



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## J U D G E M E N T

on Behalf of the Republic of Latvia

20 April, 2012, Riga

in Case No. 2011-16-01

The Constitutional Court of the Republic of Latvia composed of the Chairperson of the court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis and Sanita Osipova,

having regard to an application submitted by Riga Regional Court, Panel of Civil Cases (hereinafter – the Applicant) on initiation of a case,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16, Para 9 of Section 17, as well as Section 19<sup>1</sup> and Section 28<sup>1</sup> of the Constitutional Court Law,

on 27 March 2012 during a court hearing examined in written procedure the case

**“On Compliance of Section 62(1) of the Insolvency Law and Section 363<sup>2</sup> (2) of the Civil Procedure Law insofar as it Fails to Establish the Right of the Court to Release Persons from Deposit Payment with Article 92 of the Satversme of the Republic of Latvia”.**

## The Facts

1. On 26 July 2010 the Saeima adopted the Insolvency Law, which Entered into force on 1 November 2010.

1.1. Section 62(1) of the Insolvency Law provides: “The pre-condition for the submission of an application for insolvency proceedings of a legal person is the payment of a deposit in the amount of two minimum monthly salaries into an account specially created by the Insolvency Administration.” Section 363<sup>2</sup>(2) of the Civil Procedure Law, in its turn, provides: “In submitting an application for insolvency proceedings, a creditor shall append documents that certify payment of the State fee and other court costs, as well as payment of the insolvency proceedings deposit” (hereinafter – the contested norms).

1.2. Prior to the coming into force of the Insolvency Law, the regulation that was in force regarding submitting an application for insolvency proceedings to court envisaged payment only of the State fee and other court expenditure. Pursuant to Section 62(1) of the new Insolvency Law the deposit payment in the insolvency proceedings of a legal person (hereinafter – the Deposit) has been set as a pre-condition for submitting an application on the insolvency proceedings of a legal person in the amount of two minimum monthly salaries. The requirement to submit a document certifying the payment of the Deposit was added to the provisions of Section 363<sup>2</sup> of the Civil Procedure Law, which defines the content of the application on insolvency proceedings and the documents to be appended to it.

2. The Applicant – **Riga Regional Court, Panel of Civil Cases**, examining the ancillary complaint submitted by Anna Šeiko, Lidija Timoščuka, Olga Suhodoļskaja, Tatjana Baranova and Allas Gostevas (hereinafter – the Applicants) (case No. CA-3507-11/28) regarding the decision of 10 March 2011 adopted by Riga City Ziemeļu District Court, not to further the application concerning the insolvency proceedings of the limited company

“Jumaks”, decided to suspend the judicial proceedings and submit an application to the Constitutional Court regarding the compliance of the contested norms with the first sentence of Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

**2.1.** Riga City Ziemeļu District Court has satisfied the claims of each individual applicant in the part regarding recovery of remuneration for work from SIA “Jumaks”. The respective judgements have come into force.

On 9 March 2011 the Applicants submitted to the Riga City Ziemeļu District Court an application on the insolvency proceedings, requesting the Court to initiate and announce the insolvency proceedings of SIA “Jumaks.” It is noted in the application that SIA “Jumaks” still had not paid the remuneration for work, moreover, it had been impossible to execute the court decision on recovering the remuneration for work by using coercive measures. Simultaneously the Applicants had requested the Court to release them from paying the court expenditure, as well as the Deposit payment, indicating that the Applicants had no resources for paying these costs.

With the decision of 10 March 2011 by the Riga City Ziemeļu District Court, on the basis of the contested norms, the application was not furthered, but a deadline for rectifying the deficiencies was set, inter alia, for submitting to the court a document certifying the payment of the Deposit.

The Applicants submitted an ancillary complaint regarding this decision, requesting revoking of this decision and submitting the case for re-examination to the first instance court, since the pre-condition set for submitting an application on insolvency proceedings – a document certifying the payment of the Deposit – restricts the right envisaged by the first sentence of Article 92 of the Satversme to free access to courts.

**2.2. The Applicant** holds that the contested norms are incompatible with the first sentence of Article 92 of the Satversme.

