

Litigation to execution in legal labour relationships. Study case

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Abstract

Enforced execution is the legal way by which the Creditor under an enforceable order protects his rights by resorting to coercive force of the state. When the Debtor does not comply voluntarily, the Creditor may appeal to the Bailiff to commence the enforced execution in all manner prescribed by law. Of course, the start of compulsory execution is limited by the conditions of admissibility imperatively specified in the law, principally the condition to exist an enforceable order owned by the Creditor. Regarding the order to be enforced, it can be represented either by an enforceable or final judgement, with provisional enforcement or any other document that can be enforced. Procedurally, the provisions of Art.712 of the Civil Procedure Code allow the introduction by a Creditor who has a litigation to execution against the execution itself, against the Closures issued by the Bailiff, and against any other act of enforcement. Jurisdiction of the Court in this matter will be of the Executor Court or the Court in whose district the Debtor is situated, on the date of the appeal. The appeal of the Debtor questions the Parties not only over the acts of execution because the appeal is also allowed over the explanations relative to the meaning, scope or application of the enforceable order, but in the conditions limited by the legal nature of this order. Thus, according to the law when enforceable order is not issued by a Court or Arbitration may be invoked before an Executor Court including reasons of fact or law which could not be discussed during an earlier trial, in the first instance or in an appeal. Basically, if enforced execution is under an enforceable order that is not from a Court, these reasons can be invoked when there is no other processual mean for its abolition. There also can be submitted a complaint against the Closure by which was upheld the appeal for an enforced execution, and the act of execution concerning the division of the common property or common goods. For the purposes of the foregoing ideas, the article details the mean of introduction the execution appeal for recovery of emoluments arising from a legal labour relationship. Creditor's debt is represented by the financial rights related to the management function held in a public institution. Regarding the enforcement order it is the Decision of the Appeal Court by which the Debtor public institution is obliged to cover the material damage suffered by the Creditor civil servant, starting from the time of his dismissal from the management function until effectively reintegration on the same position. There are analysed the Debtor's appeals requesting the annulment of execution acts issued by the Bailiff, and the execution itself, the appeal motivation, the defences of the parties in fact and in law, and the role of the Court during the course of the procedure.

Keywords: *emoluments, execution, appeal, public function, labour relationship.*

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1. Introduction

Under the law, the enforced execution ensures the guarantee of legitimate interests² of both individuals and legal entities, Creditor's appeal aiming to execution appeal being resolved after public debate and contradictory case to the Court.

Procedurally, the commencement of enforced execution comes following the issue by Executor Court at the request of the Bailiff, of a Closure of enforceability. The Execution Closure shall be sent to the Debtor, together with the notice, the Closures of the Bailiff, and a copy of the execution order in the case.

Starting the execution procedures does not limit the right of Parties, namely the Creditor and Debtor, to agree that the execution to be done on certain goods subject to prosecution. As forms of recovery of debt, we have in mind both direct execution which aims to get in nature the debt stated in the enforceable order, as well as indirect, i.e. recovery of due amounts by sale in public auction or by seizure of the Debtor's assets.

Moreover, one can observe that, throughout the execution, the active role of Bailiff is determinant in the procedure's achievement; he/she may ask for clarification in writing to the Parties, but with the respect of their rights and of other interested persons. As participants in the execution procedure we regard, in accordance with Art. 644 of the Civil Procedure Code, the Creditor, the Debtor, third party guarantors, the interveners lenders, the Executor Court, the Bailiff, the Public Ministry, the public agents of security force, assistant witnesses, experts and interpreters.

In terms of implementation arrangements, failing agreement between Parties on the goods subject to prosecution by the theft of goods from executing allow expansion of the execution. Thus, the enforced execution will consider pursuing both movable and immovable property of the Debtor, and those belonging to third parties held liable³ for the Debtor.

If, at the request of the interested Party is shown that the prescription intervened⁴, which extinguishes the right to obtain enforced execution in terms of Debtor opportunities to apply not the procedure, except in cases related to the cessation of execution when it is integrally realized the obligation under the execution order, we consider the admission of introduced execution appeal.

