

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 ODNOSI NA KOSOVSKU POVERENIČKU AGENCIJU
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ASC-09-0029

In the lawsuit of

- Claimants*
1. [REDACTED]  
Private Company (Represented by [REDACTED]; business registration: [REDACTED]; address: [REDACTED] Prishtinë/Priština)  
Legal representative: [REDACTED] Prishtinë/Priština)
  2. [REDACTED]  
Private Company (Represented by [REDACTED]; business registration: [REDACTED]; address: [REDACTED] Fushë Kosovë/Kosovo Polje)  
Legal representative: [REDACTED] Lipjan/Lipljan)
  3. [REDACTED]  
Private Company (Represented by [REDACTED]; business registration: unknown; address: Rr. [REDACTED] Prishtinë/Priština)  
Legal representative: [REDACTED] Prishtinë/Priština)
  4. [REDACTED]  
Private Company (Represented by Bekim Vokrri; business registration: No.80111649; address: Ulpiana E 30, Prishtinë/Priština)  
Legal representative: Shemsi Uka (Rr. Trepçës 18, Prishtinë/Priština)
  5. [REDACTED]  
address: Shtime/Štimlje)  
Legal representative: Xhevat Bici (Aktashi I. A-2. Prishtinë/Priština)

vs.

- Respondents/  
Appellants*
1. [REDACTED]  
Socially Owned Enterprise, (Represented by Bajram Uka; business registration: unknown; address: [REDACTED] Prishtinë/Priština)  
Legal representative: Gani Tigani ([REDACTED] Prishtinë/Priština)
  2. **Privatization Agency of Kosovo (PAK)**  
address: Rr. Ilir Konushevci No.8, Prishtinë/Priština

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 3 June 2010 issues the following

### **DECISION**

- 1. The appeals of the Respondents are grounded. The decision of the Trial Panel in the joined cases SCC-05-0080, SCC-06-0029, SCC-06-0470, SCC-06-0482 and SCC-06-0524 (dated 2 June 2009) is amended. The request of the 1<sup>st</sup> and 4<sup>th</sup> Claimant to issue a preliminary injunction is rejected as ungrounded.**
- 2. On the occasion of the Appeals the Appellate Panel states that the decision of the Trial Panel to call the PAK as the 2<sup>nd</sup> Respondent into the suit is without legal effect.**
- 3. The 1<sup>st</sup> Claimant is obliged to pay 184,80 Euros and the 4<sup>th</sup> Claimant is obliged to pay 95,20 Euros as court fees to the SCSC for the appellate proceedings.**

### **Factual and Procedural Background**

The Claimants are seeking compensation for damage they suffered when the warehouses they rented from the 1<sup>st</sup> Respondent were burned by a fire on 25 February 2000.

On 18 February 2008 the 2<sup>nd</sup> Respondent (PAK) expressed its intention to join the lawsuit on the Respondent's side. The 2<sup>nd</sup> Respondent also proposed the suspension of the proceedings pursuant to Art. 278.2 of the Law on Contested Procedure of the Republic of Kosovo (herein after NLCP, Law No.03/L-006). The 2<sup>nd</sup> Respondent repeated its submission during the public hearing held by the Trial Panel on the 19 February 2009. The Parties did not object to the proposal to join the Respondent, but the Claimants were strictly opposing the suspension. On 21 May 2009 the Trial Panel allowed the 2<sup>nd</sup> Respondent to join the law suit and at the same time rejected its application for a suspension.

### III

On 4 May 2009 the 1<sup>st</sup> and 4<sup>th</sup> Claimants requested the Trial Panel to issue a preliminary injunction prohibiting the 2<sup>nd</sup> Respondent to sell, transfer or otherwise change the ownership of the 1<sup>st</sup> Respondent and/or its assets in any way until the court issues its final decision.

