

<p style="text-align: center;">DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË MIRËBESIMIT</p>	<p style="text-align: center;">SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS</p>	<p style="text-align: center;">POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU POVERENIÇKU AGENCIJU</p>
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ASC-10-0024

In the lawsuit of

██████████

Mbretëresha Teuta, Pejë/Peć

Represented by ██████████, lawyer from ██████████, Prishtinë/Priština

Claimant/Appellant

vs

Privatization Agency of Kosovo

Ilir Konushevci Street no. 8, Prishtinë/Priština

Respondent

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/Appellant against the Trial Panel decision of the SCSC of 14 January 2010, SCC-08-0267, after deliberations held on 29 April 2010, delivers the following:

DECISION

- 1. The appeal is rejected as ungrounded.**
- 2. The decision of the Trial Panel of the SCSC of 14 January 2010 (SCC-08-0267) is upheld.**
- 3. The request for a preliminary injunction is rejected as ungrounded.**

4. The Appellant is obliged to pay court fees in the amount of 60,- Euros for the appeals proceedings.

Factual and procedural background:

On 7 October 2008, the Claimant filed a claim with the SCSC requesting to be declared the legal buyer of the premises "██████████", of the Socially Owned Enterprise ██████████, located on ex ██████████, Pejë/Peć, following the annulment of the sale of the premises by the Liquidation Committee on 18 December 2007. The sale of the premises, which had been tendered on 30 November 2007, had been annulled by the Liquidation Committee, on suspicion of collusion amongst the bidders. The Claimant had been declared the winning bidder of the premises. The Claimant contested the decision of the Liquidation Committee before the Kosovo Trust Agency Board of Directors on 9 January 2008 and claimed that it violated article 13.7 of the rules of tender for the sale, and notified the Agency pursuant to Sections 29 and 30 of UNMIK Regulation 2002/12 and 2005/18 (SCC-08-0267).

On 14 January 2010, the SCSC rejected the Claimant's claim as inadmissible for failing to meet the admissibility requirements set out in Section 28.2 (d) of UNMIK AD 2008/6. The SCSC reasoned that the Claimant/Appellant failed to file the claim within the time limit of 9 (nine) months from the date that he knew or with reasonable diligence should have known of the decision or action of the Agency. The Claimant/Appellant had been informed of the Liquidation Committee's decision on 20 December 2007, pursuant to which he sent a complaint and notification to the KTA on 9 January 2008, but received no response from the Liquidation Committee or the Chairman of the KTA Board of Directors and he proceeded to file his claim with the SCSC on 7 October 2008. The SCSC Trial Panel's decision was served on the Claimant on 28 January 2010.

In 24 February 2010, the Claimant/Appellant filed an appeal with the Appellate Panel against the decision of the Trial Panel. The Claimant/Appellant alleges wrongful application of the law and requests that the decision be annulled and sent for retrial.

The Claimant/Appellant submits that according to Section 6.1 of UNMIK Regulation 2008/4, a claim may be filed against a decision of the KTA within 9 months from the date the claimant knew or would have known about a certain decision and according to Section 6.2 of UNMIK Regulation 2008/4, the provisions of Section 6.1 apply after notice has been given to the KTA in accordance with Section 30.2 of UNMIK Regulation 2002/12, as amended. The Claimant/Appellant therefore postulates that the 9 months period envisaged by Section 6.1 of UNMIK Regulation 2008/4, applied in conjunction with Section 6.2 of UNMIK Regulation 2008/4, only started running from the date of notification to the KTA, in accordance with Article 30.2 of UNMIK Regulation 2002/12, as amended, or "after the legal term of 60 days for response by KTA". The Claimant/Appellant submits that having notified KTA on 8 January 2008, the claim filed on 7 October 2008 is therefore filed within the 9 months period. The Claimant/Appellant alleges further that any other interpretation, which burdens the Claimant/Appellant due to the negligence of a public body which ignores the claims of the parties, would present a flagrant violation of human rights, and in this case, the right of access to justice.

On 18 March 2010, the Claimant/Appellant filed a request for a preliminary injunction against the sale of the same premises tendered as a liquidation asset sale by the Privatization Agency of Kosovo, as [REDACTED] on [REDACTED] [REDACTED] (previously known as [REDACTED] [REDACTED]) in Pejë/Peć.

Legal reasoning

1. The appeal

The appeal is admissible, but ungrounded. Based on Section 63.2 of UNMIK AD 2008/6, the Appellate Panel decided to dispense with the oral part of the proceedings.