2. The appeal to the forcible execution

Civil Procedure Code disposes in the content of Art.712 that against the execution⁵, the Closures given by the Bailiff, and against any execution act can be made appeal by interested or harmed Party by enforced execution.

² Savelly Z., Ciobanu V., *Tratat de executare silită*, Lumina lex, Bucharest, 2001, p. 24.

³ Stătescu C., Bîrsan C., *Drept civil. Teoria generală a obligațiilor*, All Beck, Bucharest, 2000, p. 307.

⁴ Stoica C., *Dreptul afacerilor. Contracte*, ASE, Bucharest, 2012, p. 82.

⁵ Zilberstein S., *op. cit.*, p. 250.

Under the law the appeal concerns both the effects of enforcement acts issued by the Bailiff and clarifications relative to the meaning, scope or application of the execution order, enforceability, and the division of property in joint ownership or joint property.

Expanding the jurisdiction of the Executor Court over the execution order may be admissible when it was not issued by a Judicial or Arbitration Court. As a result, if the enforced execution is done under such an execution order, there can be invoked reasons of fact or law concerning the law grounds, but only when no other remedy for its abolition exists.

At one hand, the admissibility conditions of the appeal are limiting; it is not permissible when the applicant does not claim aspects that can be submitted to the control in this way. It is therefore considered that, failing to communicate the execution order that underlies the enforced execution, and the failure of summons procedure in the basic judgement may not be subject to execution appeal nor part of the enforcement acts, the ordinary or extraordinary means to review of the issued judgment being vacated for the Debtor usage. On the other hand, if the Party against which started the execution does not have access to ordinary appeal, not because of their own fault but the existence of a procedural defect based on the judgement that runs the appeal procedure will be allowed.

All these reasons are related to mandatory legal requirement that this remedy of execution appeal to look to implement the execution measures within the meaning of illegality and not substantive reasons which could be relied upon in a previous Court case.

Likewise, regarding the application over the execution order of the provisions of Article 174 of the Civil Procedure Code, and in this case the application is inadmissible because by execution appeal cannot be requested the execution of execution order itself.

Admission of execution appeal followed by the abolition of the execution order or enforced execution itself gives the interested Party the right to ask the return of execution⁶ and restore the previous situation.

3. Case Study. Emoluments due to the employee

In fact, by Decision of the Appeal Court the Debtor has to pay to the complainant Creditor the emoluments related to management positions held in the Interim Steering Committee of the public institution employer⁷, also requested by the Syndicate⁸, starting with the date of dismissal and until the date of effective reintegration. From studying the concerned documents, particularly the Decision mentioned above, it does not appear the date of the actual reintegration, as there is not a determined period for which is possible a conclusive calculation. In this case, the amount of emoluments is stated in an extrajudicial accounting expertise,

⁶ Semenescu C., *Executare silită*, Nicora M, Bucharest, 2002, p. 51.

⁷ Dorneanu V., *Dreptul muncii. Partea generală.*, Universul Juridic, Bucharest, 2012, p. 16.

⁸ Ținca O., *Dreptul muncii. Relațiile colective*, Lumina Lex, Bucharest, 2004, p. 3.

ascertaining the compliance with the duties of public servants corresponding to the public function⁹, and the powers that were delegated to them.

As defendant recognizes, at the start date of foreclosure, he was not reinstated in his function, as the reintegration was done later, after the emission of Civil Decision dismissing as unfounded the Review Demand introduced afterwards by the Debtor against the enforcement execution. Thus, against the decision of the Appeal Court, the Debtor filed an application for review and suspension of foreclosure.

During the review action was analysed by the Appeal Court, the Creditor has submitted to the Bailiff's Office his application for forced tracking in all forms provided by law against the Debtor, based on the enforcement order, namely the rendered Decision of the Appeal Court.

