

<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-10-0023**

In the lawsuit of

1. [REDACTED]

*Claimants/Appellants*

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

all: Fushtica e Ulet, Glllogovc/Glogovac

all represented by Zef Berisha, Lawyer,

[REDACTED], Prishtinë/Priština

vs.

[REDACTED]

*Respondent*

SOE, [REDACTED], Glllogovc/Glogovac

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 Claimants against the decision of the SCSC of 21 January 2010, SCC-09-0040, after deliberation held on 17 June 2010, delivers the following

### **DECISION**

1. **The appeal is insofar grounded, as Point 1 of the decision of the SCSC of 21 January 2010, SCC-09-0040, is set aside.**
2. **The Trial Panel is ordered to retry the claim.**
3. **Point 2 of the decision is eliminated.**
4. **The Appellants are conjointly obliged to pay court fees in the amount of 60 Euros for the appeals proceedings to the Special Chamber.**

- 5. 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 the allocation of the costs of the appeals proceedings.**

**Reasons at Law:**

On 19 March 2009 (date of reception), Lawyer [REDACTED] in the name of the four Claimants filed a claim with the SCSC, maintaining the unlawful expropriation of a parcel of land with a total surface of "2.53.00 ha" in 1953 from "the Claimants and/or their successors", located in the cadastral zone Fushticë e Ulët, Gllgovc/Glogovac Municipality, and requesting the "certification that the Claimants ... are owners", or to oblige the Respondent to compensate them with "land of the same fertility" or in "cash as per actual market price". (Subsidiarily), they request the Respondent's obligation to "transfer ... the right to ownership in order to enable the same to register as legal owners". A power of attorney, bearing the signatures of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimant only, and its English translation, as well as an (Albanian only) copy of a notification to the Privatization Agency of Kosovo (the PAK) with an entry stamp of 19 March 2009, were attached to the claim.

On 6 May 2009, the SCSC issued an order requesting the Claimants to clarify their claim on diverse issues within 14 days from the receipt of the order. On 26 May 2009, they (in time) replied with an Albanian only submission.

On 7 October 2009, the SCSC issued another order, this time requesting the Claimants to provide the Court within the same time limit with the English translation of the previous submission, the translation of the notification to the PAK dated 19 March 2009, and a (certified copy of the) power of attorney signed by all the Claimants.

On 29 October 2009, the Claimants replied to the order and submitted the translation of the previous submission (dealing with the merits of the case) and a photocopy of the same power of attorney again, but this time with two additional original signatures. The Claimants did not provide any further documents, in particular no translation of the notification; they requested the SCSC, however,

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"to translate this submission with its own expenses, since the said party is in a bad financial situation". The Claimants did not submit the official ZPF1 form.

On 9 November 2009, the SCSC issued the third order, with which the Claimants were requested to submit within 14 days from the receipt: a copy of the power of attorney granting the authority to represent the Claimants in the proceeding before the SCSC, since "the submitted power of attorney is generic and without date", which should refer to the specific object of the claim, with its translation into English language.

The Claimants' Lawyer [REDACTED] received the order on 12 November 2009.

With submission dated 24 November 2009 (posted on 29 November 2009, and registered with the Special Chamber on 30 November 2009), [REDACTED], acting on behalf of the Claimants provided a response to the order, attaching a copy of the power of attorney as submitted on 29 October 2009.

With the attacked decision of 21 January 2010, the Trial Panel of the SCSC (1) rejected the claim on the grounds of inadmissibility, and (2) referred to Section 9.5 UNMIK REG 2008/4 regarding the right to appeal the decision. The Trial Panel argued that the Claimants did not comply with the repeated order of the Court requesting a power of attorney, satisfying all the requirements set forth by the order of 9 November 2009: "... the submitted authorization is the same one, generic (no date) and in Albanian language". It concluded that the claim should be admissible only if it satisfied all the requirements of Section 28.2 of UNMIK AD 2008/6, which would not be the case there. The Trial Panel also mentioned that the last submission of the lawyer of the Claimants was in fact 3 days late. The issue that the Claimants not provide the requested translation of the notification to the PAK dated 10 March 2009 (see the order of 7 October 2009), was not addressed in the decision.

The decision of the Trial Panel was served on (the lawyer of) the Claimants on 2 February 2010.

In their appeal, timely filed on 25 February 2010 by (the lawyer of) the Claimants, the Appellate Panel of the SCSC is requested to revoke the decision and to order the 1<sup>st</sup> Instance Court to continue with the proceedings. They argue that the (English translation of the) power of attorney, in fact fulfilled all legal requirements to be considered sufficient. Therefore, the claim should not have been dismissed as inadmissible.

The appeal is admissible and grounded.

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

Power of Attorney:

Section 24.4 UNMIK AD 2008/6 reads as follows: "*A lawyer acting for a party must submit to the Registry a copy of the power of attorney granting the authority to represent such party in the proceedings before the Special Chamber. The Special Chamber may require that such power of attorney be certified.*"

According to Section 24.6 in connection with Sections 25, 28.3 (f) and 28.4 AD 2008/6, the (English translation of) the power of attorney, as detailed in the above mentioned Section 24.4 AD 2008/6, is among the admissibility criteria for a claim.

