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A GLOSS FOR THE JUDGEMENT OF THE CONSTITUTIONAL TRIBUNAL OF NOVEMBER 10, 2009, FILE REF. NO. P88/08

THESIS

Art. 28 para. 1 of the Act of 28 February 2003 (Bankruptcy and Reorganisation Law),[1] in respect of a debtor who is not using the services of an advocate or a legal counsel, is incompatible with art. 45 para. 1 of the Constitution of the Republic of Poland[2] but is not incompatible with art. 32 para. 1 of the Constitution.

I

The said judgement of the Constitutional Tribunal has a great deal of practical importance. From the axiological perspective, it concerns debtors who have no support of professional representatives. It is in social interest to prevent further

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[1] Act of 28 February 2003 (Bankruptcy and reorganisation law), Journal of Laws of 2009, No. 175, item 1361 [hereafter BRL]. The legal status is subject to constitutional review.

[2] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

cases of bankruptcy.[3] The said judgement is a step towards this goal and it reflects the tendency to equalise opportunities of debtors who appear as parties in a lawsuit but have no support.

The Tribunal's rejection of the arbitrary manner of determining legal procedure is worth noting. It would be legitimate to differentiate the procedural status of entrepreneurs represented by an advocate or a legal counsel from that of those who act single-handedly. The growing appreciation of increased protection of litigation parties is a reflection of social interest. The current trend within the system of law is not only consistent with the objective interpretation but also seems to coincide with the subjective interpretation. Its significance is providing an impulse for further changes towards a lower degree of formality of bankruptcy procedure.

The Provincial Court in Warsaw inquired whether art. 28 para. 1 BRL complies with art. 32 para. 1 and art. 45 para. 1 of the Constitution. Also, the Court pointed out that the petitioner is a small-scale business operator and was not being represented by a professional representative. The content of the legal questions asked implies that the Court questions the legal norm of art. 28 para. 1 BRL. The Supreme Court sees the same sanction in art. 28 para. 1, whether or not the petitioner is using professional representation, and orders that the petition be returned, without requesting that it be supplemented or paid, which raises some legal doubts. The Constitutional Tribunal, consistently with the intent of that legal question, focuses on an appraisal of the compatibility of art. 28 para. 1 BRL with art. 32 para. 1 and art. 45 of the Constitution. The Tribunal concentrates on the effects of art. 28 para. 1 BRL and analyses the formal requirements of a guarantee of real and effective protection of an individual who has no professional legal representation. What the presented study focuses on is evaluation of the validity of views and arguments invoked to support them as well as a supplementary use of opinions of the Speaker of the Polish Sejm, Public Prosecutor General, the Research and Analysis Office of the Polish Sejm.

II

In this part we will address the opinion of the Speaker of the Sejm, who claims that art. 28 para. 1 BRL is compatible with art. 32 para 1 and art. 45 para. 1 of the Polish Constitution. While providing reasons for the irrelevance of the charge, the Speaker pointed out the fact that the Court restricted itself to the recognition that analo-

[3] Komisja Kodyfikacji Prawa Cywilnego, "Uzasadnienie projektu ustawy Prawo upadłościowe (20.01.2001)," *Przegląd Legislacyjny* 2 (2001): 177.

gous institutions of the Bankruptcy and Reorganisation Law and the Code of Civil Procedure are different, which is insufficient to substantiate the claim that the non-discrimination principle enshrined in art. 32 para. 1 of the Constitution has been violated. Other values enshrined in the Constitution should be addressed as well.

It will be necessary to highlight the important role of civil procedure.[4] Given the existing system of law, it seems justified to outline selected regulations of civil law due to the status of the Bankruptcy and Reorganisation Law within civil law.[5] This law makes frequent references to the Code of Civil Procedure, for example in its articles 35, 37, 101, 131 and 381. The Speaker's opinion does not even remotely reflect the arguments related to a comparison between the Bankruptcy and Reorganisation Law and the Code of Civil Procedure. A similarly restrictive interpretation emerges from the Speaker's reference to the contravention of art. 45 of the Constitution: he mentioned some points of art. 23 BRL and stated generally that the limits of the freedom of filing for bankruptcy had not been overstepped.