We envisage that the Creditor dismissal has not also provided the imposition of a disciplinary sanction¹⁰, and was not qualified as disproportionate to the internal regulation of the employer¹¹ and that occur without the discrimination¹² against the employee. He has not gave any statement¹³ previously his dismissal from the held management function.

Following the appeal of the Creditor, the Bailiff's Office has drawn the Closures as enforcement acts, but without complying with the provisions of Law no.134/2010 - Civil Procedure Code.

The Debtor has introduced appeal to the execution against the Closures issued by the Bailiff in the procedure of enforceable execution, summons, but also against the execution itself, seeking the annulment of the entire procedure.

4. Suspending the execution

Pursuant to Art. 719 Para 1 of the Civil Procedure Code, the suspending of enforceable execution in question was motivated by the following:

a) The Bailiff issued Closures without considering the fact that Law no. 134/ 2010 (Civil Procedure Code) was amended by Law No. 138/15.10.2014, and under Art. XIV of the same law, the Law no.134/2010 was republished in the Official Monitor No. 247/04.10.2015 and, by reprinting, the texts invoked in the three Closures do not correspond with the new articles, attracting cancellation of execution itself.

b) By the dispositive of the Civil Decision, the Debtor is liable for the payment of emoluments from the date of Creditor dismissal until the date of effective reintegration. Regarding the reintegration, from the filed documents

⁹ Iorgovan A., *Tratat de drept administrativ*, All Beck, Bucharest, 2005, p. 361.

¹⁰ Țiclea A., *Tratat de dreptul muncii*, Universul Juridic, Bucharest, 2015, p. 835.

¹¹ Ghimpu S., Țiclea A., *Dreptul muncii*, All Beck, Bucharest, p. 562.

¹² Muscalu L.M., *Discriminarea în relațiile de muncă*, Hamangiu, Bucharest, 2015, p. 137.

¹³ Dumitriu R., *Contractul individual de muncă, prezent și perspective*, Tribuna Economică, Bucharest, 2005, p. 327.

results that the date of effective reintegration of the Creditor public servant is not specified, recalling the following:

1. The Creditor was appointed by the Internal Decision of the employer and not of the Debtor;
2. The employer signed the Additional Act to the Individual Employment Contract, whereby the parties agreed modification of the function;
3. The Individual Employment Contract of the Creditor was not suspended as a result of the employer decision, but the function was changed, therefore it continued to produce effects nevertheless the function was different;
4. Based on the Decision of employer's manager, there was decided the reappointment of the Creditor, mentioning the base salary and a bonus;
5. By Additional Act to the Individual Employment Contract, the Parties agreed to preserve the function of medical director, with the maintenance of monthly base salary and the completion of granted bonuses;
6. Documents submitted by the employer also contain the Debtor Order issued to extend the appointment of Interim Steering Committee of the service. From the succession of documents submitted by employer does not follow any subsequent act to this provision, and therefore the Individual Employment Contract of the Creditor is still in force;
7. Also by Additional Act to the Individual Employment Contract, the Parties agreed to preserve the function, the modification of the monthly base salary and granted bonuses;
8. Subsequently, the Parties have agreed by the Additional Act to the Individual Employment Contract to modify the function and grant bonuses.
9. The Debtor Order whose annulment was requested by Creditor in the Court remains without object since there was not a fulfilment of the Order's provisions relating to the termination of his appointment.

In these conditions it is observed that the integration in function was done by the employer, such the reintegration cannot be achieved but by the same employer and not by the Debtor. The employer has not communicated yet if the reintegration in the function was done and neither the manner of its achievement.

5. Issues debated on the case

The defendant Creditor raised an objection on the lateness of the introduced execution appeal. In this regard, the summons issued by the Bailiff in the execution file was recorded to the Creditor accompanied by the Closures issued by the Bailiff. Subsequently, the Creditor filed an enforcement appeal in legal term within 15 days, according to Art.715 Para 2 of Civil Procedure Code, sent by mail with return receipt and registered to the Court.

