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## Constitutional judgment 3-2-1-146-15

### SUPREME COURT EN BANC JUDGMENT

in the name of the Republic of Estonia

<b>Case number</b>	3-2-1-146-15
<b>Date</b>	1 February 2016
<b>Composition of court Chairman</b>	Chairman: Priit Pikamäe; members: Tõnu Anton, Peeter Jerofejev, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Ivo Pilving, Jüri Põld, Paavo Randma, Malle Seppik and Tambet Tampuu
<b>Case</b>	<p>Claimant's action against defendants I–IV to annul a decision of the general meeting of defendant I and establish adoption of a decision with different wording, alternatively to require submission of declarations of intention, to order payment of a dividend in the amount of 4 221 283 euros and 77 cents and penalty for late payment, and alternatively damages in the amount of 1 606 287 euros and penalty for late payment. Applications by claimants I–V for determination of procedural expenses</p>
<b>Contested judicial decision</b>	Tallinn Court of Appeal order of 8 May 2015 in civil case No 2-12-35717
<b>Participants in the proceedings and their representatives in the Supreme Court Claimant</b>	representatives sworn advocates Allar Jõks and Urmas Volens Defendant I, representative sworn advocate Arne Ots Defendants II–V, representative sworn advocate Raiko Lipstok
<b>Hearing</b>	Written procedure

**OPERATIVE PART**

- 1. To declare unconstitutional and repeal § 178 (3) of the Code of Civil Procedure.**
- 2. To allow the appeal against the order in part.**
- 3. To reverse the Tallinn Court of Appeal order of 8 May 2015 in civil case No 2-12-35717 and remit the case for re-examination to the same Court of Appeal.**
- 4. To refund the sums paid as security for appeals against the order.**

## **FACTS AND COURSE OF PROCEEDINGS**

1. Harju County Court adjudicated the claimant's action against defendant I and defendants II–V to annul point 2 in a decision of the general meeting of defendant I and to establish adoption of a decision with different wording, alternatively to require submission of declarations of intention, to order payment of a dividend in the amount of 4 221 283 euros and 77 cents and penalty for late payment, and alternatively damages in the amount of 1 606 287 euros and penalty for late payment. On 29 October 2014, the Supreme Court by its judgment in civil case No 3-2-1-89-14 ordered the claimant to bear all procedural expenses incurred at all court instances.

2. On 28 November 2014, defendant I filed an application for determination of procedural expenses. According to the list enclosed with the application defendant I had incurred legal expenses in the total amount of 86 186 euros and 77 cents (legal assistance by contractual representative for 458.70 h at an hourly rate of ca 171 euros and 87 cents in the total amount of 78 836 euros and 77 cents, plus the state fee on appeal of 250 euros, security on the appeal of 100 euros, and the cost of obtaining a certificate of 7000 euros). Defendant I requested an order for a penalty for late payment of procedural expenses at the rate established under § 113 (1) of the Law of Obligations Act (LOA) from the entry into force of the court decision to the moment of compensation of expenses.

3. On 28 November 2014, defendants II–V filed an application for determination of procedural expenses. According to the list enclosed with the application they had incurred legal expenses in the total amount of 98 601 euros and 37 cents (legal assistance by contractual representative for 188.67 h at an hourly rate of ca 151 euros and 20 cents in the total amount of 28 526 euros and 35 cents, the cost of obtaining the certificate of 66 615 euros and 60 cents and translation costs of 3459 euros and 42 cents). Defendants II–V requested an order for payment of procedural expenses in the amount of 98 601 euros and 37 cents, so that the claimant would pay to each of defendants II–V one-quarter of the compensated sum. Defendants II–V affirmed that all expenses had been incurred on account of the present civil case and the defendants were not liable to value added tax.