The request was served on the 2<sup>nd</sup> Respondent on 25 May 2009 with the instruction that it should reply to the request not later than 1 June 2009. The 2<sup>nd</sup> Respondent did not comply with the order until the deadline.

On 2 June 2009 the Trial Panel issued the preliminary injunction as requested, ordering that it remains in effect until the final adjudication of the case.

The Trial Panel argued that if the 2<sup>nd</sup> Respondent would sell or otherwise transfer the ownership of the 1<sup>st</sup> Respondent, the Claimants could not be fully compensated anymore.

On 19 June 2009 the 2<sup>nd</sup> Respondent and on 22 June 2009 the 1<sup>st</sup> Respondent was served with the injunction. On 29 June 2009 the 1<sup>st</sup> Respondent and on 30 June 2009 the 2<sup>nd</sup> Respondent 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 1<sup>st</sup> and 4<sup>th</sup> Claimants did not prove that immediate and irreparable loss or damage would result if the request for the preliminary injunction were not granted.

Further, the 2<sup>nd</sup> Respondent also questions the legitimacy of such a request in its entirety, claiming that the claim for compensation should be dealt with by the Liquidation Committee for the 1<sup>st</sup> Respondent at a later stage.

The 2<sup>nd</sup> Respondent argues that such severe preliminary injunction deeply hinders the whole privatisation process as such and thus cannot be issued within a claim for damages.

**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 grounded.

Admissibility:

The 2<sup>nd</sup> Respondent, 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 this Court pointed out already previously (ASC-09-0108, decision as of 09 February 2010) there is no valid legal reasoning to call the Privatization Agency of Kosovo as an additional Respondent into any law suit if the claim concerns only the legal relations of a SOE with another natural or legal person, since the PAK due to its mandate "only" (and only in those cases where it decides to do so) acts as a representative, thus 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. Not even one of the Claimants alleged that the 2<sup>nd</sup> Respondent has any legitimatio passiva. The decision of the Trial Panel to call the 2<sup>nd</sup> Respondent as such into the suit was thus without any legal relevance. For reasons of simplification the PAK will nonetheless in this decision still be referred to as 2<sup>nd</sup> Respondent.

Since the 2<sup>nd</sup> Respondent with the challenged decision was ordered by the Trial Panel to refrain from any action affecting the legal status of the SOE, the PAK has suffered legal gravamen from this decision and has thus the right to appeal against it.

The 1<sup>st</sup> Respondent suffers gravamen from the decision as it obviously concerns its own legal status and its further "legal fate".

The appeals are grounded:

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 1<sup>st</sup> and 4<sup>th</sup> Claimants did not give any evidence in support of their request, although their allegations were contested by the Respondents. They did not indicate at all that at a given moment in time the compensation of the Claimants would be endangered by the actions of the 2<sup>nd</sup> Respondent they wanted to see prohibited by the preliminary injunction they applied for. They did not present – and they did not even allege – any indications, for example of a planned liquidation or privatisation of the SOE, that could have been understood as a significant change which might have lead to the necessity to issue such a preliminary injunction.

Moreover, the Claimants have – according to their claims – already suffered their damage at the time of the fire incident; consequently there is no danger that they might suffer new and/or additional immediate damage. It has to be clearly stated that the legal institution of the preliminary injunction is not aimed to ensure the enforceability of a possible future decision of the court granting damages, but only to avoid an irreversible change in the legal or factual status of a right or a possession which is subject to the main claim the court has to deal with.

Apart from the above mentioned considerations, the probable loss or damage would have to be irreparable, which in the case at hand is obviously not the fact, as the Appellants also pointed out. The claims are seeking monetary compensation, which by its special nature cannot be considered irreparable. Furthermore, the Claimants could be compensated by the proceeds of future privatisation proceedings, which would substitute the actual assets of the 1<sup>st</sup> Respondent.

