SCC – 08 – 0226

Claimant

SOE Bletaria "APIKO" Deçan/Dečani
Represented by the Office of Legal Affairs of UNMIK

Respondents

Republic of Serbia
Monastery of Deçan/Dečani

The Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (the "Special Chamber"), Specialized Panel, composed of Esma Erterzi, Presiding Judge, Ilmi Bajrami and Diellza Hoxha, Judges, after deliberation held on 27/12/2012, hereby issues the following:

JUDGMENT

The claim is rejected as ungrounded.

Factual and Procedural Background:

On 26 April 2000, the Claimant filed a claim with the Municipal Court in Pejë/Peć against the Respondents: (1)the Monastery of Deçan/Dečani, (2)Municipality of Deçan/Dečani and (3) Republic of Serbia regarding annulment of donation contract of 1997 for cadastral parcels that were under the ownership of the SOE "Apiko", contract no.0464-2914/97, requesting recognition of the ownership right over the cadastral parcels registered in possession list no. 131 CM Deçan/Dečani.The Claimant alleged that the contract is ungrounded and unlawful and as such it should be annulled and the property should be returned to the possession and ownership of the claimant based on the evidence and history of the cadastral records submitted by the Municipal Council in Deçan/Dečani – Directorate of Geodesy, dated 30.11.1999.

It requested from the Municipal Court to verify that the SOE Apiko in Deçan/Dečani is the owner of immovable properties and other facilities in the cadastral parcels no. 301, 302, 303, 304, 305, 306, 307, 308, 310, 311 and 312, in total surface of 12,05.12 ha, registered in the possession list no. 131 Municipality of Deçan/Dečani. From the History Record of the Municipal Directorate in Deçan/Dečani of 1999, it appears that the cadastral parcels were under the name of the socially owned property Working Organization '16 Nentori Deçan/Dečani – Apiculture Station Deçan/Dečani.

In the Municipal Court in Pejë/Peć the case took the number C.nr.23/2000.

On 28.07.2000, the Municipal Court in Pejë/Peć held the hearing but the **neither** the first or third Respondent did appear, thus, the hearing was postponed for 20.08.2000.Even on this date the Respondents did not appear and the hearing was therefore postponed for an undetermined period of time.

On 28.09.2000, the Municipal Court in Pejë/Peć declared itself incompetent and the case was transferred to the Municipal Court in Deçan/Dečani.

On 22.03.2001, the Municipal Court in Deçan/Dečani rendered the Decision C.nr.12/2000 declaring itself incompetent to decide on this legal matter and after the validity of the decision the case should be transferred to HABITAT (Directorate and Commission for reviewing property and housing requests) for further competence.

The Claimant filed an appeal against this decision C.nr.12/2000 dated 22.03.2001, and the District Court in Pejë/Peć on 04.07.2001 quashed the decision of the Municipal Court in Deçan/Dečani and returned the case for further proceeding with the reasoning that the Municipal Court wrongly applied the material provisions. In the meaning of UNMIK Regulations No. 1999/23 and No. 2000/60, and in particular the explanation of 12.04.2001 by the Special Representative of Secretary General of the UN, in similar cases, the competence of the regular local courts in Kosovo is not excluded. The concrete case did not fall within points (a), (b) and (c) of the Regulation on the Establishment of the Directorate and Commission for reviewing property and housing requests (Habitat).

After the decision was quashed, the case registered under the new number C.no.88/2001, with the Municipal Court in Deçan/Dečani.

On 23.02.2001, the Claimant filed the request for issuance of a preliminary injunction that the Monastery of Deçan/Dečani allows the immediate return into possession and free hold of all the agriculture land of SOE Bletaria "Apiko".

The Municipal Court in Deçan/Dečani, on 24.08.2001, invited the Claimant to amend, correct and clarify the claim.

On 11.09.2001, the Claimant submitted the claim amendment asking for verification of ownership as well as annulment of the contract no.0464-2914/97 concluded between the Republic of Serbia and Monastery of Deçan/Dečani as ungrounded and unlawful.

On 28.02.2002, the second Respondent Municipality of Deçan/Dečani filed a submission whereby it did not contest the claim of the SOE Apiko Deçan/Dečani and it proposed the Court to approve the Claimant's claim in its entirety.

On 19.03.2002, the Municipal Court in Deçan/Dečani held the first hearing where neither the first nor the third Respondent did appear. The first Respondent had duly been summoned through the Court Act of 05.03.2002 through the UNMIK Police but it did not reply to the summons.

On 19.04.2002, the hearing was held and it was again postponed to 28.06.2002 because there was no response by the Department of Justice in Prishtinë/Pristina for the first and third Respondent.

On 28.06.2002, the Municipal Court in Deçan/Dečani held the main hearing in which the Claimant and the representative of second Respondent participated while the first Respondent refused the summons and the third respondent did not justify the absence although it received the summons on 29.04.2002.

The Municipal Court, pursuant to Article 295 of the LCP, decided to hold the hearing in absence of the respondents who were duly summoned. After reading the claim, administration of evidence,

and closing arguments of the Claimant, the Trial Panel issued the Judgment annulling the donation contract no. 0464-2914/97, verifying that the SOE Apiko is the owner of immovable properties, cadastral parcels registered in the possession list no. 131 CM Deçan/Dečani and obliged the Respondents to return the immovable property into possession and free use. It rejected the proposal for preliminary injunction.