It had been impossible to enforce the court decisions in favour of the Applicants regarding the recovery of remuneration for work by using coercive

means. Moreover, the Applicants, due to lack of financial resources, have been deprived of the possibility to submit an application for the employer's insolvency proceedings. Thus, in fact, the Applicants are deprived of any possibility to receive the remuneration for work as stipulated in the court decision, however, in the case of the debtor's insolvency proceedings it would be possible to pay it from the resources of employee claim guarantee fund (hereinafter – the Guarantee Fund) in accordance with the law “On Protection of Employees in case of Insolvency of Employer”. The Applicant holds that the contested norms thus restrict the person's right to free access to court.

The Applicant indicates that the restriction included in the contested norms with regard to free access to court is incompatible with the principle of proportionality. It would be possible to reach the legitimate aim – to ensure appropriate course of the insolvency proceedings of any legal person – by more lenient means, less restrictive to person's rights. The legislator, by imposing the obligation of paying the Deposit to all persons, including employees, irrespective of their material status, has failed to assess the compatibility of this obligation with the first sentence of Article 92 of the Satversme. If no possibility to release the person from paying the Deposit is envisaged, access to court becomes dependent from the person's financial possibilities.

The Applicant holds that the legislator, when introducing certain payments, necessary for a person to exercise his right to free access to court, had to envisage the possibility to release from payment of the Deposit those persons, who lack the necessary financial resources.

**3.** The institution, which adopted the contested act, – **the Saeima** – holds that the contested norms comply with the first sentence of Article 92 of the Satversme.

The Saeima notes that upon adopting the contested norms the state funding in insolvency proceedings was abolished. It was replaced by the Deposit, which is paid by the party submitting the insolvency application as security. The purpose of the Deposit is to cover the minimum costs of

insolvency proceedings if the debtor were lacking sufficient resources.

Applying to the court for initiating the insolvency proceedings of legal person is not the only mechanism for protecting the employees' rights if the employer – a legal person – has not paid to employees remuneration for work. To achieve the protection of their rights the employees can apply to court and, first of all, use the compulsory execution of obligations in accordance with warning procedure envisaged in Chapter 50<sup>1</sup> of the Civil Procedure Law. Secondly, by using the court proceedings by way of action envisaged in Divisions Four of the Civil Procedure Law. The legislator has envisaged at least two legal protection possibilities to employees, to whom the employer has not paid the stipulated remuneration for work. In both of the aforementioned cases the legislator has envisaged releasing the employees from payment of court expenditure.

The Saeima emphasizes that the restriction included in the contested norms complies with Article 92 of the Satversme. It has been laid down by a law, adopted and promulgated in accordance with the procedure set out in the Satversme and the Saeima Rules of Procedure. The restriction has a legitimate aim – the protection of other persons' rights, as the Deposit performs a certain “filtering” function and allows alleviating the work of courts and the whole insolvency procedure in general. The measure chosen by the legislator has been applied to reach the legitimate purpose. Firstly, the market itself funds the insolvency procedures, the State does not have to spend its resources. Thus, the regulation, which the contested norms contain, promotes private initiative in this field and limits the participation of the State in private law relations. Secondly, the Deposit serves as a filter, distributing the flow of inactive and insolvent companies among insolvency procedure and simple liquidations. The legislator has presumed that the parties submitting the insolvency application would be ready to pay the Deposit only if being sufficiently convinced that the debtor has resources that can be recovered through insolvency proceedings. Thirdly, the Deposit may facilitate the creditors' interest in recovering resources through insolvency proceedings.

The Saeima holds that there is no other means that would be as effective and the choice of which would make the restriction fundamental rights less acutely felt. The contested norms, which envisage the payment of Deposit, are not related to compensations of the state expenditure for ensuring the operations of courts or to prevent persons from turning to courts with ungrounded applications, but to ensure the execution of the judgement on announcing the insolvency proceedings (costs of the insolvency proceedings of a legal person). Moreover, the payer of the Deposit is repaid this sum.

The Saeima draws attention to the fact that if a group of persons is released from the Deposit payment, then the issue of covering the costs of the insolvency proceedings of a legal person, if the debtor has no resources, must be solved.

**4.** The summoned person – **the Ministry of Justice** – holds that the contested norms comply with Article 92 of the Satversme.

The Ministry of Justice notes that when the new Insolvency Law was adopted, the possibility to establish a system for funding the costs of insolvency proceedings, which were able to function in the long-term and, moreover, without attracting state budget resources, had to be considered. Therefore the Deposit was introduced, if the debtor has no resources, it is used to cover the costs of the insolvency proceedings. Releasing employees from the payment of the Deposit would be possible only if the system for funding the insolvency proceedings, which does not involve the state, were reviewed.

