THE COURT OF APPEALS
Case: AC.nr.3905/2012
Date: 12th March 2013

THE COURT OF APPEALS in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, the Kosovo Judge MUHARREM SHALA and the Kosovo Judge NENAD LAZIĆ, as panel members;

In the civil case of the claimant MB from village Sllovi/Slovinje, the Municipality of Lipjan/Lipljan, with an authorized representative Lawyer EA from Prishtinë/Priština against the respondent "KT"-Lipjan/Lipljan with the participation as a third party of DZ, previously from village Muzeqinë/Mužicane, the Municipality of Shtime/Štimlie, now with residence in Batočina, the Republic of Serbia, for annulment of decision on allocation of apartment for use;

Having received the appeal of Lawyer EA filed on behalf of MB against ruling C.nr.122/07 of the Municipal Court of LIPJAN/LIPLJANE, dated 25th April 2012;

After deliberation and voting in a panel session held in accordance with Article 190, paragraph 1, second hypothesis in conjunction with Article 208 of the Law No 03/L-006 on Contested Procedure (Official Gazette of the Republic of Kosovo No 38/08), amended and supplemented by Law No 04/L-118 (Official Gazette of the Republic of Kosovo No. 28/12) (hereinafter "LCP") on 12th March 2013;

Hereby pursuant to Article 142, paragraph 5, Article 18, paragraph 1 and Article 23, paragraph 1 LCP issues the following

RULING

The COURT OF APPEALS is DECLARED as INCOMPETENT to decide the appeal filed on behalf of MB from village Sllovi/Slovinje, the Municipality of Lipjan/Lipljan by his authorized representative Lawyer EA from Prishtinë/Priština against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012.

The case is REFERRED to the SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS, as the court competent to decide this appeal in the second instance.

REASONING

I. PROCEDURAL BACKGROUND

1. By ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012, it "declared itself as incompetent in subject view point to adjudicate the case and decided after the ruling becomes final to send it to the Special Chamber of the Supreme Court of Kosovo as the court with subject – matter competence." In

the reasoning Article 4 of the Law No 04/L-033 on the Special Chamber of Supreme Court of Kosovo on Privatization Agency Related Matters (PAK) (Official Gazette of the Republic of Kosovo No 20/11) is referred to as providing "exclusive competence of the Special Chamber on all cases and proceedings with socially-owned enterprises and corporations, and particularly regarding property claims against such an enterprise or a corporation pretended to have risen during or prior to the time it has been subject to the administrative authority of the KTA or the Agency." Qualifying the claim in the case under this norm as filed against a socially-owned enterprise administered by the PAK, the Municipal Court of LIPJAN/LIPLJAN pursuant to Article 392, paragraph 1, item b) LCP decided to declare without substantive jurisdiction in this case and to refer it to the Special Chamber of the Supreme Court of Kosovo.

2. On 11th May 2012, Lawyer EA as an authorized representative of the claimant MB filed on his behalf an appeal to the District Court of PRISTINË/PRIŠTINA through the Municipal Court of LIPJAN/LIPLJAN against its ruling C.nr.122/2007, dated 25th April 2012. The ground invoked for its challenging is a substantial violation of the provisions of the contested procedure under Article 182, paragraph 1 in conjunction with Article 392, paragraph 1, item b) LCP, affecting the fairness and lawfulness of the ruling. In appellant's opinion, Article 4 of the Law No 04/L-033 on the Special Chamber of the Supreme Court of Kosovo was erroneously applied as for "the contested apartment there was a procedure before the Housing and Property Directorate, which by its final decision ordered the parties to continue it in the local court". NSH "KT", now in liquidation, was not passively legitimated to be a respondent in the case any more not having any property rights over the apartment, owned by DZ, and in possession of MB. The second instance is requested to annul the appealed ruling and to send back the case to the same court of first instance for retrial.

3. No replies to the appeal were submitted according to Article 187, paragraph 1 LCP. The court fee due for it was requested by ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 pursuant to Article 387, paragraph 1, item m) LCP, Article 253, paragraph 5 LCP and Section 10 of the Administrative Direction № 2008/2002 of the Kosovo Judicial Council on Unification of the Court Fees. Its amount was paid by MB by bank transfer on 11th May 2012.

4. On 14th September 2012, the appeal and the case were sent to the District Court of PRISTINË/PRIŠTINA and registered there under file number AC.nr.989/12.

5. The civil case was selected based on Article 5, paragraph 1, item c), sub-items (ii) and (iii) of the Law No 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("the Law No 03/L-053 on Jurisdiction") (Official Gazette of the Republic of Kosovo No 27/2008) and Article 3, paragraph 1 of the Guidelines on Case Selection and Case Allocation for EULEX Judges in Civil Cases ("the Guidelines") with ruling ref.nr.ED/EJU/MJU/0011/cd/12, issued on 1st November 2012 by EULEX Judge acting as delegate of the President of the Assembly of EULEX Judges as per decision ref.nr.2012.OPEJ.0063-0001, dated

30th October 2012. After the taking over procedure under Article 5, paragraph 7, first sentence of the Law No 03/L-053 on Jurisdiction and Article 3, paragraph 6 of the Guidelines had been conducted, by ruling ref.nr.2012.OPEJ.0145-0001 issued by the Vice President of the Assembly of EULEX Judges on 26th December 2012 pursuant to Article 5, paragraph 7, second sentence of the Law No 03/L-053 on Jurisdiction and Article 3, paragraph 8 of the Guidelines the case was assigned to a mixed three-judge panel under Article 5, paragraph 2, first sentence of Law No 03/L-053 on Jurisdiction with majority of the Kosovo Judges under its Article 5, paragraph 5.

