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-10-0031

In the lawsuit of

[redacted]

address: [redacted] Prishtinë/Priština

Claimant/Appellant

vs.

1 [redacted] **J.S.C.**

Llapje Sellë/Laplje Selo

[redacted]

SOE, Agricultural Industrial combine,

Fushë Kosovë/Kosovo Polje

Respondents

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 Eija-Liisa Helin, Judges, on the appeal of the Claimant against the decision of the SCSC of 4 February 2010, SCC-09-0037, after deliberation held on 17 August 2010, delivers the following

DECISION

1. **The appeal is grounded.**

2. **The decision of the SCSC of 4 February 2010, SCC-09-0037 is set aside and the Trial Panel is ordered to retry the claim.**
3. **The Trial Panel will have to decide on the amount of costs in the first instance procedure and their allocation among the parties, as well as on the allocation of the costs of the appeals proceedings.**

Factual and Procedural Background:

On 13 March 2009 the Claimant filed a claim with the SCSC requesting the restitution of 0,90 ha of land registered in the name of the Respondents to the Claimant, after having filed an identical claim with the Municipal Court Prishtinë/Priština, which declared itself incompetent. The Claimant alleged that the land, consisting of the arable land plot in Livački Put with a surface area of 0,30 ha and the arable land plot in Suljina-njiva near the village of Čaglavica/Caglavica with a surface area of 0,60 ha, was confiscated on 18 August 1954 from him for the purpose of Land Reform and Internal Colonization of the Peoples' Republic of Serbia and registered in the Agricultural Land Fund. He requested that the land shall be returned to him.

On 31 March 2009 the Trial Panel issued an order and requested the Claimant, among other things, to submit a confirmation that a notice pursuant to Section 28.2 (e) of UNMIK AD 2008/6 has been given to the Agency in due time.

On 21 April 2009, the Claimant submitted a copy of the written notification given to the Agency of the initiation of proceedings before the Special Chamber dated 14 April 2009. On 11 June 2009, the Claimant submitted copies of two written notifications to the Agency of the initiation of court proceedings in the case at hand, dated 3 June 2009 and 10 June 2009.

On 4 February 2010 the Trial Panel of the SCSC rejected the claim as inadmissible. The Trial Panel argued that the Claimant failed to comply with the admissibility criteria set forth in Section 28.2 of UNMIK AD 2008/6, as he did not provide any proof that the notice was received by the Agency. Moreover, the Trial Panel argued that the three different notifications to the Agency are not satisfactory, due to the fact that those were submitted only after the claim was filed and thus the Agency had not had "the opportunity to act as it wished to do".

The decision of the Trial Panel was served on the Claimant (hereinafter the Appellant) on 12 February 2010 and the Appellant filed the appeal on 8 March 2010.

In his appeal the Appellant requests the Appellate Panel to modify the decision of the Trial Panel and grant the original claim, or alternatively to set aside the decision and refer the case back to the first instance for retrial. The Appellant argues that the Trial Panel wrongfully applied the relevant legal provisions which lead to an essential violation of both procedural and material law.

The Appellant argues that he properly notified the KTA during the previous proceedings before the Municipal Court Prishtinë/Priština, but on the other hand also mentions that the notification might not have been registered or even have been lost at the KTA. The Appellant contests that the Trial Panel fulfilled its obligation to give a proper reasoning.

Legal Reasoning:

The appeal is admissible and grounded.

Notification to the Agency:

Section 29.1 of UNMIK REG 2002/12 is to be interpreted not only according to its wording, but also and mainly taking into consideration the ratio legis of the provision.

According to Section 29.1 of UNMIK REG 2002/12 written notice of the intention to file an action against a SOE has to be given to the Agency prior to the submission of the claim. The notice to the Agency about the intention to file a claim is among the admissibility criteria as set forth in Section 28.3 of UNMIK AD 2008/6. Even though the admissibility criteria have to be examined ex officio, at an early stage of the proceedings (without the Respondent having been involved yet) the mere contention by a Claimant that a proper notice was given, is – on principle – sufficient. If a Claimant maintains (in the claim or upon order pursuant to Section 28.4 of UNMIK AD 2008/6) that a proper notification has been filed, the Trial Panel cannot dismiss the claim as inadmissible, based on the lack of proof of such a notification. Unless the claim is inadmissible on other grounds, it has to give the Respondent the opportunity to take a stand on the

(claimed) notification, alongside the merits of the case (by serving the claim and other documents on the Respondent; *audiatur et altera pars*). It rests with the Respondent then to contest the facts as maintained in the claim, including the alleged (timeliness of the) notification. Only if the Respondent (potentially represented by the Agency) contests the (timeliness of the) notification, the Claimant will be required to proof the notification.

