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-10-0042

In the lawsuit of

1. , Prishtinë/Priština *Claimant*

represented by lawyer , Prishtinë/Priština

vs.

, *Respondent*
Socially Owned Enterprise,
Kosovë

Kosovo Trust Agency,
Represented by UNMIK, TSS Compound,
Prishtinë/Priština *1.Appellant*

Privatization Agency of Kosovo (PAK)
address: Rr. Ilir Konushevci No.8, Prishtinë/Priština *2.Appellant*

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer, Presiding Judge, Torsten Frank Koschinka and Eija-Liisa Helin, Judges, after deliberations held on this 26 August 2010 issues the following

DECISION

1. **The appeal is insofar grounded, as the decision of the Trial Panel in the case SCA-08-0032 dated 28 May 2010 is set aside. The Trial Panel – in a different composition - is ordered to retry the case.**
2. **Costs for the appeals proceedings are not to be imposed.**

Factual and Procedural Background

The Claimant is, referring to the case SCA-08-0032, requesting a preliminary injunction "*whereby the respondent* [redacted] *that the security objector, Privatization Agency of Kosovo, or any other eventual pretender, shall be denied to transfer, charge, possess the same in order to secure the existing condition of the real estate*" further indicating the cadastral registration number of the parcel concerned. The Claimant alleged that upon his claim he was granted the ownership title over the parcels concerned with 2 decisions of the Municipal Court Prishtinë/Priština which currently are subject to the appeal pending before the Trial Panel. The Claimant alleged further that he noticed "*that, approx. one month ago, on the real estate '*[redacted]*" somebody has discharged amounts of soil on the surface which he had later leveled.*" From this alleged fact and taking into consideration the "*prolongation of the procedure*" in the main claim he follows that the danger of a transfer of the real estate which is subject to the main claim is at hand and that the requested preliminary injunction has to be granted.

The request dating 18 May 2010 was submitted to the SCSC on 19 May 2010 and was, by order of the Trial Panel dating 25 May 2010, served on the Appellants, granting them the right to "*file their opposing arguments not later than 28 May 2010.*"

The 2nd Appellant at this moment in time was not involved in the main claim at all. The 1st Appellant was mentioned in the order as "Appellant".
Both Appellants submitted their statements concerning the Claimant's request within the time limit granted by the SCSC. Both objected to the request, pointing out that the requirements necessary to grant a preliminary injunction were not fulfilled, especially that the Claimant did not provide the SCSC with credible

evidence that he might face irreparable harm, damage or loss in case of a non-issuing of the preliminary injunction.

On 28 May 2010 the Trial Panel of the SCSC issued the challenged decision, granting the requested preliminary injunction with the following content:

"1. (...)

2. The Respondent to the original Claim [redacted], the Appellant – the Kosovo Trust Agency – and the Privatization Agency of Kosovo, as the de facto administrator of the SOE, and/or any other entity is hereby prohibited from undertaking any action in order to sell or otherwise change the ownership title of cadastral parcels [redacted] in Prishtine/Pristina.

3. The preliminary injunction will remain in effect until the final decision of the Special Chamber.

4. Pursuant to Section 55.5 of UNMIK AD 2008/6 and Section 9.5 of UNMIK Regulation 2008/4 an appeal against this decision can be submitted in writing to the appellate panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters within 15 days from the date of the service of the decision on the party."

The Trial Panel within its challenged decision argued that the request and the underlying claim would show a prima facie basis for issuing the requested preliminary injunction. From the decisions of the Municipal Court Prishtinë/Priština there would be a legal presumption in favor of the Claimant's ownership rights over the parcels. As the Claimant, in the opinion of the Trial Panel, "*has set forth specific allegations as to the immediate and irreparable harm*" he might suffer in case anybody would sell the parcels, the requirements of Section 55.1 of UNMIK AD 2008/6 would be met and the injunction would have to be issued.

On 9 June 2010 the 1st Appellant and on 8 June 2010 the 2nd Appellant was served with the injunction. On 23 June 2010 both Appellants filed separate appeals with the SCSC against the preliminary injunction.

Both of the appeals argue that the Trial Panel Decision does not comply with Section 55 of UNMIK AD 2008/6. Both Appellants claim that the Claimant did not

prove that immediate and irreparable loss or damage would result if the request for the preliminary injunction were not granted.

