creditor may oblige the debtor (...) to pay a penalty (...) in favor of the creditor*".

The concept of notifying a court does not bring any aspect of novelty. However, it is necessary to make some clarifications as to whom exactly has the legal possibility to initiate such a dispute, as well as if, respectively when and under what conditions may operate the representation of the parties.

In this respect, from the corroboration of art. 83⁵, art. 645 para. (1) and art. 646 para. (1) Code of Civil Procedure, it results that a natural person can be represented only by a lawyer or by a representative agent, including in the enforcement phase, the parties in the enforcement procedure being the creditor and the debtor, not the representative agent.

³ Article 906 para. (2) Code of Civil Procedure: "When the obligation is not assessable in money, the court notified by the creditor may oblige the debtor, by final ruling given with the summoning of the parties, to pay in favor of the creditor a penalty from 100 RON to 1000 RON, established per day of delay, until the execution of the obligation provided in the executory title". Law no. 134/2010 regarding Code of Civil Procedure, republished in Official Journal of Romania no. 545 of August 3rd, 2012, as further amended and supplemented

⁴ Consult in this respect the provisions of article 32 para. (1) point b) Code of Civil Procedure.

⁵ Article 83 para. (1) Code of Civil Procedure: "(...) natural persons may be represented by a lawyer or other agent (...)".

Also, art. 644 para. (1) Code of Civil Procedure lists the participants in the enforcement procedure as follows: "1. *parties*; 2. *third party guarantors*; 3. *intervening creditors*; 4. *the court of enforcement*; 5. *the bailiff*; 6. *The Public Ministry*; 7. *law enforcement agents*; 8. *assistant witnesses, experts, interpreters and other participants, under the specific conditions provided by law*".

Since enforcement is a distinct phase of the civil process which ensures the practical realization of the right recognized by the enforceable title⁶, respectively there are no other special rules regulated, derogating from the common law, regarding the representation of the creditor before the bailiff or the enforcement court, we consider that the provisions of art. 83 Code of Civil Procedure, to which we have already referred, are fully applicable and mandatory.

Therefore, in order for a natural person to be legally represented, he or she must either turn to a lawyer or a non-lawyer, such as a spouse or a relative up to and including the second degree, if they have a degree in law⁷.

On the other hand, we must not forget the provisions of art. 85 Code of Civil Procedure, respectively those regarding the form of the representation mandate, especially those of para. (1), namely: "*the power to represent a natural person given to the agent who does not have the quality of lawyer is proved by an authentic document*".

Obviously, an association cannot hold the status of a lawyer, having no connection whatsoever with the status of the latter profession. The association had been established under Government Ordinance no. 26/2000 on associations and foundations⁸, a normative act which, in our opinion, does not include any legal norm that could confer the appearance of the right to represent a natural person, even its own members, without providing an authentic document, issued by the notary, in this respect.

The aforementioned ordinance contains the applicable provisions regarding the legal way in which "*natural persons and legal persons pursuing activities of general interest or in the interest of certain communities or, as the case may be, in their non-patrimonial personal interest may constitute associations or foundations*", as provided by art. 1 para. (1) of the ordinance.

Also, art. 2 of the same normative act exhaustively lists the purposes for which the ordinance was adopted, respectively: "a) the exercise of the right to free association; b) promoting civic values, democracy and the rule of law; c) pursuing the achievement of a general, local or group interest; d) facilitating the access of associations and foundations to private and public resources; e) the partnership between the public authorities and the legal persons of private law without patrimonial purpose; f) observance of public order".

From the simple reading of those listed exhaustively by the act that enshrines the way in which the associations are constituted, respectively for what purpose they are to be established, it is easy to notice that nowhere in the text of the normative act is any reference or mention made regarding the legal possibility for an association to represent its own members before the courts or other enforcement bodies.

We consider, therefore, that the attitude displayed by the association corresponds to the pattern that a trade union organization would use. Unlike legal entities established under Government Ordinance no. 26/2000, trade unions, in the light of art. 28 of Law no. 62/2011 of the social dialogue⁹, "have the right to take any action provided by law, including to take legal action on behalf of their members, based on a written mandate from them"¹⁰.

