UDC 342.565.2
Review paper
Recived: -
Acceptee: March 12, 2021.
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DECISIONS OF THE COURT OF APPEAL ON APPEAL - THE ISSUE OF THE EFFICIENCY OF THE PROCEEDINGS

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Abstract: *The court of appeal, in principle, decides without holding a hearing during the so-called closed session. After the appellate procedure, the court of appeal will make a decision. The types of decisions made by the appellate court do not depend on the format in which the appellate panel decided (with or without a hearing). However, the decision of the appellate court depends on how the appeal was handled. Namely, the court of appeal may find that the appeal is not suitable for deciding on the merits, then that the appeal is suitable for deciding on the merits but that it is not founded, and finally the court of appeal may find that the appeal is founded. The current Law envisages and limits the types of decisions that court of appeal can make. However, the purpose of this restriction is not to discipline the creativity of the appellate court, the meaning of the restriction is a consequence of a certain functional connection that exists between the error of the first instance court and the need to react to that error appropriately. Second-instance decisions have a different character, they can result in either modification or revocation or confirmation of the first-instance decision. If in the appellate procedure it is assessed that the appeal is founded, than the cassation or audit powers of the second instance court are manifested. Decisions of the court of appeal in the appeal procedure may be different and depend on the results of the examination of the legal remedy, whether the legal remedy is suitable to be the subject of meritorious examination and decision-making.*

Keywords: *Litigation proceedings, court decision, efficiency of proceedings, hearing at the court of appeal, equality of parties, legal remedy*

1. INTRODUCTION

Litigation proceedings are a general and regular system of providing legal protection when subjective rights are disputed, endangered or violated. The role of litigation is to make a lawful and correct court decision that satisfies the applicant regarding judicial protection. The courts in the Republic of Serbia act in accordance with the Constitution and the laws that regulate the subject matter and their actions are motivated by the goal of making a correct and lawful court decision. This also achieves the purpose of litigation. However, the intentions of the courts do not always stand in line with their actions. There is a lot of pressure for the court to provide quality protection in the shortest possible time, with as few resources as possible. The court also has an obligation to regulate the provision of legal protection in a way that excludes any doubt and uncertainty. Namely, a wide network of civil procedural rules requires an accurate and precise system that refers to the actions of the court, as well as the actions of the parties and other participants in the proceedings. The system of procedural rules should be equally focused on achieving legal certainty, but also equality of parties and efficiency of proceedings. Due to such a complex task, civil procedural law is very extensive and diverse in the modern legal order. All this leads to the fact that in certain cases, the termination of the first-instance litigation procedure does not end with a legal decision.

On the other hand, the passing of illegal decisions destroys the foundations of every court procedure, including litigation. Incorrect and illegal decisions are an unhealthy fabric in any legal system. A legal system that contains such decisions cannot guarantee legal certainty, and without legal certainty there is no rule of law. A society in which there is no rule of law is a society that does not trust the judicial system. In order to eliminate the causes and prevent the consequences that can lead to an illegal court decision, the legislator has prescribed a procedure in which the correctness and legality of the decision are checked. This procedure is of a dispositive character and it enables the parties to check and review the character of court decisions.

In modern states, the right to appeal is a constitutional right according to which a legal remedy can be filed against the first-instance decision of a court, administrative or other body performing public service with the competent body. In the Republic of Serbia, the right to appeal is consistently provided by the constitution. This right can be limited only in certain exceptional cases, but in such a case it is obligatory to envisage another legal way to protect the right and legal interest. In the modern world, the right to appeal is one of the basic rights of man and citizen, which not only protects

individual rights and interests but also contributes to strengthening the rule of law and strengthening the legal order of a state. The right to file an appeal is a dispositive right, but it can only be used by the person against whom the decision was made. This is understandable because such a person cannot obtain greater legal protection by lodging an appeal than he had obtained by a decision which he would challenge on appeal. The right to appeal is recognized not only to those whose objective right or legal interest had been objectively violated, but also to anyone who claims that a decision was made to the detriment of his rights and interests.

An appeal against a judgment is a basic, general and regular legal remedy. It is basic because the structure of legal remedies in civil proceedings is based on it, general, because it is allowed against all first-instance verdicts, and regular, because the circumstance that it can be declared prevents the entry into force of finality. The right to appeal is prescribed by the Constitution of the Republic of Serbia (Constitution of the RS, 2006), according to which everyone is guaranteed the right to appeal or other legal remedy against a decision deciding on his right or interest based on law. Provisions on the right to review a court decision by a second instance body are also contained in the European Convention on Human Rights and Fundamental Freedoms. (ECHR, 1950[1]). The original text also containt the Protocol no. 7 in which the procedural legal guarantees of the accused from Article no. 6 are also, and it contains prohibitions on the retroactive effect of criminal laws and the retroactive imposition of stricter penalties. Having in mind the constitutional provisions and the provisions of the Convention, it is clear that no court decision in civil proceedings rendered in the first instance can become final by publication and delivery alone. If a party exercises its constitutional right to appeal, the examination of the regularity of work and the legality of the court decision takes place in the procedure before the second instance body. Of course, the interests of legal certainty require that the court proceedings be terminated at one point, so by not declaring a legal remedy or making a decision on a legal remedy, the court decision becomes final and enforceable.

The new Law on Litigation was passed in 2011. It was amended several times, due to the decisions of the Constitutional Court, and due to the need to harmonize it with other legal regulations with later interventions. The new Law also continues the tradition of the 2004 Law and provides for a general ban on reversing the first instance verdict in order to make the proceedings more efficient. The court of appeal, in accordance with the new orientation of the civil procedure, decides as a rule without

1 This principle of the Convention applies to convictions of a national court for criminal acts.

holding a second-instance hearing. However, unlike the previous one, the new Law envisages only the possibility and not the obligation to schedule a second instance hearing "if the court of appeal members find that in order to properly establish the facts, it is necessary to repeat before the second instance court already presented evidence or evidence rejected by the first instance court" (Article 383 of the LCP, 2014). In the event that the court decides in a closed session of the panel, there is a legal obligation to make a decision within nine months from the date of receipt of the first instance court file (Article 383 of the LCP, 2014). In case of violation of the rules and the exceeding of the deadline, disciplinary proceedings are envisaged against the president of the panel. When it comes to the reasoning of the verdict, the new Law states that the court will not explain the verdict in detail if it rejects the appeal and accepts the factual situation determined by the first instance verdict.