Legal Reasoning

Based on Section 63.2 of UNMIK AD 2008/6 the Appellate Panel decided to dispense with the oral part of the proceedings.

The appeals are admissible and insofar grounded, as the decision has to be set aside and the case has to be subject to retrial by the Trial Panel.

Admissibility:

The 2nd Appellant, although it has no legitimatio passiva concerning the claim in the main proceedings, is entitled to lodge an appeal, as it has suffered gravamen from the challenged decision.

As the Appellate Panel of the SCSC already decided in the case ASC-09-0053 (and others), the 2nd Appellant, although the Special Representative of the Secretary General of the United Nations (SRSG) in his clarification as of 12 November 2009 concerning the legal status of the PAK in proceedings before the SCSC pointed out clearly that the representation of SOEs is in principle still in the responsibility of the KTA, has the right to represent SOEs which are factually under its administration. The Appellate Panel in the mentioned decision reasoned as follows:

"The Kosovo Trust Agency (KTA), established in November 2002 by UNMIK REG 2002/13, as amended by UNMIK REG 2005/18, ceased its operations in June 2008. Its activities, including the representation of Socially Owned Enterprises (SOEs) before the Special Chamber, were then factually taken over by the Privatization Agency of Kosovo (PAK).

Taking into consideration the factual situation on the ground in Kosovo with the KTA not any more exercising its duties and powers as defined in UNMIK REG 2002/13, as amended, further taking into account that there is an imminent need for SOEs being duly represented before the Special Chamber, and considering that as a basic principle legal systems following the rule of law do not allow for legal vacuums, the representation of SOEs by the PAK for the time being will be accepted."

This reasoning thus naturally does not apply in those cases, in which the KTA (represented by UNMIK), is still active and exercises its responsibilities (see ASC-09-0025), which is the case here.

According to Section 29.2 UNMIK REG 2002/12 ("KTA REG"), the KTA (as defined in Section 3 KTA REG) shall have legal standing to pursue any rights of an "Enterprise" (SOE or POE; see Section 5 KTA REG) in a competent court on behalf of the SOE or POE concerned. Section 29.3 KTA REG, moreover, provides: "Whenever legal proceedings are pending on behalf of or against an Enterprise, the Agency may at any time file notice with the competent court that it will act as legal representative of the Enterprise concerned, provided that it shall act as legal representative of only one Enterprise in proceedings to which more than one Enterprise or Corporation is a party."

As a consequence, it is on principle solely up to the KTA's discretion to take up the representation of any SOE in proceedings before the SCSC, provided there is only one SOE involved.

The Appellant PAK, however, claims that it is the legal successor to the KTA, which has ceased to exist, consequently leading to the conclusion that the PAK by assuming former KTA's rights would finally end up as the SOE's representative.

This is not correct. In fact, the Appellate Panel follows the SRSG's clarification of 12 November 2009 regarding Section 5.2 UNMIK REG 2008/4, answering a request of the President of the SCSC of 26 October 2009:

UNMIK REG 2002/12 ("KTA REG"), as amended, was promulgated by the SRSG pursuant to the authority given to him under UNSC 1244 (1999). UNMIK Regulations can only be repealed or amended by the SRSG as the legislator himself, by way of another regulation. The KTA REG, as amended, remained untouched by the SRSG. It is still in force, as is UNSC 1244 (1999).

The Law No. 03/L-067 on the Privatization Agency of Kosovo ("PAK Law") adopted by the Assembly of Kosovo without being promulgated by the SRSG could not repeal or replace the KTA REG. In particular, it could not extinguish the

legal existence of the KTA as an agency with full juridical personality as outlined in the KTA REG. The PAK has not been established on the basis of the law applicable in Kosovo in accordance with UNSC 1244. In particular, Article 1 of the PAK Law ("Establishment and Legal Status of the Privatization Agency of Kosovo") providing that the PAK was to be established as the successor to the KTA, cannot be considered applicable law under UNSC 1244, and the PAK can therefore not be treated as the KTA's legal successor, even if it may carry out tasks and responsibilities of the KTA as defined in the KTA REG.

