Ac.nr. 1336/11

The District Court of Prishtine/Pristina, as the court of second instance with the panel consisting of EULEX judge Verginia Micheva-Ruseva, as the presiding judge and judges Gezim Llulluni and Shemsi Hajdini, members of the panel, in the dispute between the claimant AS and the respondent the MG for compensation of damages, pursuant to the appeals of the claimant and the respondent against the judgment of the Municipal Court of Gllogovc/Glogovac in C.nr. 120/08, dated 27 September 2011, after a deliberation session held on 23 October 2012, renders the following:

Judgment

The appeals against the judgment of Municipal Court of Gllogovc/Glogovac rendered in C.nr. 120/08, dated 27 and 28 October 2011 are hereby rejected and the judgment of the first instance is confirmed.

The request of the appellant MG for reimbursement of court expenses at second instance is hereby rejected.

Reasoning

1. THE PROCEDURAL HISTORY:

The dispute began with a claim lodged to the Municipal court of Gllogovc/Glogovac on 15 April 2005. It was once adjudicated by the Municipal court under C.nr. 60/2005. Upon an appeal of one of the parties District court of Pristina has dealt with the contest deciding to quash the first instance decision and return the case back for retrial (decision of 27.03.2008 in AC.nr.254/2006. Back in the Municipal court the contest was registered under C.nr.120/2008. On 05.12.2008 the procedure was suspended as the Ministry of Justice and the Ministry of Economy and Finance were notified about the dispute due to the requirement of Article 67 and 68 of the Law on Financial Management and Accountability (Law 03-L-048). EULEX took over the case in the first instance through a decision dated 08 December 2009. The Municipal Court of Gllogovc/Glogovac, as the court of first instance decided on 27 September 2011 with a judgment, by partially approving the claim. Against this first instance court judgment the respondent and the claimant timely filed their appeals on 27 and 28 October 2011, respectively. The appeals were sent to the parties for a reply to the appeal on 16 March 2012. EULEX took over the case in the second instance with a decision dated 09 February 2012.

2. THE CLAIMS AND THE POSITION OF RESPONDENT DURING THE FIRST INSTANCE PROCEDURE:

The claimant has lodged to the court the following six claims based on his allegations that the respondent had violated the Law on Obligation Relations ('Zakon o obligacionim odnosima' Official gazette of

SFRY 29/1978, amendments in nrs. 39/85, 45/89,31/93, art 154, mostly translated into English as the Law on the obligations and torts) by demolishing his property :
(1) Compensation for the destroyed business premises at an amount of 60.800 Euro, (950 Euro per m2, on the basis of the total surface of the shop, 64 m2 including the attics);
(2) Compensation for the lost inventory at an amount of 4.250 Euro;
(3) Compensation for lost profit at an amount of 600 Euro per month since 1 March 2005;
(4) Compensation for psychological suffering /immaterial damage at an amount of 7.000 Euro;
(5) Assignment by the respondent of an equal plot for business premises;
(6) Interest on the claimed amounts under 1, 2, 3 and 4 calculated on the interest for saving deposits in Kosovo banks.
Furthermore the claimant requested compensation of procedural expenses at an amount of 1004 Euro.

The respondent objected the claims stating that MG was fully entitled to clear the plot (including demolishing the shop) and did not violate any Law, since the contract signed between the parties foresaw that the owners had to remove their shops, if requested by the respondent. The respondent requested compensation of procedural costs at an amount of 611 Euro.

3. THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

Following the observations of the court of the first instance as well as the factual conclusions of Supreme Court of Kosovo in its judgments A.nr.19/2001 and A.nr.443/2004, the following factual situation is established:

In 1992 the MG through a decision (nr.07 br. 353-187) dated 20.04.1992 granted a plot of land for temporary use referred to as Asanajka, cadaster parcel no 768/3, nr 4 in MG with a surface area of 32m2 to ShS under the obligation to construct a shop on the said plot. On 08.05.1996, the same organ revoked its decision nr.07 br. 353-187 due to the fact that ShS did not comply with the obligation to construct a business premises within the period of time stipulated in the decision.