The Municipal Court issued this default judgment with the justification that the court continuously for almost one year duly summoned several times the first and third Respondents, the first one refused the summonses while the third one, although it received the summonses institutionally, did not justify the absence, and pursuant to the provision of Article 295 of the LCP it issued the said Judgment.

The Court noted that the donation contract was concluded in 1997 while the Regulation No. 1999/2004 of 12.12.1999, which entered into force on 10 June 1999, states that the applicable law in Kosovo are the laws in force of 22 March 1989. The Court emphasized that the contested immovable property donated with this contract was never a property of the Monastery of Deçan/Dečani; that it is verified with the History of the cadastral records and the possession list the contract is not valid; and that it was concluded contrary to Articles 4 and 5 of the Law on Transfer of Immovable Property (Official Gazette 28/88). The Court stated that donation was made during the time of violent measures. Thus the Court maintained that the contract concluded between the first Respondent, the Monastery of Deçan/Dečan; and the third Respondent Republic of Serbia is void, not valid and unlawful because the third Respondent donated to the first Respondent the property which did not belong to it but the property of the SOE and its workers. The Court also noted that the second Respondent Municipality of Deçan/Dečan did not contest the claim and accepted it.

On 25.11.2002, the lawyers of the first and third Respondent filed an appeal against this judgment through the UNMIK Office with the District Court in Pejë/Peć challenging it due to essential violations of the provisions of Article 354, paragraph 2.7 of the Law on Contested Procedure (LCP), regarding the opportunity of legal participation of parties in hearing, use of party's language in the proceeding pursuant to Article 354 paragraph 2 point 8 of the LCP. The Appellants claimed that the judgment violated the mandatory instruction issued on 28.06.2000, whereby the chief administrator Kouchner addressed to local UNMIK Administrator in Pejë/Peć stated that all disputes with regard to ownership of land and accompanying buildings will be finally decided on by appropriate authorities Habitat which is under the administration of UNMIK.

On 25.10.2005, the District Court in Pejë/Peć issued the Judgment quashing the entire Judgment of the Municipal Court in Deçan/Decani C.no. 88/2001 of 28.06.2002, and returned the case for retrial to the Municipal Court with the reasoning that the attacked Judgment essentially violated Article 354, paragraph 2.8 of the LCP which requires dully service of court documents. District Court pointed out that the first instance court, during the retrial, should consider the claim's irregularity with respect to legitimacy of the parties, the possibility of amending the claim to make it comprehensible.

After the judgment was quashed, the case took a new number C.no. 326/05.

On 24.11.2006, the Municipal Court in Deçan/Dečani invited the Claimant to clarify the claim with respect to legitimacy and the possibility of amending the relief sought in the claim.

On 8.12.2006, the Claimant submitted the clarification of the claim with regard to the legitimacy of parties and stated that it has the legitimacy as a party in this proceeding since it is a registered

entity based on the application for Provisional Business Registration made to UNMIK and registered under number 80132646, dated 11.07.2000. Another hearing was scheduled to be held on 29.08.2008 for which the parties where summoned by Court acts addressed to parties in the proceedings.

On 07.12.2007, Kosovo Trust Agency (KTA) applied for removal of the case from the Municipal Court pursuant to Section 4.5 of UNMIK Regulation No. 2002/13. With the Decision dated 20.6.2008, the Special Chamber, in case no RR-08-0001, removed the claim against the two Respondents before the Municipal Court where parties in the proceedings in case C.no. 23/2000-(326/05) are the SOE Apiko Deçan/Dečani against the Monastery of Deçan/Dečani, Municipality of Deçan/Dečani and the Republic of Serbia. The Special Chamber removed the claim against Republic of Serbia and Monastery of Deçan/Dečani not the one against the Municipality.

On 17 November 2008, the Special Chamber held the first session at this Court in cases SCC-08-0226 (the claim of Apiko represented by KTA) against Republic of Serbia and Monastery of Deçan/Dečani, SCC-08-0227 (the claim of SOE Iliria against Republic of Serbia, Municipality of Deçan/Dečani and Monastery of Deçan/Dečani), and SCC-06-0484 (the claim of Ali Demeukaj against Republic of Serbia and Monastery of Deçan/Dečani, Municipality of Deçan/Dečani, SOE Apiko,Zenun Mecaj and KTA) together without merging the cases due to their close relation. The session was not about the merits of the claims but only on procedural matters and registrations of the lands in the cadastral records. The representation of the SOE by the KTA was challenged and the position of the SOE different than the KTA was heard. The representative of the Municipality was also present in that session for case no SCC-08-0227.

On 24 November 2008, the KTA filed a submission discussing the representation authority of KTA over the SOE and its legal standing in the proceedings as well as changes made in the cadastral records during the course of years. On 1.12.2008, the SOE Apiko filed a submission only in Albanian.

On 10 March 2009, the Trial Panel of the Special Chamber decided that the Office of the Legal Affairs of UNMIK has legal standing in the case as representative of the Kosovo Trust Agency and it has the sole right to represent the interests of the enterprises in particular in this case. It is also mentioned in the legal reasoning that Chamber allows SOE to be represented by its own advisors unless and until KTA (in this case UNMIK) decides to exercise its administrative authority over the SOE. This Decision was challenged by Privatization Agency of Kosovo (PAK).

On the other hand, the Trial Panel, with its decision of 18 May 2009, called into the suit the PAK for any interest that it may have on behalf of the Claimant SOE.