Also the temporary suspension of the KTA's activities by UNMIK ED 2008/34 does not support its conclusion of legal succession: In fact the (only) temporary suspension underlines even more that the KTA's legal status should not be hampered, but preserved in case it becomes operative again.

Though, the Appellate Panel of the SCSC in its jurisprudence has taken the factual "appearance" of the PAK into consideration, and has ruled on several occasions (see ASC-09-0108, ASC-09-0038, ASC-09-0053, ASC-09-0083 et al):

"The KTA, established in November 2002 by UNMIK REG 2002/13, as amended by UNMIK REG 2005/18, ceased its operations in June 2008. Its activities, including the representation of Socially Owned Enterprises (SOEs) before the SCSC, were then factually taken over by the PAK.

Taking into consideration the factual situation on the ground in Kosovo with the KTA not any more exercising its duties and powers as defined in UNMIK REG 2002/13, as amended, further taking into account that there is an imminent need for SOEs being duly represented before the SCSC, and considering that as a basic principle legal systems following the rule of law do not allow for legal vacuums, the representation of SOEs by the PAK for the time being will be accepted.

In situations when the KTA did not take up the representation of SOEs, the PAK was allowed to overcome the legal vacuum of the (factual) absence of the KTA as the due representative.

In the case at hand, however, the KTA has explicitly taken the decision to represent the SOE involved, making use of its powers as defined in the KTA REG. In such a situation there is no legal vacuum to fill, and no space for any representation by the PAK. The PAK can only take up the representation of an SOE before the SCSC, if the KTA does not exercise its very right to do so, or if the KTA is legally not entitled to (in the conflicting cases as circumscribed in Section 29.3 KTA REG).

Thus, there is no valid reason to involve the PAK at all in this case. There is nothing within the case file indicating that the PAK is, as the Trial Panel assumes, the "*de facto administrator*" of the Respondent, what might be clarified, if from the point of view of the Trial Panel necessary.

Apart from that, as this Court also pointed out previously (ASC-09-0108, decision as of 09 February 2010) there is no legal basis to involve the PAK in any law suit if the claim concerns only the legal relations of a SOE with another natural or legal person, since the PAK even due to its mandate foreseen by the PAK Law "only" (and only in those cases where it decides to do so) acts as a representative, thus only on behalf of the SOEs in court proceedings, which does not at all affect the active legitimacy and/ or the legal integrity of the SOEs. If, like here, not even the Claimant alleges that the PAK has any legitimatio passiva, but only, within an open enumeration, names the PAK together with "any other eventual pretender" as a possible addressee of the requested preliminary injunction, there is, without the court having asked any clarification from the Claimant as to whom he wants to sue as a Respondent, no reason to involve it into the proceedings. The decision of the Trial Panel to serve the request on the 2nd Appellant thus has no legal effect to the proceedings before the Trial Panel. The Appellate Panel is, without the necessity of any further clarification, due to the reasoning given above concerning the position of the PAK in cases in which the KTA executes its responsibilities, already now in a position to finally decide on the PAK's position in the – repeated – first instance proceedings.

Nonetheless, since the 2nd Appellant with the challenged decision was ordered by the Trial Panel to refrain from any action affecting the legal status of the parcels

of land concerned, the PAK has suffered legal gravamen from this decision, as it obviously concerns its own legal affairs, and has thus the right to appeal against it.

The 1st Appellant, whose procedural position within the proceedings concerning the preliminary injunction is rather unclear – it is named as "Appellant" within the first instance proceedings -, also suffers gravamen, as the decision also orders it to refrain from any action affecting the legal status of the land concerned. Insofar - concerning the procedural position of the KTA - it has to be clearly stated that, as the Claimant in his request for a preliminary injunction did not indicate the KTA as a Respondent to this request, it is not up to the discretion of the court to add someone as a party to the proceedings when there is no reason to do so under Section 5.1 lit d) or 5.2 lit. e of UNMIK Regulation 2008/4. As the Trial Panel did not give any reasons for including the KTA as a party into the proceedings concerning the request for a preliminary injunction, the Appellate Panel is, for the time being, not in a position to judge on the validity of this procedural act. On principle it rests exclusively with the Claimant whom he wants to take action against, but not with the court (ASC-10-0022 et al.)