All of these changes, in the part concerning the appeal against the verdict, aim to ensure respect for the institute of "trial within a reasonable time" and to increase the efficiency of the work of the courts. In accordance with the recommendations and provisions of the cited Convention, our litigation is based on a court decision within a reasonable time.[2] The provisions of the Law on the Protection of the Right to a Trial within a Reasonable Time also speak about that. The European Court of Human Rights could not and should not set abstract criteria according to which it would define the time limits of the principle of "trial within a reasonable time", but the position is taken depending on the circumstances of each individual case.

2. METHODOLOGY

The method of content analysis will be used for qualitative analysis of national and international normative-legal acts, as well as available scientific and professional literature.

The comparative method will be used in order to compare current theory and practice. The statistical method will be applied for grouping, processing and classifi-

2 The Explanation of the proposed law states that the right to a trial within a reasonable time is an integral part of the right to judicial protection, the part that is derived from the right to judicial protection. However, it is not enough to prescribe the principle of trial within a reasonable time only by a special law, it is also necessary to revive this principle by procedural laws. In this way, an effective and efficient system of judicial protection in both criminal and civil matters is stimulated. See: Law on Protection of the Right to Trial within a Reasonable Time (2015), explanation of the Proposal sent by the Government of the Republic of Serbia to the National Assembly.

cation of quantitative characteristics related to the subject of research, ie data collected by empirical research.

The normative method will be used to check the functionality of procedural litigation institutes and the applicability of positive litigation legislation through the obtained statistical data.

3. THEORETICAL BASES

The court of appeal, in principle, decides without holding a hearing in the so-called closed session. After the appellate procedure, the court of appeal shall start making a decision. The types of decisions made by the appellate court do not depend on the format in which the appellate panel decided (with or without a hearing). However, the decision of the appellate court depends on how the appeal was handled. Namely, the court of appeal may find that the appeal is not suitable for deciding on the merits, then that the appeal is suitable for deciding on the merits but that it is not founded, and finally the second instance court may find that the appeal is founded. The current Law envisages and limits the types of decisions that a second instance court can make. However, the purpose of this restriction is not to discipline the creativity of the appellate court, the meaning of the restriction is a consequence of a certain functional connection that exists between the error of the first instance court and the need to react to that error appropriately.

Second-instance decisions have a different character, they can result in either modification or revocation or confirmation of the first-instance decision. If in the appellate procedure it is assessed that the appeal is founded, then the cassation or audit powers of the second instance court are manifested. The decisions of the court of appeal in the appeal procedure may be different and depend on the results of the examination of the legal remedy, whether the legal remedy is suitable to be the subject of meritorious examination and decision-making.

In a system in which cassation powers are reserved for the court of appeal, the action of the second-instance court is reduced only to the revocation of the disputed decision. This means that the court of appeal does not have the mandate to decide on the merits regarding the foundation of the appeal on the decision made by the first-instance court (Triva-Dika, 2004). Nevertheless, the court of appeal retains its control function, it is allowed to either revoke the decision in question or to refuse the appeal as inadmissible. A step further in relation to cassation powers, are the appellate powers of the court of appeal which enable the judge to reverse the chal-

lenged first instance verdict or to reject the appeal as unfounded and confirm the first instance court decision (Račić, 2003). By reversing the first instance verdict, the appellate court is given the opportunity to correct the observed errors of the first instance court.

The system of audit powers of the second instance court also includes cassation powers. When the second-instance judge reverses the first-instance verdict, he makes two decisions: the first decision is the revocation of the challenged first-instance verdict, and the second, which compensates the revoked decision with his own (Triva-Dika, 2004) The actions of the court of appeal in the decision-making process are guided by legal provisions that prescribe the type and form of decisions. The party filing the appeal is authorized to state the appeal proposal which contains the future actions of the appellate judge. However, the appellate court is not bound by such an appeal proposal and it depends on its assessment whether it will use only cassation or also audit powers. The appellate court may revoke the judgment even if the party requested a reversal of the judgment, and vice versa. The court of appeal may reverse the judgment of the court of first instance, even if the party requested revocation. Bearing in mind, as we have already noted, that the appellate court is not bound by the disposition of the parties with regard to the grounds of appeal, it would be illogical to link it to proposals relating to the content of the decision to be rendered (Triva-Dika, 2004). Since the content of the appeal depends on the reasons for the appeal, in case the content of the proposal does not correspond to the reasons, the second instance court will not be bound by the appeal proposal (Poznić, 1989). Precisely because of this non-obligation, the Law does not require that an appeal proposal be pointed out in the appeal. However, the party can point it out as a possible signpost to the court of appeal, which does not bind it.

The court of appeal decides either in the form of a decision or in the form of a judgment. The type of decision depends on whether the merits of the claim are being decided. When a decision of a procedural legal nature is made, it takes the form of a solution. When deciding on the merits, ie discussing on the merits, the decision takes the form of a judgment. With the decision, the court of appeal rejects the appeal as untimely, incomplete or inadmissible, ie cancels the first instance verdict, while with the verdict it rejects the appeal as unfounded and confirms the first instance verdict or changes that verdict.

4. RESULTS

The court of appeal may, in a session of the panel or on the basis of a hearing, make the following decisions: 1) reject the appeal as untimely, incomplete or inadmissible; 2) reject the appeal as unfounded and confirm the first instance verdict; 3) revoke the verdict and refer the case to the first instance court for retrial; 4) revoke the first instance verdict and dismiss the lawsuit; 5) reverse the first instance verdict and decide on the requests of the parties; 6) adopt the appeal, revoke the judgment and decide on the requests of the parties (Article 387 of the CCP, 2014)

4.1. Revoking of the appeal

Pursuant to the Law from 2011, we see that there is an obligation of the court of appeal to reject an untimely, incomplete or inadmissible appeal without delay if the first instance court did not do so[3]. Therefore, the legislator stated as a primary obligation the authority of the first instance court to also, without delay, reject the filed appeal if it is not timely, complete or allowed. Regardless of the fact that the Law set the rule that the first instance court is authorized to control the admissibility of the appeal, we see that the second instance court was not denied this right and duty either.