6. AC.nr.989/12 of the District Court of PRISTINË/PRIŠTINA as non-completed on 31st December 2012, pursuant to the transitional provision of Article 39, paragraph 1 of the Law No 03/L-199 on Courts (Official Gazette of the Republic of Kosovo No 49/11) on 1st January 2013 became *ex lege* a case the Court of Appeals. Accordingly, the Presiding EULEX Judge was assigned to the appellate proceeding by decision ref.nr.2103.OPEJ.0043/002 of the President of the Assembly of EULEX Judges, dated 28th January 2013, whereas the Kosovo Judges – panel members were designated by decision AGJ.I.nr.16/2013 of the President of the Court of Appeals, dated 31st January 2013. AC.nr.989/12 of the District Court of PRISTINË/PRIŠTINA was re-registered under new file number – AC.nr.3905/12 of the Court of Appeals.

II. SUMMARY OF THE FIRST INSTANCE PROCEEDINGS

7. On 5th March 1993, MB as claimant filed a claim against the Socially-owned Enterprise (SOE)–Ndremarrja Shoqerore (NSH) "KT"–Lipjan/Lipljan and DZ, as respondents. The claimant alleged that by Decision nr.012-349 of NSH "KT, dated 29th May 1990 he was allocated apartment of 45 m^2 in LIPJAN/LIPLJAN, "Vuk Karadzic" St. P+4, L-2, nr.V/17, and had been living in it uninterruptedly till the submission of the lawsuit. After illegal termination of his employment, NSH "KT" allocated the apartment to DZ in violation of the rules and procedures, laid down by the regulation of this enterprise on allocation of apartments for use. The petitum is the court to annul the decision as illegal. The claim with this initial content was registered as C.nr.104/1993 of the Municipal Court of LIPJAN/LIPLJAN.

8. By ruling C.nr.104/93 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th June 2006 the claim was declared withdrawn with respect to DZ *as respondent* and his participation in the case was allowed as a *third party* on the side of the respondent NSH "KT"- LIPJAN/LIPLJAN.

9. By ruling C.nr.104/1993 of the Municipal Court of LIPJAN/LIPLJAN, dated 18th March 1998 the case was suspended for failure of the claimant, after being duly summoned, to appear at the session on that date, and a proposal of the respondent for suspension pursuant to Article 216, paragraph 1 of the Law on Contested Procedure (Official Gazette of SFRY No 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 and Official Gazette of SRY No 27/92, 31/93, 24/94, and 12/98) (LCP 1977).

10. On 16th June 1998, Lawyer EA, authorized representative of the claimant, filed a submission for continuation of the suspended proceedings based on Article 217, paragraph 2 LCP 1977. The motion remained undecided. It was reiterated by claimant's submissions of 28th May 2003 and 2nd April 2007 until the case was re-activated by the Municipal Court of LIPJAN/LIPLJAN on 3rd April 2007 with new file number – C.nr.122/2007.

11. On 19th February 2010, PAK filed a submission that with the entry into force of the Law No. 03/L-067 all socially-owned enterprises and their assets were placed under its administration and requested information as per NSH "KT"-LIPJAN/ LIPLJAN (with all its previous names indicated), *inter alia*, the list of cases with its participation. In reply the Municipal Court of LIPJAN/LIPLJAN informed the PAK on 10th March 2010 about C.nr.122/2007 and provided its case file.

12. On 5th September 2011, the Ministry of Justice requested disqualification of the Kosovo Judge assigned to the case after its resumption for 4-years inaction in it. By ruling of the President of the Municipal Court of LIPJAN/LIPLJAN dated 7th October 2011 pursuant to Article 70, paragraph 1 LCP this disqualification was granted, the case was re-allocated and its taking over by EULEX was proposed.

13. On 25th April 2012, the appealed ruling for incompetence was rendered by the Municipal Court of LIPJAN/LIPLJAN with respect to a claim, which after 19-years of adjudication in the first instance proceedings summarized above, remained failed by MB as claimant against NSH "KT"-Lipjan/Lipljan as respondent for annulment of Decision nr.554-01-012 of SP "KT"-Prishtinë/Priština, PPS-Lipjan/Lipljan, dated 11th March 1992 for allocation for use of one-room apartment with a surface of 45 m^2 in LIPJAN/LIPLJAN, "Vuk Karadzic" Street P+4, L-2, nr.V/17 to DZ, participating as a third party in the case.

III. FINDINGS AS PER THE SECOND INSTANCE COMPETENCE ON THE APPEAL

14. In order to examine the admissibility of the appeal against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012, and decide it on the merits, the Court of Appeals should have the second instance competence in this case. Hence, pursuant to Article 17, paragraph 1 in conjunction with Article 208 LCP, the panel has first to consider whether or not this appeal falls within the jurisdiction of the Court of Appeals under the applicable law. According to Article 18, paragraph 1 in conjunction with Article 208 LCP this determination is permissible *ex officio*, even without objections of the parties, during the entire course of the proceedings, with no preclusive legal deadline in this regard. These provisions, being formulated generally and systematically placed in Chapter II, Section 1 LCP as common for all types of jurisdiction, apply for the functional second instance competence as well. Thus it is guaranteed that the court in contested proceedings shall always act within the limits of its jurisdiction as defined by law pursuant to Article 29 LCP, without transgression.

The Law No 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

15. Based on the statement of the claim as initially filed and subsequently precised and the facts verified by the case file documents according to Article 17, paragraph 2 LCP, the Court of Appeals considers itself incompetent to decide the appeal in this case since it falls under exclusive jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (SCSC).