The Ministry of Justice expresses the opinion that the possibility granted to employees by Insolvency Law to submit an insolvency application in court is an alternative possibility to recover the unpaid salary, given by the legislator. Employees can use other judicial remedies to recover their unpaid salaries, moreover, without paying the state fee, for example, the compulsory execution of obligations in accordance with warning procedure or the procedure for legal proceedings.

The Ministry of Justice holds that the restriction included in the

contested norms balances out all interests, since it envisages that all parties submitting the insolvency procedure application (debtor, creditor, administrator) pay the Deposit.

5. The summoned person – **state agency “Insolvency Administration”** (hereinafter – Insolvency Administration) – holds that the contested norms comply with the first sentence of Article 92 of the Satversme.

The Insolvency Administration notes that the Deposit serves as a means to facilitate the initiation of such insolvency proceedings, in which the aim of the insolvency proceedings could be reached – i.e., creditors’ claims can be satisfied. The obligation to pay the Deposit has the legitimate aim not only to ensure the process of any insolvency proceedings, guaranteeing the necessary funding (procedural benefit), but also the effectiveness of the insolvency proceedings (of each particular proceedings and the whole insolvency field), so that these proceedings would ensure maximum possible benefit to society.

The Insolvency Administration emphasizes that satisfying the employees’ claim from the Guarantee Fund is not a means for collecting remuneration for work, but a kind of state social assistance to an employee, whose employer, because of insolvency, has been unable to make the payments that follow from the legal labour relations. And yet, this assistance is provided to an employee within the framework of insolvency proceedings. Thus, appropriate funding for the insolvency proceedings must be ensured. The aim of the insolvency proceedings is not only to satisfy the employees’ claims, but satisfying the claims of all creditors to the extent possible. Therefore all creditors (including employees), wishing to submit an application for the creditor’s insolvency proceedings, must assume the risk of funding the insolvency proceedings. Moreover, the employees, who wish to initiate the insolvency proceedings of their employer, have the possibility to unite and submit a joint application for insolvency proceedings, thus sharing the financial burden caused by the Deposit proportionally among themselves.

The Insolvency Administration holds that the employee’s obligation to

pay the Deposit is an appropriate and proportional means, which is objectively necessary to ensure satisfying the creditors' claims in the insolvency proceedings of a legal person.

6. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – notes that the legislator may restrict a person's free access to court, however, a restriction like this must be proportional.

The Ombudsman holds that in those cases, when, by applying coercive means of execution, it has been impossible to enforce court rulings in favour of employees, the only possibility for the employees to regain at least part of the unpaid remuneration for work is to turn to the Guarantee Fund in accordance with the law "On Protection of Employees in Case of Insolvency of Employer". However, in order to receive money from this Fund, the company, from which the employees wish to recover the unpaid salaries, must be declared insolvent. Thus, the employees are unable to recover the salaries they have earned, neither are they able to initiate insolvency proceedings, since due to financial considerations they cannot afford to pay the Deposit.

The Ombudsman holds that the requirement to pay the Deposit, if no mechanism for revoking, suspending or decreasing it has not been established as regards persons, who are unable to make this payment, can decrease or even deny the possibility to this group of persons to defend their interests in court. This regulation, insofar as it does not envisage a compensating mechanism, is incompatible with the first sentence of Article 92 of the Satversme.

7. The summoned person – ***Dr.iur. Irēna Kalniņa*** – holds that the legislator, setting by the contested norms the obligation to pay the Deposit, had the possibility to envisage more lenient means for reaching the legitimate aim, i.e., to envisage the possibility to release employees from payment of the Deposit or to decrease its amount.

The employees, who can realise their interests only within the

framework of insolvency proceedings, but lack the financial means for initiating such proceedings, are denied effective right to turn to court and receive remuneration for work. Thus, the benefit gained by society as a whole does not exceed the losses caused to the rights and the lawful interests of a person.

Since the legislator, in adopting the contested norms, had failed to abide by the principle of proportionality, the contested norms are incompatible with the first sentence of Article 92 of the Satversme, insofar as these do not envisage the possibility to release persons from paying the Deposit or to decrease its amount.

### **The Constitutional Court Established**

**8.** The first sentence of Article 92 of the Satversme provides: “Everyone has the right to defend his or her rights and lawful interests in a fair court.”