The Research and Analysis Office also presented its position on the matter. In the statement of reasons, it claimed that the Polish constitution does not envisage one and only, universal model of court procedure. The dismissal of the petition does not impede the debtor's access to the court. The filing of a petition is a standard aspect of entrepreneurial diligence. This view is hard to accept, however.

The Office states that the speediness of the procedure is of critical importance, as this results from the necessity to eliminate business entities which pose a threat to commercial stability. However, it must be underscored that this objective is hard to achieve without restricting the excessive formality of the system. The Office's position concerning "the debtor's unimpeded access to the court" does not take into consideration a number of negative consequences which are accurately captured by the Constitutional Tribunal. In contrast, with regard to the Office's opinion on ways to discipline debtors, I present a similar position, which will be presented when addressing the position of the Polish Public Prosecutor General.

III

In the case at hand, also Public Prosecutor General took a stand, saying that the existing formalism with respect to filing for bankruptcy is compatible with

[4] W. Berutowicz, *Postępowanie cywilne w zarysie*, 3rd ed. (Warsaw: Państwowe Wydawnictwo Naukowe, 1984), 11–18.

[5] H. Dolecki, *Postępowanie cywilne, zarys wykładu* (Warsaw: Wolters Kluwer, 2001), 22.

the Constitution. I say this view can hardly by endorsed. In a judgement dated June 28, 2008, the Constitutional Tribunal observes that increased diligence of entrepreneurs does not imply that the procedural requirements they are to obey are the same as those for professional representatives.[6] Also, in a judgement dated April 15, 2009, the Constitutional Tribunal rightly points out that a radically higher degree of professional diligence and procedural accuracy should be expected of professional representatives, even if this were to have negative procedural consequences for the parties using their services.[7] It should be mentioned that the Polish Public Prosecutor General omitted the comparative element regarding a debtor acting alone and one enjoying professional representation.

According to Public Prosecutor General, the procedural regime results from the influx of defective petitions which are filed on purpose to gain time or to obtain supplementary material, or to engage in deceptive activities. The *a priori* claim that a debtor is acting in bad faith or even should be regarded as a potential criminal cannot be accepted. It is legitimate to point out that the legislator placed some trust in debtors, which was reflected, among others, in the permissibility of continued management, the opportunity to have one's debts cancelled or take advantage of the reorganisation procedure.[8]

The notion of "honest" debtor is known in other legal systems. Highlighting debtor protection as the chief purpose of bankruptcy proceedings, the German legislator does not rule out the normative protection of a "reliable" debtor.[9] Also the Austrian bankruptcy law manifests some degree of trust placed in a debtor.[10] It is appropriate to mention that the French insolvency law has already permitted as many as five restructuring procedures,[11] a fact which goes against the negative appraisal of the debtor demonstrated by Public Prosecutor General.

It must be stressed that Bankruptcy and Reorganisation Law envisages, among others, criminal liability by virtue of art. 522 BRL. A failure to meet the conditions

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[6] Judgement of the Constitutional Tribunal dated June 26, 2008, file ref. no. SK 20/07, Journal of Laws No. 122, item 796.

[7] Judgement of the Constitutional Tribunal dated April 15, 2009, file ref. no. SK 28/08, Journal of Laws No. 67, item 571.

[8] S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, 8th ed. (Warsaw: Wydawnictwo C.H. Beck, 2011), 865–99; 930–33; 1125–33 and 1327–77.

[9] J. Brol, "Podstawowe kierunki zmian w postępowaniu upadłościowym," *Przegląd Prawa Handlowego* 8 (2003): 7.

[10] F. Zoll, "Czy Austriackie dotyczące upadłości może stanowić wzór dla polskiego ustawodawcy?" *Studia Prawnicze* 148, no. 2 (2001): 31–33.

