

In the lawsuit of

**ASC-10-0006**

*Claimants/Appellants*

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]
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- 158. [REDACTED]
- 159. [REDACTED]
- 160. [REDACTED]
- 161. [REDACTED]
- 162. [REDACTED]

*all (1 to 162) represented by the President of the Trade Union [REDACTED], [REDACTED]  
[REDACTED], Prishtinë/Priština*

- 163. [REDACTED]
- 164. [REDACTED]
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- 199. [REDACTED]
- 200. [REDACTED]
- 201. [REDACTED]
- 202. [REDACTED]

Vs.

[REDACTED], Prishtinë/Priština

*Respondent*

Represented by  
Kosovo Trust Agency  
itself represented by the UNMIK Legal Office,  
Prishtinë/Priština

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Tapio Vanamo, President of the SCSC, Presiding Judge, Torsten Frank Koschinka and Mr. sc. Sahit Sylejmani, Judges, on the appeal of the Claimants against the decision of the Trial Panel of the SCSC dated 17 December 2009, SCC-07-0245, after deliberation held on 10 February 2010, delivers the following

DECISION

1. The appeal of the Appellants 1-162 is rejected as ungrounded.
2. The appeal of the Appellants 163-202 is dismissed as inadmissible.
3. The decision of the Trial Panel of 17 December 2009, SCC-07-0245, is upheld.
4. On the occasion of the appeal, point 2 of the enacting clause of the decision of the Trial Panel of 17 December 2009, SCC-07-0245, is eliminated.
5. On the occasion of the appeal the KTA is removed from the case as a Respondent.
5. The Appellants are obliged to pay conjointly court fees in an amount of 60 Euros for the appeals proceedings to the SCSC.

**Factual and procedural background:**

On 4 June 2007 the Claimants filed a claim with the SCSC requesting to oblige the Respondent to pay to them their salaries for the period 1991 until 1999, including legal interest,, as well as reimbursement of procedural expenses. As Respondent they indicated "the Kosovo Trust Agency regarding the SOE ██████████ in Pristine".

With decision of the Trial Panel dated 17 December 2009, SCC-07-245, the SCSC suspended the case pursuant to Section 9.3 of UNMIK Regulation 2005/18, arguing that the Agency initiated the liquidation of the Second Respondent SOE ██████████ in Prishtinë/Pristina with effect from 13 April 2007. The Trial Panel in its decision indicated as Respondents the named SOE as well as the KTA.

The appealed decision was served on the representative of the Claimants, Azem Berisha on 19 December 2009, who on 12.01.2010 on behalf of all Claimants submitted the appeal against the decision.



On 08 February 2010, the Appellate Panel issued an order requesting from the Appellants to submit a power of attorney signed by all Appellants, including a special power of attorney for the appeal's proceedings before the Appellate Panel as well as the English translation of this document within 20 days from the receipt of the order.

The order was served on the representative of the Appellants on 11 February 2010, and he replied to this order on 02 March 2010, submitting separate powers of attorney for 162 Appellants and underlining that for the rest of the appellants he is unable to produce such documents as some of them have passed away, some have changed their place of residence and address, while a number of them have emigrated.

By the order dating 04 February 2010 the Appellate Panel served the appeal and the supporting documents on the sued SOE, allegedly represented by the Privatization Agency of Kosovo (PAK), as well as on the KTA, granting them the opportunity to file a response to the appeal, within 30 days from the receipt of that order, were given.

On 08 March 2010 the PAK, filed a response to the appeal, challenging the merits of the claim.

On 26 March 2010 the Appellate Panel issued an order requesting clarification from both, the KTA and the PAK on the notification to the Appellants concerning liquidation procedure, concerning the appointment of the liquidation committee and concerning the question whether the Appellants filed a claim with the liquidation committee.

In its reply the PAK indicates that the notice of liquidation was given in the newspapers and expresses its opinion that the day of publication counts as day of notification to the claimants. The liquidation committee had been established on 13 April 2007 and that only some of the Appellants had filed a claim with the liquidation committee.

The KTA in its reply expresses the opinions that the appeal should be rejected as inadmissible considering that the Appellants failed to identify the correct Respondent, namely the KTA (instead of addressing the PAK, which was not part in the proceedings in front of the Trial Panel).

Legal Reasoning:

1. Before deciding on the admissibility of the appeal or going into its merits, the Appellate Panel has to clarify the following point: It is unclear for the Appellate Panel, why the Trial Panel ex officio indicated the KTA as Respondent. The Claimant's intent was clearly to sue the SOE, their contractor, at least at the time of the submission of the claim represented by the KTA, but not to sue the KTA itself, as it is obvious that the KTA has no *legitimatío passiva* in this case, as there were no contractual relations between the Claimants and the KTA and as the Claimants also never alleged such relations nor any other legal basis for any claims against the KTA as such.