On 12.05.2009, KTA filed a submission for both cases SCC-08-0226 and SCC-08-0227 and made an application for a hearing. It informed the Court that it withdraws the claim against the third respondent in case no SCC-08-0227 in order to facilitate the possible settlement. It is stated that KTA would agree to a settlement proposal that would not challenge the ownership rights of Monastery of Deçan/Dečani with respect to cadastral parcels that are currently located within the Special Zoning Area that includes the Monastery and its hermitage as established with UNMIK Executive Decision No 2005/5 and would waive on behalf of the Claimants in the matters in SCC-08-0226 and SCC-08-0227 and on behalf of any other SOE under statutory administration of and authority any property right claim that they may have to such plots.

The parties were summoned to the hearing held on 19 May 2009 to explore the possibility of settlement. A text of settlement in writing presented to the Court that was attached to the submission of Monastery dated 15.5.2009 by the Court; however, it cannot be specified by which

party it was submitted. The hearings of case no SCC-08-0226 and SCC-08-0227 were held together. The representative of KTA (Office of Legal Affairs of UNMIK) declared that UNMIK waives the claims against Republic of Serbia and Municipality of Deçan/Dečani. He argued that the consent of the Court is not needed to such waiving of rights since UNMIK was not only withdrew the claims but also waived the claims according to Article 193 of Law of Contested Procedure (4/1977). The representative of the Municipality stated that Municipality accepted the withdrawal of the SOE but not that of UNMIK. Furthermore, the representative of KTA and that of Monastery expressed their statements during the session on the settlement. They signed the minutes of the session on different dates.

On 10 July 2009, KTA applied to the Special Chamber asking for issuance of certified minutes and a request for order to enforce the settlement concluded in the hearing held 19 May 2009.

On 26 October 2009, in its response to the Court's order, KTA repeated its request for issuance of certified copies of minutes of the session held on 19 May 2009 and an order for execution of the settlement.

On 24 July 2010, the Appellate Panel rendered it Decision in case no ASC-09-0025, in the appeal field against the decision of Trial Panel dated 10 March 2009.

On 9 February 2011, the Trial Panel rejected the requests of KTA dated 10 July 2009 and 26 October 2009. An appeal was filed against this Decision by KTA.

On 27 December 2011, the Appellate Panel rendered its Decision in case no ASC-11-0038, on upholding the Trial Panel's Decision dated 9 February 2011; while at the same time, stating that the Trial Panel should have set another hearing to enable the parties to complete their settlement with the procedural rules as of 19 May 2009.

On 1 January 2012, the new Law No 04/L-033 on the Special Chamber of Supreme Court of Kosovo Law on Privatization Agency Related Matters entered into force.

With the Decision of Presidium of the Special Chamber No 1/2012, dated 2 February 2012, Specialized Panels were established. As a result of that Decision, the case was initially assigned to Panel 4. With the Decision of the Presidium No 19/20012 dated 20 June 2012, the case was assigned to Ownership Panel.

The Specialized Panel of Ownership Claims, as per the request of the UNMIK and opinion of the Appellate Panel held a hearing on 16 October 2012. The parties based on the Appellate Panel decisions were summoned to a hearing. The parties were ordered to provide the Court with the lacking documents for their authority to represent the parties those reaching the alleged settlement.

Legal Reasoning

1. The parties

(a) The Claimant

The Claimant in the case at hand is the Socially-owned Enterprise (SOE) "Apiko" of which name was changed from time to time. Its status as being a socially- owned enterprise is not contested by any party in the proceedings at any time. There is no other Claimant or counter-claimant apart from this SOE despite there seems many stake holders expressing their interest as to the

proceedings, in different capacities. There is only one Claimant: the SOE Apiko (with different names at different times. Its representation or legal standing in proceedings on behalf of is totally another matter that will be discussed below in details.

(b) The administrative authority of the Agency over the Claimant SOE

As known, Kosovo Trust Agency (KTA) was established with Regulation No 2002/12 based on United Security Council Resolution 1244 (1999) and competence of the Special Representative of Secretary General (SRSG). As of 13 June 2012, the KTA started to have the administrative authority over the socially-owned enterprises. UNMIK REG No 2002/12, as amended with UNMIK Regulation 2005/18, foresees that the Agency shall have administrative authority with respect to all socially owned enterprise in Kosovo. Moreover, according to Article 6.2(d) of the same, the Agency has the right "to dispose of monies and other assets of Socially-owned Enterprises."

The Law No 03/L-067on Privatization Agency of Kosovo (PAK), as amended with Law No 04/L-034, also regulates the administrative authority of the Agency in the same way as provided to the KTA. Article 6.1 of the Law on PAK, grants the Agency broad and exclusive administrative authority over all Enterprises, Assets, interests, shares and property falling within the scope of Articles 5.1 and 5.2. Such authority shall include any action that the Agency considers reasonable and appropriate, within the limits of the Agency's administrative resources, to better enable the sale, liquidation, transfer or other disposition of an Enterprise, Asset or State Owned Interest. It has the right to appoint and replace the chairman, the directors and the managers of the SOE.

In this case, the matter which is highly contested is not the administrative authority of the Agency over the socially-owned enterprise. What is at hot debate is mainly "which Agency has the administrative authority over the SOE": Is it KTA or PAK?

The second highly contested matter in these proceedings is that "what if the administrator of the SOE has different position than the directors/managers of the SOE itself. Now, the Panel is first to address the primary matter (whether it is KTA established by UNMIK or PAK established by Assembly of Kosovo as successor of the first that shall administer the SOE) as to the second one (what if when the SOE has different position than its administrator).