4. On 31 March 2015, Harju County Court delivered a reasoned order on determination of procedural expenses.

5. Harju County Court granted the application by defendant I in part, set the monetary amount of procedural expenses ordered to be compensated to defendant I at 24 620 euros (fee of the contractual representative 17 370 euros, state fee 250 euros, and cost of obtaining a certificate of 7000 euros) and ordered the claimant to pay this sum to defendant I. The County Court also obliged the claimant to pay a penalty for late payment on the sum awarded in favour of defendant I according to the rate set under § 113 (1) (second sentence) of the LOA from the entry into force of the court order to the moment of payment of the procedural expenses.

6. Harju County Court also granted the application by defendants II–V in part and set the monetary amount of procedural expenses ordered to be compensated to defendants II–V at 13 553 euros and 28 cents (fee of the contractual representative) and ordered the claimant to pay this sum to defendants II–V in equal shares. The County Court also granted the request of defendants II–V to establish the procedure for enforcement of the order and obliged the claimant to pay 3388 euros 32 cents to each of defendants II–V.

7. On 15 April 2015, the claimant lodged an appeal against the County Court order, seeking to reduce the procedural expenses ordered from the claimant in favour of defendant I by 11 914 euros and the procedural expenses ordered in favour of defendants II–V by 2589 euros and 12 cents.

**8.** On 16 April 2015, defendant I lodged an appeal against the County Court order, seeking to reverse the County Court order to the extent that it failed to order payment of procedural expenses.

**9.** Defendants II–V contested the County Court order by their appeal lodged on 20 April 2015 and sought to reverse the County Court order to the extent that it failed to order payment of procedural expenses.

**10.** By order of 8 May 2015, Tallinn Court of Appeal upheld the County Court order and dismissed the appeals by the claimant and the defendants. Tallinn Court of Appeal adjudicated the appeals under § 178 (3) (second sentence) of the Code of Civil Procedure (CCivP) with an order not containing a descriptive part and reasoning. The Court of Appeal noted that due to § 178 (3) (third sentence) of the CCivP the order was not subject to appeal.

**11.** The claimant lodged an appeal with the Supreme Court, seeking to reverse the Court of Appeal order and remit the case for re-examination to the same Court of Appeal. Alternatively, the claimant requested that a new order be issued to reduce the procedural expenses ordered from the claimant in favour of defendant I by 11 914 euros and the procedural expenses in favour of defendants II–V by 2589 euros and 12 cents. The claimant asks that § 178 (3) of the CCivP in effect since 1 January 2015 be declared unconstitutional and repealed due to a conflict with § 11, § 24 (5) and § 32 of the Constitution.

**12.** Defendant I lodged an appeal with the Supreme Court, seeking to reverse the Court of Appeal order in its entirety and the County Court order in part (to the extent that it failed to order payment of procedural expenses in favour of defendant I) and to set the amount of procedural expenses of defendant I at 86 186 euros and 77 cents and order the claimant to pay this amount. Defendant I asks that § 178 (3) of the CCivP in effect since 1 January 2015 be declared unconstitutional and repealed due to a conflict with § 11, § 24 (5), § 32 and § 15 of the Constitution. Leaving the discretion to decide over the right of appeal almost entirely with the Court of Appeal infringes the requirement to establish any restrictions under the law, as the courts may not establish restrictions on fundamental rights. § 178 (3) of the CCivP is also contrary to the principle of legal clarity, as it does not provide clear, objective guidelines for the Court of Appeal regarding situations in which the right of appeal should be ensured. It is unclear whether the right of appeal should be ensured every time the Court of Appeal amends a county court judgment. § 178 (3) of the CCivP is also unlawful in terms of substance. Other means exist to ensure procedural economy, e.g. raising the threshold under § 178 (2) of the CCivP. The restriction is neither necessary nor proportionate, and primarily distorts the essence of the right of appeal. The order of the Court of Appeal is also incorrect in substance as it upholds the erroneous order of the County Court.