This plot of land was granted to the claimant for temporary use in 1996 by the MG through a contract dated 29.01.1996. On 15.05.1997 it also granted to the claimant construction permission for the building. The business facility (a two floor shop, totally surface of 64 m2) was constructed in and used for commercial purposes during several years.
Approximately sixty plots were allocated to individuals to construct business premises which most of them did.
On 29 March 2001 the MG ordered the owners to remove the business facility.
The claimant, as owner of the business facility, appealed this decision to the Chief Executive officer of the MG.
The Chief Executive officer did not decide on the appeal.
The claimant appealed the Chief Executive officer silent omission to the Supreme Court of Kosovo.
The Supreme Court with a decision in case A.nr.19/2001 approved the lawsuit and ordered the Chief Executive officer to decide on the request of the owner.

Meanwhile the claimant together with other owners of shops, who had also received same decision of the MG to demolish their business facility, filed a claim to the Municipal court of Gllogovc/Glogovac against MG for obstruction of their possession.
MC approved the claim and imposed a temporary security measure dated 7.05.2001 forbidding the MG to demolish the shops (c.nr.50/2001).
DC confirmed the decision of MC
Meanwhile upon an appeal lodges by some owners of shops, the Ombudsperson of Kosovo requested United Nations Interim Administration Mission in Kosovo (UNMIK) to postpone the execution.
The Special Representative of the Secretary-General of UNMIK with an execution order 2001/6 dated 07.05.2001 postponed the execution.
The MG followed the UNMIK order and with a decision of 24.08.2001 postponed the execution.
On 25.01.2005 the Directorate for inspection with the MG issued a conclusion allowing execution of the ruling of the Directorate for urbanism planning and environment protection within the MG issued on 05.05.2004 ordering ShS and not the claimant to remove his building under the threat if he did not remove it in 8 days, then the premises would be removed by force. Nevertheless that the name of the addressee was not correct, the claimant appealed this decision to the Chief Executive Officer of the MG on 31.01.2005.
On 2.02.2005 the President of the Municipal court of Gllogovc/Glogovac informed the Chief Executive officer of the MG that the case of the claimant and other individuals against the MG on obstruction of possession was scheduled for 14.02.2005 and that the imposed temporary measure in case c.nr.50/2001 dated 7.05.2001 was still in force.

On 1 and 2.03.2005 the MG demolished the business premises of the claimant. The inventory inside the building was destroyed.
There is no evidence whether or when the Chief executive officer has decided on the appeal of the claimant against the order of Directorate for inspection with the MG of 25.01.2005 to release the plot.

II. RELEVANT LAW

According to the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation No 2001/9, 15.05.2001, amended by UNMIK Regulation 2002/9, 03.05.2002, in force until the Constitution of Kosovo was adopted in 2008), Chapter 3

> "3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms".
>
> 3.2 The Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in: The Universal Declaration on Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; The International Covenant on Civil and Political Rights and the Protocols thereto; The Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination Against Women; The Convention on the Rights of the Child; The European Charter for Regional

or Minority Languages; and The Council of Europe's Framework Convention for the Protection of National Minorities.

3.3 The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework. "

According to Chapter 9.4.2,

anyone "claiming to have been directly and adversely affected by a decision of the Government or an executive agency under the responsibility of the Government shall have the right to judicial review of the legality of that decision after exhausting all avenues for administrative review".

According to Section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo, 11.08.2000,

"Law and justice shall bind the administration of the municipality, and in particular the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto shall be observed. All administrative actions shall comply with the applicable law".

Section 2.4 provides that

"Each municipality shall have its own legal status, the right to own and manage property, the capacity to sue and be sued in the courts, the right to enter into contracts and the right to engage staff".

Section 35 of the same UNMIK regulation provides:

"35.1 A person may file a complaint about an administrative decision of a municipality if he or she claims that his or her rights have been infringed by the decision. Complaints must be submitted in writing to the Chief Executive Officer or made in person at the office of the Chief Executive Officer within the period of one month from the complainant being notified of the decision.

35.2 The Chief Executive Officer shall re-examine both the legality of the decision and the administrative process by which it was reached. He or she shall give the complainant a reasoned response in writing within one month of the receipt of the complaint.

35.3 If the complainant is dissatisfied with the response of the Chief Executive Officer, the complainant may refer the matter to the Central Authority, which shall consider the complaint and decide upon the legality of the decision.

35.7 The rights set out in this section shall be additional to any rights that the person may have to refer an administrative decision to the Ombudsperson or to a court of law".

Furthermore, Section 36 provides:

"A person may seek relief in a court of law against decisions of a municipality, in accordance with the rules and procedures of the relevant court".