16. The Municipal Court of LIPJAN/LIPLJAN issued the challenged first instance ruling in C.nr.122/07 (previously C.nr.104/93) on 25th April 2012, whereas the appeal of MB against it was lodged on 11th May 2012. In these circumstances the Law No 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (Official Gazette of the Republic of Kosovo No 20/11) ("LSCSC") is the one entirely applicable. *At fist place*, pursuant to its Article 15, LSCSC entered into force on 1st January 2012, *before* the issuance of the challenged ruling on 25th April 2012 and the initiation of the appeal proceeding against it on 11th May 2012. Hence, this second instance case fully falls within the temporal limits of LSCSC. *At second place*, Article 14, paragraph 1 LSCSC repealed and replaced UNMIK Regulation No 2002/13 on the Establishment of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, its amendments, and all the secondary legislation issued pursuant thereto. Therefore, as of 1st January 2012 it could not be given any further force or effect in principle, and in this concrete civil case. The latter is not to be finalized according to the procedural provisions of UNMIK Regulation No 2002/13 and the secondary legislation issued pursuant thereto based on the exception of Article 14, paragraph 1 LSCSC which reserves them only for cases pending on 1st January 2012 before the SCSC and at an advanced procedural stage. *At third place,* the provisions of LSCSC pursuant to its Article 14, paragraph 2 prevail upon inconsistency over any other legislative act. In addition, Article 1, paragraph 1, sub-paragraph 1 LCP stipulates explicitly that the jurisdiction and competences of the SCSC after 1st January 2012 are established by and provided for by the LSCSC. Therefore *per argumentum ad contrario,* they could not be governed by any other law. Being *exclusively* granted to the Special Chamber by LSCSC these functions in their scope limit the analogous ones of the regular courts and thus in cross-jurisdictional hypotheses should always overweigh.

17. The Special Chamber has exclusive jurisdiction over *all cases and proceedings* that are explicitly enumerated in Article 4, paragraph 1, sub-paragraphs 1–12 LSCSC, and in such other matters that may be assigned to it by law based on the delegation of Article 4, paragraphs 1, sub-paragraph 13 LSCSC. Within these limits, Article 4, paragraph 1, subparagraph 11 LSCSC expressly foresees the competence of the SCSC *to review and decide the legality of any judgment or decision issued by another court of Kosovo involving or relating to any claim or matter specified in this paragraph 1.* This second instance civil case satisfies all these requirements, and hence falls within

the exclusive jurisdiction of the SCSC under Article 4, paragraph 1, subparagraph 11 LSCSC. *At first place*, the appeal of MB against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 is an *application* - legal remedy to review and decide on the grounds under Article 181, paragraph 1, item a) in conjunction with Article 208 LCP the legality of a *decision* in the sense of Article 2, paragraph 1, sub-paragraph 5 LSCSC, different from judgment, rendered in the form of *ruling* under Article 142, paragraph 2 *in fine* LCP by a *court,* other than the SCSC. *At second place*, the decision challenged for its legality is in relation to a claim against NSH "KT"-LIPJAN/LIPLJAN, having the status of a socially-owned enterprise under Article 2, paragraph 1, sub-paragraph 6 LSCSC for a dispute allegedly arisen as of the date of initiation of the proceeding in C.nr.104/93 of the Municipal Court of LIPJAN/ LIPLJAN – 5th March 1993. This moment proceeds the date - 13th June 2002, when UNMIK Regulation No 2002/12 on the Establishment of the Kosovo Trust Agency, amended by UNMIK Regulation No 2005/18, entered into force and NSH "KT"-LIPJAN/LIPLJAN acquired the status of a *socially-owned enterprise* under the administrative authority of KTA pursuant to its Section 5.1, item (a), sub-item (i). In view of the alternatives given in the definition of *"socially-owned enterprise"* under Section 3 of UNMIK Regulation No 2002/12 it is irrelevant if NSH "KT" was founded under Article 2, paragraphs 1, 2 or 3 of *the Law on Enterprises* (Official Gazette of the SFRY № 77/1988 with amendments in № 40/89, 46/90 and 61/90), the *Law on Associated Labour* (Official Gazette of the SFRY № 53/76 with amendments in № 57/83, and 85/87) or other applicable law, as there is no *transformation* in the meaning of Section 3 of UNMIK Regulation No 2002/12 affecting its status, the majority of its socially-owned assets and/or capital between 22nd March 1989 and 13th June 2002. In addition, this enterprise had its actual management control in LIPJAN/ LIPLJAN on 13th June 2002 and was operating in Kosovo according to Section 5.2 (a) of UNMIK Regulation No 2002/12, as well as registered in Kosovo at 31st December 1988 according to Section 5.1, item (a), sub-item (i) of UNMIK Regulation No 2002/12. Strictly relevant here is that effective from 13th June 2002 NSH "KT", as a socially-owned enterprise registered in Kosovo on 31st December 1988, was placed under the administrative authority of the KTA under Section 5.1 and Section 6 of UNMIK Regulation No 2002/12 until 1st July 2008 when the Law No 03/l-067 on the PAK (Official Gazette of the Republic of Kosovo No 30/08) ("Law No 03/L-067) entered into force – Article 32 of Law No 03/L-067, UNMIK Regulation No 2002/12, as amended, ceased to have legal effect – Article 31, paragraph 2 of Law No 03/L-067, and PAK was established as an independent public body - successor of the assets and liabilities of KTA – Article 1 of Law No 03/L-067, as well as of *the functions to administer* according to Article 5, paragraph 1 (a)(i) of Law No 03/L-067 the *socially-owned enterprises*. With respect to NSH "KT", this administration as 1st July 2008 is verified by the notice filed by PAK with the court on 19th February 2010 according to Article 29, paragraph 3 of Law No 03/L-067. This administration was vested to PAK and exercised by PAK till 30th July 2012 when it was transferred to the Municipality