Section 6.1 of UNMIK Regulation 2008/4 sets out the time period within which a Claimant/Appellant is to file a claim challenging a decision or action of the Agency.

Section 6.1 of UNMIK Regulation 2008/4 provides:

A claimant may only submit a claim challenging a decision or action of the Agency within nine (9) months from the later of: (a) the date that such claimant knew or with reasonable diligence should have known of the decision or action of the Agency, or (b) the date on which the Special Chamber gives public notice that it is able to accept claims.

Section 6.2 of UNMIK Regulation 2008/4 provides:

The provisions set out in section 6.1 shall be subject to the claimant having previously given to the Agency the notice required pursuant to section 30.2 of UNMIK Regulation No. 2002/12.

The Claimant/Appellant in his appeal presents the opinion that the 9 months time period starts running from the date of the notification of the Agency, or 60 days after the KTA has been notified, which in the case at hand would mean after 9 January 2008. The Claimant/Appellant is of the opinion that the decision of the Trial Panel is unacceptable and that any other interpretation which burdens the Claimant/Appellant due to the negligence of a public body, which ignores the claims of the parties would be a flagrant violation of human rights, and in this case, of his right of access to justice.

The legal opinion of the Claimant/Appellant finds no basis in the law. Sections 6.1 and 6.2 of UNMIK Regulation 2008/4 applied together, set the time limit for filing a complaint against the decision of the Agency to 9 (nine) months starting from the date that the Claimant/Appellant knew or should have known of the decision or action of the Agency, which is subject to prior notification to the Agency. If it had been the intention of the legislator to extend the time limit pursuant to a 60 day notification to the Agency, it would have been stipulated in the UNMIK Regulation 2008/4. The telos of the time period of 60 days as foreseen Section 30.2 of UNMIK Regulation 2005/12 is to grant the Agency a chance for an internal review of its decision challenged by the would-be-claimant. It is not a proper legal remedy before entering court proceedings, but a proceeding *sui generis* to avoid unnecessary trials. An obligation of the Agency to inform the would-be-claimant about whether it intends to solve the legal problem outside of the court is not foreseen by law. The intention of the 9 (nine) month period of time as foreseen in Section 6 of UNMIK Regulation 2008/4 is to force both sides, the Agency and the would-be-claimant, to decide on how to proceed further within a reasonable period of time. The Agency is aware of the fact, that, if it doesn't deal with the arguments of the would-be-claimant as soon as possible, it faces the risk of being sued in front of the SCSC. The would-be-claimant knows that if he doesn't make up his mind about the seriousness of his will to lodge a claim within the time prescribed by law, he will lose his rights. This equals a kind of checks-and-balances which seem to be sufficient to produce legal certainty within a reasonable time. In the light of those interpretative arguments the Appellate Panel does not see a violation of Human Rights in the application of those provisions according to their wording.

In this case, the Claimant/Appellant filed his claim at the Special Chamber on 7 October 2008. The Claimant/Appellant had been informed of the Liquidation Committee's decision on 20 December 2007 and notified the KTA

on 8 January 2008, pursuant to Section 30.2 UNMIK Regulation 2002/12, as amended. This is not contested by the Claimant/Appellant. Therefore, calculating nine months from 20 December 2007, when the Claimant knew of the action of the Agency, would set the deadline for filing the claim to 20 September 2008. The Claimant/Appellant filed his claim on 7 October 2008. Therefore, the 9 (nine) months period specified in Section 6.1 of UNMIK Regulation 2008/4 has elapsed.

2. The request for a preliminary injunction

The request of the Appellant for issuing a preliminary injunction stopping the Respondent from selling the premises in question until a final decision of the SCSC is – under the exceptional circumstances at hand – to be considered as being admissible, but ungrounded.

Under Section 55 of UNMIK Administrative Direction 2008/6, the decision granting injunctive relief lies exclusively with the Trial Panel of the Special Chamber. If the Trial Panel issues such a decision, it may be appealed to the Appellate Panel.

Section 4.1 of UNMIK Regulation 2008/4 gives the Trial Panels of the Special Chamber primary jurisdiction for claims in relation to:

- (a) *Challenges to decisions or other actions of the Agency undertaken pursuant to Regulation No. 2002/12, including the imposition of fines as provided for in section 27 of Regulation No. 2002/12;*
- (b) *Claims against the Agency for financial losses resulting from decisions or actions undertaken pursuant to its administrative authority in respect of an Enterprise or Corporation; ...*
- (f) *Claims related to the liquidation of an Enterprise under the administrative authority of the Agency, and claims for rescission of*

transactions of an Enterprise undergoing a liquidation proceeding as provided for in section 9.4 of Regulation No. 2002/12.