Section 47 stipulates the powers of the Special Representative of the Secretary General that shall be also mentioned for clarity:

"47.1 The Special Representative of the Secretary-General shall retain in full the authority given to him pursuant to United Nations Security Council resolution 1244. He shall retain the final decision-making authority concerning any provisions of the present regulation.

47.2 The Special Representative of the Secretary-General shall set aside any decision of a municipality, which he considers to be in conflict with United Nations Security

Council resolution 1244 or the applicable law or which does not take sufficiently into account the rights and interests of the communities which are not in the majority in the territory of the municipality".

Subsidiary the administrative review of administrative decisions was regulated also by the Law on the administrative procedure (SFRY Official gazette, No 47, 15.08.1986). This Law was in force until 13.11.2006 when the new Law on the administrative procedure (Law N0 02/L-28) entered into force.

The judicial review of the administrative decisions is regulated by the Law on Administrative Disputes (Official gazette of the SFRY N04, 14.01.1977). If the aggrieved party is dissatisfied with the final decision of the administrative authority a judicial appeal may be filed with the Supreme Court. A final administrative decision shall be considered one issued pursuant to an administrative appeal or a first instance administrative decision against which no administrative appeal is allowed (Article 7). The procedure may be initiated within 30 days from the day when the administrative decision was served to the party (Article 24). If the Supreme Court finds the submission admissible it may annul the challenged administrative act and instruct the administrative authorities how to act or may issue a judgment of a substitutive character replacing the original administrative act.

Article 17 of this law stipulates that:

"The complaint, as a rule, does not prevent exercise of the administrative act against which it has been lodged.

Upon the plaintiff's request, the body whose act is exercised, i.e. the body responsible for its execution in the case of an act issued by a body not being authorised for its execution, shall postpone the execution until reaching the final court decision, if the execution of the act would cause irreparable damage for the plaintiff and the postponement would not either be in contradiction with the public interest or cause greater irreparable damage to the opposing party. Together with the request for postponement evidence on the lodged complaint should be enclosed. For each request the competent body need to bring in a decision at the latest within 3 days from receiving the request.

The body under paragraph 2 of this article may postpone execution of the relevant act until the final court decision for other reasons as well if the public interest allows that."

As to the legal ground on which the claimant was granted with the right to use the land, the Court recalls Article 14 of the Law on Land for Construction (Official gazette of SAP Kosovo, No 14/80):

"The Municipality may give non-constructed urban land for construction, on which it has the right of disposal, and contracted land in common use on temporary use for temporary needs".

According to Article 20.3 of this law:

"Persons who obtain the use of the parcel for construction, are obliged, within the term of 3 years from the day they receive the decision, to construct the building, or to finish substantial work".

According to Article 24 of the same law:

"The owner of a building on urban land for construction has the right to use the land under the building and the land that is necessary for its regular use, within the borders of construction parcel.

The right to use the land referred in paragraph 1 of this article continues as long as the building exists.

If the building from paragraph 1 of this article is no longer appropriate for use, due to age or damages incurred due to *vis major*, the owner of the building will be granted a priority for construction on the same parcel according under the conditions provided for in article 18 of this Law.

The right to use land referred to in paragraph 1 of this article cannot be transferred at all".

As to the liability of the municipal authorities in negligence the Court recalls Articles 170-173 of the Law on Obligation Relations ('Zakon o obligacionim odnosima' , OG SFRY 29/78) providing that enterprises, other employers and legal persons shall be liable for damages caused by its employees or members, or brunches to a third person in performing their work or function or in connection to performing work or function.

According to the general rule set forth in article 154

"whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault".

Article 155 of the same law defines the injury or loss as a diminution of someone`s property (simple loss) and preventing its increase (profit lost) as well as inflicting on another physical or psychological pain or causing fear (non-material damage or mental anguish).

Article 185 regulates the restitution and indemnity in form of money:

(1) "A responsible person shall be liable to re-establish the situation existing prior to the occurrence of damage.

(2) Should re-establishing of the previous situation fail to eliminate the damage entirely, the responsible person shall be liable to pay an indemnity in money to cover for the rest of the damage.

(3) Should restitution be impossible , or should the court find it necessary for the responsible person to do so, the court shall order such person to pay to the person suffering loss an adequate amount of money as compensation for loss.