When the appellate court dismisses the appeal, such appeal is treated as an unsubmitted appeal. Accordingly, the finality and enforceability of the first instance verdict occur independently of that appeal (Dika, 2003). An appeal may be considered untimely if it is filed after the deadline for its submission. In the case when the appellant, acting on the wrong instruction of the court, submits a legal remedy after the expiration of the legal deadline, and within the deadline set by the court, the question of the timeliness of such an appeal arises. Judicial practice considers such an appeal to be timely, although the deadline prescribed by law has not been respected (Keča, 2004). Also, if there is a failure of the court administration and the timely appeal is not combined with the case file, it will be considered that it was submitted within the deadline (The Decision of the VSS, Rev. 88/2006, cited according to: Petrušić-Simonović, 2011.) In these cases, it is clear that the appellant does not suffer negative consequences due to omissions in the work of the court or court administration. This position is supported both in theory and in court practice, and the basis is found in

3 In relation to the previous solution, the new Law introduces the determinant "without delay". This once again emphasizes the determination of the new Law to end the procedure as soon as possible. This created the possibility for the decision of the first instance court to become final as soon as possible. Art. 389 of the Code of Civil Procedure.

the constitutional provisions on the right to appeal and in the provisions of international conventions.

An appeal is incomplete if it does not contain the conditions prescribed in Article 370 of the Law. If the appeal is incomplete, the court should make a decision rejecting the appeal. However, like the 2004 Law, the 2011 Law accepts an appeal containing only two of the prescribed four content elements. In that sense, it is sufficient that the appeal contains the indication of the judgment under appeal and the signature of the appellant.

An appeal is inadmissible if the appeal was filed by a person: 1) who is not authorized to file an appeal, or 2) a person who waived or withdrew the appeal, or 3) if the person who filed the appeal has no legal interest in filing an appeal. When it comes to an inadmissible appeal, the situation that exists when the intervener joined one of the litigants and who in that capacity files an appeal against the judgment of the first instance court is interesting. An intervener is a person who has a legal interest in one of the parties succeeding in the dispute. This gives him the opportunity to enter into litigation, but the legislator orders him to accept the litigation in the condition in which it is at the time of entry. Also, the future actions taken by the intervener must be in line with the actions taken by the party to which he has joined. In the situation that the party (defendant), recognizes the claim and the first instance court renders a judgment based on the confession, "the appeal of the intervener on the side of the defendant filed against the judgment based on the first instance court of which it was stated by an unauthorized person." (Decision by AsB, Gž 2184/17)

4.2. Refusal of the appeal

When reviewing the legality of the contested decision, the appellate court may reject the appeal as unfounded and confirm the first instance verdict if it finds that there are no reasons for challenging the verdict, as well as the reasons it monitors *ex officio.* The court of appeal has the obligation to pay attention to certain significant violations of the provisions of the civil procedure determined by law. If the verdict does not have shortcomings due to which it can be examined, nor is it covered by any of the significant violations of the civil procedure, if the disposition of the verdict is clear, understandable and does not contradict the reasoning or reasons of the verdict, then the appellate court rejects the appeal and confirms the first instance decision (Decision by AsB, Gž2 798/10). In practice, it is possible that the appeal refutes only a part of the first instance verdict, ie that the first-instance judgment is not challenged in its entirety. In that case, the decision made by the court of appeal reflects only on

the challenged part of the verdict, the rest of the first instance verdict remains unchanged. In court practice, we also find that the court of appeal is obliged to assess the usefulness of the new evidence presented in the appeal and in case it makes a decision to reject the appeal (VS RS Rev 66/97, cited according to: Čizmić, 2009[4]). The jurisdiction of the court of instance on the appeal is not limited to the fact that this court rejects the appeal, but part of the dispositive of the second instance decision must contain a confirmation of the decision of the first instance court (Mandić-Račić, 2002). The theory (Triva-Dika, 2004) states that the court is authorized to reject an appeal not only when it finds that there are no grounds for accepting the appeal, but also when the court does not establish that such reasons exist. We think that this attitude is not justified. Take e.g. that the appeal is filed due to an absolutely significant violation of the provisions of the civil procedure. In order for the court to accept the appeal, it is necessary to suspect that the reason is justified. This means that the appellate court in a particular case can reject the appeal, only when it is sure that the reason does not exist. Therefore, it must not reject the appeal when it does not establish that such a reason exists.

The purpose of the second instance procedure is to control the legality and regularity of the court decision. In that sense, the LCP authorizes the court of appeal to reject the unfounded appeal, but this does not satisfy it, but also determines the obligation of the court to confirm the first instance verdict in that case. In this situation, we see that the court decides on the merits, but that does not mean that the result of that decision is a repetition of the dictum of the first instance verdict. There is an opinion in science that since the court of appeal decides on the subject matter of the dispute by confirming the impugned verdict, it means that the second instance verdict and not the first instance verdict (Poznić, 1989) is provided by legal force. The 2011 LCP, therefore, provides for the same solution as the 2004 LCP, in the sense that an appeal can be rejected as unfounded only when there are no compelling reasons. A novelty from 2003 in the Croatian LCP provides for another possibility of rejecting an appeal. Namely, the court of appeal will reject the appeal as unfounded and confirm the first instance verdict if it finds that the first instance court has applied the substantive law incorrectly, provided that the correct application of the substantive law should equally decide on the claim. (Article 368. Par. 2. ZPP RH, SL SFRJ 4/77)

4 Thus, the decision of the Supreme Court of the Republic of Srpska states that the second instance court is obliged to assess the strength of the new evidence and how suitable such evidence would be to question the truth of the established facts on which the verdict is based.