Concerning the right to introduce appeal related to the execution within 5 days from the notification, provisioned in the Closure issued by the executor, it appears that by Law No.138/15.10.2014 published in Official Monitor No. 753/16.10.2014, Art.714 Para 2 of Law No.134/2010 on Civil Procedure Code is

modified in the sense that these contestations against the Bailiff Closures can be made within 15 days from notice. As a result, the action was brought within the statutory period and, consequently, that objection cannot be accepted.

The second element of execution appeal regarded the justification in fact of the execution acts issued by the Bailiff. In this respect, namely the Civil Procedure Code was amended and supplemented by Law No. 138/15.10.2014, published in the Official Monitor No. 753/16.10.2014. Following the amendments and additions, the Civil Procedure Code was republished under Art. XIV of Law No. 138/2014 in the Official Monitor No. 247/10.04.2015, the texts of law were newly numbered.

By republishing the Law, the provisions of Art. 662 and Art. 663 in conjunction with provisions of Art. 730 and following, Art. 780 and following, Art. 812 and following, invoked by the executor in the issued Closure, can be found in the law republished in Art. 664, Art. 731 and following, Art. 781 and following, Art. 813 and following.

For example, Art. 662 alleged by the executor, as legal basis under which it is accepted the application filed by the Creditor, after the republishing and renumber it refers to the rights and duties of witnesses. The same situation is for the other articles mentioned above, resulting that on the finalization date of the Closure, the Bailiff did not take into account the changes and additions to the Law No. 138/15.10.2015.

Another complaint concerned the view that, by the same Closure, the Bailiff said that the Creditor motivated his appeal showing that the Debtor has not made willingly obligations established in the execution title, namely the reintegration to the function held within the Interim Steering Board of the Debtor and the recovery of emoluments related to the management function held from the date of his dismissal and until the date of effective reintegration. The amount of those emoluments was evaluated by the Bailiff according to a report of extrajudicial accounting expertise, and will be updated with the inflation rate, which will be added the costs of enforcement and executor's fees.

On the case, it was found that the date of drafting the contested Closure, the executor is not in possession of the report of extrajudicial accounting expertise prepared by the accountant expert, and was previously registered with the Bailiff previously the Closure. The situation was confirmed by the Bailiff who mentioned as annexes to Closure only certain documents, namely the original appeal for enforceable execution and original executory title. Therefore, it results in no doubt as to the date of drawing Closure, the executor is not in possession of extrajudicial accounting expertise and thus no proof for the means of calculation, and fixed amount.

At one hand, regarding the Extrajudicial Accounting Expertise, the Debtor asked the Court to record that it is not established as evidence in Court and was upheld in resolving disputes amicably.

On the other hand, according to Art.663 of the Civil Procedure Code, enforced execution cannot be done unless the debt is certain, liquid and due, so

when the very existence of claims arises from the enforcement order, when its object is determined, or when enforcement order contains elements that enable its establishment.

In this respect it is clear that the Decision of the Appeal Court does not provide the amount of the debt, and the Debtor is not the employer of the Creditor, but being in a relationship of coordination with the employer.

In the expertise content is found there are not included in the calculation, the state taxes and fees related to the employer, quality the Debtor does not hold to the Creditor, elements expressly stated in Article 111, Para. 11 of amended Law No. 95/2006.

By the Closure the Bailiff accepts the Creditor appeal to update the sum with the inflation rate in conformity with the inflation indices provided by the Romanian National Bank, thus setting the total amount that is subject to enforced foreclosure.

In addition, by the Closure the Bailiff compels the Debtor to pay the sum representing expenses related to the enforced execution of executory title related to the execution file, but the claimed amount to be paid was not legally calculated for the following reasons:

- a) As mentioned above by the report of extrajudicial accounting expertise, the amount is not correctly and legally set, the debt must be certain, liquid and due by essence, provided that its amount should be taken into account to determine the fee for the expertise.
- b) By reporting the amount mentioned in the Extrajudicial Accounting Expertise to the legislation in force does not turn the same amount to the sum established by the Bailiff as a fee.

