

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 ODOSE NA
KOSOVSKU
POVERENIÇKU AGENCIJU

SCC-08-0186

[REDACTED], Str. [REDACTED], 30000 Pejë/Pec
Represented by lawyer [REDACTED], [REDACTED] Gjakovë/Dakovica

Claimant

vs.

Respondent

Kosovo Trust Agency (KTA), represented by **UNMIK**, TSS, Prishtinë/Priština

To: Claimant, claimant's representative, UNMIK

The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (the "Special Chamber"), the Trial Panel, composed of Anna Bednarek as Presiding Judge and Sabri Halili Judges, acting in accordance with the order of the Trial Panel on delegation of power pursuant to Section 8.2 of UNMIK Regulation (REG) 2008/4 and Sections 11.1 to 11.4 of UNMIK Administrative Direction (AD) issued on 8 December 2010, after deliberation held on 24 January 2011 hereby issues the following:

JUDGMENT

The claim of the claimant [REDACTED] against the Kosovo Trust Agency is rejected as ungrounded.

Procedural background

On 17 June 2008 the claimant: [REDACTED] filed a claim against the respondent: Kosovo Trust Agency and requested the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters to verify that he fulfilled all the requirements described in the Rules for Tender of the KTA to become a winning bidder of the tender that took place on 30 November 2007 with regard to business premises: Shop ex [REDACTED] (ex Marshal Tito) in Pejë/Peč. The

claimant explained that he was declared as a potential buyer by the KTA and paid a deposit in the amount of Euro 9.900,00. He claimed to have offered Euros 23.400,00 plus the VAT to buy the premises formerly owned by [REDACTED] an SOE in liquidation. The claimant claimed that the property offered for sale was declared to be about 39,50 m2 size instead of 50 m2, as presented by the KTA. The claimant further stated that his offer was the highest one and that no minimal offer value had been indicated. Therefore, his offer was the winning offer. According to the KTA's Rules of Tender, the claimant stated, the KTA was obliged to confirm him as the winning bidder in writing and to request the winner to pay the price within 10 (ten) days. Contrary to these rules, the claimant underlined, he had been called to appear in the KTA's office in Pejë/Pec three days from the day when his offer had been stated to be the winning one, and had accepted to pay an additional Euro 3,000.00 to the offer price. He stated that therefore he would have had to pay Euro 26,400 which meant: Euro 668,35 per square meter. The claimant's representative had, in a submission dated 17 March 2008, requested from the respondent to respect the Rules of Tender and to sign the contract. The claimant added that he had not received a reply to this letter until the date of filing of the claim with the Special Chamber. According to the claimant the KTA had no grounds to cancel the tender. In particular, in his opinion, the explanation that the price offered was not the market value was groundless since there had been many other instances where tenders had not been cancelled even though the prices were low. The claimant added that if the KTA had wished, it could have included a reserve price rule in the auction, which the KTA had not done. As a consequence, the claimant requested that the Special Chamber obliges the KTA to sign the purchase contract regarding this property with the claimant and to compensate him for the procedural expenses, all within 15 days from the judgment becoming enforceable and under the threat of forced execution.

On 23 April 2009, the Special Chamber issued an order requesting the claimant to provide English translation of submitted documents, proof that he gave the written notice to the KTA about his intention to file a claim, as well as the list of evidence that he intended to produce.

On 8 May 2009 the claimant submitted a response to the order.

With an order dated 30 July 2009, the Special Chamber served the claim on the respondent KTA, who was advised to file a defense within 1 (one) month from the service of the order. The respondent received this order on 14 August 2009.

On 22 September 2009, the KTA requested an extension of the deadline for the submission of a defense to the claim. On 19 October 2009, the Special Chamber extended the deadline for the submission of a defense until 24 October 2009.