⁶ See in this respect **Gabriel Boroi, Mirela Stancu**, *Drept procesual civil*, third edition, Hamangiu Publishing House, Bucharest, 2016, p. 916.

⁷ Article 83 para. (2) Code of Civil Procedure.

⁸ Published in Official Journal of Romania no. 39 of January 31st, 2000, as further amended and supplemented.

⁹ Published in Official Journal of Romania no. 3229 of May 10th, 2011, as further amended and supplemented.

¹⁰ See article 28 para. (2) of the Social Dialogue Law no. 62/2011.

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On the other hand, we consider that, in a dispute in which a member of an association is involved, the latter has the legal possibility to make a request for an accessory intervention in order to support its member's arguments, but in no way a legal leverage is granted to act as a lawyer or trade union organization in the absence of a genuine mandate or a derogatory legal provision from the common law.

Thus, the introduction of an enforcement request on behalf of the members of the association, whom, in fact, are the creditors, should have been subject to the mandatory rules on the granting of a mandate, in which case they must meet the requirement of authenticity. The fact that the request for enforcement was made by the lawyer whose services were requested only by the association, in its own name, shows that the members of the latter have no active legitimacy whatsoever in the entire enforcement proceedings (including foreclosures, respectively summons and so on).

It is irrelevant that the creditors in their personal name subsequently formulated the action seeking the application of delay penalties. As is well known, an essential condition for the promotion of such a dispute is the expiry of the period of 10 days from the communication of the conclusion of the enforcement by the bailiff.

In other words, a condition of admissibility is the very existence of an enforcement file initiated by the creditor, by seeking the services of a bailiff, so that the latter can initiate the necessary procedures in order to obtain and subsequently communicate the conclusion of the enforcement to the debtor. Only in case of non-compliance, the creditor has the possibility to request the application of penalties for delay.

However, as long as the creditors did not formulate the request for enforcement in their personal name, respectively there was no authentic mandate given to the association to act in this way on behalf of its members, it results, in our opinion, that in the enforcement file thus started, the legitimacy of the creditor will belong only to the association in whose name the application was submitted by the lawyer, and not to its members.

We consider that the legal provisions regarding the non-lawyer representative agent cannot be circumvented, all the more so since "*the application of comminatory fines (currently penalties) does not mean an actual enforcement of the execution, but constitutes a means of indirect coercion of the debtor*"¹¹.

Moreover, perhaps the most important provision that should be interpreted in conjunction with the provisions regarding representation is that of art. 664 Code of Civil Procedure. Thus, in accordance with par. (1), "*enforcement may start **only at the request of the creditor**, unless otherwise provided by law*", while in the very next paragraph it is established that "*the application for enforcement is submitted, personally or through a legal or conventional representative*"¹².

Summarizing the arguments already detailed, the debtor understood to defend itself by raising the exception of lack of active procedural legitimacy, arguing, in essence, the fundamental difference between the legitimacy of creditor as a whole and the legitimacy of creditor in an enforcement case, in the absence of authentic mandate given to a legal person who desires to act as the creditor's representative agent.

As to the extent to which the plea of lack of active procedural legitimacy could be raised, it must be pointed out that there is no real and legal justification for not examining it both in the enforcement appeal and directly before the court seized to pronounce a sentence in a dispute having as object the application of penalties for delay, due to the non-fulfillment of the obligation to perform by the debtor, all the more so as it is an absolute and preemptory exception.

¹¹ See in this respect **Viorel Terzea**, *Noul cod de procedură civilă adnotat*, Universul Juridic Publishing House, Bucharest, 2016, p. 1066.

¹² Consult in this respect the provisions of article 664 para. (2) Code of Civil Procedure.

2. THE CONTRADICTORY ARGUMENTS HELD BY THE COURTS ON THE SAME ISSUE OF LAW.

By the Sentence from June 6th 2019, the Court of First District of Bucharest rejected the exception of the lack of active procedural legitimacy, raised by the debtor, as unfounded.