(4) At the request of the person suffering loss, the court shall award compensation in money to him, unless the circumstances of the specific case justify the restitution".

Article 186 provides when duty of compensation is due:

"Compensation for damage shall be due from the moment of the damage taking place".

According to article 189:

(1) "A person sustaining damage shall be entitled both to indemnity of common damage and compensation of profit lost.

(2) The amount of damages shall be determined according to prices at the time of rendering court decision unless something else be ordered by law.

(3) In accessing the amount of the profit lost the profit which was reasonably expected according to the regular course of events or particular circumstances, and whose realization has been prevented by an act or omission of the tort-feasor shall be taken into account".

Article 190 stipulates that:

"While also taking into account the circumstances after the occurrence of damage, the court shall determine damages in the amount necessary to restore the material state of the person sustaining damage into the state it would have been without the damaging act or omission".

As for the non-material damage the law stipulates the following in article 200:

(1) "For physical pains suffered, for mental anguish suffered due to reduction of life activities, for becoming disfigured, for offended reputation, honour, freedom or rights of personality, for death of a close person, as well as for fear suffered, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, provide a corresponding ground thereof- award equitable damages, independently of redress the property damage, even if the latter is not awarded.

(2) In deciding on the request for redressing non-material loss, as well as on the amount of such damages, the court shall take into account the significance of the value violated, and the purpose to be achieved by such redress, but also that it does not favour ends otherwise incompatible with its nature and social purpose".

According to article 376:

(1) "A claim for damages for lost shall expire three years after the party sustaining injury or loss became aware of the injury or loss and of the tort-feasor.

(2) In any event, such claim shall expire after five years after the occurrence of injury or loss".

Article 1 of Protocol 1 to the European convention on Human rights, directly applicable in Kosovo in 2005 based on the Constitutional Framework for Provisional Self-Government in Kosovo, Article 3.3, reads as follows:

„Every natural or legal person is entitled to the peaceful enjoyment of his posessions. No one shall be deprived of his posssessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a sate to enforce such laws as it deems necessary to control the use of property in accordance with the general interes or to secure the payment of taxes or other contributions or penalties."

4. THE JUDGMENT OF THE FIRST INSTANCE COURT

The Municipal Court of Gllogovc/Glogovac, as the court of first instance decided on 27 September 2011 with a judgment, by partially approving the claims.

(1) and (2) The court of the first instance partially approved the claim for the pecuniary compensation of the destroyed business premises (shop) at an amount of 9.600 Euro as well as

the claim for the compensation of destroyed inventory in the shop at an amount of 1.500 Euro , and ordered these two amounts to be paid together with the interest which is applied in accordance with the bank deposits for savings for over one year time, counted from the date 15 April 2005, when the lawsuit has been filed until the final payment.

The court accepted that the respondent acted against the law and justice thus in contradiction to section 33 of the UNMIK Regulation 200/45 on the self-government of municipalities in Kosovo. The administrative procedures to terminate the contract with the claimant and to have the plot cleared were not finalized when the demolishment of the shop took place. The MG did not take into account the interests of the shop owner while executing its power. Moreover the MG failed to announce a deadline when the plot would be cleared and also failed to announce the date on which the MG would clear the plot by demolishing the premises. Thus the respondent deprived the claimant from the option to remove his property and inventory. The court concluded that the demolition of the shop is a clear violation of the property rights of the claimant as protected by Article 1 of Protocol 1 to the European Convention of Human rights. Regarding the amount of compensation, the court of first instance expressed the opinion that that it was not possible any more to established the exact amount of damage caused by the demolition as well as the value of the inventory due to the long time passed since 2005. The court calculated the approximate construction costs at the time of the construction and did not take as a base the commercial value of the shop, because according to the applicable conditions between the parties, the user did not have the right to sell the premises. As to the lost inventory the court accepted that there was no evidence for destroyed inventory, neither was this damage specified in the claim. The court approved the compensation claim considering that the respondent did not dispute the fact that the claimant had inventory in the shop when it was demolished, and granted compensation amount equal to the price of the inventory which any shop of that size could have.

(3) The court of the first instance rejected as ungrounded the claim for compensation for lost profit, since it decided that was incompetent to decide about the legality of the administrative decision to terminate the contract. The court accepted that the respondent would be liable for the compensation of lost profit only when the decision for termination would be illegal, which could be decided only in an administrative procedure.