On 26 October 2009, the respondent filed its defense, in which it stated that on 2 and 6 November 2007, it had published a Notice of Public Sale, Sale Number PEJ 0701,

relating to the SOE ██████████ in the course of liquidation procedures which the respondent KTA had commenced earlier for the SOE. Nine shops, two warehouses and one washing premises of the SOE were offered for sale. The Notice of Public Sale had stipulated that the sale would be subject to the KTA Rules of Tender for Sale of Property through a Competitive, Sealed Bidding Process. On 30 November 2007, the KTA had held a sealed bid auction in Pejë/Peč. According to the respondent the claimant had submitted the highest bid in the amount of Euros 23,400.00 for the shop Galanteri, Mode 1. Further the KTA explained that on 7 March 2008, the Liquidation Committee responsible for the liquidation of the SOE had held a meeting at which it had been decided that the price offered was much too low, even though the surface was only 38 m² and not 50 m² as erroneously mentioned in the Notice of Public Sale. The defense argued also that on 19 March 2008, the KTA Board had agreed with the Liquidation Committee's recommendation to approve the sale of seven shops and two warehouses of the SOE on the basis that the prices offered by the bidders was a minimum market price, a reasonable, fair market price, or above the market price. In respect of the claimant's offer, the Liquidation Committee had recommended to the KTA's Board to reject the bid of Euros 23,400.00 for the shop in question, arguing that the shop is in a prime location in the centre of Pejë/Peč and that the winning bidder's offer amounted to only 50% of the estimated market price of Euros 1,200.00/m². This would disadvantage the creditors of the SOE, in the opinion of the Liquidation Committee. The KTA's Board had discussed the matter briefly during its meeting on 19 March 2008, but then postponed it to the next Board meeting. The respondent described that on 18 April 2008, the KTA's Board had unanimously approved the Liquidation Committee's recommendation to reject the claimant's bid. The Respondent argued that solely relying on Rule 8.3 of the KTA Rules of Tender, it would be obliged to enter into a sale agreement with the claimant. However, so the respondent stated, the provision had to be read in conjunction with Rule 13.3 of the KTA Rules of Tender, which would stipulate that the Board may cancel or amend in whole or in part the Tender for sale of any property at any time and for any reason in its sole discretion and without liability. The KTA claimed that the KTA Bid Submission Form would remind the bidder of this discretionary power of the KTA's Board. In the present case, the claimant's bid was unanimously rejected by the KTA's Board during its meeting of 18 April 2008, and consequently the tender had been cancelled due to the price being 50% below the estimated market price. The lowest price offer for the property expected by the Liquidation Committee had been established at Euros 40,000.00. Even if some kind of post-bidding offer in the range of Euros 3,000.00 could be established and the claimant had accepted it, it would have still been far below the expected Euros 40,000.00 as the respondent stated. However, the KTA claimed that such agreement would anyway not be legally valid as it would violate the Rules of Tender. The KTA underlined that it had made clear in its liquidation policy that there would be no negotiation of sales prices under any circumstances, and only sealed bids could be used for establishing the price.

On 21 December 2009, the Special Chamber issued an order serving the KTA's defense on the claimant, the receipt of which the claimant acknowledged on 24 December 2009.

On 10 March 2010, the claimant filed a request for issuance of a preliminary injunction, against the Privatization Agency of Kosovo. He indicated that from the public media and from the web site of the Privatization Agency of Kosovo, he got the information that the sale of the assets was announced. For that reason he requested the Special Chamber to oblige the Privatization Agency of Kosovo, to stop privatizing the business premises, located in Pejë/Peč, Galanteria Mode 1.

On 12 April 2010, the Special Chamber issued an order serving the claimant's request for a preliminary injunction on the respondent. The request was served on the respondent on 14 April 2010.

The Kosovo Trust Agency submitted its response on 19 April 2010, stating that the claimant has failed to provide any evidence that the preliminary injunction is the only way of avoiding the injury or loss that is both immediate and irreparable. Added that the claimant's bid was rejected by the KTA's Board in April 2008 with the consequence that the tender/sale was never completed and that is why the claimant was not in a position to legally claim any right relating to the property concerned. Therefore, in the respondent's opinion, no loss or damage relating to any of the claimant's rights could occur. The KTA requested that the request for preliminary injunction be denied.