**13.** Defendants II–V lodged an appeal with the Supreme Court, seeking to reverse the Court of Appeal order in its entirety and the County Court order in part (to the extent that it failed to order payment of procedural expenses in favour of the defendants) and to set the amount of procedural expenses of defendants II–V to be additionally 85 048 euros and 9 cents, i.e. a total of 98 601 euros and 37 cents, and order the claimant to pay this amount. Defendants II–V ask that § 178 (3) of the CCivP in effect since 1 January 2015 be declared unconstitutional and repealed. Defendants II–V agree with the claims contained in the appeal of defendant I concerning the unconstitutionality of § 178 (3) of the CCivP. Moreover, the Court of Appeal and County Court orders are incorrect in substance.

**14.** In the reply to the claimant's appeal, defendant I finds that it is unjustified, except with regard to § 178 (3) of the CCivP. In the reply to the appeal by defendants II–V, defendant I has no objections to it.

**15.** Defendants II–V in their reply to the appeal by the claimant find it to be unjustified, but § 178 (3) of the CCivP to be unconstitutional.

**ORDER OF THE CIVIL CHAMBER**

**16.** In its order of 13 October 2015 the Supreme Court Civil Chamber found that as the adjudication of the case presumed adjudication of an issue to be reviewed under the Constitutional Review Court Procedure Act (CRCPA), the case had to be transferred to the Court *en banc* under § 19 (4) clause 3 and § 690 (1) (first sentence) of the CCivP and § 3 (3) (second sentence) of the CRCPA.

**17.** The Chamber expressed doubt whether the restriction on the right of appeal under § 178 (3) of the CCivP could conflict with the fundamental right to property under § 32 of the Constitution, as well as the right of appeal under § 24 (5), and the fundamental right to equality under § 12 of the Constitution. Allocation of procedural expenses and determination of their monetary amounts interferes with the fundamental right to property of the participants in the proceedings, as this imposes a pecuniary obligation on one of the parties in favour of another party, or is imposed partly or not imposed at all. The determination of procedural expenses also has the characteristics of issuing a final decision in a case at one court instance. In essence it constitutes adjudication of a claim for damages under special regulation.

**18.** Since 1 January 2015 determination of procedural expenses under § 177 (1) clauses 1 and 2 of the CCivP may take place either in the court judgment, or in an order terminating the proceedings, or by a separate order after entry into force of a judgment on adjudication of the merits of a civil matter or an order which terminates the proceedings. If procedural expenses are determined in money in a court judgment, the CCivP does not lay down any restrictions on contesting that judgment in the court of appeal and the Supreme Court. However, if procedural expenses were determined by a separate order and the court of appeal adjudicates an appeal against the county court order by an order not containing reasoning, § 178 (3) (third sentence) of the CCivP restricts the right of appeal to the Supreme Court. Thus, the law may treat persons in a similar situation (i.e. subjects entitled and obligated to payment of procedural expenses) differently depending on the type of order used for determining the procedural expenses.

**19.** In the opinion of the Chamber, the substance of § 178 (3) of the CCivP is not sufficiently clear, leaving the existence of the right of appeal essentially for the court of appeal to decide, so that it might not comply with the requirement to restrict the right of appeal by a simple statutory reservation. In terms of guaranteeing fundamental rights, it is questionable when the law fails to lay down precise criteria for restrictions on fundamental rights. § 178 (3) of the CCivP may conflict with the principle of legal clarity arising from § 13 (2) of the Constitution. Even if considering the wording of the second and third sentence of § 178 (3) understandable, by relying on these norms individuals cannot foresee whether the court of appeal will make an order with or without reasoning, and thus also whether the individual will have the right of appeal against the Court of Appeal order.

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

**20.–50.** [Not translated.]

## **CONTESTED PROVISION**

**51.** § 178 (3) of the CCivP:

„§ 178. Contesting the determination of procedural expenses

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(3) If a provision of procedural law was clearly violated or evidence was clearly incorrectly evaluated in the determination of procedural expenses and this could materially affect the decision, the court of appeal adjudicates an appeal against the order on determination of procedural expenses with a reasoned order. In other cases, the court of appeal may adjudicate an appeal against the order by an order without a descriptive part and reasoning. An order of the court of appeal without the descriptive part and reasoning is not appealable.