(c)KTA or PAK

Whether it is KTA or PAK that administers the SOE has long been under discussion in these proceedings. It has already been responded not only once but twice by the Appellate Panel of the Special Chamber with the Decisions mentioned above in the procedural background(*Decision dated 24.7.2010, case no ASC-09-0025 and Decision dated 27 December 2011, in case no ASC-11-0038).*

All arguments deriving from Article 1.2 of Law on PAK as amended, stating that PAK is the legal successor of the KTA were repeatedly presented by the SOE itselfand by the lawyer of the Municipality during the hearings and in the written submissions. Representative of PAK as well argued the matter both in writing and orally during the session held on 19 May 2009 and in its appeal filed against the Decision of Trial Panel dated 10 March 2009. Furthermore, the Ministry of Justice had the opportunity to express its understanding on this representation with its letter of 14 October 2009 and maintained that according to Article 67.4 of Law on Management of Public Finance and Accountability (Law No 03/L-048, dated 13 June 2008) allows and obliges the Ministry of Justice to be involved in the proceedings. All these arguments were available to the first instance and second instances judges of that time and assessed with their respective decisions on the matter.

On 10 March 2009, the Trial Panel of then concluded that the Office of the Legal Affairs of UNMIK, as representing the KTA, has legal standing in this case and that it has the sole right to represent the interests of the Enterprises in cases before the Special Chamber and in particular to the cases this decision applies. Upon the appeal filed by PAK against the Decision of the Trial Panel of 10 March 2009 the Appellate Panel upheld the conclusion of Trial Panel (Decision of 24 July 2010, case no ASC-09-0025).

In another decision of the Appellate Panel, dated 27 December 2011, case no ASC-11-0038, in the appeal against the Decision of the Trial Panel dated 9 February 2011 in cases SCC-08-0226 and SCC-08-0227, it is reiterated that the representation of the SOE by KTA and Office of the Legal Affairs of UNMIK is final and therefore binding and not be questionable anymore and even considered as to be *res judicata* by the Appellate Panel. At the time of issuance of that Decision, the new Law on PAK no 04/L-034 was already in force.

It is not relevant whether the current composition of the Specialized Panel agrees with that conclusion or not. The final Decisions are binding not only on parties but also on all Courts unless a new law regulates the field differently after the adoption of such final Decision on a procedural matter. The predictability and legal certainty principles require that the final decisions/judgments cannot be challenged further, no matter they are correct or not, unless an extraordinary remedy is available (which is still subject to specific time limit). There is no evidence or notification in the file indicating that any party or third person claiming to have an interest in this case has challenged the constitutionality of the Decisions of the Appellate Panel or applied for extraordinary remedies in this particular case at hand.

In the case at hand, the Appellate Panel, in its Decision dated 24 July 2010, made its determination on that it is the Office of the Legal Affairs of UNMIK that has the sole right to represent the SOE when the Law on PAK and the Constitution of Republic of Kosovo were already in force. The Constitution of then, in Article 143, was referring to the role and effect of Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. According to Article 143.2 of the Constitution, the provisions of the Comprehensive Proposal shall take precedence over all other legal provisions in Kosovo. Furthermore, the Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail (Article 143.3 of the Constitution).

It is a very well-known fact that the Comprehensive Proposal (Ahtisaari Plan) gives the administrative authority over the socially-owned enterprises to Kosovo Trust Agency (Annex VII of the Comprehensive Settlement, Article 2). The fact that as of today the Constitution does not make any reference to the Comprehensive Proposal or does not give prevalence over the Constitution is not relevant. All the submissions of the parties and their statements on their settlement and signing of the minutes of the hearing in which the settlement was expressed, apart from the last one supplementing the previous ones, were made at a time when such reference to Comprehensive Proposal was still existing in the Constitution as the higher one in the hierarchy of the norms.

The Specialized Panel will not take a new stance on the matter but only refer to the previous determination of the Appellate Panel on the representation of the Claimant SOE by the Office of the Legal Affairs of UNMIK which is only declaratory now but not constitutive.

(d) The remaining Respondent(s)

The original claim filed with the Municipal Court was directed against Republic of Serbia as the first Respondent and Municipality of Deçan/Dečani as the second Respondent and Deçan/Dečani Monastery as the third one. The Municipal Court already concluded before removal of the claim that Municipality accepted the claim and the removal Decision of the Special Chamber in case no RR-08-0001 only referred to two Respondents remaining. In any case, both the SOE and the UNMIK waive the claim against Municipality. The Municipality accepted the waiving of the claim by the SOE against it. i n the session held on 19 May 2009, Office of Legal Affairs of UNMIK clearly expressed that it waives the claim filed against Republic of Serbia based on Article 193 of the Law on Contested Procedure. The Panel of then, despite stating that it would examine the oral submission as such and take a stance on whether to consider it as a withdrawal request or waiving of claim has not made a determination until recently.