**8.1.** The Constitutional Court, analysing the first sentence of Article 92 of the Satversme, has recognised that the term it refers to – “fair court” – has two aspects, i.e., an independent court as an institution of independent judicial power, which hears the case, and fair court as due procedure, compliant with a judicial state, in which this case is examined. Article 92 of the Satversme envisages the obligation of the State to establish an appropriate system of judicial institutions, as well as the obligation to adopt procedural norms, pursuant to which the court examines cases, ensuring fair and unbiased hearing of cases (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 11 April 2007 in Case No. 2006-28-01, Para 9*).

The right to fair court also means that a person has the right to access to court. If the State has the obligation to establish independent and unbiased courts and the obligation to ensure a number of procedural guarantees, then the requirement to ensure to persons access to court and the possibility to make use of these guarantees is well founded. As the Constitutional Court has already

noted, the fairness of judicial proceedings would be meaningless, unless accessibility to the proceedings were ensured (*see, for example, Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 1.1. of the Findings, Judgement of 17 October 2005 in Case No. 2005-07-01, Para 6, and Judgement of 14 March 2006 in case No. 2005-18-01, Para 8*).

Thus, the right to fair court comprises also the right to free access to court (*see Judgement of 6 November 2003 by the Constitutional Court in Case No. 2003-10-01, Para 1 of the Findings*).

**8.2.** The contested norms provide that a person, submitting an application to court for the recognition of the insolvency of a legal person, must pay a Deposit in the amount of two minimum monthly salaries (currently – 400 LVL).

The opinion of the Saeima and the Ministry of Justice that the Deposit payment should not be considered an obstacle to free access to court, since its aim is not linked with the compensation of the state expenditure needed to ensure the functioning of courts or deterring persons from turning to courts with unfounded applications (like, for example, State fee or security payment), but is envisaged to ensure the enforcement of the judgement on announcing insolvency proceedings, is unfounded.

The Constitutional Court has established repeatedly that the introduction of various payments restricts the fundamental right to free access to court (*see Judgement of 4 January 2005 by the Constitutional Court in Case No. 2004-16-01, Para 7.2, Judgement of 14 March 2006 in Case No. 2005-18-01, Para 9 and Judgement of 20 November 2008 in Case No. 2008-07-01, Para 6*). It is impossible to initiate judicial proceedings on the insolvency proceedings of a legal person without paying the Deposit.

**Thus, the obligation to pay the Deposit in order to submit an application to court must be recognised as a restriction to a person's right to free access to court.**

**9.** Protection of person's fundamental rights is one of the most

significant obligations of a democratic, judicial state. The state has to ensure effective protection to all persons, whose rights or lawful interests have been infringed (*see Judgment of 5 December 2011 by the Constitutional Court in Case No. 2001-07-0103, Para 1 of the Findings*). Therefore ensuring a person's right to fair court is a means for reaching this aim (*see Judgment of 14 March 2006 by the Constitutional Court in Case No. 2005-18-01, Para 10 of the Findings*), since the protection of other fundamental rights of a person depends upon due ensuring of this right.

The right to free access to court, guaranteed by the first sentence of Article 92 of the Satversme, can be restricted only in cases of utmost necessity. If, however, such restriction has been set out, it must be assessed, whether this has been done by a law adopted in proper procedure, whether the restriction has a legitimate aim and whether the restriction is proportional to the legitimate aim ( *see, for example, Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 1.2. of the Findings*).

**10.** The Insolvency Law was adopted by the Saeima on 26 July 2010 and entered into force on 1 November 2010. Section 62(1) of the aforementioned law envisaged payment of Deposit in the amount of two minimum monthly salaries as a pre-condition for submission of application for insolvency proceedings of a legal person. The law of 30 September 2010 "Amendments to the Civil Procedure Law", in its turn, added Chapter 46<sup>1</sup> to it "Cases of Insolvency Proceedings of Legal Persons", including into the norm of Section 363<sup>2</sup> the requirement to submit documents certifying the payment of the Deposit.

The contested norms were adopted and promulgated in accordance with the procedure set out in the Satversme and the Saeima Rules of Procedure. Neither has the Applicant referred to circumstances testifying to procedural violations in adopting the contested norms.

**Thus, the restriction that the contested norms comprise has been**

## **laid down by law.**

**11.** Any restriction to the fundamental rights should be based upon circumstances and arguments regarding its necessity, i.e., the restrictions are laid down because of significant interests – a legitimate aim.