[11] P. Terlecki, "Zarys francuskiego prawa insolwencyjnego," *Przegląd Prawa Handlowego* 9 (2009): 35–36.

set forth by art. 369 BRL results in debtor liabilities to be cancelled. The court may also hear the debtor, appoint an expert, revoke the management powers of the estate, etc.[12] There are also, for example, the provisions of art. 296, art. 300–302 of the Penal Code.[13] Apart from that, if the debtor has filed for bankruptcy, his documents are typically verified by a temporary insolvency administrator.[14] Such circumstances enable him to supply any missing documentation to supplement the petition for bankruptcy. In general, the court has a number of instruments which make any irregularities on the part of the debtor less likely.

The Prosecutor General's argumentation that debtors can deliberately file defective petitions for bankruptcy in order to gain time to gather essential attachments is not plausible. If a debtor decides to mislead the judiciary, he does not do that on an *ad hoc* basis, and as a result he has sufficient amount of time to fix the inaccurate documents. Other than that, given today's state of technology and means communication, the short time for such preparation is usually not an issue.

To sum up, the standpoint of the Public Prosecutor General contravenes chiefly the principle of proportionality. This principle requires that the least onerous measures that are essential to achieve goals be chosen.[15] The high degree of formalism of the precept of art. 23 BRL is at odds with both the systemic and the functional interpretation. It also contrasts with the idea of social sensitivity (art. 20 of the Constitution) and does not come close to the principle of social equity (art. 2). Simultaneously, it seems doubtful whether the statement of truth should be placed in a separate article, that is 25 BRL. The legal drafting rules[16] prescribe that the content which specifies several provisions should be assigned to general provisions or in its immediate vicinity. Leaving aside the drafting rules, it would seem best to duplicate the requirement to provide a statement of truth in the provisions of art. 22 and art. 23 BRL.

Concluding, those aspects of the Tribunal's position which are not addressed in this part of our study or those presented in a general manner here will be endorsed.

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[12] P. Zimmerman, *Prawo upadłościowe i naprawcze*, 2nd ed. (Warsaw: Wydawnictwo C.H. Beck, 2012), 1063; 798–801; 67–69 and 393–95.

[13] Act of 6 June 1997 (Penal Code), Journal of Laws of 2016, item 1137.

[14] Gurgul, *Prawo*, 126–131.

[15] L. Morawski, *Zasady wykładni prawa* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2006), 122–23.

[16] Regulation of the President of the Council of Ministers of 20 June 2002 on legislative drafting rules, Journal of Laws of 2016, item 283 [hereafter LDR], art. 23.

IV

The Constitutional Tribunal also sought to decide whether the debtor's petition for bankruptcy addressed by art. 28 para. 1 BRL, which does not fulfil the requirements specified by the law or which has been paid unduly, is to be returned without requesting the debtor to supply any missing information or pay the application fee.

In its statement of reasons, the Tribunal accurately addresses the consequences of art. 28 BRL, its aims and the essence of bankruptcy. It underscores that although the failure to meet an application deadline does not rule out the possibility of reapplying, within the meaning of art. 21 para. 3 BRL the debtor is subject to liability for damages or even a prohibition to carry on his economic activity (art. 373 para. 1 point 1). We will add that violation of art. 21 para. 3 BRL can have severe repercussions, leading to being deeply entangled with the State Treasury due to art. 116 of General Tax Law,[17] whereby the legislator toughened the regime concerning the conditions of liability[18] relative to art. 299 of Commercial Companies Code.[19] Also, the debtor has no opportunity to take advantage of art. 369 BRL.

Excessive procedural formalism (art. 23 BRL) leads to delays or even debtors deciding not to file for bankruptcy. In consequence, judicial proceedings can be instituted against debtors or their representatives. The failure to observe the principle of proportionality with respect to procedural formalism can lead to increased unemployment with all its negative consequences, including decreased income flowing into the State Treasury. This state of affairs is contrary to the goals set by the legislator when drafting Bankruptcy and Reorganisation Law.[20]

As rightly observed by the Constitutional Tribunal, the provisions of the law call for numerous documents. The detailed catalogue of requirements with respect to petitions filed by all eligible entities is provided in art. 22 paras. 1 and 2 BRL, and art. 23 and art. 25 BRL with respect to the debtor. Failure to submit a declaration specified by art. 25 BRL has the same effects as those indicated by art. 28 para. 1 BRL.