In order to pronounce the aforementioned solution, the court retained the following: "within an action based on the provisions of art. 906 alin. (1) C.pr.civ, the active procedural legitimacy belongs to the creditor from the executive legal report, a report that represents the transposition, on an executive level, of the obligatory report from which results the claim recognized by the executory title". Therefore, by the mentioned conclusion, the court considers that it is perfectly legal that an association has filed a request for enforcement on behalf of a creditor, omitting the stage of identifying an authentic mandate given by the creditor in the enforcement report, respectively the enforceable title in order to empower the association in this regard.

By the same sentence, the court even notes that "the request for enforcement was made by the association not in its own name, but in the name of former employees", as well as the fact that "as long as the association did not formulate the request for execution of the enforceable title in the name and for the association, invoking an own right of claim, but in the name and for the creditor (...) for the capitalization of his rights, recognized by the executory title, the creditor has active procedural legitimacy in the action based on the provisions of art. 906 alin. (1) C.pr.civ".

Also, regarding the procedural legitimacy of the association, which supposedly acted on behalf of its members, the court mistakenly refers to the executory title and also refers to the fact that, "regarding the possibility and conditions for the enforcement by the association on behalf of the creditors, it cannot be analyzed in the present proceedings, but only in the appeal proceedings to the enforcement itself".

For these reasons, by the Sentence from June 6th 2019, the Court of First District of Bucharest wrongfully rejected the exception of the lack of active procedural legitimacy, raised by the debtor, as unfounded.

On the other hand, by the Sentence from June 13th 2019, the Court of First District of Bucharest admitted the exception of the lack of active procedural legitimacy, raised by the debtor, and rejected the request as being made by a person without active procedural legitimacy.

In order to pronounce the aforementioned solution, the following arguments were retained: the court begins its reasoning by invoking art. 36 Code of Civil Procedure, according to which the procedural legitimacy must result "from the identity between the parties and the subjects of the disputed legal relationship".

Therefore, analyzing both the aforementioned article and the provisions of art. 906 Code of Civil Procedure, the court concluded that "*only the creditor in the enforcement file has the active procedural legitimacy to notify the court for the application of penalties as a result of non-enforcement of the obligation to do or not to do, which cannot be fulfilled by another person*".

Going further with the logic of the argument, the court also states that in no document, of course, except for the writ of execution, does the name of the creditor appear, only the name of the association. We exemplify, in this way, the documents retained by the court as part of the above statement: the request for enforcement, the conclusion of approval of enforcement, the summons sent by the bailiff to the debtor, and the rest of the documentation related to the enforcement file.

For these reasons, by the Sentence from June 13th 2019, the Court of First District of Bucharest rightfully admitted the exception of the lack of active procedural legitimacy, raised by the debtor, and rejected the request as being made by a person without active procedural legitimacy.

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3. CONCLUSIONS

In view of the non-uniform practice in this matter, as well as the need to establish a unified opinion, since the rulings in such disputes are final from the first instance, in our opinion, we conclude that the correct approach to such situations is to admit the exception for the lack of active procedural legitimacy, since there is only one creditor in the enforcement file (the association), which has not been legally mandated by the other creditors to file the enforcement application and does not benefit in any way from a right of legal representation regarding the members of the association. Consequently, there is no identity between the parties and the subjects of the disputed legal relationship.

Even in the case of a mandate, we consider that an authentic one would have been necessary in order to introduce the request for enforcement on behalf of the members of the association, as creditors. The request for the enforcement of any ruling must benefit from the consent of the creditor. Therefore, we appreciate that accepting a view contrary to the latter thesis would give rise to at least hilarious situations since the will of the creditor must be the central component, clearly expressed and not diluted in any way by the interests of another person, natural or legal.

In conclusion, the confusion between the legitimacy of creditor as a whole or found in the enforcement file is not grounded or justified in any way, the two situations being, indeed, similar, but fundamentally different in relation to the effects that each of them can provide, regarding the legal potential in a litigation based on the provisions of art. 906 Code of Civil Procedure.

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