On 21 April 2010 the Special Chamber issued an order serving the respondent's response to the claimant, and requested to submit, with 7 (seven) days from the acknowledgment of service of the order, a clarification as to which Agency is the respondent in this case: the Kosovo Trust Agency (KTA) as indicated in the initial claim or the Privatization Agency of Kosovo (PAK) as indicated in the claimant's request for a preliminary injunction. The order was served to the claimant's lawyer on 24 April 2010.

On 30 April 2010 the claimant submitted response to the order. He indicated again the Kosovo Trust Agency as the respondent.

The same day the claimant submitted also another submission in which he stated that: "The Claimant has claim Kosovo Trust Agency (February: KTA) as defined in the initial claim". With regard to the preliminary injunction [REDACTED] indicated: "In the proposal for the appointment of the Interim Measure to ban the sale, dated 9/3/2010, submitted by the Special Chamber on 10.03.2010, Claimant has cited the Kosovo Privatization Agency, as the legal post-seller Kosovo Trust Agency, known as the Kosovo Trust Agency has completed its mandate with the date 30/06/2008, and the decision to sell space method businessmen through liquidation received the

Kosovo Trust Agency”. Moreover the claimant complained that he had not received the response of the respondent to his request.

On 5 November 2010 the Special Chamber, repeated the order of 24 April 2010, and served the same on the claimant.

The claimant answered on 18 November 2010 stating that he maintained his previous position and that the opinion of the statement of the respondent was groundless.

On 9 December 2010 the hearing was held in the Special Chamber during which the claimant maintained his previous position and argued that the prices of the premises sold by the respondent in the same area of the city obtained similar, if not lower price than the premises in question. He also added that after the bid he paid the additional amount of 9.900 Euro. The respondent admitted that the facts of the case are not contested, while only the question of the right of the respondent to cancel the tender at any time, according to the Rules for Tender, without giving any reason for that was disputable between the parties. The KTA underlined that it was its own discretion to decide on that topic. The respondent argued that the fact raised by the claimant that he had paid additional 9.900 Euro for the bided premises was not proven and furthermore is not subject matter of the present case as the claimant did not request to be paid back that amount.

Legal reasoning:

The claimant requested the Special Chamber to verify that he fulfilled all the requirements described in the Rules for Tender of the KTA to become a winning bidder of the tender that took place on 30 November 2007 with regard to business premises: Shop ex Galanteri Mode 1, Str. 122/2 (ex Marshal Tito) in Pejë/Peč and to oblige the KTA to sign the purchase contract regarding this property with the him within 15 days from the judgment becoming enforceable and under the threat of forced execution. The respondent requested the claim to be rejected as ungrounded.

The parties to these proceedings did not contest the facts: on 13 November 2007 the claimant submitted the Bidder Registration Form at the Regional Office of the Kosovo Trust Agency in Pejë/Peč with regard to business premises Shop ex Galanteri Mode 1, Str. 122/2 (ex Marshal Tito) in Pejë/Peč. On 30 November 2007 the bidding process took place. [REDACTED] offered the amount of 23.400 Euro which was to be increased by the relevant Value Added Tax and he was declared to be the provisional winning bidder. The Board of the Kosovo Trust Agency decided to cancel the tender and the parties never signed the sales contract regarding the disputed premises. Those facts were described by the claimant in his claim and in his further submissions and were never contested directly or indirectly by the opposing party. The representative of the respondent admitted during the hearing held on 9 December 2010 that it did not question the facts as presented by [REDACTED]

The dispute between the parties referred though to the question whether the Kosovo Trust Agency had the right to cancel the tender at any time and especially after the bidding took place, without giving the reasons for that.

The answer to that question should be positive. After examining the case the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters concludes that the claim is to be rejected as ungrounded for the following reasons.

The Kosovo Trust Agency – the authority which organized the sale of the said premises issued a Notice of Public Sale Number PEJ 0701 in which it informed all the interested parties that “the sale is subject to the ‘Rules of Tender for Sale of Property through a Competitive, Sealed Bidding Process’ and the legal terms and conditions for sale’ ”.