4.3. Revocation of the verdict by the first instance court

The court of appeal makes a decision on revoking the decision of the first-instance court in case it determines the existence of significant violations of the provisions of the civil procedure in the appellate procedure. Within the decision, the court of appeal orders either to return the case to the same first instance court or to submit it to the competent first instance court for a new main hearing. Also, within the decision, the court of appeal must state which actions of the first instance court are being revoked. This is requested for the reason that the court of appeal has the obligation to revoke all those civil actions that are affected by the violation of the provisions of the civil procedure by revoking the first-instance decision (Čizmić, 2009).

The reasons for the appeal may be: significant violations of the provisions of civil procedure, incomplete and erroneously established facts and incorrect application of the material law. What are the powers and how does the appellate court act with regard to the stated grounds for appeal? When it comes to significant violations of the litigation, unlike the theory, the legislator does not classify absolutely and relatively significant violations of the provisions of civil procedure according to their name, but, of course, makes a difference in procedural consequences. Thus, in the case of relatively significant violations of the provisions, the court did not apply or incorrectly applied a procedural provision and it could have had an impact on making a lawful and correct decision. In the case of absolutely significant violations, the legislator irrefutably assumes that they resulted in the adoption of an illegal and incorrect court decision. Of particular interest is the case which is standardized in legal regulations as the first example of significant violations of the provisions of civil procedure. Namely, when it comes to the improper composition of the court as a reason for revoking the first instance verdict, in court practice a difference is made whether the improper composition of the court existed when passing the verdict or when undertaking a certain civil action. In the first case, it is an obligatory reason for revoking the verdict, and in the second case, there is a possibility of convalidation (empowerment). Convalidation occurs if the main hearing is concluded before a properly composed court panel and if all the evidence presented so far is read before such a panel (Decision by OSB, Gž. 5992/2000, cited according to: Petrušić-Simonović, 2011).

In the case of relatively significant violations of the provisions of litigation procedure, the court shall, without exception, revoke the judgment and return it to the same or the competent first instance court for retrial. When it comes to absolutely significant violations of the provisions of civil procedure, the Law makes certain differences. Thus, when it is decided on a request that does not fall within the jurisdic-

tion of the court, ie when it comes to the absolute incompetence of the court that rendered the challenged verdict, the court of appeal will revoke the first instance verdict, but will not return it for retrial but will refuse the lawsuit (Article 391. LCP, 2014). Here the question can be asked why the court of appeal in the case of court jurisdiction rejects the lawsuit? We believe that the court of appeal is acting correctly, because in the matter of the non-existence of judicial jurisdiction, the intention of the legislator to speed up the end of the litigation procedure is clearly evident. When it is decided on the request on the lawsuit that was filed after the legally prescribed deadline, the court of appeal will revoke the first instance verdict with a decision and reject the lawsuit. In this case as well, viewed from the point of view of procedural economics, there is no justifiable reason to return the case to the first instance court due to the determined untimeliness of the lawsuit. The same provisions apply if there are any of the procedural obstacles to the conduct of the procedure, such as lis pendens, res judicata, court settlement. At this point, the new Law from 2011 extended the possibility of revoking the verdict and dismissing the lawsuit to the case when the court based its decision on the illicit dispositions of the parties (Article 391. LCP, 2014).

If a violation of the provisions concerning party and litigation capacity, as well as the provisions relating to representation, has been violated in the proceedings before the first instance court, the court's conduct depends on the nature of the violation. Namely, if those provisions are remediable, then the court of appeal will revoke the challenged verdict and return the case to the competent court. If those violations are irreparable, then the court of appeal will revoke the verdict and dismiss the lawsuit. In the event that a party who does not have legal capacity participated in the first-instance procedure, the court of appeal will dismiss the lawsuit and revoke the first-instance verdict. In other cases of this group, the errors of the first instance court can, as a rule, be eliminated. When it cannot be concluded from the operative part of the judgment to whom the defendant is obliged to make the payment, in what amount, nor in the reasoning of the judgment the reasons on which basis, such judgment must be revoked on appeal (Judgment by OSL, 22/97. Krsmanović, 2003[5]). If the appeal justifiably indicates that "the impugned verdict does not contain clear and sufficient reasons about the essential facts, and the reasons given are contradictory to the situation in the files" (AsB, 1941/12) the correctness of the challenged decision cannot

5 In the retrial, the first-instance court will determine what the plaintiff is seeking in the lawsuit, and then, depending on the request, will assess whether the resolution of the dispute falls within the jurisdiction of the court, and will make an appropriate decision accordingly.

be determined and the court of appeal is authorized to revoke the challenged verdict and return it to the first instance court for a new trial.

The reasons for the appeal can be, we have said, both incomplete and erroneously established facts and misapplication of substantive law. In these cases, too, the legislator prescribes the obligation of the court to revoke the first instance verdict and return the case to that court for a retrial. There is one exception to this rule. Bearing in mind that the presentation of new facts and proposing new evidence in legal proceedings is limited, the court will revoke the judgment of the first instance court but will not return the case to the first instance court in case the court of appeal finds that it is necessary for the court to repeat the evidence already presented, or evidence that the first instance court rejected. In that case, the panel will schedule a second-instance hearing. The court will act in accordance with the law in this way, only when it is convinced that the factual situation is incorrect or incompletely established. In order for the appellate court to revoke the first-instance judgment and schedule the main hearing, the party must point out this shortcoming. The first instance verdict must be revoked, and the second instance hearing opened accordingly (Račić, 2003). The new Law denied the possibility for the second instance court to order that a new main hearing be held before another judge or panel as it existed in the previous decision.