[---]."

## OPINION OF THE SUPREME COURT *EN BANC*

**52.** The Court *en banc* will first assess whether § 178 (3) of the CCivP has relevance in the case (I). Then it will deal with interference with fundamental rights arising from the contested provision (II), and assess whether they are compatible with the Constitution (III). Finally, it will adjudicate the appeals against the order (IV).

### I

**53.** Within constitutional review proceedings the Supreme Court reviews the legality of a provision which is relevant for adjudication of the case (§ 14 (2) CRCPA). A provision is relevant if it is of decisive importance for adjudicating the case, i.e. if it is unconstitutional and invalid the court should adjudicate differently than if it is constitutional (Supreme Court opinion since the judgment of the Court *en banc* of 22 December 2000 in case No 3-4-1-10-00, para. 10, and judgment of 28 October 2002 in case No 3-4-1-5-02, para. 15; see also Supreme Court *en banc* order of 30 April 2013 in case No 3-1-1-5-13, para. 19).

**54.** § 178 (3) of the CCivP regulates the right of appeal to the Supreme Court in a situation where a county court has determined the monetary amount of the expenses of civil proceedings separately from a decision on the merits in the case. When issuing a judgment, or an order terminating the proceedings, the court adjudicating a civil case must determine the allocation of procedural expenses between the parties (§ 173 (1) CCivP). Unless this hinders issue of the judgment or an order terminating the proceedings, the county court will determine the monetary amount of the procedural expenses in the judgment or in the order terminating the proceedings (§ 174 (2) CCivP). Otherwise, the county court which adjudicated the merits of the matter determines the monetary amount of procedural expenses in separate proceedings after entry into force of the judgment or of the order terminating the proceedings (§ 177 (1) clause 2 and § 177 (2) CCivP). Under § 178 (3) of the CCivP, it is not possible to lodge an appeal with the Supreme Court against a court of appeal order unsupported by a descriptive part and reasoning by which the court of appeal adjudicated an appeal against a county court order issued under § 177 (2) of the CCivP.

**55.** § 178 (3) is relevant in the present case as it is of decisive importance for adjudicating the case. The Supreme Court *en banc* adjudicates appeals lodged with the Supreme Court against a court of appeal order unsupported by a descriptive part and reasoning by which the court of appeal had adjudicated the appeals against a county court order under § 177 (2) of the CCivP on determination of the monetary amount of procedural expenses.

**56.** If § 178 (3) of the CCivP is compatible with the Constitution and remains in effect, the appeals against the order have been admitted for proceedings erroneously and should be disregarded due to absence of the right of appeal (§ 682 (1) CCivP). If the Supreme Court *en banc* declares § 178 (3) of the CCivP unconstitutional and repeals it, the appeals against the order lodged with the Supreme Court should be reviewed under § 696 (1) (second sentence) of the CCivP.

### II

**57.** By excluding the possibility of lodging an appeal with the Supreme Court against a Court of Appeal order if the order was unsupported by a descriptive part and reasoning, § 178 (3) of the CCivP interferes with the right of appeal guaranteed under § 24 (5) of the Constitution.