At the same time, it is legitimate to stress that pursuant to art. 23 BRL the list of creditors should be complete in compliance with the requirements of judicial proce-

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[17] Act of 29 August 1997 (General Tax Law), Journal of Laws of 2015, item 613.

[18] Judgement of the Supreme Administrative Court dated February 10, 2009, file ref. no. II FSK 1072/07; judgement of October 26, 2010, file ref. no. II FSK 1667/09; judgement of June 9, 2011, file ref. no. II FSK 61/10 – all available in Centralna Baza Orzeczeń Sądów Administracyjnych [hereafter CBOSA], www.orzeczenia.nsa.gov.pl.

[19] Act of 15 September 2000 (Commercial Companies Code), Journal of Laws of 2016, item 1578; for more on this, see K. Osajda, *Niewypłacalność spółki z o.o.* (Warsaw: LexisNexis, 2014), 209–69.

[20] Komisja Kodyfikacji Prawa Cywilnego, "Uzasadnienie projektu ustawy," 176–78.

dure. No indication of the form of organisation is treated as an attempt at preventing identification of the entity. It is unacceptable to use only a fragmentary hard copy of accounting books or other internal documents. Likewise, it is not acceptable to indicate merely a balance derived from the sum of accounts receivable if no deduction of mutual liabilities has been made.[21] Also, the debtor should reveal any information about those court or administrative proceedings which are related to all matters of financial character, regardless of whether the debtor is an active or passive party.[22]

As the Constitutional Tribunal rightly pointed out, with regard to defective petitions the right to trial can be indirectly contravened by imposing procedural requirements, which make the institution of proceedings overly difficult. Additionally it can be said that the principle of the protection of legitimate expectations requires that the legislator does not allow a situation in which the recipients of a legal norm cannot make use of it. Any legal obstacles preventing its implementation must be removed.[23]

We need to underscore the fact that the protection of a debtor who is not professionally represented could be seen considered in the light of other constitutional values, which will be addressed in the latter part of this gloss.

V

It should be noted that the questioned provision of art. 28 para. 1 BRL contravenes – apart from articles 32 and 45 of the Constitution addressed by the Tribunal – other constitutional values, that is the principle of social justice (art. 2) and the core idea of social market economy (art. 20). The Constitutional Tribunal linked the principles of social justice and proportionality, pointing out the existence of a correlation between the essential features of individual categories and their proper application. A state which does not observe them is not a democratic state of law.[24] In contrast, if we realise the principle of social market economy using various instruments, not necessarily legal ones, we should respect social equity in order to control necessary economic processes to achieve specific goals.[25]

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[21] Zimmerman, *Prawo*, 56.

[22] Gurgul, *Prawo*, 96–97.

[23] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw: Wydawnictwo C.H. Beck, 2012), 26.

[24] Ibid., 55–57.

[25] Ibid., 155–56.

The solution, rightly challenged by the Polish Constitutional Tribunal, sometimes causes the violation of the dignity (art. 30 of the Constitution) of a debtor who is not represented by a professional agent and who has become insolvent through no fault of his own in the wake of extraordinary events, such as a personal tragedy. Also, such a stringent regulation breeds our disapproval given the breached principle of proportionality in a situation when in practice the creditor is subject to the otherwise weak disposition of art. 212 BRL with respect to his liability for damage caused to the bankrupt party.[26]

It should be emphasised that the Constitutional Tribunal addressed the protection of potential participants of proceedings, for example in its judgement of May 15, 2012, in connection with the debtor's option to request the reimbursement of legal costs incurred. In its judgement, the Tribunal argued that art. 32 para 1 BRL, insofar as it concerns debtors registered as limited liability companies, is incompatible with with art. 45 para. 1 in conjunction with art. 31 para. 3 of the Constitution.[27] Earlier on, in its judgement dated March 30, 2004, the Tribunal observed that multiple conflicting interests of various entities and the public interest should all be weighed up. Excessive fees for a petition should be discouraged.[28]

To sum up, the Tribunal's arguments are convincing. Their analysis will be pursued below against a dissenting opinion.