In court practice, the position is taken that if the appeal reasonably states that the first instance court did not have in mind the relevant provisions of substantive law when making the challenged court decision, an incompletely established factual situation must result. The court then revokes the verdict and returns the case for a retrial. In the retrial, the first-instance court will determine the facts pointed out by the court of appeal (AsB, Gž 5159/12). The erroneous application of the substantive law and the erroneously and incompletely established factual situation also exist in the case of non-distinction of the procedural consequences of the recognition of the claim from the recognition of the facts. The consequence of the recognition of the claim is the passing of a judgment on the basis of the recognition. A distinction should be made in relation to the acknowledgment of facts in the proceedings from the acknowledgment of the claim, as this second acknowledgment relates to the claim itself. When acknowledging the claim, the defendant states that the plaintiff's claim highlighted in the lawsuit is based on the law. If the recognition of the claim is in question, the court will pass a judgment approving the claim without further discussion. When the defendant admits the claim, then he tacitly admits the facts stated in that request. However, the opposite situation is not identical. When the defendant admits the facts

presented in the procedure, it does not mean either explicitly or tacitly that the claim itself is acknowledged. So if the first instance court does not have a clearly recognized claim, it does not treat the recognition of the fact as a recognized claim[6].

The verdict is also revoked when the claim is exceeded. The court does not pay attention to exceeding the claim *ex officio*, but according to the request of the party. The legislator made a distinction between two situations: The first situation exists in the case that the first instance court in its challenged verdict awarded more than what was requested in the lawsuit. In that case, We have the so-called quantitative overdraft (Triva-Dika, 2004) and the court of appeal has the obligation to revoke the first instance verdict in the part in which the overdraft occurred. This means that the appellate court revokes the part of the verdict that was passed without the party's request, and thus reduces the verdict to the limits of the parties' request (Dika, 2003). The part of the decision that does not exceed the claim, the second instance court does not touch and it remains unchanged. The second situation exists when the first-instance verdict exceeds the claim by deciding on something other than what was requested by the lawsuit, the court of appeal will revoke the first-instance verdict and return the case for retrial. This is about the so-called qualitative exceeding of the claim. These two oversteppings of the claim contain different actions by the court of appeal. In the first situation, the appellate court revokes the verdict but does not return the case for retrial, while in the second situation, the court revokes the first instance verdict and returns the case for retrial. In the first case, the court will not return the case for a retrial because in that case there is no request that should be decided. In the second case, the court of appeal will return the case for a new trial after the first-instance verdict is revoked (Grbin, 2004), because the first-instance court must make a new decision on the claim. The appelate court, according to the valid legal regulations, cannot oblige the first instance court to adopt its legal understanding. Otherwise, it would run counter to the principle of legality and independence of the courts. Nevertheless, this does not mean that a certain measure of obligation should not exist (Kecha, 1984). The new Law supplements this Article 393 of the LCP, with a provision which stipulates that in the case of the so-called qualitative exceeding of the claim the provisions of Article 383 of the LCP should not be applied, which speak of the mandatory opening of the second instance hearing.

6 "In the procedural-legal sense, for a verdict based on recognition, the recognition of the claim is important, and not the recognition of facts. By acknowledging only the facts, the request itself is not recognized at the same time, so the circumstance that the defendant acknowledges only the amount of the request is not the basis for passing a judgment based on the confession." Belgrade Court of Appeal, Gž9063/10.

4.4. Reversal of the impugned judgment

The court of appeal also has the possibility of reversing the impugned verdict. Therefore, in addition to revoking the verdict, the legislator envisages another institute by which the court decision is revoked, and that is reversal. Reversal of a verdict is a process that contains two actions: first, the judge must revoke the verdict (no special decision), and then make a new decision on the claim (Starović-Keča, 1998). Therefore, by reversal, the appellate judge revokes the first instance verdict and at the same time issues a new verdict that takes the place of the revoked one. This is the reason why when reversing the first instance verdict, the court of appeal makes a decision in the form of a verdict and not a decision (Petrušić-Simonović, 2011). The court of appeal is authorized to reverse the verdict in four cases: a) when, on the basis of the hearing, it has established a different factual situation than that established in the first instance verdict; when the first instance court has erroneously assessed the documents or indirectly presented evidence, and the decision of the first instance court is based exclusively on that evidence; when the first-instance court has drawn an incorrect conclusion about the existence of other facts from the facts established by it, and the verdict is based on those facts; when the appellate court considers that the factual situation in the first instance verdict was correctly established, but that the first instance court erred in applying the substantive law (Article 394 of the LCP). It should be noted here that the second-instance court in the procedure of appealing the verdict in a closed session cannot evaluate other evidence than that was presented directly before the first-instance court. The court of appeal has this possibility only by holding a second-instance hearing and presenting the evidence itself. Therefore, there would be a violation of the provisions of civil procedure in a situation when the court of appeal, in a closed session of the panel, evaluates differently the evidence that was directly presented before the first-instance court. (SC RS, No: Rev-225/05, cited according to: Blagojević- Tajić, 2011)

The new Law provides for a second-instance hearing in case the court finds it necessary to re-present evidence. This means that it is necessary to correctly determine the factual situation on the basis of which a court decision can be made. In that case, the reversal of the verdict is the result of the second-instance hearing and a different assessment of the evidence than the one given by the first-instance court. However, if the appellate court does not open the hearing, and bases its decision on the information in the files that is not in the first instance verdict, it changes the factual situation and consequently commits a significant violation of the procedure by preventing the discussion of relevant facts (Decision by the SP, Rev. 3555/02; Decision by

the SC, Rev. 1353/02; Decision by the SC, Rev. 5515/98, Milošević-Kašćelan, 2006). This leads to a change in the factual situation, which is procedurally impossible without opening a second-instance hearing. The result of this action of the court of appeal is an illegal court decision. The principle of two levels, which is a constitutional category, in this case presupposes two levels in terms of established facts, and therefore the appellate court has no right to base its decision on otherwise established facts without opening a hearing. In support of this, we cite another position from case law (SC of F B&H, No. 070-0-Rev-06-001064, 2017, cited according to: Čizmić, 2009) Furthermore, in a situation where new facts are presented at the second instance hearing and new evidence is proposed, the court of appeal will revoke the verdict and return the case to the first instance court for a retrial. In other words, the court of appeal will not change the first instance verdict if it is necessary to present new facts and new evidence in order to correctly establish the factual situation.