The Trial Panel argues that the power of attorney submitted does not fulfil these requirements, namely that it should specifically be addressed to conduct the proceedings before the SCSC.

It is not contested – not even by the Appellants – that the power of attorney submitted is a generic one, authorising lawyer Zef Morina to represent the Claimants in all court proceedings.

Contrary to the Trial Panels position as laid down in the challenged decision, and their order of 9 November 2009, however, the displayed provisions do not require the parties before the SCSC to issue a specific power of attorney, as long

as procedures before the SCSC are covered. A general authorisation – by its nature – principally includes the SCSC also (see ASC-09-0072).

The power of attorney in the case at hand reads: “We ... hereby give this power of attorney to Mr. [REDACTED] ... to represent us before all ... court authorities in Kosovo ... with all civil and legal matters without limitation.” Thus, the submitted power of attorney (including its English translation as already produced together with the claim, and in the following supplemented with all signatures of the Appellants in original), satisfies the requirements set forth by the law; therefore, the reasons given by the Trial Panel for dismissing the claim on these grounds are not valid. Under these circumstances, the late filing of the last submission is without further relevance.

Notification of the Agency (Section 28.2 [e] AD 2008/6):

Even though the Trial Panel did not take this issue up in the attacked decision (any more), on the occasion of the appeal some remarks are to be made with regards this issue:

As already clarified by the Appellate Panel’s case law (see (ASC-09-0072, ASC-10-0027, ASC-10-0036, et al), the notice to the Agency about the intention to file a claim is among the admissibility criteria as set forth in Section 28.3 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, as it is up to the Respondent’s discretion not to contest the facts as stated by the Claimant, including the question of the notification. Therefore, it has to be reiterated again that if a Claimant maintains (in the claim or upon order pursuant to Section 28.4 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 prove the notification.

In the case at hand, the Respondent has not had the opportunity to contest the notification yet. Though, the Appellants submitted an (Albanian only) copy of a notification dated 19 March 2009 (with an entry stamp of the PAK of the same date). Regardless of the question of the initial timeliness of the notification (the claim was received by the SCSC the same day), it can already be seen that from 19 March 2009 the PAK was aware of the claim. Since then, it did not opt to settle the dispute with the Appellants. Bearing in mind that the notification's aim is 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 21 January 2010, roughly 10 months later). 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 (ASC-09-0072, ASC-09-0057, ASC-10-0027, ASC-10-0036, et al).

Also the fact that an English translation of the notification was not provided, does not alter the result: In the order of the Trial Panel dated 7 October 2009 the Appellants were prompted to submit - amongst others - the English translation of the notice given to the Agency pursuant to Section 29.1 UNMIK REG 2002/12 (in conjunction with Section 28.2 [e] AD 2008/6). The Appellants did not provide the requested translation, but within their submission of 29 October 2009 filed an application for assistance in translation, even if not using the proper form(at), which was not decided upon by the Trial Panel. Under these circumstances the notification was translated ex officio by the Appellate Panel, with the result as foreseen in Section 25.9 AD 2008/6.

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.

When retrying the claim, the Trial Panel may deem it necessary to request translations of other documents from the Appellants. However, prior to that their request for assistance in translation may have to be (clarified, e.g. with providing them with a ZPF 1 form, and) decided upon.

#### Instructions to file an appeal:

Lately, point 2 of the appealed decision has 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-10-0036, et al).

#### Court fees / costs:

According to Section 11 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. The case at hand has to be retried in the first instance; therefore, no decision on any allocation on costs can be taken for the time being, as this allocation depends on the future decision of the Trial Panel. As of now, only the amount of court fees in the 2<sup>nd</sup> instance can be determined:

Based on Section 57.2 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 –

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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.

(...)

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 said above, it will rest with the Trial Panel to decide upon the amount of court fees in first instance, consisting of the two components, and their allocation.

As to the appeals procedure:

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.



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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, in first instance a statement as to the value of the claim was given (150,000 Euros). The court fee for the decision in second instance therefore is 30 Euros.

As a consequence, the following court fees for the appeals proceedings finally 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 preliminarily borne by the Appellants who are therefore (conjointly) obliged to pay the mentioned amount to the Special Chamber (see Article 2 [1] Law on Court Fees, Official Gazette of the Socialist Autonomous Province of Kosovo of 3 October 1987).

It will rest with the Trial Panel to allocate these costs of the appeals proceedings among the parties, together with the decision in first instance, including the decision on the (future) costs of the first instance.

Richard Winkelhofer, Presiding Judge                    signed

EULEX

Torsten Frank Koschinka, Judge                         signed

EULEX

Eija-Liisa Helin, Judge                                    signed

EULEX

Tobias Lapke, Registrar                                 signed

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