**58.** Under § 24 (5) of the Constitution, in accordance with the procedure provided by law, everyone is entitled to appeal a judgment issued in his or her case to a higher court. § 24 (5) of the Constitution guarantees the fundamental procedural right which is part of the general fundamental right to judicial protection and the aim of which is to ensure review of a court decision to avoid errors in court decisions (Supreme Court *en banc* judgment of 14 April 2011 in case No 3-2-1-60-10, para. 45). Any hindrance to access to a higher instance court interferes with the scope of protection of § 24 (5) of the

**59.** The substantive scope of protection of § 24 (5) of the Constitution includes a right of appeal against a decision of the first instance court to the court of appeal, as well as a right of appeal against a court of appeal decision to the Supreme Court (Supreme Court *en banc* judgment of 21 April 2015 in case No 3-2-1-75-14, paras 61–62). The legislator may impose both procedural and substantive restrictions on the right of appeal under the law, excluding the possibility of appeal against certain types of decision for a reason compatible with the Constitution (Supreme Court *en banc* order of 21 April 2015 in case No 3-2-1-75-14, para. 63).

**60.** It is complicated to lodge an appeal with a higher instance court against a judicial decision not containing reasoning. Therefore, both the fact that § 178 (3) of the CCivP does not oblige the court of appeal to provide reasoning in its order, as well as the fact that no appeal to the Supreme Court can be lodged against a court of appeal order unsupported by reasoning, amount to interference with the fundamental rights under § 24 (5) of the Constitution.

**61.** Under § 178 (3) (first sentence) of the CCivP, the court of appeal is obliged to provide reasoning in its order only if in the opinion of the court of appeal the county court has violated a provision of procedural law or clearly incorrectly evaluated evidence in its order on determination of procedural expenses and this could have materially affected the decision. Although this is not immediately obvious from the wording of the provision, interpretation may lead to the conclusion that the court of appeal must provide reasoning in its order if it amends (including reversing) the county court order by which the county court determined the monetary amount of procedural expenses. Under § 178 (3) (second sentence) of the CCivP, in other cases, i.e. when the court of appeal does not amend the county court order, the court of appeal may issue an order without a descriptive part and reasoning.

**62.** In assessing the constitutionality of interference with § 24 (5) of the Constitution, the fact that § 178 (3) of the CCivP also interferes with the fundamental right to liberty guaranteed under § 12 (1) of the Constitution, which prohibits unequal treatment of people in a similar situation should also be taken into account.

**63.** By making the requirement of reasoning in a court of appeal order dependent on whether it amends the county court order, § 178 (3) of the CCivP treats participants in proceedings unequally. If the monetary amount of procedural expenses is determined in the main proceedings, the court of appeal reviewing a county court decision is obliged to provide reasoning in its decision (except in the case mentioned in § 654 (6) of the CCivP when the court of appeal adheres to the reasoning of the county court; through § 659 of the CCivP this also applies upon review of an appeal against an order). In that case, the court of appeal's duty of reasoning does not depend on whether it amends the county court decision.

**64.** Moreover, the contested provision interferes with the fundamental right to equality also because under § 178 (3) (second sentence) of the CCivP the court of appeal may provide reasoning in its order even when it does not amend the county court order on determination of the monetary amount of procedural expenses. In such a case, participants in the proceedings whose appeal the court of appeal was adjudicating when making the order unsupported by reasoning would be treated unequally in comparison with the parties in whose appeal the court of appeal made an order supported by reasoning.

**65.** In conclusion, there would be unequal treatment of parties in whose case the decision on determination of the monetary amount of procedural expenses would be appealable to the Supreme Court as opposed to parties in whose case the decision would not be appealable to the Supreme Court. Determination of the monetary amount of procedural expenses can be contested in the Supreme Court if the amount of the expenses was determined in the main proceedings by a judgment or by an order terminating the proceedings (§ 177 (1) clause 1 CCivP). Additionally, an appeal to the Supreme Court can be lodged by a participant in the proceedings in whose case the monetary amount of procedural expenses was determined in separate proceedings but the court of appeal amended the county court order and issued a reasoned order on this (§ 178 (3) (first sentence) CCivP). An appeal to the Supreme Court can also be lodged by a participant in the proceedings in whose case the monetary amount of procedural expenses was determined in separate proceedings and the court of appeal did not amend the county court decision but nevertheless decided to issue a reasoned order (§ 178 (3) (second sentence) CCivP). All these participants in the proceedings are treated unequally in comparison with a participant in whose case the monetary amount of procedural expenses was determined in separate proceedings but the court of appeal did not amend the county court order and did not consider it necessary to issue a

reasoned order itself.

