

<b>DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT</b>	<b>SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS</b>	<b>POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU</b>
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29 November 2012

**SCC – 09 – 0134**

**PIK XX, XX, MDD XX, XX**

Represented by Privatization Agency of Kosovo, Ilir Konushevci 8, Prishtinë/Priština

*Claimant*

vs.

**1. M.S., from XX**

Represented by attorney-at-law XX, XX

**2. H.B., from XX**

**3. D.R., XX**

represented by XX

**4. P.M., from XX,**

**5. L.K., from XX,**

represented by XX

*Respondents*

The first Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Privatization Agency Related Matters composed of the Presiding Judge Alfred Graf von Keyserlingk, Judge Shkelzen Sylaj and Judge Ćerim Fazliji, after hearing held on 1. November 2012, issues the following

## **DECISION**

**The Claim is dismissed as inadmissible**

### **Procedural and Factual Background**

In its claim of 3 March 2006, filed with the Municipal Court Prishtinë/Priština under C nr 467/06, the Claimant seeks the revocation of a sales contract over certain parcels of land between the Respondents and the confirmation of its ownership rights over the property.

Upon request of the Privatization Agency of Kosovo (PAK), acting on behalf of the Claimant, the Special Chamber on 8 July 2009 (RR-09-0001), removed the case from the Municipal Court in Prishtinë/Priština. In its legal reasoning, the Special Chamber

stated it had primary jurisdiction regarding that claim as one brought against an enterprise or corporation currently or formerly under the administrative authority of the Kosovo Trust Agency (KTA), and that it had not referred the case to the Municipal Court Prishtinë/ Priština.

The case file C.nr.467/06 was submitted accordingly by the Municipal Court Prishtinë/Priština, and registered with the Special Chamber under SCC-09-0134 on 20 July 2009.

On 15 October 2009, the Special Chamber rejected the claim as inadmissible. The decision is based on Section 28.2 UNMIK AD 2008/6 in connection with Section 4.1 UNMIK REG 2008/4, according to which the Special Chamber does not have jurisdiction over claims against natural persons.

On the appeal filed by the PAK on 9 March 2010, ASC-09-0087, the Appellate Panel set aside the Special Chamber decision of 15 October 2009 and ordered the Trial Panel to retry the claim.

In the legal reasoning the Appellate Panel stated that “Contrary to the Trial Panel’s conclusion, claims against natural persons are not per se excluded from the jurisdiction of the SCSC, as defined in Section 4.1 UNMIK REG 2008/4: As outlined in the removal decision of the SCSC of 8 July 2009, RR-09-0001, claims involving the recognition of a right, title or interest in property in the possession or control of an enterprise or corporation currently or formerly under the administrative authority of the KTA, fall under the jurisdiction of the trial panel(s) of the SCSC, regardless of the respondent (see Section 4.1 [d] leg cit). In addition, Section 5.2 (e) leg cit provides for claims against “other persons” the SCSC “deems necessary for the full and complete adjudication of the case before it”, including natural persons. In the claim at stake, the recognition of claimed property rights in favor of the Claimant, a SOE, is the relevant subject matter. It therefore falls under the SCSC’s jurisdiction.”

In defense to the claim the First Respondent submitted that the claim should be rejected. He states that the challenged sale of property was carried out with the approval of UNMIK, which shall also bear responsibility for this matter. Further, the transactions were carried out in 2005 and since then the properties had been transferred to other individuals. He is not the owner of the properties anymore, but they were transferred to other individuals, P.M. and H.B. and then to D.R. and I.K. who are not called in this suit.

In reply to the defense the Claimant expanded the claim against 2 more respondents, P.M. and H.B. The Claimant states that they acquired the property based on false documents.

On 15 March 2011 MDD XX filed a submission stating that it has its own interest in this case since it has the ownership and the possession of the property subject to the claim and therefore requests to be informed of the next hearing. The MDD XX submits that it filed a claim for annulment of the contract with the Municipal Court of Prishtinë/Priština, which declared itself incompetent.

By order of the Panel of 8 August 2012 PAK was requested to submit an authorization appointing a lawyer who is a member of a bar association or chamber of advocates to represent it before the Special Chamber.

In the hearing of 1 November 2012 for the Claimant appeared S.K., who is not a registered Lawyer. Lawyer S.M. declared that he only represents the Respondent 1, M.S., and that the other four Respondents have withdrawn their authorisation to present them. Respondent 2, H.B., neither was present in the hearing, nor was he represented. Respondent 3, D.R., was represented by E.R., who is not a registered Lawyer. Respondent 4, P.M. was not represented but personally present in the hearing. Respondent 5, I.K. was represented by the registered Lawyer N.P., whom he had authorized the day before the hearing.

In the hearing of 1 November 2012 also appeared M.T., presenting himself as "lawyer by education", but not being a registered lawyer, for 30 former employees of IAC XX. By submission of 23 October 2012 he requests to allow him to interfere in the Lawsuit, claiming that the former employees have a legal interest that the disputed parcels are transferred back to the Claimant because it would increase their 20% share.