U situaciji kada prvostepeni sud zasnuje svoju odluku na pogrešnoj oceni isprave kao dokaznog sredstva ili zasnuje svoju odluku isključivo na posredno izvedenim dokazima, drugostepeni sud može presudom preinačiti takvu prvostepenu odluku. Dakle, drugostepeni sud može na osnovu ovih istih posrednih dokaza i isprava drugačije oceniti izvedena dokazna sredstva. U ovom slučaju, vidimo, nije potrebno da drugostepeni sud otvara raspravu, jer on na osnovu iste procesne građe izvodi drugačiji zaključak (Račić, 2003). Kada drugostepeni sud na raspravi utvrđuje činjenično stanje, on formira samostalno uverenje o postojanju, odnosno nepostojanju neke činjenice ili sam tumači sadržaj isprave, dakle, neslažući se sa ocenom prvostepenog suda. In a situation when the first instance court bases its decision on a wrong assessment of the document as evidence or bases its decision exclusively on indirectly presented evidence, the second instance court may change such first instance decision by a judgment. Therefore, the second instance court may, on the basis of these same indirect evidence and documents, evaluate the presented evidence differently. In this case, we see, it is not necessary for the second instance court to open a hearing, because it draws a different conclusion on the basis of the same procedural material (Račić, 2003). When the second-instance court determines the factual situation at the hearing, it forms an independent belief about the existence or non-existence of a fact or interprets the content of the document itself, therefore, disagreeing with the assessment of the first-instance court.

The question arises as to whether this provision of Article 394, item 2, should be interpreted restrictively or whether it should be allowed to apply it to all presented evidence. The intention of the legislator who reserves the possibility of a different

assessment of evidence only for indirectly presented evidence is absolutely justified. Take, for example, that the first instance court presented evidence by hearing a witness. As is well known, witnesses testify orally. The first instance judge gets the impression of the evidence by following the oral presentation of the witness[7]. They are heard individually without the presence of other witnesses. This way of gaining an impression and evaluating the evidence is not available to the second instance judge. This means that only the first instance court is "competent to obtain a certificate of the accuracy of the content of the testimony of a witness whose hearing directly performs as evidence and has insight into his conduct and the manner in which he gives testimony." (PAS, Pž 10283/2012., cited according to: Kozar-Počuča, 2014).

The legislator, as the third case of reversing the verdict, regulates the situation in which the court draws an erroneous conclusion from the facts that it has correctly established. This conclusion concerns the existence of other facts that form the basis for the decision on the merits. Therefore, on the basis of indirectly important facts that it has correctly established, the court draws an incorrect conclusion about the existence of some other facts and puts such a poorly perceived other fact in the basis of its decision. In this situation, the court draws a different conclusion based on the existing procedural material, which means that it is not necessary to revoke the verdict, but in accordance with the efficiency of the procedure, the court is given the authority to change the first instance decision and thus end the appeal procedure. When the court of appeal considers that a new assessment of the material is needed, then it cannot change the verdict, but must revoke the verdict and open a hearing at which it would determine the correct factual situation. The conduct of the court of appeal is an expression of the same situation in which the first-instance court found itself when determining the correct factual situation, so that the principle of immediacy will not be violated (Dika, 2003).

Reversal is also possible in case of incorrect application of the substantive law by the first instance judge. This situation is allowed when the first instance court correctly determines the factual situation and creates the appropriate procedural material, but brings it under the inappropriate material norm. What does this provision mean in practice? It is a question of the so-called wrong legal assessment of the matter. In this case, the legal regulations are correctly applied to the already established factual situation and it is not treated, supplemented and clarified as such again. It is possible

7 The judge has the opportunity to follow the course of the witness's presentation, whether the witness changes the order of testimony, whether he shows uncertainty during the testimony, whether he changes the version of the event he is testifying about, etc.

that the court not only incorrectly applied some existing legal regulation, but also did not know how to correctly apply some legal presumption. For example. in our law there are legal presumptions where the court on the basis of one fact draws a conclusion about the existence of another relevant fact. In the event that the first instance court indisputably determined that the child was born during the marriage of the husband and wife, and then stated in the verdict that the child did not come from the said husband because there is no evidence for that, the court erroneously applied the legal presumption. This opens another way of reversing the verdict. Namely, we believe that in the appellate procedure, the court of appeal may change the decision on the basis of incorrect application of the legal presumption.

In court practice, the position is expressed that when the court of appeal considers that the factual situation in the first instance verdict was correctly established, and that the substantive law was incorrectly applied, then there must be no difference in interpretation of the factual situation in the amended verdict. (Decision by the SC, No. 612/1996.). In the mentioned case, the second instance court will apply the legal norm that it finds appropriate to the correctly established factual situation (Račić, 2003).

One detail should be mentioned herewith. We have seen that the current law also prohibits the double reversal of the first instance verdict[8]. However, this prohibition applies only to cases in which a decision on the merits has been made. When it comes to a procedural decision, such as a verdict due to absence, such a verdict is not the result of the conducted evidentiary procedure and the established factual situation, but it represents a sanction for the failure of the defendant. In that situation, there is no obstacle for the appellate court to revoke the verdict, because such a procedural decision is excluded from the general prohibition of double reversing of verdicts. (AsB, R61/2013., cited according to: Kozar-Počuča, 2014) According to the valid legal regulations, the court of appeal cannot oblige with its legal understanding the first instance court to which the case is referred for retrial. That would encroach on the rules on the independence of the court. The courts are independent in relation to the legislature and the executive power, but also in relation to each other. In that sense, the court decides independently in relation to other courts of the same or higher rank[9]. Basic and higher courts, in their work, respect the decisions of the

8 This is also evident in the court practice: "the amended provisions of the Law on Civil Procedure prohibit multiple or revocation of the first instance verdict whenever it has already been revoked once, according to the provisions of any Law on Civil Procedure." Supreme Court of Cassation of Serbia, R1 657 / 2016.