Merits of the appeals:

The appeals are insofar grounded, as the decision has to be set aside and the Trial Panel - in a different composition (Section 65 lit.c of UNMIK AD 2008/6) - has to be ordered to retry the case:

The criteria to grant a preliminary injunction arise from Section 55.1 of UNMIK AD 2008/6: A party shall give credible evidence that immediate and irreparable loss or damage would result if the request is not granted. These criteria are set in a way that if any of the above is missing the request shall be denied.

The Claimant did not give any evidence in support of his request, although his allegations were contested by the Appellants. He did not indicate at all that at a given moment in time his alleged property rights were or would be endangered by any specific actions of the Appellants or the Respondent he wants to see

prohibited by the preliminary injunction he applied for. He did not present – and not even alleged - any indications, for example of a planned liquidation or privatisation of the Respondent, that could have been understood as a significant change in the structure of the Respondent which might have lead to a danger for his property and thus to the necessity to issue such a preliminary injunction. It has to be pointed out that in the alleged fact that "*somebody* (who?) *has discharged amounts of soil on the surface which he had later leveled*" is not a sufficient fact that could be understood as a sole indicator for any attempts to transfer the property. The arguing of the Trial Panel cannot be followed that the request and the underlying claim would show a prima facie basis for issuing the requested preliminary injunction, respectively that from the decisions of the Municipal Court Prishtinë/Priština would result a legal presumption of the Claimant's ownership rights over the parcels and thus the Claimant would have had "*set forth specific allegations as to the immediate and irreparable harm*" he might suffer in case anybody would sell the parcels.

One might follow insofar, as the decisions of the Municipal Court Prishtinë/Priština – which, due to the still pending appeal at least formally are still in force – might grant a prima facie evidence as concerning the ownership rights of the Claimant. But from this ownership rights in connection with the allegations that "*somebody has discharged amounts of soil on the surface which he had later leveled*" there is no logical connection with any presumption that a – not even specified - "*entity*" might plan to sell the parcels. This does not lead to the conclusion that the Claimant's ownership rights are in immediate danger. In particular, it cannot be seen in how far the Respondent endangers any rights of the Claimant. The Trial Panel did not explain why the "underlying claim" shows a prima facie basis for issuing the injunction. The legal reasoning of a decision has to contain the subsumption of facts under a given definition or provision. The pure repetition of the definition or provision without clarifying which of the facts of a case fulfill the set out requirements does not meet this criteria.

Thus, the Trial Panel will have to clarify, by asking the Claimant, what facts he may present to the SCSC that might be eligible to support his request and to proof that the Respondent (represented by the KTA) is planning to commence

any step towards a change in the actual property relations concerning the parcels of land.

Apart from the above mentioned considerations, the probable loss or damage would have to be irreparable and the requested preliminary injunction would have to be the appropriate and proportional measure to avoid such a damage or loss. In the case at hand, there are no facts provided that would allow the court to come to such a conclusion concerning the scope of no.2 of the enacting clause of the challenged decision.

If there were any reasons to issue a preliminary injunction – which the Trial Panel will have to clarify and to decide depending on the facts to be gathered and evaluated by the Trial Panel in the retrial - the Trial Panel will have to take into consideration if a preliminary injunction should include an order to the Cadastral Office to add a "lis pendens" note to the cadastral register, thus securing that any future alleged proprietor of the parcels, who pretends to have acquired his claim on the property after the issuing of the preliminary injunction, would have to accept the outcome of the main trial against him. This would especially put a much lighter burden on the Respondent, as he would still have the possibility to make use of his – alleged – real property by selling it to someone under the condition and under the risk that he might turn out not to be the rightful owner, while the risk of the requester to lose his – alleged – property by such an action would be eliminated. In no case it can be appropriate to oblige "and/*or any other entity*" to restrain from any actions. Obligations can only be imposed to the parties of a law suit.

It rests with the Trial Panel to ask the Claimant for more facts supporting his request, and to inform the Claimant about the obvious deficiency of his request with regards to the above listed criteria to be included in a request for a preliminary injunction.