VI

In his dissenting opinion, Judge Marek Kotlinowski argued that art. 28 para. 1 BRL infringes the right to trial both of a debtor who is filing a petition for bankruptcy on his own and one using professional representation. At the same time, Kotlinowski does not raise any doubts regarding the inconsistency with the provision of art. 32 para. 1 of the Constitution.

The Author indicates that not all requirements with respect to the filing of a motion for bankruptcy have a strictly legal character, since accounting documentation can be supplied, or composition proposals if any. To prepare such documents one needs to have mainly economic and entrepreneurial know-how. It also should be undersco-

[26] Gurgul, *Prawo*, 730–31.

[27] Judgement of the Constitutional Tribunal dated May 15, 2012, file ref. no. P11/10, Journal of Laws of 2012, item 578.

[28] Judgement of the Constitutional Tribunal dated March 30, 2004, file ref. no. SK 14/03, OTK ZU No. 3/A/2004, item 23.

red that the legislator has exempted advocates and legal counsels from the duty to pass an examination for members of supervisory boards of state-owned companies. Further, the legislator acknowledged that they are also highly competent in economics – an aspect which, apart from knowledge of legal matters, forms an important element of a supervisory board member's area of competence. Professional representatives have been made equal in respect of knowledge of economics with professionals acting as statutory auditors or with doctors of economics.[29] It is, then, valid to invoke the Tribunal's judgements, discussed against Public Prosecutor General's viewpoint,[30] which highlight the professionalism of professional representatives.

A fortiori, when debtors are obliged to file an effective petition for bankruptcy, regardless of their level of qualification, professional representatives are all the more obliged to prepare an effective petition. Professional representatives are in contact with the sphere of economy in many areas of law, for example financial law, securities law, etc. Fundamentally, the indispensable elements of law, that is both systemic and functional interpretation make reference to economical aspects.[31] Economic analysis of law is also a relevant area.[32]

The dissenting opinion accurately addresses the undesirable phenomenon of bankruptcy petitions being signed by the debtors despite being prepared by professionals. However, this is a reductionist interpretation. Some debtors, mainly due to their poor financial condition, and to some extent their low awareness of potential sanctions, do not hire professional representatives. Also, a debtor's decision can sometimes be influenced by a lower price offered for a petition without a signature of a professional agent. Aside from that, some debtors draft petitions for bankruptcy by themselves, using competences of their own or their subordinates. Legal counselling in this case is restricted only to consultation and making corrections.

It is questionable to make reference to a wide array of extra-legal areas which can be directly addressed by legal professionals. In practice, professional representatives as a rule do not draft many documents, which they typically receive from debtors anyway. They sometimes collect them, for example documents related to the National Court Register, but frequently their clerks do those tasks. If need be,

[29] Regulation of the Council of Ministers of 7 September 2004 on training and examinations for candidates for members of supervisory boards of state-owned companies, Journal of Laws No. 98, item 2038.

[30] Judgement of the Constitutional Tribunal dated June 26, 2008, file ref. no. SK 20/07; judgement dated April 15, 2009, file ref. no. SK 28/08.

[31] T. Chauvin, T. Stawecki, and P. Winczorek, *Wstęp do prawoznawstwa*, 6th ed. (Warsaw: Wydawnictwo C.H. Beck, 2011), 237–41.

[32] P. Buława, and K. Szmit, *Ekonomiczna analiza prawa* (Warsaw: Wolters Kluwer, 2012), 93–99.

legal professionals collaborate with other entities, such as accountancy offices. Representatives are also capable of granting substitution, debtors consenting. In effect, their role is to focus on the legal aspects of the case.