9 The basis of this position of the court is in the Universal Declaration on the

appellate court or the Supreme Court of Cassation, but they should also be independent and free in creating their decisions. Of course, there is an obligation to act on the objections of the higher court, which does not interfere with their decision-making independence. In view of this, the legislator did not allow the case to be returned to the first instance court in the cited previous case, as it may be logical where the first instance court would correctly apply the substantive law.

4.5. Reformatio in peius

The principle of prohibition "Reformatio in peius" is one of the most important principles not only in civil procedural law (litigation, non-litigation and enforcement), but in our procedural system in general. Deciding on the appeal, the court of appeal cannot change the verdict to the detriment of the party that appealed, if only this party filed the appeal. It should be immediately noted here that, according to the legal wording, the prohibition does not mean that the court cannot decide less favorably in relation to the proposal presented in the legal remedy. The prohibition means that the appellate court cannot place the appellant at a disadvantage compared to the position he had after the first instance verdict was pronounced. In other words, court of appeal may not award less than what the court of first instance has ruled if the party itself has lodged an appeal. In a situation where both parties have declared a remedy, each in the part in which it has failed, the appellate court is not bound by this prohibition reformatio in peius (See: SC F B&H, Rev-3/99, cited according to: Čizmić, 2009)

The principle that it is not possible to change the verdict to the detriment of the only appellant has its justification in fairness and legal certainty guaranteed by the right to a legal remedy (VSS, GZZ. 87/98. Cited in: Petrušić-Simonović, 2011). The purpose of the right to a remedy is to provide lawful and fair protection to the appellant. This means that the legislator provides an unhindered opportunity to examine the correctness and legality of the first instance decision, giving the appellant the freedom to decide. The appellant is guided exclusively by his understanding of the correctness or irregularity of the first instance verdict and must not be burdened by the fear that his right to a legal remedy will worsen his position (Kovačević, 1975). We have said that in deciding on a challenged judgment, the appellate court may reverse or revoke the first instance judgment if it finds that it has deficiencies. The prohibition of reformatio in peius also refers to the procedural situation created by the revocation of the judgment. In theory, it is stated that the first instance court in

Independence of the Judiciary adopted in Montreal in 1983.

the retrial acts according to the instructions and orders of the second instance court and renders a new verdict which must not be less favorable for the appellant than the revoked one (See: Grbin, 2000; Poznić1989; V Starović-Keča, 1998). We have the opposite opinion on this issue. In a situation where only one party has lodged an appeal, it is entirely justified to prohibit the passing of a judgment to the detriment of the party appealing. But that prohibition, in our opinion, is exhausted only on appeal proceedings. In the situation when the judgment is revoked and returned to the first instance court for a new decision, the application of the principle of reformatio in peius ceases.

However, this prohibition is of a relative nature and applies only to cases in which the party has not acted contrary to coercive regulations, public order, rules of morality and good customs[10]. This means that the first-instance court will not render a verdict on the basis of recognition, omission or waiver if it determines that these are illegal dispositions of the parties. The same logic is followed by the court of appeal. In the examination phase of the challenged decision, if it finds that it is the dispositions of the parties that are contrary to coercive regulations, public order, rules of morals and good customs, the second instance court must not literally adhere to the principle of reformatio in peius, but is obliged to revoke such first instance decision. changes in accordance with the provisions of Article 3 of the Law on Civil Procedure. This conduct of the court is independent of whether both parties or only one has filed an appeal. Outside this described situation where the court must act ex officio, there is a field of application of the principle of reformatio in peius.

In the literature (See: Poznić, 1989; Triva-Dika, 2004; Jakšić, 2015), the question is whether the principle of reformatio in peius is valid even when the first instance court rejected the lawsuit and the second instance court rejected the lawsuit as unfounded. The question arises whether the rejection of the claim created a procedural situation that is more unfavorable than the situation in which the claim was rejected as inadmissible. We are of the opinion that this action of the court of appeal does not violate the mentioned principle because the procedural situation of the party whose lawsuit was rejected as inadmissible is not more favorable in relation to the situation when the court rejected such a lawsuit as unfounded. Therefore, by rejecting the lawsuit as unfounded, the court of appeal did not put the appellant in a less favorable position, to whom the first instance court rejected the lawsuit as inadmissible. This interpretation corresponds to the principle of economy, which appears in civil proce-

10 The Law on Civil Procedure from 2011, with amendments from 2014, adds a new determinant - "good customs".

dural law as a postulate of the quality of judicial protection, but also as a characteristic of judicial activity.

4.6. Proceedings after the revocation of the first instance verdict

The form and content of the second-instance verdict corresponds to the appearance of the first-instance verdict, of course, with the present exceptions caused by the specificity of the appellate decision. In addition to the statement, the verdict contains an explanation which manifests the creativity of the judge and which contains the reasons for its adoption. According to the previous LCP in the explanation of the verdict, ie the decision, the court of appeal was obliged to assess the appellate allegations of importance and to state the reasons that it took into account ex officio. This position of the legislator introduced a certain amount of uncertainty because the term "of importancew" was interpreted and applied differently. In practice, it happened that the reasoning contained extensive interpretations of both relevant and other complaints. The new LCP amended this wording and provided that the court of appeal should evaluate only important appellate allegations. In this way, the explanation of second-instance decisions is shortened, because now the explanation is reduced only to important and not to all the stated appellate allegations.

A substantial novelty in the reasoning of the verdict is the shortening of the reasoning in case the appellate court rejects the appeal and accepts the factual situation determined by the first instance verdict, as well as the application of substantive law. Namely, in case the verdict rejects the appeal and the court relies on the previously established factual situation and application of substantive law, then the second instance court will not explain the verdict in detail, but will only refer to the factual situation determined by the first instance verdict and the application of substantive law. This achieves a significant shortening of the reasoning and thus a more effective work of the appelate courts.