(4) The court of the first instance partially approved the claim for compensation of immaterial damages at an amount of 250 Euro. The court accepted that demolishment of the shop and the inventory had caused psychological suffering to the claimant. As the amount due could not be precisely established the court of first instance allotted a symbolic amount of 250 Euro.

(5) The court of the first instance rejected the claim for assignment of an equal plot for business premises as ungrounded as there was no obligation for the respondent to offer the claimant another equal plot of land. In addition, the court accepted that the issue of the assignment of a new plot would depend from the legality of the decision to terminate the contract, which constituted a matter for which the court was of the opinion that it was incompetent.

(6) On the last claim regarding grunting interest for claims 1, 2, 3 and 4 , the court of first instance decided in its decision on each of the above mentioned claims, and grunted interest for claims 1 and 2 whereas rejected the requested interest regarding claims 3 and 4.

The first instance court ordered the respondent to cover the procedural expenses because according to the court the activities of the respondent gave rise to the dispute.

5. THE CONTENT OF THE APPEALS ON THE JUDGMENT OF FIRST INSTANCE COURT:

The claimant filed an appeal because of essential violation of provisions of contested procedure, wrong verification of factual situation and wrong application of substantial law, requesting from the second instance court to change the judgment of the first instance court and decide on the merits of the case, as per his claim. Specifically, the claimant claimed in his appeal that the provision of Article 182.2 of the Law on Contested procedure has been violated, because its enacting clause is unclear and contradictory with the reasoning and it does not contain decisive facts, [and] the judgment is not sufficiently reasoned with the evidence and that there are contradictions between the reasoning of the judgment and the content of the evidences. More specifically, the claimant challenged the amounts decided by the first instance court in the partially approved statements of the claim (1, 2, 4, 6), as well as the decision of the court to reject statements 3 and 5 of the claim. The claimant stated that the amounts due were fully specified during the first instance procedure, including three expertizes. The claimant considers that the decision of the first instance court is unjust.

The respondent filed an appeal against points 1, 2 and 4 of the judgment of the first instance court, as well as against the decision on procedural expenses because of essential violation of provisions of contested procedure, wrong verification of factual situation and wrong application of substantial law, requesting from the second instance court to annul points 1, 2 and 4 of the judgment, as well as the decision on procedural expenses and remit the case for retrial to the court of the first instance. The respondent claimed that the first instance court violated Article 182 (n) of the Law on Contested Procedure, because the enacting clause of the judgment is contradictory with the facts, respectively with the documentary evidence, because according to this evidence it is clear that the land has been given to the claimant in temporary use, as well as it does not stand that the respondent did not take any administrative activity in administrative procedure for destroying the shop. The respondent further claimed that the wrong establishment of the factual situation consists on the fact that according to Articles 154.1 and 158 of the Law on Obligations, in order to establish the responsibility for the caused damage there must exist a damage due to illegal and not allowed action, whereas the activities of the respondent were legal, since they were undertaken in accordance with the Law on general Administrative Procedure. The claimant was given the land in temporary use in accordance with the Law on Construction Land. Since the claimant did not remove the shop from the plot after the request of the respondent, made pursuant to the decision on annulling the previous decision to allocate the land, the respondent removed the shop in accordance with the applicable provisions. The statement of the first instance court that the claimant was not given time to clear the plot is not correct, because the activity to destroy the shops was undertaken in order to execute the decision on annulment of the decision to allocate plots and this decision was served to the parties. In addition, the respondent claimed that the claimant did not use any administrative remedy in order to challenge the administrative procedure regarding the shop. The Law on Basic Property Relations specified that on some things, the ownership right of individual on the socially owned property cannot be established, thus also not on the construction land which falls under the social property. The claimant did not prove that he is the owner of the immovable – he was just a temporary user. The respondent also stated that the court of first instance wrongly established that the provisions of Protocol 1 of the Convention on Human Rights were violated, because the administrative procedure was carried out in accordance with Article 6 of the said Convention, which means that there was a public interest

involved for clearing the plots. Finally, the respondent objects the claim and the statements of the claim because it considers that the court does not have a real competence to decide in this matter, since it considers it as an administrative issue, which belongs to the competence of the Supreme Court in the administrative dispute. Therefore, the respondent considers that the claim should have been dismissed due to the incompetence of the court.