of LIPJAN/LIPLJAN, after this enterprise was transformed by Law No 04/L-111 from socially-owned into publicly-owned (see paragraph 25 below). Summarizing, the claim in C.nr.122/07 is filed against NSH "KT" - LIPJAN/LIPLJAN for a dispute that has allegedly arisen as the date of its submission at the latest – 5th March 1993, prior to the time when this enterprise *was* subject to the administrative authority of KTA (13th June 2002 – 30th June 2008), and later of the PAK (1st July 2008 – 30th July 2012). Therefore, the claim *prima facie* qualified within the limits of this appellate review satisfies Article 4, paragraph 1, sub-paragraph 4 LSCS in view of it *subjective scope*, namely, the passive legitimacy of the respondent and its past legal status of a socially-owned enterprise under the administration of the KTA and then of PAK in the period 13th June 2002 – 30th July 2012. *At third place,* the claim also *prima facie* complies with Article 4, paragraph 1, sub-paragraph 5.1 LSCS in terms of its *subject-matter* as alleging an *occupancy right* of MB on the contested apartment based on Decision № 012-345 of the Workers Council of NSH "KT", dated 29th May 1990 and also *interest* to annul Decision nr.554-01-012, dated 11th March 1992 for its allocation to DZ for its use. The contested apartment as an *asset located in the territory of Kosovo in socially-owned property on 22nd March 1989* from 13th June 2002 was placed under the authority of KTA pursuant to Section 5.1 (a) (ii) of UNMIK Regulation No 2002/12, amended by UNMIK Regulation No 2005/18, till 1st July 2008 when the same authority was transferred to PAK according to Article 5, paragraph 1 (a) (ii) of Law No 03/L-067. The *administration over assets* as explicitly indicated in the cited Section 5.1 (a) (ii) of UNMIK Regulation No 2002/12, amended by UNMIK Regulation No 2005/18, and Article 5, paragraph 1 (a) (ii) of Law No 03/L-067 was ascertained regardless whether they were organized into an entity or not, based on the socially-owned property on them as of 22nd March 1989, in addition to *the administration of enterprises* by KTA according to Section 5.1 (a) (i) of UNMIK Regulation No 2002/12, amended by UNMIK Regulation No 2005/18, and by PAK according to Article 5, paragraph 1 (a) (i) of Law No 03/L-067. Assessed in that perspective, the claim in C.nr.122/2007 qualifies under Article 4, paragraph 1, sub-paragraph 5.1 LSCS alleging right and interest with respect to the apartment in question *as an asset – residential immovable property over which the KTA and then PAK has ascertained administrative authority.* Finally, the claim is to be subsumed under Article 4, paragraph 1, sub-paragraph 4 LSCS since the same asset was in *possession* of NSH "KT"-LIPJAN/LIPLJAN, *and the claimed rights and interests with respect to it allegedly arose in the period 29th May 1990–5th March 1993 prior to the time when this enterprise was subject to the administrative authority of KTA and then of PAK (13th June 2002 – 30th July 2012).* Having scrutinized these provisions, the present panel concludes that SCSC has the exclusive jurisdiction to review and decide the appeal of MB against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 according to Article 4, paragraph 1, sub-paragraph 11 read in conjunction with Article 4, paragraph 1, sub-paragraph 4 and Article 4, paragraph 1, sub-paragraphs 5.1 and 5.4 LSCSC.

18. Since the challenged ruling is for non-competence of the Municipal Court of LIPJAN/LIPLJAN, and referral of the case to the SCSC under Article 392, paragraph 1, item b) LCP, applicable here is also Article 4, paragraph 6, second sentence LSCSC which explicitly states that *the SCSC has the exclusive authority to determine whether or not the specific matter falls within the scope of Article 4, paragraph 1 LSCSC.* The rule is imperative and generally formulated for determination the existence or non-existence of jurisdiction in all cases and proceedings listed in Article 4, paragraph 1 LSCSC, *regardless of their first or second instance level.* Negatively read, Article 4, paragraph 6, second sentence LSCSC makes impermissible such determination by any another court which irrespective of its rank cannot validly decide if a case is within or out of the jurisdiction of the SCSC, as defined by Article 4, paragraph 1 LSCSC. This is expression of its exclusiveness and a guarantee for its respect as only to the SCSC is vested by Article 4, paragraph 6, second sentence LSCSC the power incidentally or as a principal issue in the proceedings to rule on its competence or non-competence.

19. While Article 4, paragraph 1 LSCSC enumerates the claims, matters, cases and proceedings in the jurisdiction of the SCSC, thus *positively outlining it,* Article 4, paragraph 5, first sentence LSCSC *negatively delineates* it excluding exactly the same claims, matters, cases and proceedings from the authority of any other Kosovo court. Overlapping is allowed only for those referred by the SCSC prior to 1st January 2012 with a substantive decision rendered by the respective regular court as of this date - Article 4, paragraph 4, second sentence, item (ii) LSCSC. The exception is irrelevant in this case which has never been previously referred from the SCSC to the Municipal Court of LIPJAN/LIPLJAN. Therefore, if the Court of Appeals reviews and decides the appeal filed by MB against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012, this would represent *de facto* exercise of jurisdiction under Article 4, paragraph 1, sub-paragraph 11 and paragraph 6 LSCSC, not based on the exception under Article 4, paragraph 4 LSCSC, and sanctioned by Article 4, paragraph 5, second sentence, item (i) LSCSC with invalidity of its decision and possibility for its nullification by the SCSC, non-barred in time. To avoid these negative legal consequences and comply with the prohibition of Article 4, paragraph 5, first sentence LSCSC, the Court of Appeals has to terminate immediately its second instance proceedings - Article 4, paragraph 5, second sentence, item (ii) LSCSC and to transfer the appeal in AC.nr.3905/12 to the SCSC - Article 4, paragraph 5, second sentence, item (iii) LSCSC.