When it revokes the first instance verdict, the appellate court returns the case together with all the files to the competent first instance court. Upon receipt of the file, the first instance court is obliged to hold a hearing within 30 days and to set a time frame for a new main hearing. At the new main hearing, "parties may present new facts and propose new evidence only if they make it probable that they could not present or propose them through no fault of their own, or if the appellant was not a party or did not have the position of a party until the judgment was quashed. it is not prescribed otherwise" (Article 398 of the LCP). Here we see that the new LCP, unlike the previous one, introduced the rule of preclusion of new facts and evidence at the

new main hearing. Nevertheless, the legislator restricts this rule to a certain extent because guilt is required. It should be noted that the legislator introduced these rules on the preclusion of new facts and new evidence as a general principle that permeates litigation through all its phases and thus made a step further towards a more efficient and faster trial.

When the first instance court receives the necessary documents, it is obliged to act on the instructions of the court of appeal, which means that it is obliged to perform all civil actions and to discuss all disputable issues pointed out by the appellate court in its decision. This opens another important issue, and that is the position of the first instance court and the parties at the new main hearing.

In the situation when it revokes the first instance verdict, the appellate court returns the case together with all the files to the competent first instance court. The first-instance court is obliged to perform all litigation actions and to discuss all disputable issues pointed out by the second-instance court in its decision on revoking the first-instance verdict. The legal wording "obliged" should be understood in the context of the fact that the first instance court is not authorized, e.g. refuse to perform any action he deems unnecessary. Here, we make a difference between the actions that need to be reported from the legal understanding that is stated in the decision. In terms of actions, the first instance court is bound by the decision of the second instance court (Poznić, 1989). However, it should be said that the first instance court is not bound by the legal understanding on which the revoked decision is based (Grbin, 2004). As we have already mentioned in the theory (Poznić, 1989; Triva-Dika, 2004), it is stated that obliging the first instance court with the opinion of the second instance court would be a direct violation of the principle of judicial independence. The Civil Procedure Act of 1956 (Official Gazette of the Federal People's Republic of Yugoslavia 4) introduced for the first time this rule on judicial independence with regard to the mutual relationship of courts of different ranks. Namely, before the aforementioned Law, in previous proceedings it was envisaged that the first instance court was bound by the legal understanding of the second instance court. The legislator considered that this rule weakens the principle of two-levelness and that the principle of devolution is abused. This rule was taken over and applied by all procedural laws up to the current Law on Civil Procedure. In that sense, the first instance court is obliged to perform all litigation actions and discuss all disputable issues pointed out by the second instance court. However, the first-instance court is completely free to take a different legal position from the one taken by the second-instance court, even on the basis of such supplemented and clarified factual situation. If the parties are not

satisfied with this legal position of the first instance court, they can re-appeal the legal remedy and apply to the court of appeal.

We are of the opinion that such a sequence of events does not guarantee the fulfillment of the goal set by the legislator by passing the said Law. The aim of the amendments to the procedural matter was to speed up the litigation procedure while respecting the rights and duties of the litigants. If the first instance court were bound by the legal understanding of the court of appeal, the parties would be discouraged from re-filing legal remedies and questioning the judgment of the first instance court. Even if they re-filled a legal remedy, it can be foreseen how the court of appeal would act in that case, because the second instance court, due to its authority and prestige, could not be completely objective and impartial according to the legal position it has already taken.

The following also speaks in favor of the obligation: if the Law envisages a provision that would bind the first instance court, we believe that in that way the procedure would be made simpler, faster, more efficient and cheaper. Judicial practice shows that sooner or later the courts of first instance still accept the positions of higher courts, so that their independence exists only in abstracto. Accordingly, we can ask ourselves why the legislator would have the desire and need to support something that has no effect in practice? By obliging the first instance court to accept the legal position of the higher court in the event of revocation of the first instance verdict would facilitate the proceedings of the first instance court itself. As a rule, first instance courts do not accept the views of the higher court, fearing that they may question their competence, experience and perhaps their authority. However, by acting in this way, the courts are working in favor of delaying the proceedings.

In the current situation, it is difficult for a court of "first instance" to express the opinion of a higher court as an expression, with which it disagrees to a greater or lesser extent. If he were legally bound by the position of the higher court, it would be psychologically easier for the lower court, because in his new verdict he could write that he made his decision based on the position that binds him." (In accordane with the above see more in: Grbin, I, 2000).

6. CONCLUSION

The new Law on Civil Procedure was passed in 2011. It has been amended several times, due to the decisions of the Constitutional Court, and due to the need to harmonize it with other legal regulations with later interventions. The new Law also

continues the tradition of the 2004 Law and provides for a general ban on reversing the first instance verdict in order to make the proceedings more efficient. The court of appeal, in accordance with the new orientation of the civil procedure, decides as a rule without holding a second-instance hearing. However, unlike the previous one, the new Law envisages only the possibility and not the obligation to schedule a second instance hearing. Also, in case the court decides at a closed session of the panel, there is a legal obligation to make a decision within nine months from the day of receiving the first instance court file. According to the valid regulations, when there is a violation of the rules and exceeding the deadline, disciplinary proceedings are envisaged against the president of the panel. When it comes to the reasoning of the verdict, the new Law states that the court will not explain the verdict in detail if it rejects the appeal and accepts the factual situation determined by the first instance verdict.

Numerous changes compared to previous procedural solutions in the part concerning the appeal against the verdict are aimed at ensuring respect for the institute of "trial within a reasonable time" and increasing the efficiency of the work of courts. In accordance with the recommendations and provisions of the cited Convention, our litigation is based on a court decision within a reasonable time.

The goal of the latest changes in the procedural matter was to speed up the litigation procedure while respecting the rights and duties of the litigants. However, the legislator remained inconsistent in the part concerning the return of the case to the first instance court. If the first instance court were bound by the legal understanding of the court of appeal, the parties would be discouraged from re-filling legal remedies and questioning the judgment of the first instance court. Even if they filled a legal remedy, it can be foreseen how the court of appeal would act in that case, because the second instance court, due to its authority and prestige, could not be completely objective and impartial according to the legal position it has already taken. By obliging the first instance court to accept the legal position of the higher court in case of revocation of the first instance verdict would facilitate the proceedings of the first instance court itself. As a rule, first instance courts do not accept the views of the higher court, fearing that they may question their competence, experience and perhaps their authority. However, by acting in this way, the courts are working in favor of delaying the proceedings.

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