DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIČKU AGENCIJU

ASC -09-0043

In the lawsuit of

Claimant

[redacted], Natural person
[redacted] Prizren

vs.

Respondent/Appellant

[redacted] Prizren
Represented by the [redacted]

the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Mr.sc. Sahit Sylejmani, Judges, on the appeal of the Respondent against the decision of the Trial Panel of the SCSC of 8 July 2009, SCA-08-0074, after deliberation held on 11 October 2010, delivers the following

D E C I S I O N

1. **The appeal is grounded.**
2. **The decision of the Trial Panel of the SCSC of 8 July 2009 (SCA-08-0074) is modified as to read as follows:**
   'I. The decisions on Execution of the Municipal Court in Prizren, E.no.571/06 of 24 July 2006 and of 1 March 2007, as well as E.no. 2229/07 of 30 June 2008 are declared null and void.

II. On the occasion of the appeal, the judgment of the Municipal Court in Prizren dating 17 February 2005 (C.no.450/2004) and the decision of the District Court in Prizren dating 08 May 2007 (Ac.no.281/2005) are declared null and void.

III. The case C.no. 450/2004 (Municipal Court in Prizren), Ac.no.281/2005 (District Court in Prizren) is withdrawn from the regular courts and is to be decided by the Trial Panel of the SCSC.'

3. **The Respondent is preliminary obliged to pay court fees in an amount of 90 Euros for the appeals proceedings to the SCSC.**

Factual and procedural background:

On 28 June 2004 the Claimant ([redacted] filed a claim against the Respondent [redacted] with the Municipal Court Prizren. The Claimant asked the court to approve that she has been and still is in a working relationship with the Respondent continuing after 27 December 1993 and that the Respondent owes her wages for a specific period of time. The claim was registered under the number C.no.450/2004. On 17 February 2005, the Municipal Court Prizren in this case rendered a judgment in favour of the Claimant and advised the Respondent that an appeal can be filed within 15 days after the judgment was rendered to the District Court Prizren, through the Municipal Court Prizren.

On 14 June 2005 (via normal mail), the Respondent filed an appeal against this decision in two parts, dating 08 June 2005 and 14 June 2005, based on an essential violation of the procedural provisions, a wrong ascertainment of the factual situation and a wrong application of the material law. The Respondent requested from the District Court Prizren to approve the appeal, to annul the contested judgment of the Municipal Court Prizren and to return the case to the Municipal Court Prizren for retrial.

The District Court Prizren with its decision Ac.no.281/2005 of 03 March 2006 dismissed the appeal of the Respondent as untimely, since the judgment of the Municipal Court was served on the Respondent on 24 May 2005, whereas the appeal was lodged on 14 June 2005, therefore not complying with the time limit of 15 days granted by the Municipal Court Prizren. The District Court's decision was served on the Claimant's lawyer on 20 March 2006 and on the Respondent's representative, on 21 March 2006.

On 5 April 2006, the Claimant submitted to the Municipal Court Prizren a proposal for execution (E.no.571/06) of the judgment C.no.450/2004 requesting also the payment of the procedural expenses in an amount of 160 Euros.

With its decision E.no.571/06 of 24 July 2006 the Municipal Court Prizren decided for the execution of the Municipal Court Prizren's judgment against the debtor (Respondent), and advised the Respondent on the possibility to file an appeal against this decision, within 8 days after the service of it, through the Municipal Court Prizren to the District Court Prizren.

The original file of the Municipal Court Prizren contains a document of the Municipal Court Prizren (information letter), dated 08 December 2006, which is addressed to the Kosovo Trust Agency (hereinafter KTA) in Prishtinë/Priština, informing the KTA about the execution procedure conducted at that time in the Municipal Court Prizren, according to the proposal of [redacted] (the Claimant), against [redacted] (the Respondent). The submission bears the seal of the Municipal Court Prizren and is signed by Judge Qerim Fazlija, but there is no evidence in the file proving that this document was delivered to the KTA.

The case file also contains another information letter, dated 11 January 2007, of the same content as the previous one, but, although bearing the

signature of the same judge, not bearing the court seal and again without any evidence that it was delivered to the KTA.

The Municipal Court file contains no notification of the Claimant's intention to file a claim submitted to the KTA, as required by Section 29.1 of UNMIK Regulation 2005/18.

As the Respondent objected, based on Artickle 48 of the Law on Executive Procedure (Official Gazette of SFRY 20/1978, as amended), against the decision of the Municipal Court of 24 July 2007 within the time limit foreseen by the law, the Municipal Court held hearings to decide on that objection. Following those hearings in the case E.nr.571/06, the Municipal Court Prizren, with its decision E.nr.571/06, of 1 March 2007, declared itself incompetent and referred the execution case to the SCSC.

On 28 March 2007, the Claimant filed an appeal against the decision of the Municipal Court Prizren dated 1 March 2007 with the Municipal Court Prizren to the District Court Prizren.