Simultaneously, we should say that the legislator of bankruptcy and reorganisation law envisages the activity and awareness of the debtor, who can file a petition for bankruptcy unaided, propose composition solutions or initiate a reorganisation procedure. Consequently, the debtor should all the more collaborate with a legal professional with respect to filing a petition for bankruptcy as this minimizes the risk of formal shortcomings, the repercussions of which are highlighted by Judge Kotlinowski.

In the following part of the gloss, we will look at how the consequences of formal shortcomings are dealt with by the Code of Civil Procedure, on the one hand, and the Bankruptcy and Reorganisation Law.

VII

From the perspective of expertise of professional representatives and the specific character of their work, the argument used in the dissenting opinion at hand that greater rigorism should be limited to cases of unpaid fees can hardly be seen as convincing. It must be underscored that the Supreme Court, in its decision of November 10, 2006, expressed the view that the provision of art. 130^2 §3 of the Code of Civil Procedure does not discriminate against advocates, legal counsel and patent agents.[33] It is natural that professional representatives are obliged to manifest a great deal of diligence observing all formal requirements, not only the fiscal ones. As rightly pointed out by the Constitutional Tribunal, they should not be treated on equal terms with those who do not have such competences. The solid case law which the Tribunal makes use of in connection with fiscal omissions can also be used analogously with respect to other formal shortcomings but taking into consideration the specific nature of bankruptcy proceedings.

In the context of the changes involved in the amendment of the Code of Civil Procedure, addressed by the representative of the dissenting opinion,[34] when a petition has been filed via a professional representative but the payment is lacking, this can be made within a week from the decision to return the petition. However,

[33] Decision of the Supreme Court dated November 10, 2006, file ref. no. III UZ 10/06, OSNP 2007 nos. 21–22, item 333.

[34] Act of 5 December 2008 amending the Code of Civil Procedure and certain other acts, Journal of Laws No. 234, item 1571.

it should be noted that an entrepreneur is expected to demonstrate a greater knowledge of law, all the more so if he or she is using the services of a legal professional in comparison with the addressees of the Code of Civil Procedure, the majority of whom may not have any knowledge of law. It follows from the foregoing that a more severe disposition of the statute can be applied in the name of the principle of proportionality. Other than that, court cases related to the submission of a petition for bankruptcy are rarer in comparison with the much more common cases resulting from the Code of Civil Procedure, and in effect the possibility of formal shortcomings occurring is minimized.

In summary, thanks to the expertise of professional representatives and higher standards expected of them plus the other arguments presented in this gloss, we will not share the view of the unconstitutionality of the provision of art. 28 para. 1 BRL with respect to a debtor who has filed a petition for bankruptcy using the help of an advocate or a legal counsel.

VIII

The Constitutional Tribunal validly questioned the provision of art. 28 para. 1 BRL with respect to a debtor acting on his own as being incompatible with art. 45 para. 1 and art. 32 para. 1 of the Constitution. In great detail, the Tribunal presented the aims of the law and emphasised the high degree of formalism required of a petition for bankruptcy. It demonstrated that the excessive rigorism of the initiation of proceedings causes that the goals envisaged by the legislator are not achieved, especially in the area of speediness of procedure and the principle of optimisation. Simultaneously, taking into account the specific nature of bankruptcy proceedings, the Tribunal underscored that no arbitrary procedural solutions must be introduced if there are no adequate reasons. It also demonstrated significant differences between entrepreneurs represented by professional counsels and those acting independently, a fact which should be reflected in the degree of formalism.

