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-10-0028

In the lawsuit of

1. [redacted]
2. [redacted]
3. [redacted]
all: Sali Nivica Street, No.47/a, Prishtinë/Priština

Claimants/Appellants

vs.

1. [redacted]
Fushë Kosovë/Kosovo Polje
2. [redacted]
Llapje Sellë/Laplje Selo

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, after deliberation held on 26 August 2010, delivers the following

D E C I S I O N

1. **The appeal is grounded. The decision of the Trial Panel in the case SCC-09-0078 dated 14 January 2010 is set aside. The Trial Panel – in a different composition - is ordered to retry the case.**
2. **On the occasion of the appeal, the decision of the single judge of the Trial Panel in the case SCC-09-0078 dated 29 April 2010 is set aside.**
3. **Costs for the appeals proceedings are not to be imposed.**

Factual and Procedural Background:

On 14 May 2009 the Claimants filed a claim with the SCSC, asking for the annulment of a sales contract concerning real estate property that belonged to their late father, [redacted], and asking for the restitution of that real estate to them. The Trial Panel on 28 May 2009 issued a clarification order, requesting the Claimants to provide evidence that they are the legal successors of [redacted] and *"all the evidence that the Claimants intend to bring to the Court"* within 14 days. The Claimants complied with that order.

Answering to another clarification order by the court, asking them among other things to provide *"pursuant to Section 28.2 (e) of UNMIK AD 2008/6 proof that the Claimants have given notice to the Agency of their intention to file a claim against the Enterprise and the KTA within the prescribed period pursuant to sections 29.1 or 30.2 of UNMIK Regulation 2012/12 as amended"*, the Claimants submitted a notification to the Privatization Agency of Kosovo (PAK) dated 10 June 2009.

With decision dating 14 January 2010, the Trial Panel, composed of two international judges and one local judge, dismissed the claim as inadmissible, arguing that the *"Claimants have not proposed any facts or evidence that would indicate invalidity of the sales contract. The Claimants have not clarified the legal arguments for their claim as determined under section 27.2 (e) of UNMIK AD 2008/6. From Claimants' submission of 4 August 2009 it appears that the Claimants have failed to notify the Agency of their intention to file a claim as required under section 28.2 (e) of UNMIK AD 2008/6. In fact the submitted Notification bears the date 10 June 2010, which is after the Claimants filed their Claim at the SCSC."*

The Claimants on 01 March 2010 filed an appeal against this decision, which had been served on them on 02 February 2010, requesting the Appellate Panel of the SCSC to set aside the aforementioned decision and to return the case to the first instance for retrial, or to amend it and to approve the claim of the Claimants.

On 11 February 2010 the Claimants had already submitted a request for restoration to the previous position to the Trial Panel. The single judge of the Trial Panel with the decision of 29 April 2010 accepted the request of the Claimants *"for restoration to the previous situation"* and declared its decision of 14 January 2010 *null and void*.

The factual and procedural background of this decision dating 29 April 2010 reads:

"(...) the Special Chamber rejected the claim as inadmissible for the main reason that the Claimants did not submit a notice sent to the Agency prior to filing of the claim. The Special Chamber stated also that the Claimants had not proposed any facts or evidence that would indicate invalidity of the sales contract and had not clarified the legal arguments for the claim. (...)"

In the legal reasoning it is stated as follows:

"(...) With their motion, the Claimants submit a notice received by the KTA on 17 February 2005, sent by their predecessor, [redacted] *who had informed the Agency of the proceedings ongoing before the Municipal court of Prishtinë/Priština under C.nr.500/2004 related to his claim for annulment of the sales contract Vr,nr.164.*

These proceedings were stayed by a decision issued on 28 January 2009 by the Municipal Court due to [redacted] *death.*

The Claimants resumed the proceedings before the Special Chamber through their claim filed on 14 May 2009 of which the subject matter is the same as their predecessor's.

The notice to the Agency is related to the same claim firstly filed with the Municipal Court of Prishtinë/Priština by [redacted]*, then with the Special Chamber by his inheritors.*

(...) However, such a notice which was given to the Agency out of the deadline in the proceedings before the Municipal Court can be considered as regularly given to the same Agency for the further proceedings before the Special Chamber resumed by the inheritors on 14 May 2009. (...)"