Section 55 of UNMIK Administrative Direction 2008/6 provides that the Special Chamber may issue a preliminary injunction provided the applicant gives credible evidence that immediate and irreparable injury, loss or damage will result to the party if no preliminary injunction is granted. The aforementioned UNMIK Administrative Direction provides that the request must be submitted together with a claim, or if submitted subsequent to a claim, to refer to that claim. Section 55.5 of UNMIK Administrative Direction 2008/6 provides further that if a trial panel issues a decision granting injunctive relief to a party, it may be appealed.

Section 4.4 of UNMIK Regulation 2008/4 provides:

The appellate panel shall have exclusive jurisdiction to decide appeals against any Judgement or Decision by a trial panel of the Special Chamber, unless otherwise provided by the present Regulation.

Section 58.3 of UNMIK Administrative Direction 2008/6 provides:

A decision of a court ... (ii) that has decided a claim for which primary jurisdiction lies with the Special Chamber, may be appealed.

It follows from the above quoted provisions, that, in principle, a request for a preliminary injunction has to be lodged with the Trial Panel and that a request, lodged for the first time and exclusively with the Appellate Panel, would have to be, due to a lack of jurisdiction of the Appellate Panel, considered to be inadmissible. This does not collide with Section 55.5 sentence 2 UNMIK AD 2008/6, as the distinction implied in this provision between preliminary injunctions issued by the Trial Panel and such issued by the Appellate Panel still has its own scope of applicability, as in cases, in which the Trial Panel refuses to grant a preliminary injunction and the claimant appeals against this decision, it definitely would lie within the

Appellate Panel's (bound) discretion, to issue the requested preliminary injunction as a result of a successful appeal. Section 55.5 sentence 2 UNMIK AD 2008/6 thus has no other meaning as to be a clarification concerning the fact that the Trial Panel's decision granting a preliminary injunction (opposite to one of the Appeals Panel) can be appealed (which also goes for Trial Panel's decision refusing to grant a preliminary injunction).

At the case at hand, as an exception from the rule, the request was nonetheless admissible.

One of the main reasons that the legislator laid the jurisdiction concerning the issuing of preliminary injunctions primarily in the hands of the first instance is to grant the Claimant (or the Respondent) the chance to be heard in two instances, should the first instance decide against him, even if it would be highly probable that the Trial Panel, after deciding negative on the main claim, would also reject the later filed request for a preliminary injunction. This telos of the law cannot be accepted as a valid argument in those cases, in which it is clear from the very beginning that the right the claimant would like to see protected by the preliminary injunction can under the circumstances given not exist (any more).

The case at hand fulfils exactly this criteria. As explained above concerning the merits of the appeal itself, the Claimant has – under the facts submitted by himself and thus to be taken into consideration when judging on the conclusiveness of the claim – no right to ask for the cancellation of the decision of the Respondent to annul the sales contract. He thus has no right to stop the Respondent from going on with the sales procedure.

For those reasons, the Appellate Panel considers the request for a preliminary injunction to be admissible, but ungrounded.

3. Decision on the court fees

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 2nd instance decisions of the Trial Panel.

(...)

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.

Section 10.15 ADJ determines that for decisions dismissing claims (as inadmissible) only half the amount of the fee as ruled in Section 10.1 ADJ (which on principle bases the court fees on the value of the claim) has to be paid, up to a maximum of 30,-- Euros. This applies to decisions in second instance, too (Section 10.21 ADJ refers to Sections 10.12 to 10.18 ADJ). Section 10.15 in conjunction with Section 10.21 covers decisions in second instance dismissing appeals as inadmissible, as well as decisions on appeals against first instance decisions that do not touch upon the merits of the case.

Unless the value of the claim is proven less (in first instance by the claimant, in second instance by the appellant), according to Section 10.1 in conjunction with Sections 10.15 and 10.21, the court fee is 30,-- Euros.

In the case at hand, neither in first nor in second instance statements as to the value of the claim, have been made. The court fee for the decision in second instance therefore is set to 30,-- Euros.

In total, the following court fees for the appeals proceedings apply:

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in conjunction with 10.21 and 10.1 (decision in second instance)	30 Euros
Total	60 Euros

These court fees are to be borne by the Appellant.

Richard Winkelhofer, EULEX Judge

signature

Torsten Koschinka, EULEX Judge

signature

Eija-Liisa Helin, EULEX Judge

signature

Tobias Lapke, EULEX Registrar

signature