On 8 May 2007 the District Court Prizren rendered a decision by which it approved the appeal of the creditor (Claimant), quashed the Municipal Court decision and returned the case for retrial to the Municipal Court.

The file of the Municipal Court Prizren concerning the execution contains one acknowledgment of receipt dating 27 November 2007 proving that the Privatization Agency of Kosovo (hereinafter "PAK") was informed of and invited to the court hearing scheduled for 19 December 2007 in the case E.no.2229/07, a new case file number given by the Municipal Court Prizren after the Claimant applied for the supplementation of the execution decision. As per the court minutes dated 19 December 2007, no representative of the Respondent or the PAK was present and the court decided to hold the hearing nonetheless.

On 30 June 2008 the Municipal Court Prizren rendered the requested supplementary decision to the decision dating 24 July 2006 (E.no. 571/06) under the case file number E.no.2229/07 and ordered the Economic Bank in Prizren to pay to the creditor (Claimant) 17.243,10 Euros from the bank account of the debtor (Respondent), and advised the debtor on the possibility to file an appeal against this Decision within 8 days from its service, through the Municipal Court Prizren to the District Court Prizren. This decision was served on the creditor, the debtor and on the Economic Bank.

On 17 July 2008 the debtor (Respondent) filed an appeal against the supplementary decision with the Municipal Court Prizren to the SCSC. The appeal was submitted to the SCSC on 21 July 2008.

On 08 July 2009, the Trial Panel of the SCSC issued a decision (SCA-08-0074) and rejected the appeal of the Respondent as inadmissible, stating that the SCSC has no jurisdiction over appeals against execution decisions.

On 10 August 2009, the PAK, pursuant to section 9.5 UNMIK Regulation 2008/4, filed an appeal against the decision of the Trial Panel (SCA-08-0074) of 08 July 2009 with the SCSC, requesting from the Appellate Panel to review the decision of the Trial Panel and to quash the judgment of the Municipal Court Prizren C.no.450/04 of 17 February 2005 as well as the decision of the Municipal Court Prizren E.no.571/2006 of 01 March 2007 as they are taken without legal basis and ultra vires, as the Municipal Court and the District Court did not have the jurisdiction over the case.

Legal reasoning:

The appeal is admissible and grounded. It leads to the modification of the Trial Panel's decision, to the declaration of the decisions of the Municipal

Court and the District Court in the main case null and void and, on the occasion of the appeal, to the declaration of the named decisions of the Municipal Court and of the District Court in the execution case null and void.

Modifying the Trial Panel's decision and declaring the decisions of the Municipal Court and the District Court null and void is a necessary and logical result of the legal reasoning given below for the declaration of the other decisions to be null and void.

The decisions of the Municipal Court and the District Court on the main case:

Jurisdiction:

The regular courts do not and did not have the jurisdiction concerning the case at hand. According to Section 4.1 lit c UNMIK Regulation 2008/4 (which has the same wording as its predecessor provision, Section 4.1 lit c UNMIK Regulation 2002/12), the SCSC has primary jurisdiction for claims, including creditor claims, brought against an Enterprise or Corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the Agency.

The claim of the Claimant obviously falls under the described primary jurisdiction of the SCSC, as the Claimant asked the court for declaring her to be in a continuing work relationship with the Respondent, a SOE which pursuant to UNMIK Regulation 2002/12 (as amended) is under the administrative authority of the Agency. The claim also arose during a period of time prior to the time when the Respondent came under the administrative authority of the Agency. Insofar, as the Claimant claims the right to a continuing payment of wages, the claim also arose and arises during the time the Respondent was/is under the administrative authority of the Agency.

Removal of the claim from the regular courts:

According to Section 4.6 UNMIK Regulation 2008/4 in conjunction with Section 16.3 UNMIK AD 2008/6, if the SCSC establishes that another court in Kosovo has assumed jurisdiction in a case over which the SCSC has primary jurisdiction pursuant to UNMIK Regulation 2002/13 (respectively UNMIK Regulation 2008/4), the SCSC, upon the application of a party to the case shall, or in the absence of an application may at its own initiative and discretion, remove the proceedings from that court, regardless of the stage of the proceedings.

The Respondent, properly represented by the PAK (see ASC-09-0108 et al.), argues in his appeal that the regular courts exercised jurisdiction illegally. This argumentation can be understood as a request for removal of the claim under Section 16.3 UNMIK AD 2008/6.

Section 16.3 UNMIK AD 2008/6 states clearly that the removal can take place regardless of the stage of the proceedings. The Appellate Panel does not have to decide in the case at hand, if this would also include in general the power of the SCSC to exercise its jurisdiction even in those cases, in which the regular courts exercised jurisdiction illegally and in which those decisions of the regular courts might have become final and legally binding due to a lack of one of the parties making use of a given legal remedy or due to a legal remedy being decided finally by another instance of the regular courts.

