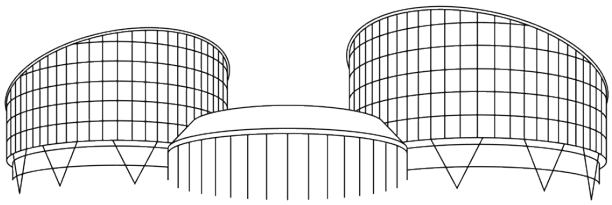

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

CASE OF KULIŚ AND RÓŻYCKI v. POLAND

(Application no. 27209/03)

JUDGMENT

STRASBOURG

6 October 2009

FINAL

06/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kuliś and Różycki v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 15 September 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 27209/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Polish nationals, Mr Mirosław Kuliś, and Mr Piotr Różycki ("the applicants"), on 10 June 2003. The second applicant died in 2004.

2. The applicants were represented by Mrs A. Wyrozumska, Professor of Law at the University of Łódź. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged a breach of their right to freedom of expression guaranteed by Article 10 of the Convention.

4. On 4 April 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1956 and 1946 respectively. The first applicant lives in Łódź.

6. The first applicant owns a publishing house named "Westa Druk" which publishes a weekly magazine, *Angora*, and its supplement for children, *Angorka*. The second applicant was the editor in chief of the magazine.

7. On 16 May 1999 *Angorka* published an article referring to an advertising campaign by a company, Star Foods, for its potato crisps. On the first page of the magazine there was a cartoon showing a boy holding a packet, with the name "Star Foods" on it, saying to *Reksio* – a little dog, a popular cartoon character for children – "Don't worry! I would be a murderer too if I ate this muck!" ("*Nie martw się – też bym był mordercą, gdybym jadł to świństwo!"*). Above the cartoon, there was a large heading reading "Polish children shocked by crisps advertisement, 'Reksio is a murderer' (*Reksio to morderca*)".

8. The article, printed on the second page of the magazine, read as follows:

> "Recently in Star Foods crisps [packets] stickers appeared which terrified parents and their children: 'Reksio is a murderer'.
>
> In the [packets of] crisps from the company Star Foods, which are stocked on the shelves of almost all shops, stickers appeared recently which terrified parents and children. In the packets there are little pieces of paper bearing the slogan: "Reksio is a murderer".
>
> Before the stickers appeared in the packets of crisps the company ordered a market study. One of the advertising agencies proposed slogans and sayings used every day by teenagers. Children, however, are terrified by those slogans.
>
> ...
>
> Prepared following 'the Super Express'"

9. The above quoted article on the second page was accompanied by a small cartoon featuring two cats holding a packet with the word "crisps" on it and the dog *Reksio* in the background. One cat holds a piece of paper with the slogan "Reksio murderer" apparently taken out from the packet and says to the second cat - "surely, he is sometimes unpleasant, but a murderer?!" (*"Owszem, nieraz bywa przykry, ale żeby od razu mordercą?!")*.

10. On 2 November 1999 Star Foods ("the plaintiff") lodged against both applicants a civil claim for protection of personal rights. The company sought an order requiring the defendants to publish an apology in *Angora* and *Angorka* for publishing a cartoon discrediting, without any justification, Star Foods products. They further sought reimbursement of their legal costs and payment by the applicants of 10,000 Polish zlotys (PLN) to a charity.

11. On 28 May 2001 the Łódź Regional Court (*Sąd Okręgowy*) found for the plaintiff. The court ordered the applicants to publish apologies as sought in the statement of claim and to pay PLN 10,000 to a charity. The applicants were also ordered to pay the plaintiffs PLN 11,500 to reimburse the costs of the proceedings. The court considered that the cartoon in question had breached the personal rights of the plaintiff and discredited the products of the company. The words used by the applicants had an unambiguous meaning relating to disgust and repulsion and were strongly pejorative. Accordingly, the court concluded that the applicants had overstepped the threshold of permissible criticism, in particular in a magazine aimed at children. The court dismissed the applicants' arguments that the cartoon had aimed to criticise the advertising campaign run by Star Foods and not their product. It considered that such an attack on the plaintiff's personal rights could not have been justified even by the argument that their campaign was ill-considered.