<u>Instructions to file an appeal:</u>

Lately, point 4 of the appealed decision is incorrect and would have to be eliminated without substitution, as 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 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-10-0023, ASC-10-0036, ASC-09-0075 et al).

In addition, the advice given by the Trial Panel in the case at hand is also incorrect and may be based on a misinterpretation of the law. The time limit to lodge an appeal against any decision of the Trial Panel is 30 days, as explicitly foreseen by Section 9.5 of UNMIK Regulation 2008/4. Section 13.2 of UNMIK AD 2008/6, as invoked by the Trial Panel as a legal basis for shortening the time limit for the appeal to 15 days, does not grant such discretion to the court. Its wording only grants the discretion to shorten time limits for "*the time for compliance with any Decision by the court*", but not for time limits for lodging a legal remedy as prescribed by law. Moreover, the Trial Panel which did not argue that it applied this provision by means of analogy (which, as it would violate rights of the parties granted explicitly by the law, without any gap in the law to be filled, would be incorrect), did not take into consideration the legal principle, that a lower ranking norm (as the provisions of the AD are in relation to those of the Regulation) can never supersede a higher ranking norm (in this case: Section 9.5 of UNMIK Regulation 2008/4). This legal principle is already part of the case law of the SCSC especially in connection with Section 9.5 of UNMIK Regulation 2008/4.

Aspects that may have to be clarified by the first instance:

The Trial Panel, in a different composition, will have to, before issuing a new decision, clarify – among other aspects mentioned above - the following aspects:

From the procedural and factual background of the appealed decision it is not clear, if the request for the preliminary injunction was lodged within a pending law suit between the persons named as parties in the decision. This has to be clarified and stated explicitly. Also, the question why the 1st Appellant has already had the procedural role of an Appellant within the proceedings before the Trial Panel does not find its answer from the attacked decision and has thus be tackled by a possible new decision.

The Trial Panel will have to clarify if the KTA actually really is a party to the proceedings or if it only represents the Respondent.

Returning the case to the first instance:

To grant the parties the opportunity to be heard by two instances (see ASC-09-0013), the case has to be returned for retrial by another composition of the Trial Panel, Section 65 lit c UNMIK AD 2008/6.

Section 65 lit c UNMIK AD 2008/6 foresees the discretion of the Appellate Panel to order the retrial of a case before another Trial Panel. This discretion is, as any discretion of a judge in a legal system governed by the rule of law, not unlimited, but subject to certain requirements which have to be defined on a case by case basis to establish a predictable case law. Defining the limits of the discretion, the ratio legis of the provision has to be taken into account. One of the reasons for this provision (next to the obvious one of a proven lack of impartiality and the one of a specialization of another Trial Panel into the matter that has to be decided) is, that the legislator took into consideration possible concerns of the parties of the case that has to be retried with regard to the impartiality of the judges (see ASC-09-0013). Without any prejudice to the actual impartiality of judges, which as a principle can be presumed also in cases in which a case has to be retried, the perception of the parties can be – with good subjective reasons – different. Especially when a case has been decided on the merits, the perception of the parties concerning the impartiality of the judges might be that their trust in the impartiality of the judges is undermined, because the judges already once expressed a final position on their case. This naturally cannot be the case every time the Appellate Panel orders the retrial of a case based on a legal opinion that differs in one point or the other from that of the Trial Panel, but the perception of a potential lack of impartiality becomes more and more solid, if the Appellate Panel, in its decision ordering the retrial of a case, deviates considerably from the legal opinion of the Trial Panel. Thus, taking into consideration the specifics of the case at hand, the case has to be heard by a different composition of the Trial Panel (due to a lack of judges [both International and local] the SCSC does

not yet include different Trial Panels, but only different compositions of the Trial Panel).

Costs:

As the case has to be reheard ex principio by another composition of the Trial Panel, the Appellate Panel, applying the legal principle of Article 54 Law on Court Fees 1987, holds it to be reasonable not to impose the costs of the appeals proceedings as well as those of the first 1st instance proceedings on either of the parties.

Richard Winkelhofer, Presiding Judge ______________________________
EULEX

Torsten Frank Koschinka, Judge ______________________________
EULEX

Eija-Liisa Helin, Judge ______________________________
EULEX

Tobias Lapke, Registrar ______________________________
EULEX