6. DISTRICT COURT ASSESSMENT

A. Admissibility

Before entering into conclusions on the merit the Court shall consider *ex officio* the admissibility of the claim. The claimant, alleging to be owner of a business facility and inventory, both demolished and destroyed by the respondent has the legal interest to submit the claim. The Respondent, MG is passively legitimated to respond to the claim as according to UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo (applicable in 2005), Section 2.4 the MG has its own legal status and could be sued in the court.
Furthermore, the claims were submitted to the court within the deadlines stipulated by Article 376 of the Law on Obligation Relations.

B. The merits

First of all the court has to decide which law recognizes the liability of the MG as a legal person and local authority. In 2005 Kosovo did not have special law engaging the responsibilities of the government and local self-governing authorities for damages caused to the citizens in negligence. Therefore, the general law of torts is applicable (the Law obligation relations, Official gazette SFRY 29/78) as it recognizes the liability of legal persons and enterprises for lost or damage caused by their staff while exercising functions or service. In 2005, apart from the domestic law, international instruments including the European Convention of Human Rights were directly applicable. The Convention in Article 1 of Protocol 1 protects existing possessions and assets against interference. The right to temporary use the land, the right of ownership over a building and over movable items is considered by the convention as "possession". The right under Article 1 of Protocol 1 includes the possibility to exercise those rights and this enjoyment is protected against interference by public and private entities. The interference may be in forms of deprivation or control of use, and must have a legitimate aim, satisfy the requirement of lawfulness and can be exercised with fair balance between the demands of the general interest of the community and the requirement of the protection of the individual`s fundamental rights.
The first instance court applied solely Article 1 of Protocol 1 to the Convention to recognize the liability of the respondent under some of the claims.
District court considers that domestic law shall be also applied in this dispute always recalling of course the text of the Convention and the case law of the European Court of Human Rights.
The Court, after considering all administered evidence, finds that the MG had demolished the business facility of the claimant without any administrative act against him ordering release of the plot. He was never notified that a demolishment of his shop and inventory will be implemented, he was not given a chance to release the land and take away the inventory. Wrongfully the MG

considered ShS as the temporary user of cadaster parcel no 768/3, nr 4 , even though in 1996 the MG had annulled his allocation to that plot . The respondent did not consider the change of individuals authorized to use the plot. Thus the claimant was deprived from the right to use administrative and judicial remedies against any administrative decision which would deprive him from the right of temporary use the plot. Additionally, the respondent acted against the imposed security measure not to demolish the shop of the claimant until the matter was decided by the court in the dispute on obstruction of possession in c.nr.50/2001. The respondent acted against the principles of law and justice foreseen as a duty of the administrative body set forth in section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo. The MG was obliged to follow the applicable law, including the international standards which in 2005 were directly applicable in Kosovo (see art.3.3 of the Constitutional Framework for Provisional Self-Government in Kosovo). It is a general obligation of the MG to observe law and justice, and in particular the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto (section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo). One of the basic human rights is the right to peaceful enjoyment of possession. The claimant was not an owner of the land but he was granted the right to temporarily use it and to build a shop on it. The government body could deprive him from this right in accordance to the general interest, and this is not disputed, but the Court considers that at the moment of the demolishment of the shop the claimant was still not deprived. This Court is incompetent to consider the lawfulness of this depravation, that issue would be solved in the administrative procedure or dispute. This Court has to decide if the MG legally demolished the business facility of the claimant, and if it was not legal then to recognize the liability of the MG to pay compensation for damaged caused to the claimant, if any caused.

The development of the event shall be considered in a broader view regarding all concerned individuals and their possession rights. The dispute for termination of the temporary use of the land granted to the claimant and other more than 20 citizens of Gllogovac was pending since 2001. The decision of the MG to take back the land and remove the shops was challenged before the Ombudsperson of Kosovo, before the Special Representative of the Secretary-General, before the Supreme Court (by some owner of shops). All these institutions intervened against the execution. For some owners of shops, including the claimant, the Municipal Court of Gllogovc/Glogovac even imposed security measures against the MG forbidding it to demolish the shops.
This situation required consideration by the local authority not only of the individual interest of the claimant but also the public interest, as the demolishment of more than 20 shops before the finalization of the administrative and judicial remedy could cause irreparable damage to more than 20 families of Gllogovac. The local authorities had the actual knowledge of the risk of damage to property if they acted before a final decision of competent body (administrative or judicial) is reached but they neglected it. The damage to the claimant was a reasonably foreseeable consequence. Additionally the MG breached its duty set forth in section 33 of UNMIK Regulation 2000/45 on self-government of municipalities in Kosovo to follow the law and to protect property, as a basic human right. There is no evidence that implementing the project of "Skenderbeu" square in Gllogovc/Glogovac was an urgency matter and required immediate vacation of the municipal land.