Pursuant to Section 62(2) of the Insolvency Law the aim of the Deposit is to cover the costs of the insolvency proceedings of a legal person, if the debtor has no property and the creditors have not decided to use another source of financing. In accordance with the legal regulation, which existed prior to the introduction of the Deposit, the costs of such insolvency proceedings were covered by the State budget resources. Thus, the State every year financed the process of such insolvency proceedings, in the framework of which it was impossible to recover resources and satisfy the creditors' claims (*see Case Materials, pp. 102 – 103*).

In the course of drafting the new Insolvency Law, it was concluded that the funding of such proceedings, which essentially have no economic returns, from the State resources was not useful (*see Annotation to the draft law No.1621/Lp9 "Insolvency Law", Section II, Para 1*). Insolvency proceedings is a labour intensive and expensive procedure, worth initiating only in those cases, when it brings some returns to main persons involved in the process – creditors of the debtor. Therefore it was decided that the interested persons, wishing the initiation of the insolvency proceedings, should take upon themselves the risk of financing these proceedings (first of all – paying the remuneration of the insolvency administrator) in case, if the debtor has no means (*see: Jauja H. Piezīmes pie jaunā Maksātnespējas likuma. Jurista Vārds, 2011. gada 22. februāris, Nr.8*).

The legislator, likewise, held: the introduction of the Deposit would decrease the number of unfounded applications for insolvency proceedings, which, in its turn, would restrict unfair competition, i.e., when market players use the insolvency proceedings in attempt to hinder normal work of their competitors (*see Annotation to the draft law No.1621/Lp9 "Insolvency Law",*

*Section II, Para 2).*

The Insolvency Administration notes that the aim of the Deposit payment is not only to ensure the course of all insolvency proceedings, guaranteeing the financing needed for it, but also the effectiveness of the insolvency proceedings (of each particular proceedings and the whole insolvency field), so that the society as the result of these proceedings would gain maximum benefit possible (*see Case Materials, pp. 102 – 103*). In addition to that the Saeima emphasizes that the Deposit envisaged by the contested norm performs a certain “filtering” function, allowing to alleviate the work of courts and also the process of insolvency proceedings in general (*see Case Materials, pp. 17 – 18*).

**Thus, the restriction included in the contested norm was laid down to ensure effective process of insolvency proceedings, and its legitimate aim is to protect the rights of other persons.**

**12.** The principle of proportionality requires that rational balance between the interests of the society and persons is respected, if the public power restricts a person’s rights and lawful interests.

To establish, whether the principle of proportionality has been complied with, it must be assessed, whether:

- 1) the means chosen by the legislator is suitable for reaching the legitimate aim,
- 2) no more lenient means exist for reaching this aim;
- 3) the benefit gained by society is greater than the damage caused to an individual’s rights and lawful interests.

If, in assessing the legal norm, it is recognised that it is incompatible with even one of these criteria, then the norm is incompatible with the principle of proportionality and is unlawful (*see Judgement of 19 March 2002 by the Constitutional Court in Case No. 2001-12-01, Para 3.1. of the Findings*).

**13.** The legislator has set the payment of the Deposit in the amount of two minimum monthly salaries, i.e., 400 LVL, as the means for reaching the legitimate aim.

**13.1.** It ensures covering the costs of the insolvency proceedings of a legal person, if the debtor has no resources. Thus the market itself funds insolvency proceedings and the State does not have to spend its resources to ensure it. The regulation included in the contested norms promotes private initiative in this field and restricts the State's involvement in the private law relations.

**13.2.** The introduction of the Deposit stimulates creditors' actions. In order to regain as much money as possible within the framework of insolvency proceedings, it is important to start these proceedings as soon as possible. The applicant risks the Deposit, therefore is interested in submitting the application as soon as possible, without waiting for months or even years for the debtor to pay. If the debtor has sufficient resources, the Deposit shall be repaid to the applicant.

**13.3.** The debtor's representatives, in their turn, whose duty, as set out by law, is in case of debtor's insolvency to turn to court with an insolvency application, have all the possibilities to control and estimate the financial status of the debtor. Taking into consideration the obligation set out in Section 60(3) of Insolvency Law to submit insolvency application, the debtor's representatives should act in due time, i.e., at the moment when the debtor has at its disposal this necessary sum of money. If this moment is missed, the lack of money does not release the debtor's representatives from the liability set out by law for not submitting the insolvency application. For the debtor's representative not to be made liable, he has only one possibility – to submit the application, paying the Deposit from his own personal resources.