12. The applicants appealed against the judgment.

13. On 21 March 2002 the Łódź Court of Appeal dismissed the appeal and ordered the applicants to pay the plaintiffs PLN 2,500 to reimburse the costs of the appellate proceedings. It agreed with the lower court's assessment that the critical statement had not concerned the style of advertisement adopted by Star Foods. Calling the product of the company "muck" was surely not a critical assessment of their advertising campaign but had been aimed at the product, the brand, and the good name of the company. The statement in question "I would be a murderer too if I ate this muck" contained an obviously negative assessment of the taste and quality of the product. Thus, the applicants' action aimed to discredit, without justified grounds, the product of Star Foods and as such could not enjoy the benefit of legal protection. The appellate court also observed that the applicants had repeatedly relied on the interests of children to justify their actions, while they themselves had repeated, in the supplement for children, the slogan that in their opinion had had a negative impact on children's emotions and had terrified them.

14. On 12 December 2002 the Supreme Court refused to examine the cassation appeal lodged by the applicants.

II. RELEVANT DOMESTIC LAW

15. Article 23 of the Civil Code contains a non-exhaustive list of the rights known as "personal rights" (*dobra osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, reputation (*cześć*), freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic work, [as well as] inventions and improvements shall be protected by the civil law regardless of the protection laid down in other legal provisions."

16. Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. According to that provision, a person facing the danger of an infringement may demand that the prospective perpetrator refrain from the wrongful activity, unless it is not unlawful. Where an infringement has taken place, the person affected may, *inter alia*, request that the wrongdoer make a relevant statement in an appropriate form, or claim just satisfaction from him/her. If an infringement of a personal right causes financial loss, the person concerned may seek damages.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicants complained of a breach of Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

18. The Government contested that argument.

A. Admissibility

19. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

20. The applicants submitted that the interference with their right to freedom of expression had not been necessary in a democratic society as it had not been justified by a pressing social need. They maintained that what was at stake in the present case was not purely commercial interests but participation in a general debate. In such cases the existence of particularly strong reasons for restricting the freedom of the press in a democratic society was necessary and the national margin of appreciation was limited.

21. The applicants argued that the cartoon in question had to be examined in the full context in which it had been published. It was one of two cartoons referring to the advertising campaign run by Star Foods and was accompanied by the heading "Polish children shocked by crisps advertisement..." and a clear indication that the details could be found in the article on the second page. The applicants stressed that the slogan "Reksio is a murderer", on which they had based the cartoon in question, had been only one example – of a mild nature in comparison to others – of highly inappropriate phrases which had been used in the campaign directed at children. Others alluded to sexual behaviour and alcohol drinking or were of a racist and chauvinistic nature. Examples of other slogans included: "I'm pretty but not easy ("*Jestem ładna ale nie łatwa*"), "Where are the panties?" ("*Gdzie są majtki*?"), "You fool! I multiply with ease" (*Ty baranie!, łatwo się rozmnażam*!"), "Entertain me" ("*Rozerwij mnie*"), "Stick with me" ("*Przyklej się*"), "I can't on Saturday" ("*W sobote nie mogę*"), "Drink Your Highness" ("*Pij Waść*!"), "Don't drink alone (to the mirror)" ("*Nie pij do lustra*"), "100 years behind Blacks" ("*Sto lat za murzynami*"; meaning to be backward), "Poles – go farming" ("*Polacy na pole*"), "People to Zoo" ("*Ludzie do Zoo*").

The inappropriateness of such a campaign had been clearly a matter of public interest and the subject had been raised by some newspapers. Thus the applicants had been justified in joining this debate.

22. The applicants submitted that the cartoon had been a satirical commentary on the article and disagreed that it had obviously attacked the good name of the product. They maintained that they had not been interested in criticising the quality of the product. Ultimately, the use of such wording was a consequence of employing a simplified and satirical form of expression as the publication had been addressed to children. Admittedly, they had used provocative and inelegant language and the journalistic form had been exaggerated; nevertheless, the cartoon remained within the limits of acceptable criticism which should be allowed in a democratic society.

23. The applicants also considered that the plaintiff company had not incurred any material damage, and even if the good name of the company had suffered it had been more as a consequence of the ill-considered advertising campaign than their publication. The applicants concluded that the reasons adduced by the domestic authorities had not been relevant or sufficient to show that the resulting judicial decision had been necessary in a democratic society. The domestic courts had failed to achieve a balance between the two interests at stake – that of the freedom of the press and protection of the reputation of the company.