District court shares the opinion of the first instance court that the respondent caused material damage to the claimant by destroying his shop and inventory without even notifying him about any deadlines for voluntarily and forcible execution. The MG did not present any evidence that the claimant was notified about the execution. Thus he was deprived of the possibility to remove the facility and to take away the inventory. There is clearly a causal link between the actions of the MG and the destruction of the claimants' shop and inventory and respectively the caused damages. The material damage caused to the claimant is the amount of his pecuniary lost – the value of shop and inventory. As the Municipal Court correctly pointed out the claimant could not sell the shop. The right to use the land is an individual right and can not be transferred to third party (see Article 24.4 of the Law on Land for Construction). That is why the loss of the claimant would be measured not by the market value of the facility but by its construction value. Damages in tort are awarded to place the claimant in the position in which he would have been had the tort not taken place. The first instance court requested the claimant to specify his claim as to the material damage of the shop and inventory, but he did not. The claimant did not present any evidence how much money he had paid for the construction of the shop and what items he had in the shop before the demolishment. On the other hand the respondent did not object the existence of the shop, the presence of inventory in this shop and the fact that the MG had demolished the shop thus also destroying the inventory. In such a case the judge can decide on the amount of the compensation following average reasonable measures and implying the principles of fairness. The requested amount of 45 600 Euro compensation for the 48 m2 shop (a temporary building) calculated as 950 Euro per m2 is too high and unjustified for a construction (not market) value for a temporary facility built in 1997. Damages place a monetary value on the harm done, following the principle of *restitutio in integrum* . The Court can not award the claimant with compensation for which the respondent is not liable. The claimant did not prove the existence of any item of the inventory in the shop prior 1 and 2 March 2005, there is no evidence of the state of the inventory, if any (new or used items, what type of items, etc.).

Regarding the claim for compensation of profit lost, the Court shares the opinion of the first instance court that the commercial activities in the shop depended on the termination of the contract for temporary use of the land over which the shop was constructed. If this termination was valid, then the shop could not operate and receive profit from its activity. The legality of the termination of the contract for use of the land is out of the competence of this Court. This issue shall be decided in the administrative procedure/dispute. The respondent can not be liable on this point. Additionally, according to the claimant the shop was sealed by the MG days before the demolishment due to administrative reasons. If so, the shop was not even operational before the demolishment. The claimant did not provide evidence if he had made steps to the MG to solve the administrative obstacles closing the shop, and to prove legitimate expectations that the shop would be operational in near future. The claimant did not provide any evidence what was his income/profit until 1 March 2001 to convince the court that he had sustained a loss of profit. There is no evidence that the shop was operational and realized profit. This claim was correctly rejected by the Municipal court as well as the claim for assignment of an equal plot for business premises. There is no legal ground to compensate the damage of demolished shop and destroyed inventory with assignment of a land.

The Court also accepts that the demolishment activities of the MG caused psychological suffering and pain to the claimant. This damage shall be also compensated by the MG pursuant to Article 200 of the Law on Obligation Relations. The first instance court had ordered fair satisfaction to the claimant. The requested amount of non-pecuniary damages is too high and unjustified. The Court reminds the

fact the claimant knew that he was not owner of the land on which he had built his shop, that the facility was temporary and one day the shop would be removed and the business activity closed. The compensation is granted for the shock he had suffered finding the shop and the inventory in it demolished. This is not a compensation for the loss of business or profits. The claimant did not present any evidence that he had suffered some additional pains which require higher compensation (medical costs, etc.). The amount of compensation shall be proportional to the suffering. In this case it is not possible to determine the value of the harm to the claimant as no proves for quantification of damages exist, that is why the Court accepts that 250 Euros would represent fair compensation for the non-pecuniary damage sustained by the claimant.