### **Legal Reasoning**

1.

The Claim had to be dismissed as inadmissible.

The Claimant was not duly represented in the hearing of 1. 11. 2012.

The PAK did not validly represent the Claimant because PAK itself was not represented by a lawyer.

Before the Special Chamber every party, except for natural persons, must be represented by a lawyer (Art 24 Annex of the Law No.04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, in the following: Annex SCL).

This also applies to SOEs represented by PAK. The wording of this provision lacks any indication why it should not apply. Art 73, 74, 85 and 86 Code of Contested Procedure (Law No03/L-006, CCP), regulating who can be party, which actions can a party take and who can represent a party allows that parties and representatives who are not registered lawyers act in court but in relation to these provisions Annex Art 24 SCL is *Lex Posterior* and *Lex Specialis*, which supersedes the CCP provisions. The Legislator issued Annex Art 24 SCL when the CCP already existed and he regulated by the Annex Art 24 SCL a special procedure in a special court, different from other Kosovo courts. The Annex Art 24 SCL supersedes also Art 29 Law on the PAK (04/L-034, PAK) because it is issued later and regulates not representation generally, as does the PAK Law but specifically representation in front of the SCSC. This also applies to Art29.2 PAK Law which regulates the Agency's "Legal standing" to pursue any rights of an enterprise in a competent court on behalf of the enterprise concerned. Also this provision is superseded by the later enacted special provision of Annex Art 24 SCL.

The Legal regulation that natural persons do not need a lawyer but all others need a lawyer does not violate Art 73 and 74 CCP. This is not possible because Art 73 and 74 do not apply. They are superseded by Art 24 SCL.

The requirement to be represented by a lawyer is not a violation of the constitutional right of Equality before the Law. It may remain open whether PAK as a “public body” (Art1.1 PAK Law) can plead for the fundamental right of equality, which is historically and in its constitutional context a right of natural persons and private legal entities against the state, not a right for a state organ against the state. The Claimant has a right to be treated equal, but constitutional Equality does not mean that everybody is treated equally regardless if they are reasonably and non-discriminatory aspects of differentiation. It is neither unreasonably nor discriminatory to privilege natural persons in front of the court in relation to legal entities (or a public state authority). Often, if not even regularly natural persons do not have the financial means to afford a lawyer. This under constitutional aspects is a sufficient reason for their privilege to appear before the SCSC without a lawyer.

As a result it may be stated that the Claimant as everybody except natural persons must be represented before the Special Chamber by a lawyer who is member of a bar association or a chamber of advocates the representation by PAK which appeared without registered Lawyer is not valid.

Although the Claimant in the hearing of 1.11.2012 was not duly represented, there cannot be issued a Default Judgment because the Respondents did not apply for a default judgment against the Claimant (Article 52 paragraph 1 and 2 Annex SCL). But there was no reason to postpone the hearing. Parties cannot extend the procedure by just one party not being duly represented and the other party not requesting a default Judgment.

The court had to issue a Judgment as if there was no default. The claim had to be dismissed as inadmissible because the claimant was not duly represented.

2.

The former employees of MDD XX do not participate in this procedure. They also are not duly represented.

The request of 9 March 2011 is submitted by XX, who is a “Lawyer by education”, but not member of bar association in Kosovo or in Serbia (Section 24.1 of the UNMIK Administrative Direction 2008/6, which applied till 31.12.2011).

The request submitted in the hearing of 1 November 2012 again was submitted by XX. In 2012 Annex Art 24 SCL 04/L-033 requires representation by a registered Lawyer.

As the employees of MDD XX were not duly represented the court had not to decide whether their interest in this procedure is merely an economic interest or whether it is a legal interest (Art 271 Law No.03/L-006 on contested Procedure, Art 14.4 SCL).

## **Costs**

The court does not assign costs to the Appellant as the courts presidium till now did not issue a written schedule which is approved by the Kosovo Judicial Council (Art.57 Paragraph 2 Special Chamber Law). This means that till now there is no sufficient legal base to impose costs.

## **Legal Advice**

Against this decision within 21 days an Appeal can be submitted to the Appellate Panel of the Special Chamber. The Appeal shall also be served to the other party and submitted to the Trial Panel by the Appellant, all within 21 days. The Appellant shall submit to the Appeals Panel a proof that he has served the Appeal also to the other party.

The prescribed time limit begins at midnight of the day, when the Appellant has been served with the decision in writing.

The Appellate Panel shall reject the Appeal as inadmissible if the Appellant has failed to file it within the prescribed period.

The Respondent may file a response with the Appellate panel within 21 days from the date he was served with the appeal, submitting the response also to the appellant and the other party.

The appellant then has 21 days after being served with the response to its appeal, to submit to the Appellate panel and to serve the other party its own response. The other party then has 21 days after being served with the appellant's response to submit to the Appellant and to the Appellate panel its counter-response.

Alfred Graf von Keyserlingk,  
Presiding Judge

[signed]

Internal order

This decision is to be served on the parties (respectively their Lawyers) and to M.T.