The Specialized Panel considers that the declaration of the representative of the Office of Legal Affairs of UNMIK did not require the consent of the Trial Panel. The withdrawal of the claim was explicitly regulated in UNMIK AD 2008/6 and now in Article 26 of Annex of the Special Chamber Law which requires the consent of the Specialized Panel. However, there is no explicit provision on waiving of rights and claims in the UNMIK AD 2008/6 or in the Annex of the Special Chamber Law. Thus, the provision of the Law on Contested Procedure (LCP, Article 193 of old one, Article 261 of the new) is applicable, pursuant to Article 70 of UNMIK AD 2008/6 (and Article 14 of Special Chamber Law) in waiving of claims which neither needs the consent of the Court nor that of Respondent(s). The declaration made by the representative of the Claimant on 19 May 2009, therefore, produced its legal effect as of that date. Now, the Panel only draws attention to the fact that Republic of Serbia is not a party anymore in these proceedings. The only remaining Respondent is the Deçan/Dečani Monastery. Such conclusion was already reached by the Panel and announced during the hearing held on 16 October 2012.

2. The relief sought

In the claim filed with the Municipal Court the reliefs sought from the local Court as amended were having two folds:

(a) the request asking the verification of ownership right over the immovable property described in possession list no 131, later on as amended asking for registration of the lands in the name of SOE as well as handover of the possession and

(b) the request asking for annulment of donation contract of 5 November 1997 concluded between Deçan/Dečani Monastery and Republic of Serbia.

As to the first relief, the Panel found out that, despite all actions taken by different bodies at different times, the lands in question is still registered under the name of the Claimant SOE as of 14 August 2012 as verified with the response of the Cadastre to the request of the Court sent in a case which was previously held together with this case (Case no SCC-06-0484). Accordingly, even if there is no settlement reached by the parties and their representatives, the Claimant lacks interest in such a claim filed with Municipal Court.

As to the second relief, the Claimant is not one of the parties of such a donation contract made by Republic of Serbia and the Monastery. Thus the Claimant lacks active legitimacy in such a claim unless one of the contractors makes a move for asking for registration of the land under its name based on the donation contract.

In this regard it is worth to mention the Executive Decisions of SRSG as to the changes in the Cadastral records. The SRSG, first, with the Executive Decision No 2008/16 of 22 April 2008, decided that in the absence of substantiating documentation provided by the Municipality of Deçan/Dečani, the entries of land parcels No 301 through 312 (possession list no 131) currently registered in the cadastral books of Deçan/Dečani Municipality in the name of Socially-owned Enterprise "16 November Apiculture Center Deçan/Dečani, land parcels Nos. 494, 495, 502, 503, 522, 523, 524, 528, 1104, 1105 and 1106 (possession list No 237) currently registered in the cadastral books of Deçan/Dečani Municipality in the name of Socially-owned Enterprise "Tourist Hotel Enterprise Deçan/Dečani and land parcel No. 943 (possession list No.119) currently registered in the cadastral books of Deçan/Dečani Municipality in the name of Socially-owned Enterprise "Public Housing Enterprise" shall temporarily be set aside with immediate effect and the *status quo ante* shall be restored. The Executive Decision shall be reviewed if satisfactory substantiating documentation is provided to UNMIK by the Municipality of Deçan/Dečani. It is also stated in this Executive Decision that it shall be without prejudice to a final authoritative determination of the property rights regarding the land parcels concerned following the outcome of the ongoing judicial proceedings before the competent courts in Kosovo and ongoing proceedings before the Kosovo Property Agency.

With a subsequent Executive Decision No 2008/21, dated 17 May 2008, the SRSG decided that the entries in the Cadastre set aside by Executive Decision No 2008/16, shall be substituted by entries into cadastre records that restore and consistent with possession list No 138 (N95-01-1/97) issued by the Peje/Pec Office of Land Cadastre on 10 March 1998. It further stated that consistent with the above the Visoki Decani Serbian Orthodox Monastery shall continue to enjoy undisturbed possession of land parcels No 301 through 312 (current possession list No 131), land parcels Nos 494, 495, 502, 503, 522, 523, 524, 528, 1104, 1105 and 1106 (current Possession List No 237) and land parcel No 943(current Possession List No 119). In the event of an authoritative adjudication of the proprietary rights regarding the lands concerned by a court of competent jurisdiction in Kosovo, following the outcome of the ongoing proceedings before the Kosovo Property Agency, the cadastre records shall accurately reflects such adjudication.

It is not known by the Panel why the UNMIK Executive Decision No 2008/21 has not been executed in the Cadastral records. What is known is that the cadastral records are still in the name of the SOE and the parties are aware of this fact as can easily be understood from their oral submissions during the sessions. Thus, the SOE seems to be lacking legal interest as of today in asking for verification of the ownership right and its registration in the cadastre.

As to the handover of possession of the cadastral parcels, the possession of the lands by the Respondent Monastery has already been protected with the above mentioned Executive Decision of the SRSG. As of today, since the case pending before the Special Chamber is at its early stage as to the conduct of proceedings, the Panel does not hold any information whether Kosovo Property Agency made such a determination referred in the Executive Decision No 2008/21 of the SRSG. It is not relevant either, since the claim of the Claimant SOE asking for handover of the possession as such would not fall today under the jurisdiction of the Special Chamber which operates under the Special Chamber Law No 04/L-033. Special Chamber has jurisdiction over the claims against the Respondent SOEs or the Agency not those of SOE in the capacity of a Claimant against the private natural or legal persons. (Article 4 read in conjunction with Article 5.2.2 of the Special Chamber Law).

3. The registration in cadastre actual situation as of the date of settlement

It is unknown to the Specialized Panel whether the parties has ever attempted to change the cadastral records in accordance with UNMIK Executive Decision of 2008/21 and if yes, why it cannot be executed. However, what is important is that the lands in dispute are still registered under the name of the Claimant.