The Bidder Registration Form submitted to the Regional Office of the KTA in Pejë/Peč consisted of 5 pages contained, a part from the personal data of the bidder, also the Instructions to Bidders, which were to be accepted by the interested bidder by signing the Form. The information on the second page of that Form was as follows: “The Bidder understands and agrees that: 1. Any sale of property which is being conducted by the Kosovo Trust Agency or by any party acting on behalf of or under authorization from the Agency is subject to the ‘Rules of Tender for Sale of Property through a Competitive, Sealed Bidding Process’ and any special terms and conditions of sale and/or sale provisions listed in the Notice of Public sale and/or any other bid document as defined in the Rules of Tender, including any attachment to any of these documents. By completing this form and submitting a bid the Bidder agrees to be bound by the aforementioned documents.”

At the page number 4, just above the signature of the claimant there was a declaration of the bidder stating that: “I acknowledge that I have read, understood, and agree to the terms outlined above, and confirm that I am eligible to bid with respect to the requirements of paragraph 2, above”. The consequence of such declaration meant that the claimant agreed to accept that the ‘Rules of Tender for Sale of Property through a Competitive, Sealed Bidding Process’ and the legal terms and conditions for sale’ constituted the rules which governed the bidding process and agreed on the content of those rules.

On 30 November 2007 the bid took place and the claimant filled out the Bid Submission Form, Sealed Bid for sale number PEJ 0701, where he indicated the amount of 23.400 Euro as the Amount Bid. Page 2 of that Form contained the same instructions for bidders as the Bidder Registration Form. Additionally point 10.b of the Bid Submission Form stated that: “The Agency reserves the right to terminate the Tender at its sole discretion.” Point 12 of the same Form read as follows: “The Board may cancel or amend in whole or in part the Tender for the sale of any property at

any time and for any reason in its sole discretion and without liability. (...) Should the Agency so cancel the Tender, the Agency shall not be held responsible for any costs or liabilities incurred by any Bidder or third parties.”

The provisions that governed the Tender and which were the legal bases for the assessment of its validity, as well as for the rights of the Agency and the bidders are expressed in the quoted above: “Rules of Tender for Sale of Property through a Competitive, Sealed Bidding Process”. According to Point 8.3 of those Rules “The highest price shall be identified and announced as the winning Bid”. Point 13.3 stated instead that: “The Board may cancel or amend in whole or in part the Tender for the sale of any property at any time and for any reason in its sole discretion and without liability.(...) Should the Agency so cancel the Tender, the Agency shall not be held responsible for any costs or liabilities incurred by any Bidder or third parties.”

The Special Chamber shares the opinion of the respondent that the provisions indicated in the Rules of Tender should be read in conjunction one with another. None of the sections of those Rules should be read separately and left aside one from another. For that reason the Court concludes that the Agency had the right to cancel the Tender of 30 November 2007, although the claimant was declared the Winning Bidder. The claimant acknowledged the fact that he was aware of the content of the Rules of Tender and accepted their content. Even though he is still interested in becoming the owner of the said premises there is no legal instrument that the Court could apply in order to grant [REDACTED] what he requested within his claim.

Moreover it needs to be clarified that section 8.3 of Rules of Tender describes only how to identify the winning bid, but at the same time it does not foresee the obligation of the institution that organizes the Tender to sign the sales contract with the bidder announced this way. To the contrary: there is no rule in the whole text of the Rules of tender that would put this obligation on the respondent. Furthermore: the Rules state that the KTA is entitled to cancel the Tender at any time on its discretion.

In the opinion of the Special Chamber the provisions of the Rules of Tender cannot be perceived as abusive ones. The right of the Agency to step back from a certain tender may not be interpreted as abuse of power of one of the parties. In fact, the conditions on which the tendering process was supposed to be held were indicated by one party: the KTA, but the claimant had the right not to submit any offer in case he interpreted the conditions as not acceptable.

The claimant agreed, by putting his signature under the Rules of Tender, and accepted that their content would constitute the rules that would regulate the whole process leading to the signing of the sales contract. Afterwards, the claimant is not in a position to complain about the consequences that are drawn from the application of those Rules.