The Trial Panel did not mention, neither in the factual and procedural background nor in the legal reasoning, any new facts or submissions concerning the evidence it declared to be missing in its first decision. There are also no such new submissions in the case file. Its legal reasoning goes on as follows:

"(...) Furthermore, the Special Chamber assesses that there are justifiable reasons explaining the Claimant's failure to submit the notice given to the Agency within the time limit of the order issued on 16 July 2009. Resuming their predecessor's proceedings, they could have not been aware of the fact that a notice was delivered by him in 2005 and that this document could have been presented to the Special Chamber.

(...) Pursuant to Article 122 of the above mentioned Law on contested procedure, this decision is not appealable."

The Trial Panel did not mention any decision of the Municipal Court Prishtinë/Priština or of the Trial Panel itself that transferred the case from that court to the SCSC. There is also no such decision in the case file.

Since the decision against which the appeal is brought was declared null and void by the Trial Panel, the Appellate Panel on 19 July 2010 requested the Claimants/Appellants to clarify if they withdraw their appeal filed against the decision of the Trial Panel dated 14 January 2010.

The Claimants/Appellants responded to this order and informed the SCSC that they withdraw the appeal filed against the decision of 14 January 2010, since this decision has been declared null and void with the decision of 29 April 2010.

Legal Reasoning:

Withdrawal of the appeal

UNMIK Regulation 2008/4 and UNMIK Administrative Direction (AD) 2008/6 do not contain provisions concerning the withdrawal of an appeal. Section 26.1 of UNMIK AD 2008/6 concerning claims stipulates that the Claimant may at any time withdraw the claim, with the consent of the SCSC. In granting its consent the SCSC shall consider the interests of all other parties. Section 58.2 of UNMIK AD stipulates that the rules of procedure that govern proceedings in the Trial Panel shall apply mutatis mutandis to the proceedings in the Appellate Panel. Reading the aforementioned Sections 26.1 and 58.2 of UNMIK AD 2008/6 in conjunction, the Appellate Panel considers that in exceptional cases also the withdrawal of an appeal can be depending on the consent of the SCSC (see ASC-09-0034).

The case at hand is in that sense exceptional and the appeal can thus not be considered to be withdrawn by the announcement of the withdrawal. A case is exceptional in the sense of the above given definition, if the interests of all other parties of the case, and, following from the ratio legis of the provision, the interest of justice itself are at stake if the withdrawal is accepted. This can be the case, if the decision that is appealed, becoming legally binding, would violate the law or would endanger the rights of those who are parties to the law suit but did not appeal against the challenged decision.

In the case at hand, the appealed decision as well as the decision taken by the single judge of the Trial Panel declaring the first mentioned decision null and void violate basic procedural rules. Granting the consent to the withdrawal of the appeal would thus endanger the interest of justice itself and would also endanger the rights of the other parties to this law suit, who were not yet properly involved (see below).

Incorrect application of procedural rules

1. The decision dismissing the claim as inadmissible is incorrect and has to be set aside.

a. Lack of evidence and submission of legal arguments

Section 28.2 (f) UNMIK AD 2008/6 lists among the admissibility criteria for a claim (all) "... the requirements of Sections 25 and 27 ...", at first sight giving the impression that all the elements listed therein may lead to the dismissal of the claim as inadmissible, if not provided upon order (see Section 28.4 UNMIK AD 2008/6). A closer reflection, however, reveals that the scope of this provision has to be reduced on teleological grounds (see ASC-09-0072 et al.):

Apparently, one of the main common principles of continental European Civil Procedural Codes is the conclusiveness of a claim (as the question if the claimed facts, in connection with the legal arguments presented may have the legal consequence as requested in the claim) not being an issue of the admissibility of the claim, but of its merits. If (sufficient) facts and / or legal arguments are not presented, or the claimed facts do not lead to the conclusion as drawn by the Claimant, the claim can only be subject to rejection as ungrounded, if not clarified upon request.