24. The Government admitted that the penalty imposed on the applicants had amounted to an "interference" with their right to freedom of expression. However, they submitted that the interference was "prescribed by law" and pursued a legitimate aim as it was intended to protect the reputation and rights of others.

25. The Government argued that the applicants had overstepped the boundaries of what is protected by Article 10 and breached the plaintiff company's personal rights. The domestic courts' reaction was thus legitimate and necessary in a democratic society as they were responding to a "pressing social need" to protect the rights of Star Foods. Moreover, the courts had fairly assessed the relevant facts and ordered a moderate penalty.

26. The Government submitted that while the text published by the applicants concerned the advertising campaign, the cartoon on the front page of the magazine referred exclusively to the product of Star Foods. The applicants, in the cartoon under consideration, had not directed their exaggerated criticism at the advertising campaign but at the product itself clearly stating that crisps produced by Star Foods were "muck". They considered that the cartoon sent an obvious message to the readers – children – "that they should keep away from the products referred to in such critical and derogatory language". The applicants had discredited the potato crisps produced by the company without providing any valid reason for doing so and had failed to provide any factual basis which could support their value judgment regarding the product.

27. The Government concluded that the interference complained of had been proportionate to the legitimate aim pursued and thus necessary in a democratic society to protect the reputation of others. They submitted that there had been no violation of Article 10 of the Convention.

2. The Court's assessment

(a) General principles

28. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable

not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, § 57, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

29. There is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV).

No doubt Article 10 § 2 enables the reputation of others – that is to say, of all individuals – to be protected; but the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues (see *Lingens v. Austria*, cited above, § 42).

30. The pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, *inter alia*, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 43). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38).

31. Although freedom of expression may be subject to exceptions they "must be narrowly interpreted" and the necessity for any restrictions "must be convincingly established" (see the above-mentioned Observer *and* Guardian judgment, p. 30, § 59).

Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 47, and *Feldek v. Slovakia*, no. 29032/95, § 78, ECHR 2001-VIII).

32. One factor of particular importance is the distinction between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. A requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the

right secured by Article 10. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment may be excessive where there is no factual basis to support it (see *Turhan v. Turkey*, no. 48176/99, § 24, 19 May 2005, and *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II).

33. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, pp. 25-26, § 52, and *Jerusalem v. Austria*, cited above, § 33).

(b) Application of the general principles to the present case

34. The Court notes that it is undisputed that the civil proceedings against the applicants amounted to an "interference" with the exercise of their right to freedom of expression. The Court also finds, and the parties agreed on this point, that the interference complained of was prescribed by law, namely Articles 23 and 24 of the Civil Code, and was intended to pursue a legitimate aim referred to in Article 10 § 2 of the Convention, namely to protect "the reputation or rights of others". Thus the only point at issue is whether the interference was "necessary in a democratic society" to achieve such aims.

35. At the outset the Court notes that the plaintiff in the present case was a private company which has a right to defend itself against defamatory allegations. In addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II).

36. However, the Court considers that the facts of the case differ substantially from the *Steel and Morris* case cited above, which concerned serious defamatory allegations against McDonalds. The applicants in the instant case had published in a magazine addressed to children two cartoons accompanied by an article about an advertising campaign launched by the

company producing crisps. The domestic courts found that they had breached the company's personal rights by employing in one of the cartoons the word "muck" which had been considered as aimed at discrediting, without justification, the product of Star Foods.

37. The Court firstly notes that, in the domestic proceedings, and in their submissions before the Court, the applicants argued that the publication had contributed to a public debate on the question of the ill-considered and harmful advertising campaign conducted by Star Foods. The Court considers that the domestic courts did not give sufficient attention to the applicants' argument that the satirical cartoon had been a riposte to, in the applicants' view, an unacceptable advertising campaign conducted by Star Foods and targeted at young children. The campaign used slogans referring not only to the *Reksio* character, but also to sexual and cultural behaviour, in a manner scarcely appropriate for children – the intended market segment. This clearly raises issues which are of interest and importance for the public.