Insofar, it has to be stated that the mere "inclusion" of another party as Respondent, without the Claimant(s) having extended the claim towards this Respondent, is in general without any legal relevance, and without any impact on the "party" thus (explicitly or implicitly) called into the suit (compare ASC-09-0029, ASC-09-0035, ASC-10-0022, ASC-09-0004 et al.). It is one of the main principles of the civil procedure (at least in the continental European context) that it exclusively rests with the Claimant whom he wants to take action against, not with the Court. For this reason, the decision of the Trial Panel has to be corrected insofar, as the only Respondent is the SOE [REDACTED], Prishtinë/Priština.

As to the question which of the two Agencies that submitted a response to the appeal has the right to represent the Respondent and thus has to be indicated (and served with the decision) as representative of the Respondent, it has to

be stated that this question is, concerning the lack of success of the appeal as such, of no real importance for the outcome of these proceedings. Nonetheless, the indication of the representative in the case at hand follows the guidelines developed by the Appellate Panel in its decision ASC-09-0025 dating 24 July 2010.

2. The appeal is partly inadmissible and partly admissible, but ungrounded.

a. Concerning the Appellants 163 till 202, the appeal is inadmissible. The alleged representative of the Appellants did not provide the Appellate Panel with the requested power of attorney. According to Sections 61.4, 58.2, 28.2 lit.f and 25.1 UNMIK AD 2008/6. As the appeal was not signed by a properly authorized representative of the Appellants 163 till 202, it does not bear the signature necessary according to Section 25.1 UNMIK AD 2008/6.

b. Concerning the Appellants 1 till 162, the appeal is admissible, but ungrounded.

Correctly the Trial Panel suspended the proceedings due to the ongoing liquidation of the Respondent.

As quoted by the Trial Panel, Section 9.3 UNMIK REG 2002/12, as amended by UNMIK REG 2005/18, reads as follows:

"9.3 Any legal action against a Socially-owned Enterprise subject to liquidation pursuant to this section shall be suspended upon application by the Agency to the court of the place where the action is filed. Such application shall be accompanied by: (a) Proof of submission of the notice described in section 39.3 of the Regulation on Business Organizations (when the object of the liquidation proceeding is a Corporation); (b) Proof of publication of information contained in such notice in a major Albanian language publication of general circulation in Kosovo once a week for two consecutive weeks, and a major Serbian language publication pursuant to criteria to be established by the Board;

(c) Proof of appearance in the website of the Agency in Albanian, Serbian and English if a website exists at the time of liquidation; and

(d) Proof of notification to entities, which the Agency believes or should reasonably have believed, have a claim against the Socially-owned Enterprise concerned.”

In addition, Section 13.1 UNMIK AD 2007/1 implementing UNMIK REG 2005/48 On the Reorganisation and Liquidation of Enterprises and their assets under the administrative Authority of the Kosovo Trust Agency provides that the notification accompanied by the required evidence has the effect of a moratorium as set out in Section 5.1 UNMIK REG 2005/48.

The notification of the KTA received by the SCSC on 6 June 2007 concerning the initiation of the liquidation procedure of the Respondent with effect from 13 April 2007 fulfils the criteria set out in the quoted provisions. In particular, the list of Claimants who were notified directly by the KTA includes the Appellants.

Under these circumstances the suspension of the case, as decreed by the Trial Panel, was a compulsory consequence, and no other decision could have been taken.

With the request for suspension of proceedings the Court is *ex lege* obliged to immediately suspend the proceedings.

The Trial Panel in the appealed decision has properly instructed the Appellants to file a claim with the liquidation committee, which, in such cases, is the sole legal body for reviewing claims of potential creditors against the Respondent. Thus the Claimants, may realize their claims before the liquidation committee set up by the Agency.

3. Point 2 of the enacting clause of the appealed decision has to be eliminated on the occasion of the appeal, as instructions to file an appeal by quoting the law, without any discretion on the side of the court, are no decisions to be

taken in the enacting clause. Such information may be given within the legal reasoning or – rather – to be attached to a decision only.

4. According to Section 11 UNMIK REG 2008/4 and Section 66 UNMIK AD 2008/6, the Trial Panel has to decide on the allocation of costs of the proceedings in first instance, and the Appellate Panel – when deciding a case finally - on the allocation of costs of the proceedings in both instances.

Court Fees determined by Section 10 of Administrative Direction no. 2008/02, approved on 27.11.2008 by Kosovo Judicial Council, are applicable for the court proceedings in front of the SCSC, pursuant to the Additional Procedural Rules (re-)issued by the President of the SCSC on 13 December 2010.

According to Section 10.11, the court fee tariff for filing an appeal is 30 euro, whereas pursuant to Section 10.21 in conjunction with 10.1 of the above Administrative Decision, the tariff for a decision in second instance is 30 euro. Based on the cited provisions of this Administrative Direction, the Appellants have to pay conjointly 60 Euros to the Special Chamber. For more information about the aspect of court fees (see ASC-09-0021, ASC-10-30, ASC-10-0009 etc).

Issued by the Appellate Panel of the SCSC on this 10 February 2011:

Tapio Vanamo, EULEX Presiding Judge

Torsten Koschinka, EULEX Judge

Mr. sc. Sahit Sylejmani, Judge

Tobias Lapke, EULEX Registrar