20. The composition and organization of the SCSC governed by Chapter II of LSCSC now include five specialized panels and one appellate panel, established by Article 3, paragraph 8, first sentence LSCSC. The *specialized panels* composed as per Article 3, paragraph 10 LSCSC are assigned with primary jurisdiction within the SCSC in the areas that are expressly listed in Article 3, paragraph 9, sub-paragraphs 1 - 5 LSCSC. Cases over which no specialized panel of the SCSC has such primary jurisdiction or for which a specialized panel has not yet been established at the time

when the claim or complaint is filed, pursuant to Article 12, paragraph 2 of the Annex to the LSCSC shall be dealt with by a specialized panel to be determined by the additional rules to be adopted according to Article 10, paragraph 1, subparagraph 3 of the Annex. As per the *appellate panel,* based on Article 3, paragraph 14, Article 10, paragraph 6 LSCSC and Article 58, paragraph 1 of the Annex to LSCS, it has the *final and exclusive appellate jurisdiction* over all appeals against decisions or judgments rendered by a single judge, a sub-panel or a specialized panel of SCSC or any court with respect to a claim, matter, proceeding or case previously referred to it by the SCSC pursuant to Article 4, paragraph 4 LSCSC. Apart from these appeals expressly included by Article 3, paragraph 14, Article 10, paragraph 6 LSCSC and Article 58, paragraph 1 of the Annex to LSCS in the second instance jurisdiction of the appellate panel of the SCSC, Article 3, paragraph 8, second sentence LSCSC *extends its scope to all other within the competence of SCSC, without enumerating them.* Therefore, due to this structural and functional differentiation, the SCSC through its respective panels could act *as a court of first instance* in some cases, and as a *court of second instance in other cases.* The exact internal allocation of the primary and appellate competences among the panels, sub-panels and single judges of the SCSC is externally irrelevant as they are all entrusted to the SCSC and are encompassed by its exclusive jurisdiction.

21. According to Article 1, paragraph 3 LSCSC, the Special Chamber *is a part of the Supreme Court of Kosovo*, as provided by Article 21, paragraph 2 of the Law No. 03/L-199 on Courts. Therefore, in terms of judicial hierarchy it is not permissible the *Court of Appeals* to decide in the second instance the existence or non-existence of first instance jurisdiction of the *Special Chamber of the Supreme Court* over the claim filed by MB against NSH "KT"-LIPJAN/LIPLJAN for annulment of decision for allocation of apartment for use. Such decision of the Court of Appeals will *directly contradict Article 4, paragraph 6, second sentence LSCSC* which prohibits any court other than SCSC to determine whether or not any specific mattes falls within the exclusive jurisdiction of the SCSC under Article 4, paragraph 1 LSCSC. In addition, since the Municipal Court of LIPJAN/LIPLJAN, after 1st January 2013 the Basic Court of PRISHTINË/PRIŠTINA, Branch LIPJAN/LIPLJAN and the SCSC *are of different levels*, the Court of Appeals according to Article 25 LCP and Article 18, paragraph 3, subparagraph 3 of the Law No. 03/L-199 on Courts is not authorized to resolve any potential conflict of jurisdiction between them. The lack of such power excludes accessorily the possibility the Court of Appeals in the second instance to decide the jurisdiction over the claim in C.nr.122/2007 of the Basic Court of PRISHTINË/PRIŠTINA, Branch LIPJAN/LIPLJAN, since its ruling on the this question pursuant to Article 24, paragraph 2 LCP will not bound the court to which the case would be sent after the appellate proceedings, regardless whether this might be the Basic Court of PRISHTINË/PRIŠTINA, Branch LIPJAN/LIPLJAN or SCSC. Article 24, paragraph 2 LCP is to be applied on this procedural issue as non-addressed by LSCSC following the subsidiary rule of Article 14, paragraph 4 LSCSC.

The Law No 03/L-006 on Contested Procedure and the Law No 03/L-199 on Courts

22. The jurisdiction of the Court of Appeals in this case could not be legally based on LCP. According to Article 176, paragraph 3 in conjunction with Article 208 LCP the appeal against a ruling of the court of first instance shall be decided *by the court of second instance.* Analogically, all norms of Chapter XIII LCP regulating the appeal proceedings against first instance decisions refer generally to the *court of second instance*, without naming it directly or otherwise individualizing it indirectly. In view of this abstract wording, the appeal proceedings against first instance judgments and rulings governed by Chapter XIII of LCP should be conducted and decided by the *court of second instance which is provided by law.* Since the Court of Appeals is not mentioned at all, it could not be considered expressly empowered by the LCP with appellate jurisdiction competing the analogous one of SCSC under LSCSC. The latter will always prevail due to its normatively guaranteed exclusiveness under Article 4 LSCSC, and the priority of LSCSC over any inconsistent provisions of regulation, law or secondary legislation pursuant to its Article 14, paragraph 2. Here, as envisaged by Article 19, paragraph 1 *in fine* of the Law No 03/L-199 on Courts, the second instance competence of the Court of Appeals under Article 18, paragraph 1.1 of the Law No. 03/L-199 on Courts in conjunction with Article 176, paragraph 3 and Article 208 LCP being *general* is derogated *ex lege* by the *special* appellate jurisdiction of SCSC under Article 4 LSCSC in conjunction with Article 176, paragraph 3 and Article 208 LCP.