Whilst implementing the changes,[35] the legislator retained the requirements of art. 22 and art. 23 NBL. Also, the requirement of including a statement of truth, contained in art. 25 NBL – all too often ignored by debtors – was retained. On the other hand, the consequences of formalism in the context of the obligation to file

[35] Act of 28 February 2003 (Bankruptcy Law), Journal of Laws of 2015, item 233 [hereafter BL]. As of January 1, 2016, the title of the act was changed to Bankruptcy Law [called New Bankruptcy Law for our purposes, NBL].

a petition for bankruptcy mitigate the changes connected with the definition of insolvency and involving the extension of the time for submission to a date not later than when the basis for the declaration of bankruptcy becomes apparent.[36] The creation and isolation of Restructuring Law is also a major change.[37] The legislator made restructuring activities possible by providing for restructuring proceedings.[38]

Despite the apparent legitimacy of the said changes, there emerges a more substantial uncertainty which ought to be carefully addressed by the legislator with respect to the validity of all formal conditions concerning the obligation to file a petition for bankruptcy. The question remains open whether the implemented changes, especially those affecting increased protection of entrepreneurs, will do. It is appropriate to note that despite the objective interpretation being correlated with the changes introduced on January 1, 2016 into Bankruptcy and Reorganisation Law, the judicature will be more restrictive and adverse toward debtors,[39] which should persuade the legislator to reflect on further improvements to the new bankruptcy law.

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[36] P. Zimmermann. *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, 24–30, 53–58. Warsaw: Wydawnictwo C.H. Beck, 2016.

[37] Act of 15 May 2015 (Restructuring Law), Journal of Laws of 2012, item 978.

[38] S. Gurgul. *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, 978–81. Warsaw: Wydawnictwo C.H. Beck, 2016.

[39] P. Dudek. "Liczy się to, czy dług jest spłacony." *Dziennik Gazeta Prawna*, April 24, 2017, no. 79; judgement of the Provincial Administrative in Warsaw dated April 18, 2017, file ref. no. III SA/Wa 790/16, CBOSA.

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A GLOSS FOR THE JUDGEMENT OF THE CONSTITUTIONAL TRIBUNAL OF NOVEMBER 10, 2009, FILE REF. NO. P88/08

Summary

The presented gloss, addressing the judgement of the Constitutional Tribunal, file ref. no. P88/08, issued on November 10, 2009, concerning the decision under art. 28 para. 1 of the act of 28 February 2003 (Bankruptcy and Reorganisation Law) [referred to as BRL] as regards the debtor who is not using an advocate or legal counsel, demonstrates inconsistency of art. 28 para. 1 of the above law with art. 45 and art. 32 para. 1 of the Constitution. The Speaker of the Sejm, Public Prosecutor General and the Research and Analysis Bureau have presented their positions approving the compliance of art. 28 para. 1 BRL with art. 32 para. 1 and art. 45 para. 1 of the Constitution. The Constitutional Tribunal draws attention to numerous formal requirements, especially concerning the bankruptcy petition filed by the debtor. The Tribunal argues that the right to trial may be infringed not only directly, but also indirectly as a result of the procedural requirements being formed by the legislator in the manner which makes the initiation of the proceedings excessively difficult. Subsequently, the Tribunal points out that excessive strictness connected with considerable formalism of petitions for bankruptcy does not fulfil a compensatory function, and does not satisfactorily protect the debtor and his undertaking. In the context of professional representatives, the Tribunal expresses its position on the professional skills that assure professional legal service in court proceedings. The Constitutional Tribunal drew a distinction between debtors having a professional representative and debtors acting on their own, by defining a relevant feature that allows to separate a group, as a consequence the provision in question does not fulfil the constitutional requirements in art. 45 para. 1 of the Constitution. As regards art. 32 of the Constitution, the Constitutional Tribunal presents the view that with considerable complexity and strictness connected with the lack of representation, in a concrete case the constitutionally guaranteed rights may be infringed. As part of the judgement of the Constitutional Tribunal, a separate statement was made in the part concerning the compliance of art. 28 BRL with art. 45 para. 1 of the Constitution. The presented gloss shares the argumentation observed by the Constitutional Tribunal, at the same time considering the public interest, negative results of the late submission of the bankruptcy petition, pointing to the legislator that greater protection of entrepreneurs debtors may be considered.

Key words: formal requirements; a bankrupcy petition; professional representatives; protection of the debtor; right to court.

Translated by Tomasz Pałkowski

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