4. The settlement

Taking into account the determination of the Appellate Panel that it is the Legal Office of UNMIK, as representing the KTA, which has the sole legal standing in the proceedings; and bearing in mind that the same concluded that SOE can only represents itself unless the KTA takes over the proceedings, as discussed above in details, the mere contention of the SOE that it does not agree with the settlement allegedly reached between the KTA and Respondent Monastery or that it should have been represented by PAK not by KTA, cannot bring any new feature to the discussion which has not been addressed previously. All those arguments are already responded by the first and second instances.

After this point, what the Panel should look for is whether the settlement reached between the UNMIK Legal Office and the sole remaining Respondent Deçan/Dečani Monastery fulfills the requirements of procedural rules and what kind of legal effect may derive therefrom.

The parties, in particular the KTA, have been submitting repeatedly written and oral submissions to the Court on the intention of KTA and the Monastery to reach a settlement. In some of those submissions only pure wishes of KTA or its readiness to reach a settlement were expressed whereas to some other written submissions, the content of settlement were attached. What is important to note here is that the Trial Panel and the Appellate Panel of the Special Chamber did not consider those settlements expressed by the KTA and Monastery as in compliance with applicable procedural rules. The rejection of the Trial Panel previously that a settlement was reached has nothing to do with the content of the settlement or the authority of the parties to reach a settlement but simply because the Trial Panel of then considered that the alleged settlement was not complying with procedural rules.

The following can be pointed out as four important submissions related to the will to reach a settlement;

(a) The will on reaching a settlement expressed in the submission of KTA dated 12 May 2009 and application for a hearing to present this settlement
(b) The settlement expressed during the session held on 19 May 2009 and
(c) The application made on 10 July 2009 by KTA asking for certified minutes of the hearing of 19 May 2009 and execution of settlement
(d) The settlement presented in writing and expressed in the session held on 16 October 2012 and supplemented in accordance with the Appellate Panel opinion stated in its decision of ASC-11-0038 dated 27 December 2011

The first three were not considered as a proper settlement complying with procedural rules by the Trial Panel and the Appellate Panel previously.

The Trial Panel, with its Decision of 9 February 2011, rejected the request of UNMIK Office of the Legal Affairs dated 10 July 2009 and its further submission dated 26 October 2010 repeating the same requests, in both of which UNMIK claimed that the settlement reached by the parties is final and binding on the parties. The applicant asked to be provided by a certified true copy of the minutes of the hearing held on 19 May 2009 as well as the issuance of an order for the

enforcement of the settlement reached by the parties remaining after their waving of the claim against the Respondent Republic of Serbia in accordance with Article 193 of Law on Contested Procedure. The applicant requested the certified copy of the minutes of the hearing in accordance with Article 322 of the Law on Contested Procedure and that the Special Chamber takes necessary measures, following issuance of such certified copy for the enforcement of the settlement duly reached by the parties during the hearing before the Special Chamber by ordering the competent authorities to make the necessary changes in the cadastral records.

What was the problem in the interpretation of former Trial Panel?

Upon these requests, the Trial Panel rejected the request on 9 February 2011 based on the arguments that the execution of settlements are not under the jurisdiction of the Special Chamber and more importantly a settlement was not finalized between the parties. It also discussed that the minutes are the evidence that parties have the right to obtain to prove their obligations assumed in the hearing. This implies that the Trial Panel even rejected to provide the applicant with the certified minutes. Furthermore, seemingly the Trial Panel of then concluded that waiving of such rights can only be made during the hearings and there is no such statement made properly during the hearing. The Trial Panel maintained that outside of the Court, parties were free to make all declarations relating to their rights but since they requested for their agreement to be approved by the Court, the procedural limits of the trial had to be verified. The Trial Panel further discussed that in relation to parcels that KTA waives rights; it is not clear whether this waiving was done in favor of KTA and whether that means a transfer of the right or recognition of the claimed rights (*for details see the Decision*). That's what the Panel of then considered that the contract (meaning the agreement) lacked essential cause of settlement which cannot be approved. On the other hand, the Trial Panel argued that it is not clear if the will of the Claimant to waive the claims against those respondents remains unchanged in the situation of settlement is disapproved.

That Decision of the Trial Panel was reviewed by the Appellate Panel. The Appellate Panel, as put by it, reviewed the said Decision only upon the content of the appeal. It declared that that Decision was correct and in line with legal provisions of the subject matter at hand (*Decision dated 27 December 2011 in case no ASC-11-0038).*

What was the problem in the interpretation of the Appellate Panel as to the alleged settlement?

Seemingly, the justification of the Appellate Panel was, however, somehow different than that of Trial Panel. The Appellate Panel emphasized the explanation of the Trial Panel on that the minutes of the hearing of 19 May 2009, during which that they made their declarations constitute their settlement but the minutes were signed on different dates by the parties. The Claimant's representative signature bears the dates of 22 June 2009 whereas the Respondent's is dated 8 July 2009. The Appellate Panel attached importance to such different dates of signing of the minutes. In the interpretation of the Appellate Panel, as the UNMIK AD No 2008/6 in Section 26.4 requires that such an agreement be in the written form, the wording of this Section implies that an agreement has to be put in writing by the parties outside of the hearing. To quote from that Decision "…*following the written agreement, submitted to the Trial Panel , the Court can close the case, and the parties are free to give execution to their agreement by the legal instruments provided by the law to this extent".*

According to the Appellate Panel, another form of settlement is within the Court is provided for by Article 322 of Law on Contested Procedure (the former LCP), applicable to the proceedings before the SCSC pursuant to Section 70.3 of UNMIK AD No 2008/6. The said Article reads "*the settlement of the parties shall be entered in court records. The settlement is considered made when the parties, upon*

reading of records to them, sign the records. The parties shall be issued certified copies of the records into which the settlement was entered, should they request so."