23. The entitlement of the Court of Appeals in this case could not be extracted from the *legal remedy* nominated by ruling C.nr.122/07 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 as an appeal to be lodged within 15 days from its service to the District Court of PRISHTINË/PRIŠTINA. This is instruction of the court of first instance to the parties on their right to file an appeal included in the ruling as a requisite of its content according to Article 160, paragraph 1 *in fine* in conjunction with Article 170 LCP which *does not change the appellate jurisdiction* on this regular legal remedy as *imperatively defined by the applicable law.* This legal advice given to the parties is not mandatory for the Court of Appeals which has the duty to consider *ex officio* its second instance competence or non-competence in this case pursuant to Article 17, paragraph 1 in conjunction with Article 208 LCP.

24. The appeal of MB against the challenged ruling C.nr.122/07 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 is addressed to the District Court of PRISHTINË/PRIŠTINA. However, being a procedural action of a party this appeal could not derogate the statutory jurisdiction in this case as provided by the LSCS, and does not actually modify it. According to Article 195, paragraph 3 LCP, the Court of Appeals though *de facto* seized by the appeal is not bound to decide, as proposed in it, and is fully entitled to consider *de jure* its competence on this regular legal remedy.

The Law No 04/L-111 amending and supplementing the Law No 03/L-087 on the Publicly Owned Enterprises

25. With the entry into force of the Law No 04/L-111 amending and supplementing the Law No 03/L-087 on the Publicly Owned Enterprises (Official Gazette of the Republic of Kosovo No 13/2012) ("LPOE") on 15th June 2012, the legal status of NSH "KT" - LIPJAN/LIPLJAN was changed from a *socially-owned enterprise under the administration of the PAK* to a *local publicly-owned enterprise*, included in Schedule 2 to Article 3, paragraph 2 LPOE as Bus Station in LIPJAN/LIPLJAN, 100 % ownership of the Municipality of LIPJAN/LIPLJAN. By Letter nr.118 of PAK, dated 4th February 2013 it was verified that the enterprise was handed over from PAK to the Municipality of LIPJAN/LIPLJAN on 30th July 2012. This change became effective in the course of the second instance proceedings after the challenged ruling was rendered. The question whether it affects or not the primary jurisdiction of the SCSC to adjudicate the claim in C.nr.122/07 of MB against "KT"-LIPJAN/LIPLJAN after the transformation from a SOE into a local publicly-owned enterprise based on the *past* administration of PAK could be only decided by SCSC pursuant to Article 4, paragraph 6, second sentence LSCSC. Its appellate jurisdiction in this regard could not be considered reversed by the current status of the respondent as a local publicly-owned enterprise - after the explicit lists of parties in the SCSC proceedings under Article 5, paragraph 1, sub-paragraphs 1 - 5 and Article 5, paragraph 2, sub-paragraphs 1 – 4 LSCSC, the blank Article 5, paragraph 1, sub-paragraph 6 and Article 5, paragraph 2, sub-paragraph 5 LSCSC then allow the participation of *any person* that the SCSC deems appropriate to admit as a party in order to ensure the full and complete adjudication of the case.

UNMIK Regulation No 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission

26. According to the appellant the competence of the SCSC in this case is excluded since "by a final decision of the Housing and Property Directorate it had been ordered to the parties to continue the procedure in the local court." The invoked argument will be addressed by the panel to the extent that *the substantive jurisdiction of the first instance* to adjudicate the case accessorily predetermines *the functional jurisdiction of the second instance* to decide appeals against decisions of this first instance.

27. On 15th November 1999, UNMIK Regulation No.1999/23 on the Establishment of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) came into force. Its Section 1.2 provides that as an exception of the jurisdiction of the local courts, HPD shall receive, register and refer to HPCC for resolution the claims listed in the provision, *inter alia*: a) claims of natural persons whose ownership, possession or occupancy right to residential real property have been revoked subsequent to 23rd March 1989 on the basis of legislation discriminatory in its application or intent; c) claims by natural persons who were the owners, possessors or

occupancy right holders at residential real property prior to 24th March 1999, do not enjoy its possession, where the property has not voluntarily been transferred.

28. Evidenced by the respective HPD/HPCC documents presented in the case, on 22nd May 2003 MB filed a claim (No. DS008169) under Section 1.2 (a) of UNMIK Regulation No.1999/23 to HPD/HPCC with allegations that by Decision № 012-345 of the Workers Council and Decision № 012-349 of the Director of NP "KT", dated 29th May 1990 as an employee of this enterprise he was allocated apartment in Lipjan/Lipljan, "Vuk Karadzic" Street, P+4, L-2, nr.5/17, and signed for it a contract on use № 173 on 30th May 1990 with the Public and Housing Enterprise. In June 1991 special measures were introduced in NSH "KT" and by Decision of the Interim Body of this enterprise, dated 3rd August 1991 MB was dismissed with other employees of Albanian ethnicity. In 1994 he was evicted forcefully by the police. The request to HPD/HPCC was for restitution of his property right over the apartment.

29. On 22nd March 2002, DZ filed a claim (No. DS305615) under Section 1.2 (c) of UNMIK Regulation No. 1999/23 to HPD/HPCC ascertaining that Decision № 012-345 of the Workers Council of NP "KT", dated 29th May 1990 for allocation of the apartment in Lipjan/Lipljan, "Vuk Karadzic" St., P+4, L-2, nr.5/1 to MB was challenged by FH and ZD, workers of this enterprise, and was finally annulled by Decision A.nr.298/91 of the Court of Associated Labour of Kosovo, dated 31st May 1991 for found violations of the Rules on allocation of apartments of the enterprise in scoring the points of the candidates. Afterwards the apartment was advertised again and re-allocated in a new procedure to DZ by Decision № 554-01-012 of the Workers Council of NP "KT", dated 11th March 1992. Later he signed with the Public and Housing Enterprise - Lipjan/Lipljan contract on use № 132 on 23rd Match 1993 and purchased the apartment by contract No 121/012 with NP "KT" on 6th April 1993, attested under Vr.nr.578/93 by the Municipal Court of LIPJAN/LIPLJAN on 27th July 1993. The legal relief sought by DZ was repossession of the apartment.