Reparations for pecuniary damages shall be paid by the MG with the interest requested, counted from the day the claimant had requested them (the date the claim was filed with the court) until the final payment is done pursuant to art.186 of the Law on Obligation Relations. The legal interest over the non-pecuniary reparation, as decided by the Municipal Court, shall be paid from the moment of issuing the decision. Law on Obligation Relations does not foresee legal possibility to pay non-pecuniary compensation retrospectively from the moment the damage occur. Article 186 of the Law on Obligation relations concerns only pecuniary damages as its place in the law is in the chapter "Indemnity for damage to property". In the chapter "Indemnity for non-material damage" (articles 199- 205) such a retrospective provision is missing. Additionally Article 205 specifies that only "provisions on separate liability and reduction of indemnity applicable to material loss shall apply accordingly to non-profit loss as well". Consequently the provision of Article 186 is not applicable for non-pecuniary damages, and interest over the awarded compensation can not be granted.

To most of the remarks made in the appeals of both parties, the Court has already answered in its reasoning above. There are some issues to be added.

This court is not interfering in the legality of the MG to take back the land and implement another project. This court is not competent also to decide if the MG acted in public interest when terminating the contracts for temporary use of the land. This matter will be decided by the administrative court. As already cleared above this Court has to consider if the respondent had illegally demolished the shop and the inventory of the claimant and if positive, what is the amount of the compensation the claimant shall be entitled to.

The Court does not share the opinion of the parties expressed in the appeals that the enacting clause of the challenged decision is in contradiction to the final facts. The conclusions of the first instance court are clearly and comprehensibly reflected in the enacting clause. The first instance court has acted according to its obligations set forth in article 8 of the Law on Contested Procedure (Law No03/L-006, Official gazette No38/2008) and has established the facts after conscientious and careful consideration of the evidence and the overall perception gained during the proceedings, as well as has examined each and every piece of evidence.

As to the issue of the challenged competence of this Court and the Municipal court, expressed by the MG, the panel shares the opinion already expressed by the first instance court on this issue in the appealed decision (page 5 of the English version of the decision).

As to the opinion of the claimant in his appeal that the Municipal court did not accept the conclusions of the expert in another similar case–(XhP case nr. 22/05 before the Municipal Court of Gllogovc/Glogovac) the Court reminds that in XhP case the expert JT provided conclusion as to the market value of a shop, probably similar to the shop of the claimant. The Court had already

explained further up the reasons to reject market value as a base for the quantification of the pecuniary damages sustained by the claimant.

The Court does not share the statement of the claimant in his appeal that he had specified the loss inventory but nevertheless the Municipal court did not grant his claim in its entirety. The claim for the inventory would have been specified if the claimant had pointed out each item he had in the shop on 1 March 2005, the price of each item including receipts of the price paid when he had bought the items, or if receipts not available, then other relevant evidence including witness statements. The same refers to the claim for compensation for profit loss. As mentioned above, the claimant did not present any evidence that he had profit from the shop and what was the amount of this profit. Here the Court will recall the general rule in civil litigations, reflected in Article 7 of the Law on contested procedure, that each party have a duty to present all the facts on which his or hers claim is based, and to present evidence that establish those facts. The burden of prove lays to the claimant. The court can not establish liability for the respondent on the base of allegations.

Furthermore, the claimant continues in the appeal that the first instance court unfairly rejected his claim under count 5 while it was mandatory to award him with a replacement of land where he could built another facility and provide income for his family. The claimant never specified in front of the court which is the legal ground for this claim. The law (the Law on Land for Construction) does not foresee such a possibility. Thus this claim is not legally successful.

Apart from the grounds indicated in the appeals, the Court *ex officio*, pursuant to Article 194 of the Law on contested procedure, examined any violation of the substantive law as well as any violation of the provisions of the contested procedure under Article 182 para 2 points b), g), j), k) and m) of the Law on Contested Procedure. There are no grounds for challenging the decision rendered in this dispute. The judgment of the Municipal court is upheld.

The request of the MG to be reimbursed to the procedural costs in front of the second instance is ungrounded as the appeal of the MG is not successful. That is why the Court rejects it.

As stated above, pursuant to article 200 of the Law on Contested Procedure, it is decided in accordance with the enacting clause of this judgment.

District Court of Prishtine/Pristina,
Ac.nr. 1336/11, dated 23.10.2012

Verginia Micheva-Ruseva	**Gezim Llulluni**	**Shemsi Hajdini**
Presiding judge	**Panel member**	**Panel member**