After giving these explanations, the Appellate Panel concluded that in the case at hand the procedure prescribed by above mentioned provision was not followed since the parties signed the minutes on different dates. According to the Appellate Panel, Article 322 of Law on Contested Procedure, as it can be understood by a thorough reading of the law, implies that the agreement shall be made at the same time by the same parties, during the same hearing, who shall sign the agreement before the judge in charge in the public hearing, "upon reading of the records to them".

However, it stated that the Trial Panel should have set another hearing, during which the parties could have finalized the settlement procedure or the parties pursuant to Article 26.4 of UNMIK AD No 2008/6, could have reached an agreement out of the hearing, set it out in a written form, and then presented it to the SCSC.

The Appellate Panel remained silent as to non-issuance of the minutes to the parties as requested by the UNMIK Office of the Legal Affairs.

Appellate Panel noted that the parties had expressed their will to settle the dispute and therefore, the Trial Panel should set a hearing in order to investigate the possibility of such settlement to reach pursuant to applicable provisions.

Another point raised by the Appellate Panel was that in any case execution of such settlement does not fall under the jurisdiction of the Special Chamber.

On 20 June 2012, the case was transferred to the jurisdiction and competence of the Ownership Panel with the Presidium Decision No 19/2012. The Panel, based on the request of the UNMIK Office of the Legal Affairs and taking into account the Appellate Panel Decision set another hearing. The hearing was held on 16 October 2012.

The representative of the Claimant, in the session held on 16 October 2012, presented in writing the text of the settlement reached between UNMIK Office of the Legal Affairs and Deçan/Dečani Monastery and signed by the representatives of those parties and confirmed during the session the text read to them. However, due to the fact that the draft minutes are made available to the review of the Presiding judge after a few days later by the court recorders and then needs to be translated in the language of the parties before signature, there was no possibility of signing of the minutes on the date of the hearing. However, the minutes signed by the Presiding Judge were served on both parties reaching the settlement and they were invited to sign the minutes on the same date. They signed the minutes of the session at the same time on 15 November 2012. Thus, the procedural requirements of Section 26.4 and Article 322 of Law on Contested Procedure (4/1977) and Article 26 of Annex as well as Article 416 of Law on Contested Procedure (Law No 03/L-006) are all met.

The only missing documents were the ones showing the legal personality of the Monastery on its own apart from any other institution in Serbia or Kosovo, the representation of the Monastery and the right to reach a settlement as a separate legal entity and the documents showing the appointment of the Abbot to the Monastery. Such documents as well as the translation into Serbian of the settlement were presented by the parties within the time limit provided by the Presiding Judge during the session.

The representative of the SOE objected to the settlement reached by UNMIK and Deçan/Dečani Monastery. It argued that PAK should have been invited to the hearing. It was explained during the

session that the parties were invited to a hearing by means of taking into account of the Decision of the Appellate Panel dated 24 July 2010 in case no ASC-09-0025.

As to the procedural rules, the presentation of the settlement right now, even the one expressed in the hearing of 19 May 2009 was complete in the interpretation of the Specialized Ownership Panel of now. Before that session, the KTA already provided a text to show its will. It repeated in the hearing the proposal. The proposal made as such accepted by the representative of the Monastery. The Presiding Judge stated that the Court would prefer a text in writing and gave them time limit to be clear on the content of the settlement. However, the representative of the Monastery clearly stated that they did not need time for this and accepted the offer made by the representative of the UNMIK Office of the Legal Affairs. In the interpretation of the Specialized Panel, the offer and the acceptance of the offer is enough to decide that an agreement is concluded. This is the basic principle of Law on Obligations (or Contracts) in many legal systems on how to reach an agreement. Whether there is a need for a written form for validity of such an agreement is another question. Sometimes, the written form may be imperative for the validity of an agreement whereas for some other types of contracts it may not be a constitutive element but only declaratory or only a matter of proving of existence of such an agreement. In any case, the free will of the parties were put in the minutes on 19 May 2009 and those minutes were signed by them despite the signing of the minutes by parties took place at different times. Nevertheless, the Panel as mentioned above considers itself bound with the interpretation of the Appellate Panel on how to reach a settlement.

Article 416 of the LCP (Law No 03/L-006) regulates the form of settlement and defines the way to reach it. According to this Article; the settlement is included in the minutes of the meeting. The court settlement is concluded at the moment when the parties read minutes of the meeting on settlement and sign it. Certified copy of the minutes of the meeting, including settlement, is given to the parties. Court settlement should consist of also an agreement of court expenses. If the parties cannot agree on expenses they can ask that this decision be brought by the court of the matter,

Such settlement presented in the session held on 16 October 2012 is considered as in line with the Decision of the Appellate Panel. It is considered that the text concluded and signed outside of the Court and presented and read and confirmed during the hearing by the UNMIK Office of the Legal Affairs as the Claimant having legal standing in the proceedings related to the claim filed by the SOE (in accordance with Section 29.2 and 3 of UNMIK REG 2002/12, as amended, and Article 29.2 and 29.3 of Annex of Special Chamber Law) and the sole remaining Respondent Deçan/Dečani Monastery is in compliance with Article 26 of UNMIK AD No 2008/6 and that of Annex of SCL and that such settlement has been completed and is in compliance with Article 416 of LCP as well.