According to Article 10 of the Law of Contract and Torts (O.G. of the SFRY No 29/1978): “Parties to the obligation relations shall be free, within the limits of compulsory legislation, public policy and good faith, to arrange their relations as they please”. That means also, that the Agency which organized the Tender had the right to indicate conditions under which the process may be finalized. Such reasoning is in line with the content of the provision of Article 20 of the Law on Contract and Torts, which states that: “Parties may regulate their obligation relations in a way different from the specified by the present Law, unless something else follows from a particular provision of the Law, or from its general meaning”.

The Special Chamber considers that in the present case the parties were in the phase of the negotiations which were preceding the entering into contract. On the basis of Article 30.1 of the above mentioned Law, such “negotiations shall not be binding, and each party shall at any moment be free to interrupt them”.

The claimant answered to the KTA’s invitation to treat and submitted his offer to buy business premises for a certain amount of Euro. Afterwards, according to section 8.3 the offer of the claimant was declared as winning bid, since the price offered was the highest. Nevertheless the respondent as the offeree never expressed the statement of the acceptance of the offer of the claimant and thus the contract may not be considered as entered according to Article 31 of the Law on Contract and Torts. The silence of the person offered (meaning of the KTA) does not mean the acceptance of an offer neither (Article 42.1 of the Law on Contract and Torts). The silence of the respondent, as well as the eventual further negotiations after the claimant’s bidding price was known to the respondent could lead to a conclusion that the KTA was not interested in that offer.

The Court wishes to underline that the circumstances raised by the claimant about the sales of the other premises in Pejë/Peč which reached lower prices than the one offered by [REDACTED] remain without any significance for the final decision in the case at hand. Since in the opinion of the Special Chamber the rule which granted the respondent the right to cancel the Tender could not be perceived as abusive one, it constituted a legal basis for the Board of the KTA to take a decision on annulling of the mentioned Tender. The Court acknowledges that consideration of the respondent about the height of the amount offered by the winning bidder and its relevance for the premises which were intended to be sold may not be subject to the examination in the present proceedings. Neither the inference may be drawn that the lack of the reserve (the minimal prize indicated by the organizer of the Tender) may lead to the conclusion that there was an obligation of the KTA to enter in fact into contract with the bidder who offered the highest prize, although retained not satisfactory for the seller.

Taking into consideration all the above mentioned reasons the Special Chamber concludes that the claim of [REDACTED] is ungrounded and as such is rejected.

The costs:

According to Section 11 of UNMIK Regulation 2008/4, the Sub Panel has to decide on the allocation of costs of the proceedings in first instance.

Based on Section 57.2 of UNMIK Administrative Direction 2008/6 the Special Chamber issued Additional Procedural Rules regarding Court Fees, in force from 10 March 2010 which 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. These Additional Procedural Rules entered into force on 10 March 2010 and are valid at the date of the rendering of the present Judgment.

The court fees consist of a fee for the filing of submission(s), and a fee for the issuance of (a) decision(s).

The fee for the filing of the claim in the present case was paid according to the former rules, applicable at the date of the registration.

Section 10.12 of AI No. 2008/2 determines that for decisions of the first instance based on the value of the object the fee shall be paid according to tariff's number 10.1.

The amount of contest was indicated by the Claimant as 500 Euro, but the Special Chamber considers that the value of the claim the case at hand is measurable and amounted to 23.400 (twenty three thousands four hundreds) Euro: the sum offered by the claimant in order to buy business premises. The court fee for the issuance of this Judgment is 117,00 (one hundred seventeen) Euro. That amount the claimant who lost the case is obliged to pay to the Special Chamber.

Legal remedy:

Pursuant to Section 9.5 of UNMIK Regulation 2008/4 an appeal against this Judgment 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 thirty (30) days from the receipt of this Judgment.

Anna Bednarek
Presiding Judge EULEX

Sabri Halili
Judge

Tobias Lapke
Chief Registrar EULEX