The same goes for naming the evidence the Claimants intend to produce: On principle, only contested facts need to be proven by the Claimant. If the Respondent does not contest the facts as claimed in a conclusive claim, there is no need to take evidence. A "list of evidence" may come in handy only if the gathering of evidence is necessary. If at all, a claim may be rejected as ungrounded if the Claimant fails to submit evidence to proof the facts the Respondent has contested. Prior to the involvement of the Respondent, a list of evidence may well be asked for, if the Claimant has to clarify on other issues, anyway, but cannot be an issue at that stage of the proceedings. Moreover, the missing list can never lead to the dismissal of the claim.

In the case at hand, the Respondents had not been involved yet. Material facts, a list of evidence, and legal arguments therefore are not yet relevant issues. In addition, it cannot be seen to what extent the Trial Panel considers the claim

being insufficient: Facts and legal arguments are given (the claimed ownership over a specified parcel of land, the invalidity of the sales contract, the position of the Claimants as heirs of the former owner), alongside the evidence to use (the name of witnesses, at least named in the documents attached to the claim; documents as the contested contract). The Trial Panel did not ask for clarification regarding any specific issue but only asked the Claimants to submit *"all the evidence that the Claimants intend to bring to court"*. This is not specific enough to be, if not followed by the Claimants, a valid reason to dismiss a claim as inadmissible; as shown above, the non-submission of evidence may lead to the rejection of the claim only at a later stage, after a specified and detailed request for submitting evidence for a specific alleged fact.

As a consequence, the legal reasoning of the Trial Panel as regards the issue of facts, evidence and legal arguments cannot be followed.

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

According to Section 29.1 UNMIK REG 2002/12 (in conjunction with Section 28.2 [e] UNMIK AD 2008/6), written notice of the intention to file action against a SOE has to be given to the Agency prior to the submission of the claim (the Trial Panel's reference also to Section 30.2 UNMIK REG 2002/12 is incorrect, as this provision only applies to claims against the Agency). 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, as well. Even though the admissibility criteria have to be examined ex officio, at that early stage of the proceedings (without the Respondent having been involved yet) the mere contention by the Claimant that a proper notice was given, is – on principle – sufficient, following the same pattern as described above. If a Claimant maintains (in the claim or upon order pursuant to Section 28.4 UNMIK AD 2008/6) that a proper notification was filed, the Trial Panel cannot dismiss the claim as inadmissible out of this reason. 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 contests the (timeliness of the) notification, the Claimant will be required to proof the notification.

In the case at hand, the Respondents have not had the opportunity to contest the notification yet. The Claimants submitted a copy of the notification dated 10 June 2009, but, clearly showing that it was filed after the submission of the claim (14 May 2009), and therefore not being in line with Section 29.1 UNMIK REG 2002/12 in conjunction with Section 28.2 (e) UNMIK AD 2008/6. Under these circumstances no further necessity arose to involve the Respondent; after the Claimants' submission of 4 August 2009, it was already clear (without any prejudice to the legal qualification of the notice given by the predecessor of the Claimants to the KTA) that not all admissibility criteria were met at the date of the filing of the claim.

However, already without taking into consideration the notice given by the predecessor of the Claimants to the KTA, it has to be taken into account here that from 10 June 2009 the Privatization Agency of Kosovo (PAK) was aware of the claim. Since then, they did not opt to enter into the proceedings as representatives of the Respondents. 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, the notification's target has been met (in the meantime). In addition, it has to be taken into consideration that the duty of a claimant to notify the Agency in advance adds extra burden to him as to the access to justice, and must therefore be interpreted in a restrictive way. Under the specific circumstances of the case it could even be considered an abuse of a legal right, if the (PAK on behalf of the) Respondents would now refer to the untimely notification. In this peculiar situation, the Appellate Panel considers the untimely notification without (further) relevance as to the adjudication of the claim (see also ASC-09-0072, ASC-09-0057, ASC-10-0027, ASC-10-0031, ASC-10-0036, et al).

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

c. Lis alibi pendens (dispute already pending elsewhere)

The decision of the Trial Panel raises the question if the claim would not have to be dismissed as inadmissible due to a lis alibi pendens. The Trial Panel explicitly points out in the decision as of 29 April 2009 that the predecessor of the Claimants lodged the same claim already with the Municipal Court Prishtinë/Priština, and that the Claimants *"resumed"* this law suit by lodging a new claim before the SCSC. It is unclear, how a pending – but stayed – law suit can be *"resumed"* by lodging a new claim before another court. As there is no decision within the case file, indicating any legal act of transfer of the case from the Municipal Court Prishtinë/Priština to the SCSC, the Trial Panel of the SCSC will have to clarify on that and will have to deal with the question of lis alibi pendens.

d) Instructions to file an appeal:

Lately, point 2 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).