The competent institutions, consistently abiding by this logic in practice and calling the debtor's representatives to liability, can ensure real additional impetus for timely submission of the debtor's insolvency application (*see: Jauja H. Piezīmes pie jaunā Maksātnespējas likuma. Jurista Vārds, 2011. gada*

22. februāris, Nr.8).

**13.4.** The Deposit also ensures that the inactive and insolvent companies are liquidated in the framework of simple liquidation procedure, not the insolvency proceedings. The applicant itself decides, whether it is worth risking the Deposit and submitting the insolvency application. The legislator has presumed that the applicants will pay the Deposit only when being convinced that the debtor has resources to be recovered through insolvency proceedings.

**14.** Since the payment of Deposit upon submitting an application for insolvency is an appropriate means for reaching the legitimate aim, it must be established, whether it is also the most lenient measure.

**14.1.** The Saeima holds that there are no other means that would be as effective and impose restrictions to the fundamental rights that would be less acutely felt. The Civil Procedure Law envisages sufficiently effective judicial remedies for the employees, so that they would be able to recover their claim for remunerations.

One of the ways, in which an employee can recover the unpaid remuneration for work is the use the compulsory execution of obligations in accordance with warning procedure envisaged in Chapter 50<sup>1</sup> of the Civil Procedure Law. The person, who has concrete claim, funded upon documents, against the debtor, requests the court to warn this debtor to meet the obligations voluntarily, and, if the debtor has not submitted objections or paid the debt within 14 days, the judge shall make a decision on the compulsory execution of obligations.

The Saeima notes that the employee does not have to pay for submitting the claim for compulsory execution of obligations in accordance with warning procedure to recover the remuneration for work. I.e., Para 1 of Section 43(1) of the Civil Procedure Law envisages that the plaintiffs in claims for recovery of remuneration for work and other claims of employees arising from legal employment relations or related to such shall be exempt from payment of court costs.

The second way, in which an employee can recover the unpaid remuneration, is to use the procedure for legal proceedings, envisaged in Division Four of the Civil Procedure Law. I.e., if the debtor after receipt of the warning has objected to the validity of the claim, the employee has the right to submit a claim according to the general procedure for legal proceedings. Also in this case the legislator has released the employee from paying the court costs into the State revenue.

Thus, the legislator has envisaged at least two types of judicial remedies for the employees, whose employer has not paid the envisaged remuneration for work, in both cases employees are released from paying the court costs.

In accordance with Para 4 of Section 57 and Section 60(3) of the Insolvency Law the debtor (employer) is obliged to submit the insolvency application also in case if it has not paid to employees remuneration for work in full, compensation for damage related to an accident at work or vocational disease or has failed to make the mandatory social insurance contributions within two months from the day set for their payment. Section 166<sup>35</sup> of Latvia's Administrative Violations Code envisages administrative liability for failing to perform this obligation. Thus, in such cases the employee should not at all submit the application for insolvency (and pay the Deposit), as this obligation first of all falls upon the employer.

**14.2.** The examination of the contested norms in the case under review should be performed within the framework of concrete control, i.e., upon a court's application, assessing the concrete situation.

It follows from the application submitted to the Constitutional Court that the employees have used the judicial remedies included in the Civil Procedure Law (*see Para 14.1 of this Judgement*). However, the employees claim for the recovery of remuneration for work even following a court judgement cannot be enforced. Moreover, in the concrete situation the employer itself has not submitted an application for recognition of insolvency.

In a situation like this employees could receive remuneration for work or at least compensation from the Guarantees Fund only if the employer were

declared insolvent. However, in order to submit an application for initiating insolvency proceedings, the employees must pay a Deposit in the amount of 400 LVL. Hence, the judicial remedies for protecting the employees' rights, referred to by the legislator, in some cases cannot be used and employees, to protect their rights, must submit an application to court for recognising the employer insolvent.

**14.3.** The Saeima admits that the amount of the Deposit is sufficiently big, however, it notes at the same time that the employees, wishing to initiate the insolvency proceedings of their employer, have the possibility to unite and submit a joint application for insolvency proceedings. Thus, the financial burden, caused by the Deposit, would be shared proportionally among all employees. Moreover, it is possible to recover the Deposit, if the insolvent person itself can cover the costs of insolvency proceedings.