**66.** In addition, the contested provision interferes with the fundamental right to property under § 32 of the Constitution. As the aim of fundamental procedural rights is to ensure the exercise of substantive fundamental rights of individuals, assessment of the constitutionality of fundamental procedural rights should also take into account which fundamental rights a person wishes to protect by invoking their procedural rights (see Supreme Court *en banc* judgment of 22 March 2011 in case No 3-3-1-85-09, para. 75). Determination of procedural expenses interferes with the parties' fundamental right to property under § 32 of the Constitution, as it imposes a material obligation on one party in favour of another party, or it is done partly or not done at all.

### III

**67.** The Supreme Court Civil Chamber found that, formally, § 178 (3) of the CCivP could be unconstitutional as it does not conform to the principle of legal clarity under § 13 (2) of the Constitution. § 13 (2) of the Constitution protects everyone from the arbitrary exercise of governmental authority. The principle of legal clarity requires that legal rules should be sufficiently clear and understandable, so that individuals could predict the behaviour of a public authority with certain probability and regulate their behaviour accordingly (Supreme Court *en banc* judgment of 28 October 2002 in case No 3-4-1-5-02, para. 31).

**68.** From § 178 (3) (first sentence) of the CCivP it can be concluded through interpretation that the court of appeal should provide reasoning in an order by which it amends a county court order on determination of the monetary amount of procedural expenses. From § 178 (3) (second sentence) of the CCivP it arises that, unless the court of appeal amends the county court order for reasons listed under § 178 (3) (first sentence) of the CCivP, it does not have to provide reasoning in its order. In the opinion of the Court *en banc*, the norm arising from § 178 (3) of the CCivP, which excludes the duty of the court of appeal to provide reasoning in its order, thus also imposing a restriction on the right of appeal, is sufficiently clear and formally constitutional.

**69.** From the wording of § 178 (3) (second sentence) of the CCivP it arises that a court of appeal may provide reasoning in its order even when it does not amend a county court order. The fact that § 178 (3) does not establish the criteria based on which the court of appeal should decide whether to provide reasoning in its order does not make the provision itself unclear. From the wording of § 178 (3) of the CCivP it can be understood with sufficient clarity that the legislator has given the court a wide margin of appreciation with regard to this procedural issue.

**70.** Under § 11 (second sentence) of the Constitution, interference with fundamental rights is in substantive conformity with the Constitution if the interference constitutes a proportionate (appropriate, necessary, and proportionate in the narrow sense) measure for achieving a legitimate aim. The Court *en banc* will not separately assess interference with the fundamental right to equality under § 12 (1) and the fundamental right to property under § 32 of the Constitution, but will take them into account when assessing the narrow proportionality of the interference with § 24 (5) of the Constitution.

**71.** The right of appeal ensured under § 24 (5), the fundamental right to equality under § 12 (1), as well as the fundamental right to property under § 32 of the Constitution, are fundamental rights subject to a simple statutory reservation and can be restricted for any reasons compatible with the Constitution.

**72.** The contested provision was introduced to the Code of Civil Procedure by the Act amending the Code of Civil Procedure and other Acts, entering into force on 1 January 2015. This Act changed the previous procedure for determination of procedural expenses, so as to allow the court adjudicating a civil case to decide whether to determine the monetary amount of procedural expenses in the main proceedings (in a judgment, or in an order terminating the proceedings) or in separate proceedings after the entry into force of the decision issued in the main proceedings.