The Justice Minister's Order No. 2550/C/14.10.2006 approving the minimum and maximum fees for services provided by Bailiffs approves minimum and maximum fees for services provided by Bailiffs. In Annex 1 modified by Order No. 2561/C/2012 Section 3 "Indirect Executions" (tracking movable and immovable property of debts) are set maximum fees and minimum fees charged by Bailiffs, and the value of calculated executor fees was different from the value stipulated in the Annex to the Order.

Considering the provisions of Art. 670, line a, of the Civil Procedure Code, the executing Court can censure the amounts claimed by Closure as execution expenses.

6. Conclusions

Given that the Closures drawn by the Bailiff's Office did not take into account the fact that Law No.134/2010 (Civil Procedure Code) was amended by Law No. 138/15.10.2014, and under Art. XIV of Law no.138/2014, Law no.134/2010 was republished in the Official Monitor No. 247/ 10.04.2015 and by reprinting the invoked texts do not conform to the new articles, which constitute grounds for nullity.

In terms mentioned above, mentioning in the contents of Closures issued in enforced foreclosure file, since its inception, of legal inapplicable texts (Art. 622, 662, 663 corroborated with Art. 730 et seq., Art. 780 et seq., art. 812 et seq. of Civil Procedure Code), draws nullity of the act.

At one hand, in this regard, however, the provisions of Art. 657 Para (1) Pt. g of the New Civil Procedure Code expressly provide, under penalty of nullity, the provision in the content of that respective Closures specifying the applicable legal grounds, without specifying that nullity is covered by further issuing of other acts in the enforced foreclosure procedure wherein were subsequently mentioned appropriate legal provisions (Art. 663, 632, 633, 656 and 665 of Civil Procedure Code). Thus, as the Bailiff issued the Closures without regard to the provisions of the Civil Procedure Code, the invoked texts do not correspond with the new articles, which is in itself a reason for nullity.

On the other hand, the Decision of the Appeal Court does not set the definite amount of emoluments, and the Extrajudicial Accounting Expertise Report does not constitute an enforcement order in respect of determining the amount, because according to Art. 719 Para 4 Pt. 1 of Civil Procedure Code, the suspending of execution is mandatory and the bail is not necessary if the act is not executory by law.

Thus, in accordance with Art. 628 (2) of New Civil Procedure Code at the date of the Closures drawing, the quantum of due amount should have been calculated directly by the Bailiff, and in regard to a Report of Extrajudicial Accounting Expertise on a partial period, therefore the Court held that thereafter was to be conducted a separate calculation from the one provided in the expertise, this time by the Bailiff.

Regarding how to recover the amounts owed to the Creditor in question, it is to be noted that there are applicable provisions of Government Emergency Ordinance No. 83/2004, which provides in Art. 34 Para 1 that payment of the amounts provided by Court Decisions covering some emoluments established in the favour of the staff in public institutions and authorities, become effective will be done as follows:

- a) In the first year from the date on which the judgment becomes enforceable is charged 5% of the value of executory title;
- b) In the second year from the date on which the judgment becomes enforceable is charged 10% of the value of executory title;
- c) In the third year from the date on which the judgment becomes enforceable is charged 25% of the value of executory title;
- d) In the fourth year from the date on which the judgment becomes enforceable is charged 25% of the value of executory title;
- e) In the fifth year from the date on which the judgment becomes enforceable is charged 35% of the value of executory title.

Besides, how easy is seen for the rights of salary nature established for staff of public institutions and authorities, it cannot be done a single payment, but

shared in five years, in established percentages and to which is applied to the amount provided by the Court Decision.

According to Art. 34, Para. 3 of Government Emergency Ordinance no. 83/2014, during the above mentioned period, any enforced foreclosure procedure is suspended by law, what constitutes a good and legal reason of the suspending appeal brought by the Debtor public institution.

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