Moreover, upholding the preliminary injunction could lead under certain circumstances to an inequality between the creditors of the 1<sup>st</sup> Respondent. Concerning their legal nature, the claims raised by the Claimants are not different from any other claim against the 1<sup>st</sup> Respondent. If the preliminary injunction would be upheld, this might gravely influence the possibility of the execution of other possible claims.

Concluding the above listed arguments, since none of the criteria necessary to issue a preliminary injunction set forth by the quoted provision of the law is fulfilled, the decision of the Trial Panel granting the requested preliminary injunction had to be set aside and the request had to be rejected.

Costs:

According to Section 11 REG 2008/4 and Section 66 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.

Based on Section 57.2 of UNMIK AD 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees, in force from 10 March 2010. They read as follows:

‘Section 10 of Administrative Instruction No. 2008/2 on Unification of Court Fees of the Kosovo Judicial Council of 27.11.2008, concerning “The Court Fee Tariffs”, is hereby – with the following specifications - declared to be applicable for the court proceedings in front of the SCSC.

Section 10.9 till Section 10.23 are – mutatis mutandis – applicable for the appeals procedure in front of the Trial Panel and in front of the Appellate Panel.

As a clarification, Section 10.11 is also applicable for the procedure governing the appeal against 2<sup>nd</sup> instance decisions of the Trial Panel.

(...)

## VII

These Additional Procedural Rules enter into force on 10 March 2010 and are valid until 31 December 2010.'

The court fees in both instances consist on the one hand of a fee for the filing of submission(s), on the other hand of a fee for the issuance of (a) decision(s).

As the decision in first instance was rendered before the day of entry into force of the above mentioned rules, only court fees for the appeals procedure are to be dealt with here:

The amount of the fee for the filing of the appeal as governed by Section 10.11 of the Administrative Direction of the Kosovo Judicial Council No.2008/2 on Unification of the Court Fees ("ADJ") is 30 Euros.

The amount of the fee for issuing a decision as governed by Sections 10.17, 10.12 and 10.1 of ADJ has to be determined according to the value of the claim. The value of the – joint – claim of the 1<sup>st</sup> and 4<sup>th</sup> Respondent is 195.000 Euros + 101.500 Euros = 296.500 Euros. The fee for a first instance decision for claims exceeding the value of 10.000 Euros is 50 Euros plus 0.5% up to 500 Euros. The court fee regarding a preliminary injunction is 50% of the amount which would be payable for the first instance decision. As the court fee for a claim with an value of 296.500 Euros would exceed 500 Euros, 500 Euros have to be divided by 2 in order to calculate the court fee for the appeals decision on the preliminary injunction at hand.

Since the claims were joined by the SCSC at the first instance proceedings the court fees are calculated pursuant to the joined amount, but should be paid by the Claimants taking into account the value of their individual claims in relation to the overall value of the joint claim. Since the value of the joined claims is exceeding the maximum value for the calculation of court fees, the total amount is € 250 plus € 30 as the appellate fee.

Pursuant to the above the 1<sup>st</sup> Claimant shall pay 184,80 Euros (based on the value of his claim 195.000 Euros).

## VIII

The 4<sup>th</sup> Claimant shall pay 95,20 Euros (based on the value of its claim 101.500 Euros).

In general court fees have to be paid by the party that loses the case, with the exception of those cases in which the case has to be retried by the Trial Panel (or, when the Appellate Panel acts as third instance, by either the Municipal Court or the Trial Panel). In those cases the costs have to be borne on a preliminary basis by the Appellant and the final allocation of costs is up to the Trial panel in its new decision. In cases like the one at hand, in which the Appellate Panel finally rejects a request for a preliminary injunction, the costs have to be paid by the one who requested the preliminary injunction.

Richard Winkelhofer, Presiding Judge signed  
EULEX

Torsten Frank Koschinka, Judge signed  
EULEX

Eija-Liisa Helin, Judge signed  
EULEX

Tobias Lapke, Registrar signed  
EULEX