In the case at hand, the Respondent has not had the opportunity to contest the notification yet. According to the Claimant/Appellant he submitted three different notifications (dated 14 April, 3 June and 10 June 2009) to the Agency. Regardless of the initial untimely notification (the claim was received by the SCSC on 13 March 2009), it can be seen that the Agency already on 22 January 2009 was aware of the future claim with the SCSC because of the previous proceedings at the Municipal Court of Prishtinë/Priština. Since then, it did not opt to settle the dispute with the Appellant. Bearing in mind that the notification's aim is not to "give to the Agency the opportunity to act as it wished to do", but to inform the Agency about (potential) claims, and to provide them with the opportunity to take the matter up on behalf of the SOE involved (see again Section 29.3 UNMIK Regulation 2002/12), the ratio legis of the notification in the meantime has been met (the attacked decision was rendered on 4 February 2010). In addition, it has to be considered that the duty of a Claimant to notify the Agency in advance adds extra burden to him as to the access to justice; the provision must therefore be interpreted in a restrictive way. In this situation - and as long as the notification will not be contested - the Appellate Panel considers the notification issue to be without (further) relevance as to the adjudication of the claim (see also ASC-09-0072, ASC-09-0057, ASC-10-0027, ASC-10-0036, et al).

Thus the dismissal of the claim as inadmissible was not appropriate. The attacked decision therefore cannot persist and has to be set aside. The Trial Panel will have to deal (again) with the claim, refraining from a further dismissal based on the grounds outlined above.

Instructions to file an appeal:

On occasion of the appeal the Appellate Panel wants to point out that instructions to file an appeal by quoting the law without any discretion on the side of the

court, are no decisions and thus cannot be –as in point 2 of the appealed decision - included in the enacting clause. Such information may be given within the legal reasoning or – rather – to be attached to a decision only, but cannot be a part of it (see ASC-09-0108, ASC-10-0036, et al).

Costs:

According to Section 11 of UNMIK REG 2008/4 and Section 66 of 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. The case at hand has to be retried in the first instance; therefore, no decision on any allocation of costs can be taken for the time being, as this allocation depends on the future decision of the Trial Panel.

On 6 October 2009 the Claimant/Appellant was granted assistance in translation and on 28 May 2010 the Appellant was exempted from the paying of court fees. Pursuant to the applicable Additional Procedural Rules of the SCSC in force from 21 June 2010, amending the Additional Procedural Rules regarding Court Fees as of 10 March 2010, the court fees of the appeals procedure to be borne by the Appellant would have been 60 Euros and the translation costs arising from the appeals procedure 30 Euros.

According to Article 22 of the Law on Court Fees (hereinafter the LCF, Official Gazette of the Socialist Autonomous Province of Kosovo, 3 October 1987) if in civil proceedings upon a private claim a party exempt from paying court fees wins, the fees that that party would have been obliged to pay had it not been exempt from paying shall be paid by the party which has not been granted exemption, in the proportion to the success achieved in the procedure by the exempt party.

Costs of translations done by the SCSC are comparable with court fees and thus have to be handled in the same way.

Pursuant to Article 22 of the LCF in the case at hand when deciding on the allocation of costs, also court fees and translation costs from which the Appellant has been exempted shall be paid by the adverse party of the Appellant depending on the success achieved in the procedure by the Appellant. These costs in the appeals proceedings are in total an amount of 90 Euros.

Richard Winkelhofer, Presiding Judge EULEX	signed
Torsten Frank Koschinka, Judge EULEX	signed
Eija-Liisa Helin, Judge EULEX	signed
Tobias Lapke,Registrar EULEX	signed