30. The HPD/HPCC proceedings on the claims above, both filed within the legal deadline under Section 3.2, second sentence of UNMIK Regulation No 2000/60 – 1st July 2003, as competing for one and the same apartment, and raising common legal and evidentiary issues, were joined based on Section 19.5 (a) of UNMIK Regulation No 1999/23. Thus connected, DS008169 & DS305615 were both finally resolved by Decision No HPCC/REC/82/2006, dated 7th December 2006, rendered by HPCC in its second instance reconsideration procedure under Section 14.1 of UNMIK Regulation No.2000/60. In point 1 of the enacting clause HPCC ordered: *the A claim DS008169* of MB to be dismissed; b) the determination of the legal relief, if any, available to this A claimant under the applicable law for allegedly irregular manner in which the apartment was allocated to and acquired by the C claimant to be referred to *the competent local court*; c) the transfers of the property were prohibited until the decision of *the competent local court* except based on an amicable settlement of the dispute; d) the freeze order would lapse unless the A claimant within 60 days lodges

with *the competent local court* a notice of his intention to continue the proceedings in *the competent local court* (i); and may be varied or discharged by the *competent local court* if the interests of the justice so require according to the applicable law (ii)". In point 2 of the enacting clause Decision No HPCC/REC/82/2006, dated 7th December 2006 with respect to the DS305615 claim the HPCC ordered: a) DZ to be given possession of the apartment; b) any person occupying it to vacate it within 30 days; c) the occupant to be evicted upon non-compliance within the time stated.

31. In the reasoning to Decision No HPCC/REC/82/2006, dated 7th December 2006 (paragraphs 3, 4, 5 and 7) HPCC justified the dismissal of DS008169 with the failure of MB as a category A claimant to prove a valid *property right* on the apartment under Section 1.2 (a) of UNMIK Regulation No 1999/23 and Section 2.2 of UNMIK Regulation No 2000/60 read with its legal definition in Section 1 of UNMIK Regulation No 2000/60 as his allocation Decision № 012-345 issued by the Workers Council of NP "KT" on 29th May 1990 was appealed, and annulled by Decision A.nr.298/1991 of the Court of Associated Labour of Kosovo, dated 31st May 1991. As per the connected C claim DS305615 of DZ, HPCC justified its granting in paragraph 14 of the reasoning with *prima facie* shown property rights over the apartment, loss of its possession in the circumstances surrounding the NATO air campaign, and lack of voluntary disposal of its ownership, in compliance with the requirements of Section 1.2 (c) of UNMIK Regulation No 1999/23 and Section 2.6 of UNMIK Regulation No 2000/60. HPCC also decided to accommodate this outcome with referral of the allegations for discrimination to *the competent local court* in view of the dismissal of MB attributed to the temporary measures imposed in NP "KT in 1991 that hindered him to apply in the newly advertised procedure for reallocation of the apartment. HPCC Decision No HPCC/REC/82/2006, dated 7th December 2006 was signed by the Chairperson according to Section 22.9, first sentence of UNMIK Regulation No 1999/23. Its *finality* as of the date of issuance was explicitly verified on its last page with reference to and quotation of the provision of Section 2.7 of UNMIK Regulation No 1999/23.

32. Opposite to the appellant's view, the HPCC Decision No HPCC/REC/82/2006, dated 7th December 2006 has not predetermined the jurisdiction of this case in the first and/or second instance. *At first place,* here there is no *ex officio* referral from HPCC to any local court pursuant to Section 2.5, second sentence of UNMIK Regulation No 1999/23 of any *specific parts of DS008169&DS305615 claims* as not raising issues under Section 1.2 of UNMIK Regulation No 1999/23, nor pursuant to Section 22.1 of UNMIK Regulation No 2000/60 of *issues arising in connection with these claims* not falling within the jurisdiction of HPCC. Acting within the delegation of Section 22.7 (g) of UNMIK Regulation No 2000/60 to make any other decision or order necessary to give effect to the regulation, by point I.1 (b) of Decision No HPCC/REC/82/2006, dated 7th December 2006 HPCC only *instructed the A claimant* to determine the legal relief under the applicable law for the allegedly irregular allocation to and acquisition