The applicants' publication therefore concerned a sphere in which restrictions on freedom of expression are to be strictly construed. Accordingly, the Court must exercise caution when the measures taken by the national authorities are such as to dissuade the press from taking part in the discussion of matters of public interest (see *Standard Verlags GmbH v. Austria*, no. 13071/03, § 49, 2 November 2006).

38. Secondly, the Court considers that the subject of the instant case is not a defamatory statement of fact but a value judgment – as submitted by the Government. Moreover, the publication in question constituted a satirical denouncement of the company and its advertising campaign in the form of a cartoon. The Court observes that the cartoon in question was accompanied by a large heading referring to "a shocking advertising campaign" and an article on the second page reporting on the Star Foods campaign. The cartoon itself had been obviously inspired by the company's advertising campaign as it used the *Reksio* character and the slogan which was to be found in the packets of crisps.

Taking the above facts into account the Court finds that the applicants' aim was not primarily to denigrate in the minds of readers the quality of the crisps but to raise awareness of the type of slogans used by the plaintiff company and the unacceptability of such tactics to generate sales.

39. The Court finally considers that the domestic courts failed to have regard to the fact that the press had a duty to impart information and ideas on matters of public interest and in so doing to have possible recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (see *Mamère v. France*, no. 12697/03, § 25, ECHR 2006-..., and *Dąbrowski v. Poland*, no. 18235/02, § 35, 19 December 2006).

The wording employed by the applicants had been exaggerated; however, they were reacting to slogans used in the plaintiff's advertising campaign which also displayed a lack of sensitivity and understanding for the age and vulnerability of the intended consumers of their product, namely children. The Court thus considers that the style of the applicants' expression was motivated by the type of slogans to which they were reacting and, taking into account its context, did not overstep the boundaries permissible to a free press.

In sum, the Court is of the opinion that the reasons adduced by the domestic courts cannot be regarded as relevant and sufficient to justify the interference at issue.

40. Regard being had to the above considerations and in particular to the interest of a democratic society in ensuring and maintaining the freedom of the press on subjects of public interest, the Court concludes that the authorities' reaction towards the applicants' satirical cartoon was disproportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society" "for the protection of the rights of others".

There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The first applicant claimed 24,000 Polish zlotys (PLN), equivalent to 7,200 euros (EUR) at the date on which the claims were submitted, in respect of pecuniary damage. This sum represented PLN 2,500 and PLN 11,500 paid by the applicants to the plaintiff as reimbursement of the costs of the proceedings and PLN 10,000 paid to a charity - as ordered by the domestic courts. The first applicant further claimed interest due on this amount.

As regards non-pecuniary damage, the first applicant claimed EUR 10,000 as compensation for damage caused to his good name as a reliable publisher given the publicly made allegations that he lacked professionalism and diligence.

43. The Government submitted that the final judgment in this case was delivered on 21 March 2001 and the State could not be held responsible for paying interest during a subsequent period of examination of the case by the Court. With regard to non-pecuniary damage, the Government argued that the sum claimed by the applicant was excessive. They invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

44. The Court finds that in the circumstances of the case there is a causal link between the violation found and the alleged pecuniary damage as the first applicant referred to the amount which he was ordered to pay by the domestic courts (see *Busuioc v. Moldova*, no. 61513/00, § 101, 21 December 2004 and *Kulis*, cited above, § 59). The Court awards the first applicant the sum claimed in full, that is EUR 7,200.

45. The Court also accepts that the first applicant also suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the first applicant EUR 3,000 under this head.

B. Costs and expenses

46. The first applicant also claimed PLN 6,270, equivalent to EUR 1,900, for the costs and expenses incurred before the domestic courts which included PLN 1,400 for court fees at the cassation stage and PLN 4,870 for the legal representation of the applicants before the domestic courts. He further claimed PLN 14,000, equivalent to EUR 4,200, for the costs of their representation before the Court.

47. The Government submitted that the costs and expenses should be awarded only in so far as they had been necessarily incurred and in a reasonable amount.

48. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court notes that the applicant sufficiently substantiated that these sums had been actually and necessarily incurred by submitting relevant invoices and other evidence. Regard being had to the information in its possession and the above criteria, the Court allows the first applicant's claim in full and awards him the sum of EUR 6,100 covering costs under all heads.

C. Default interest

49. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
      (i) EUR 7,200 (seven thousand two hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 6,100 (six thousand one hundred euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Nicolas Bratza President