The case at hand has certain specific aspects which, in addition to the lack of jurisdiction of the regular courts, make their decisions null and void. A decision being null and void cannot enter into the state of being final and legally binding:

Reasons for the nullity of the decisions of the regular courts concerning the main claim:

Seeing the lack of jurisdiction of the regular courts in connection with the following aspects of those decisions leads to the conclusion that the judgments do not fulfill the criteria to be valid and binding:

The regular courts did not take into consideration that a claim against the Respondent, as being a SOE under the administrative authority of the Agency, requires a specific procedure to be admissible. Pursuant to Section 29.1 of UNMIK Regulation 2005/18, no legal proceedings against an Enterprise under the administrative authority of the Agency shall take place in a court without the claimant providing proof that written notice of the intention to file an action was submitted to the Agency specifying the name of the claimant, the name of the Enterprise or Corporation and other relevant identifying data, the basis of the claim, and the relief sought. The notification's aim is to inform the Agency about (potential) claims, and to provide them with the opportunity to take the matter up on behalf of the SOE (ASC-10-0027 et al.), to safeguard that the Agency, as the one who was created to protect the socially owned enterprises and their assets for the benefit of the people, can anytime exercise its responsibilities and thus, among other things, also prevent possible fraudulent actions of collusive parties in front of courts, a ratio legis that can also be seen in the creation of the SCSC as guardian to those proceedings as such. Not only did the regular courts not ask the Claimant to provide facts concerning the notification foreseen by Section 29.3 UNMIK Regulation 2005/18, the courts also did not inform the Agency about the claim pending in front of them. The first – proofed - notification of the Agency took place on 27 November 2007, in the proceedings concerning the execution of the by then already – theoretically – final judgements. The decisions themselves, both concerning the main claim and the execution procedure, were never formally served on the Agency.

In addition, the legal advice concerning the possibility to file an appeal given with the Municipal Court Prizren's decision was not according to the law. The Municipal Court gave the advice that the appeal has to be lodged with the Municipal Court to the District Court within 15 days from the service of the decision (obviously according to Article 348 Law on Contested Procedure [LCP, Official Gazette of the SFRY 4/77-1478, as amended]), was not in compliance with the law, as pursuant to Section 58.3 (ii) UNMIK AD 2008/6, a decision of a court that has decided a claim for which primary jurisdiction lies with the Special Chamber, may be appealed to the Special Chamber when the appeal is against a decision by a court on a matter for which the Special Chamber has primary jurisdiction. In those cases, according to Section 59.1 UNMIK AD 2008/6, an appeal shall be filed with the Special Chamber within two months of the service of the Judgment on the party appealing.

Thus the Municipal Court, giving the wrong legal advice on how to appeal, and the District Court, dismissing the appeal as inadmissible although it was in the time limit for an appeal as foreseen by Section 59.1 UNMIK AD 2008/6, deprived the Respondent of his right to the legal remedy foreseen by the applicable law.

Thus, due to the considerable number of errors in the decisions concerning the main claim, and due to the massive violation of the rights of the Respondent with regards to the lawful judge as well as to the right to a legal remedy foreseen by law, taking into consideration also the deprivation of the Agency to exercise its basic powers to safeguard the protection of the assets of the socially owned enterprises for the sake of the people, it is inevitable to declare the named decisions null and void and to remove the case from the regular courts and to have it decided, as a new claim, by the Trial Panel.

Cetero censeo the Appellate Panel holds it to be appropriate to point out that according to its legal opinion a case that has been removed from the regular courts after a wrongful decision violating the SCSC's jurisdiction cannot be referred back (according Section 4.2 UNMIK Regulation 2008/4) to the regular courts.

Nullity of the execution decisions of the regular courts:

According to the legal reasoning given above the decisions of the Municipal and District Court Prizren cannot be considered to be valid, as the legal basis for them, the decisions of the Municipal and District Court Prizren in the main case, are null and void. An execution decision cannot stand when its basis is null and void. On the occasion of the Appeal, this had to be outlined to avoid any misunderstanding.

Modification of the attacked Trial Panel decision:

As it follows from the legal reasoning concerning the decisions of the Municipal and District Court Prizren on the main case above, the attacked decision of the Trial Panel of the SCSC of 8 July 2008, SCA-08-0074, rejecting the appeal as inadmissible had to be modified. A retrial had not to be ordered, as the decision of the Appellate Panel consists in the removal of the case from the regular courts. The case has to be handled as a new claim in front of the Trial Panel of the SCSC.

Court fees:

The following court fees for the appeals proceedings (in the Appellate Panel) apply (see ASC-09-0072 et al):

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros

Court Fee Tariff Section 10.15 in conjunction with 10.22 (Procedural decision in third instance)	60 Euros
Total	90 Euros

These court fees are to be borne by the Appellant on a preliminary basis.

Richard Winkelhofer, EULEX Presiding Judge

Torsten Frank Koschinka, EULEX Judge

Mr.sc. Sahit Sylejmani, Judge

Tobias Lapke, EULEX Registrar