2. The decision of 29 April 2010 granting the restoration to the previous position and declaring the appealed decision null and void has to be, on the occasion of the appeal and although it has not been directly appealed, set aside.

On principle, a decision that is not attacked by a legal remedy cannot be subject to a decision of the appeals court. In the case at hand, however, both decisions (of 14 January, and of 29 April 2009) are inseparable, and the Appellate Panel would not be in the position to decide on the appeal, which is under its exclusive jurisdiction, if the decision of the Trial Panel of 29 April 2010 – taken ultra vires (see below) – would stand, as it affects the decision which is subject to the pending appeal. Thus, the competence of the Appellate Panel to decide on an

appeal – in this specific case – implies the competence to set aside even a decision which was not appealed itself, if this decision would prevent the Appellate Panel from exercising its competence concerning the appealed decision.

The decision is taken ultra vires (a). Apart from that, the decision is based on an incorrect interpretation of the law (b).

a) On principle, the moment a decision finalizing the proceedings of one instance has been taken, the same court cannot lift that decision any more. This principle is even more applicable, when the decision finalizing the proceedings of that instance is already subject to an appeal, as appeals are defined, among other criteria, by their devolutionary effect. This even goes for a motion for restoration to the previous position. Art.117 para.2 Law on Contested Procedure (LCP), which is not directly applicable in proceedings before the SCSC (Section 70.3 lit.a UNMIK AD 2008/6), has to be interpreted for the cases before the SCSC with the teleological reduction that it does not concern decisions which finalize the proceedings of an instance.

   In addition, even taking into consideration a delegation order pursuant to Section 11.1 UNMIK AD 2008/6, a single judge can not declare a decision of the full panel null and void.

   Thus, the decision to declare the former decision null and void was taken ultra vires and thus had already for this reason to be set aside on the occasion of the appeal.

b) The decision is also based on an incorrect interpretation of the law.

   It mainly deals with the question if the notice given to the KTA by the predecessor of the Claimants was timely pursuant to Section 29.1 UNMIK AD 2002/12. This is not a question that has to be clarified when scrutinizing the question if an omission to submit such a document to the court can be excused according to Art.117 para.1 LCP. The question

relevant for granting a restoration, if there have been justifiable reasons for not presenting the required document (which, compare the above given reasoning of this decision, is at the end without any relevance), is not answered in the decision, as the Trial Panel only assumes that the Claimants "*could have not been aware of the fact that a notice was delivered by* (...) {their predecessor} *in 2005 and that this document could have been presented to the Special Chamber*", meaning that the Trial Panel did not clarify or at least was not convinced of the fact that the Claimants actually did not know about it, but did grant the restoration to the previous position anyhow.

The court has to be convinced of the fact that justifiable reasons have been given, otherwise it would, by granting restoration to the previous position, infringe the procedural rights of the other party.

Lately, the Trial Panel incorrectly declared the decision as of 29 April 2010 to be not appealable, based on Art. 122 LCP.

As pointed out above, in proceedings before the SCSC the LCP is not directly applicable. Its applicability follows only, and only with modifications deemed necessary by the SCSC, from Section 70.3 lit. a UNMIK AD 2008/6. According to Section 9.5 UNMIK Regulation 2008/4 and Section 58.1 UNMIK AD 2008/6 every decision and judgment of the Trial Panel is appealable. Section 12 UNMIK Regulation 2008/4 explicitly states that the provisions of that Regulation supersede any other provision in the applicable law which is not consistent with it. Apart from that, it follows also from basic principles of civil law, namely lex posterior derogat legi priori and lex specialis derogat legi generali, that the provisions concerning the appealability of decisions of the Trial Panel given by the Regulation and the AD supersede any provision of the LCP.

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 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. When a case has been ordered to be retried by the first instance court, 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 _____
EULEX Presiding Judge

Torsten Frank Koschinka _____
EULEX Judge

Eija-Liisa Helin _____
EULEX Judge

Tobias Lapke _____
EULEX Registrar