This argument present by the Saeima is unfounded, since the right to free access to court, enshrined in Article 92 of the Satversme, is an individual, not a collective right. Free access to court is guaranteed to all persons. The persons cannot be imposed the duty to unite, in order to exercise their fundamental right envisaged in Article 92 of the Satversme. Thus, the offered solution cannot be regarded as an effective means for protecting individuals' fundamental rights.

Moreover, the Constitutional Court has already noted previously that an employee's right to initiate insolvency proceedings of the employer cannot be regarded as an effective means for exercising the fundamental social rights of a person. As regards such cases the legislator has neither established a simplified procedure for an employee to protect his rights, nor has released him from the payment of the State fee envisaged in the Civil Procedure Law or from the obligation to pay the Deposit in the amount of two minimum monthly salaries, envisaged in Section 62(1) of the Insolvency Law (*see Judgement of 19 December 2011 by the Constitutional Court in Case No.2011-03-01, Para 30*).

**Thus, the solution chosen by the legislator cannot be recognised as the most lenient means for restricting fundamental rights.**

15. The Applicant notes that more lenient means for reaching the legitimate aim would be granting the right to court to assess the material status of applicants on case by case basis and to decide on decreasing the amount of the Deposit or releasing from its payment, similarly to the procedure set out in regulatory enactments on the payment of state fees and security in the framework of civil procedure.

In selecting the most lenient means it must be taken into consideration that the obligation to make various payments as a restriction to a persons right to free access to court is admissible only if it is not an obstacle, depriving of the fundamental right to free access to court. Neither the Insolvency Law, nor the Civil Procedure Law envisages decreasing the amount of the Deposit or releasing a person from its payment.

Even though the Deposit for ensuring the insolvency proceedings and the State fee or security in the framework of judicial proceedings are two different institutions, introduced for different purposes, nevertheless their impact upon a person's free access to court in the context of proportionality principle is to be assessed similarly. In similar cases the Constitutional Court has concluded that the legislator, failing to envisage a mechanism allowing to release poor persons fully or partially from the obligation to make a concrete payment in order to access court, has fully deprived these persons from the possibility to exercise the right to fair trial (*see, Judgement of 14 March 2006 by the Constitutional Court in Case No. 2005-18-01, Para 17 and Judgement of 20 November 2008 in Case No. 2008-07-01, Para 11.2*).

Also in the case under review the protection of persons' lawful rights depend upon their financial possibilities. Envisaging a concrete payment – the Deposit, to initiate legal proceedings on the insolvency of a legal person, the legislator had to envisage the possibility to protect one's interests in fair court also to persons without such financial means.

Moreover, it must be taken into consideration that employees are regarded as socially the weakest persons and persons in need of additional special help. It follows from the regulation on legal labour relations that one of

the parties – the employee – is an economically weaker positions (*compare to Judgement of 13 March 2001 by the Constitutional Court in Case No. 2000-08-0109, the Findings, and Judgement of 17 January 2005 in Case No. 2004-10-01 Para 9*).

The legislator has already envisaged a number of mechanisms for protecting the employees' rights. For example, the plaintiffs in claims regarding recovery of remuneration for work and in other claims arising from or connected to legal labour relations are released from paying the court costs into the State revenue. Section 118(2) of the Insolvency Law, likewise, sets out that the employees are a special and priority group of creditors within the framework of insolvency proceedings.

The legislator, adopting the contested norms, has failed to assess sufficiently the protection of employees' rights and has failed to ensure the possibility to exercise the right to fair court independently of a person's financial status.

**Thus, the contested norms are incompatible with the principle of proportionality and do not comply with the first sentence of Article 92 of the Satversme.**

### **The Substantive Part**

Pursuant to Section 30 – 32 of the Constitutional Court Law the Constitutional Court

**held :**

**to recognise the norms of Section 62(1) of the Insolvency Law and Section 363<sup>2</sup> (2) of the Civil Procedure Law, insofar as these apply to employees, the only legal remedy of whom is declaration of the employer**

**insolvent, incompatible with the first sentence of Article 92 of the Satversme of the Republic of Latvia.**

The Judgement is final and not subject to appeal

The Judgement comes into force as of the day of its pronouncement.

The Presiding Judge

G. Kūtris