5. Lack of counter claim

The UNMIK Office of the Legal Affairs now and then asks for issuance of an order for a change in the books of Cadastre to reflect the settlement in the cadastral records. However, there is no counter claim or a separate claim filed by the Respondent Deçan/Dečani Monastery for the verification of the ownership right over the lands in question and/or registration of them in the records of Cadastre under its name up to now.

The settlement of parties and binding effect of that reached by the parties in a pending proceeding is a different legal concept than an acceptance of a claim or a counter claim. Without having a counterclaim, the Court can decide on the effect of the settlement only over the relief asked in a pending proceedings based on a claim.

What the Specialized Panel can decide is limited to the claim of the SOE. It can either grant the relief sought therein or reject it. Considering that there is no counter claim filed by the Respondent which would be subject to certain limit of time that already expired, the Panel can only take a stance on the request of the Claimant stated in the current proceedings. The Court settlement can be reached only if charges are raised (Article 418.1 of LCP).

6. The relief that can be granted based on the settlement

The only relief that can be granted based on this settlement in the case at hand is to reject the claim. Article 26 of UNMIK AD No 2008/6 or of Annex of the Special Chamber Law does not explicitly state what kind of actions should be taken by the Panel based on a settlement. It only stipulates that such a settlement is binding on the parties but nothing else. The matter is covered with in Law on Contested Procedure.

According to Article 417 of LCP, during the entire court procedure, the court considers if it is going along side with the charges if it came to a settlement, and if it considers the charges are addressed, rejects the charges. Thus, only determination that can be made now by the Court as to this settlement is to reject the claim as ungrounded.

The rest is not in the competence of the Specialized Panel. Nor there is a counter claim or a separate claim to be joined with this one filed by the Respondent to acquire the ownership right over the lands in question or asking the verification of the ownership or registration of them under its name.

7. The execution of the settlement

The representative of UNMIK Office of Legal Affairs filed a submission on 19 November 2012 asking for certified copy of the minutes of the session held on 16 October 2012 as well as issuance of an order to the Cadastre instructing it to register the cadastral parcels in dispute under the name of the Respondent Monastery. The minutes of the said hearing will be provided to the parties and served on them as attached with this judgment.

As for the request for issuance of order for the change in Cadastre to enable the execution of their settlement reached between UNMIK and Monastery:

According to Article 414 of Law on Contested Procedure (Law No 03/L-006);

In court settlement the entire charge or just a part of it can be included in it. The court brings an order regarding legal settlement. However, the parties cannot reach the settlement through court if the charge has to do with the rights they do not freely poses (Article 3, paragraph 3 of LCP). In case that case, the parties come to an agreement on the rights they do not freely possess, the court will include in the minutes of the hearing the agreement between parties which can later be evaluated by the appeal court for its validity Article 414.4 of LCP). Thus, the settlement reached by parties made be subject to an appeal and third parties may still claim that the rights are not the ones the parties freely possess.

Otherwise, such settlement is binding on the parties in accordance with Article 26 of Annex of the Special Chamber Law, the explicit provision which does not require the application of LCP, either in this sense read in conjunction with Article 14 of Special Chamber Law and/or Section 70.3 of UNMIK AD No 2008/6.

Nonetheless, execution of such settlement does not fall under the jurisdiction of the Special Chamber. The Special Chamber does not have jurisdiction over the execution of even its own decisions or judgments. The regular courts have jurisdiction over execution requests. The binding nature of settlement between the parties does not change this fact.

If the parties wish to execute their settlement, they are free to take necessary actions before the administrative authorities by means of presenting the minutes signed by them as to their settlement reached before the Special Chamber in this case and verified and delivered on them by the Court together with this Judgment. In case of non-compliance of the administrative authorities to their settlement, they may present their challenges within the administrative procedure.

Or else, they may ask for execution of this judgment before the competent regular court if and when it becomes final. It is worth to state that such execution request still would fall outside of the jurisdiction of the Special Chamber.

The Costs

The parties did not take a stance as to the costs. Thus, no party asks to be reimbursed. As to the court fees, the Panel decides that no imposition on the cost needed as there is no written court schedule yet approved by the Kosovo Judicial Council in accordance with Article 57.2 of Annex of the SCL.

Legal Advice

The settlement reached by the parties is binding on them in accordance with Article 26 of Annex of SCL. Such settlement can only be challenged by them under the conditions stipulated in Article 418.2 of LCP.

In case any person claiming that his/her/its procedural rights had been infringed or that he/she/it has substantial rights over the subject matter of this case or intending to challenge the settlement reached; the Panel reminds that the appeal procedure is as follows:

Pursuant to Article 10.6 of the Special Chamber Law, may file an appeal against this judgment is to be in writing to the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters within twenty-one (21) days from the receipt of this decision or being aware of it. According to the same Article the appeal has to be served on the other parties within the same time limit by the appellant and proof of service is to be attached to the appeal. The Specialized Panel, in this regard, reminds also the provision of Article 59 of the Annex. The Appellate Panel may reject the appeal, thus this Judgment will become final, if the parties fails to comply with the provision of Article 10.6 of the Special Chamber Law and Article 59 of the Annex within the prescribed time period.

Whether the appeal of those who claim such interest is admissible or not is to be assessed by the Appellate Panel.

Esma Erterzi,

Presiding Judge, EULEX