**73.** According to the explanatory memorandum to the Draft Act, the aim of changing the procedure for determining the monetary amount of procedural expenses was to save the time involved in special proceedings for determination of

procedural expenses. Although the explanatory memorandum does not specifically indicate the purpose of the restriction imposed on the reasoning of the order and on the right of appeal under § 178 (3) of the CCivP, it could similarly be assumed to be economy of proceedings and swift adjudication of the case which should be seen as a legitimate aim for interference with fundamental rights established under § 24 (5), § 12 (1) and § 32 of the Constitution (cf. Supreme Court Constitutional Review Chamber judgment of 25 March 2004 in case No 3-4-1-1-04, para. 21).

**74.** Restricting the right of appeal is an appropriate and necessary measure for achieving procedural economy, in view of the absence of alternatives by which the aim sought could be achieved equally effectively but which would amount to a less intensive interference with the rights of the participants in the proceedings. To assess the narrow proportionality of interference with a fundamental right, the intensity of the interference should be assessed and weighed against the aim which it seeks to achieve. The Court *en banc* is of the opinion that interference with the right of appeal is intensive.

**75.** The intensity of interference in the present case is reduced by the fact that it involves contesting the court of appeal order in the Supreme Court. First, the monetary amount of procedural expenses is determined by the county court, which is obliged to provide reasoning in its order (in the case of separate proceedings, to the extent and under the procedure established under § 177 (6) CCivP). As a rule, an appeal against a county court order can be lodged with the court of appeal (additionally, the right of appeal is restricted under § 178 (2) of the CCivP, which stipulates that an appeal against determination of procedural expenses may not be lodged if the contested amount is less than 200 euros).

**76.** The intensity of interference is increased by the following circumstances. Determination of the monetary amount of procedural expenses constitutes adjudication of an ancillary claim but it amounts to a final decision with regard to proprietary rights (§ 32 Constitution) of the participants in the proceedings. The Supreme Court *en banc* has found that “even though determination of procedural expenses by the county court under the Code of Civil Procedure does not constitute adjudication of the main case as it has already been adjudicated by a court judgment that has entered into force, determination of procedural expenses is also characterised by features corresponding to issuing a final decision in one court instance” (Supreme Court *en banc* judgment of 4 February 2014 in case No 3-4-1-29-13, para. 43.1).

**77.** Depending on the circumstances, interference with proprietary rights can be very intensive in the case of long and complicated judicial proceedings where the parties have incurred substantial costs (in the present case the County Court ordered the claimant to pay 38 173 euros and 28 cents in favour of the defendants; in total, the defendants sought an amount of 184 788 euros and 14 cents from the claimant). The intensity of interference would be reduced, for example, if the restriction on appeal to the Supreme Court were dependent not on the reasoning of the court decision but on the intensity of interference with proprietary rights (thus, the right of appeal would emerge if the contested amount were higher than a certain threshold established by law). Also under currently effective law the right to contest determination of procedural expenses has been made dependent on the intensity of the interference with proprietary rights. Under § 178 (2) of the CCivP, an appeal against determination of procedural expenses may be lodged if the amount of contested procedural expenses exceeds 200 euros. Interference with proprietary rights is also a conclusive factor when deciding whether to grant leave to appeal in cassation against a court of appeal decision. The Supreme Court need not grant leave to an appeal in cassation lodged in a matter of a proprietary claim if the appellant in cassation contests the judgment of the court of appeal to an extent less than ten times the minimum monthly wage established by the Government (§ 679 (4) CCivP).

**78.** The intensity of interference with the fundamental right of appeal is also increased by the fact that the law treats participants in the proceedings unequally both as regards reasoning in the court of appeal order as well as the appeal of the order to the Supreme Court. Arising from the principle of equality, procedural resources should be allocated equally between persons in the same situation. The Supreme Court has found that difficulties of an administrative or technical nature cannot serve as a reasonable and appropriate cause for unequal treatment (see Supreme Court Constitutional Review Chamber judgment of 21 January 2004 in case No 3-4-1-7-03, para. 39); likewise, unequal treatment of persons may not be justified by the speed of work of agencies and officials (Supreme Court *en banc* judgment of 17 March 2003 in case No 3-1-3-10-02, para. 38).



**79.** In view of the intensity of the interference with the fundamental right to appeal and the fundamental right to property, the Court *en banc* does not see a reasonable justification for unequal treatment of the participants in the proceedings arising from the fact whether the monetary amount of procedural expenses is determined in the main proceedings or in separate proceedings after entry into force of the judgment or of the order terminating the proceedings. Under § 174 (2) of the CCivP, the decision whether to determine the monetary amount of procedural expenses in the main or in separate proceedings is within the discretion of the court adjudicating the civil case. When making this discretionary decision the court also bears in mind procedural economy. The county court determines the monetary amount of procedural expenses in a judgment if determining the expenses does not hinder issuing of the judgment (i.e. it is not too time- or resource-consuming).

**80.** By interpreting the first sentence of § 178 (3) of the CCivP as suggested in para. 61 the cause for unequal treatment is that the County Court and the Court of Appeal reached different opinions. Probably the legislator considered it necessary that in such a situation recourse to the Supreme Court should be possible to avoid judicial errors. If the county court and the court of appeal decide similarly, the probability that no judicial error has occurred is higher and recourse to the Supreme Court is not necessary. This justification for unequal treatment cannot be considered sufficient either. In many cases, the Supreme Court reverses decisions in which the county court and the court of appeal had been of the same opinion.

**81.** It is not possible to find reasonable justification for unequal treatment arising from the fact that the court of appeal decides whether to include reasoning in its order (§ 178 (3) (second sentence) CCivP), as the law fails to establish precise criteria for making this decision.

**82.** Having weighed the interference with the fundamental right to appeal guaranteed under § 24 (5) of the Constitution, in combination with interference with the fundamental right to equality under § 12 (1) and with the fundamental right to property under § 32 of the Constitution, the Court *en banc* concludes that the interference with the fundamental rights is so intensive that in the sense of narrow proportionality it cannot be considered proportionate to the aim of achieving procedural economy. On that basis and relying on § 15 (1) clause 2 of the CRCPA, the Supreme Court *en banc* declares unconstitutional and repeals § 178 (3) of the CCivP.

#### IV

**83.** The claimant and the defendants lodged appeals against the order with the Supreme Court, seeking to declare § 178 (3) of the CCivP unconstitutional and grant leave to appeal. The claimant asked the Supreme Court to reverse the Court of Appeal order and return the case for re-examination to the same Court of Appeal or to issue a new order reducing the procedural expenses ordered from the claimant in favour of the defendants. In their appeals Defendant I and defendants II–V sought to reverse the Court of Appeal order in its entirety and the County Court order in part, to the extent that it failed to order payment of procedural expenses in favour of the defendants.

**84.** As the Court *en banc* repealed § 178 (3) of the CCivP, which posed an obstacle to adjudication of appeals against orders in the Supreme Court, the appeals against the order lodged by the claimant and the defendants should be reviewed (arising from § 696 (1) (second sentence) CCivP). As the Court *en banc* repealed § 178 (3) of the CCivP also to the extent that it allowed the court of appeal to issue an order not supported by reasoning, under § 667 (1) (first sentence) of the CCivP the court of appeal is obliged to provide reasoning for the order issued in adjudicating the appeal against the county court order on determination of the monetary amount of procedural expenses. In the present case the Court of Appeal has not provided reasoning in its order. On that basis, the Court of Appeal order should be reversed and the case remitted for re-examination by the same court.

**85.** Due to partial satisfaction of the appeals against the order, under § 149 (4) (first sentence) of the CCivP the sums paid as security on the appeals should be refunded.

**86.** Under § 178 (4) of the CCivP, the costs incurred upon contesting the determination of procedural expenses are not compensable.

Priit Pikamäe, Tõnu Anton, Peeter Jerofejev, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Ivo Pilving, Jüri Põld, Paavo Randma, Malle Seppik, Tambet Tampuu

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