of the apartment by the C claimant in judicial proceeding before the competent local court. Again pursuant to Section 22.7 (g) of UNMIK Regulation No 2000/60 by point I.1 (c) of Decision No HPCC/REC/82/2006, dated 7th December 2006 prohibited were all transfers of the property except through an amicable settlement, until the decision of the court, unless the freeze order lapses for non-initiation of the judicial proceeding within 60 days. In summation, DS008169 & DS305615 were resolved by Decision No HPCC/REC/82/2006, dated 7th December 2006 without *ex officio* referral from HPCC to any Kosovo court of *the claims at whole* pursuant to Section 10.3 of UNMIK Regulation No 2000/60, *their specific parts* pursuant to Section 2.5, second sentence of UNMIK Regulation No 1999/23, or *issues arising in connection with these claims* pursuant to Section 22.1 of UNMIK Regulation No 2000/60. Without direct referral from the HPCC to any concrete Kosovo court in any of the alternatives above, ordered by Decision No HPCC/REC/82/2006, dated 7th December 2006, the latter could not even theoretically produce its legally binding effect under Section 2.7 of UNMIK Regulation No 1999/23 as per the jurisdiction on the anti-discrimination legal relief left to sought or not by the category A claimant. Therefore, the competence over the judicial proceeding for its determination after the closure of the HPCC case has to be defined on *normative basis* only. *At second place,* the same infers from the text of Decision No HPCC/REC/82/2006. All orders given by its point I.1 (b) – (d) as per the anti-discrimination legal relief refer generally to *"the competent local court",* without concretizing it. Thus, HPCC retained the issue for discrimination in acquisition of property rights over the apartment and/or the award of compensation for the damages that might have been caused to MB after 23rd March 1989 to the local court having such *jurisdiction under the applicable law.* The Municipal Court of LIPJAN/ LIPLJAN is not directly envisaged in HPCC Decision No HPCC/REC/82/2006, nor is *indirectly specified.* Instead the anti-discrimination legal relief was left to the local court competent to resolve this accessorial dispute, as provided by law. The respective reference in Decision No HPCC/REC/82/2006 being abstractly formulated should be interpreted as covering the law in force at the time of its issuance, all amendments thereto and if repealed or replaced - any new law, general or special, that becomes effective in the course of the judicial proceedings instituted by the A claimant. Apart from that, as Decision No HPCC/REC/82/2006, dated 7th December 2006 delegates the issue to *"the competent local court" to be defined by the applicable law,* it does not extend or otherwise modify the respective normative jurisdiction but in technical terms refers to it. Hence, the delegation may apply to any Kosovo court, including the SCSC, which having international judges in its composition according to Article 3, paragraph 1 LSCSC, is a part of the Supreme Court of Kosovo according to Article 1, paragraph 3 LSCSC, and the Kosovo court system according to Article 8, paragraph 1 and Article 21, paragraph 2 of the Law No 03/L-199 on Courts. *At third place*, based on Decision No HPCC/REC/82/2006, dated 7th December 2006 no case was sent from the HPCC to the Municipal Court of LIPJAN/LIPLJAN, nor was MB given express legal advice by the HPCC to commence proceedings on the discrimination issue

before the Municipal Court of LIPJAN/LIPLJAN. In the resumption of the suspended proceedings in C.nr.194/93 (C.nr.122/07) after the completion of the HPCC case there is no involvement of the SCSC. Therefore, this is not a previous referral of a claim, matter, proceeding or case from SCSC to the Municipal Court of LIPJAN/LIPLJAN under Article 4, paragraph 4, first sentence LSCSC which automatically excludes any jurisdiction of the regular courts in the first and appellate instance in the exception of Article 4, paragraph 4, second sentence, sub-item (ii) LSCSC.

IV. CONCLUSION

33. Based on the considerations above, the panel concludes that SCSC pursuant to Article 4, paragraph 1, sub-paragraph 11 and Article 4, paragraph 6, second sentence LSCS has the *exclusive authority* to decide the appeal of MB against ruling C.nr.122/2007 of the Municipal Court of LIPJAN/LIPLJAN, dated 25th April 2012 in order to determine whether or not the claim in this first instance case falls *within the scope of its exclusive jurisdiction* under Article 4, paragraph 1 LSCSC. As only the SCSC is entitled to consider the existence or non-existence of its jurisdiction in the first and second instance, this statutory power due to its exclusiveness pursuant Article 14, paragraph 2 LSCSC derogates the competences of the Court of Appeals under Article 18 of the Law No 03/L-199 on Courts to decide this cross-jurisdiction in the second instance. This authority being legally concentrated in the SCSC is *de jure* excluded by Article 4, paragraph 5, first sentence LSCS for all other courts, while *its de facto* exercise by them is banned by Article 4, paragraph 5, first sentence LSCSC. For these reasons, the Court of Appeals shall declare itself incompetent to decide the appeal in AC.nr.3905/12 pursuant to Article 18, paragraph 1 LCP and shall refer it to the SCSC as the competent court of second instance pursuant to Article 23, paragraph 1 LCP.

In view of the aforementioned reasoning it is decided as in the enacting clause.

LEGAL REMEDY: No appeal is permitted against this ruling according to Article 206, paragraph 1 *in fine* in conjunction with Article 208 and Article 176, paragraph 1, first sentence LCP.

THE COURT OF APPEALS - PRISHTINË/PRIŠTINA

AC.nr.3905/2012 on 12.03.2013

PRESIDING JUDGE ROSITZA BUZOVA

Prepared in English as an official language according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo

NOTE OF DELIBERATION AND VOTING

THE COURT OF APPEALS in the second instance through a panel composed of EULEX Civil Judge ROSITZA BUZOVA, as Presiding, the Kosovo Judge MUHARREM SHALA and the Kosovo Judge NENAD LAZIĆ, as panel members, in a closed session on 12th March 2013 deliberated and voted unanimously as in enacting clause.

The present note is added to ruling AC.nr.3905/12 of the Court of Appeals, dated 12th March 2013 pursuant to Article 140, paragraph 1, second sentence LCP.

THE COURT OF APPEALS - PRISHTINË/PRIŠTINA

AC.nr.3905/2012 on 12.03.2013

PRESIDING EULEX JUDGE

ROSITZA BUZOVA

JUDGE MUHARREM SHALA

PANEL MEMBER

JUDGE NENAD LAZIĆ

PANEL MEMBER

ANDRES MORENO

EULEX LEGAL OFFICER

DAUT LATIFAJ

EULEX INTERPRETER/TRANSLATOR (ENGLISH/ALBANIAN)

JELENA JANJIĆ

EULEX INTERPRETER/TRANSLATOR (ENGLISH/SERBIAN)

Prepared in English as an official language according to Article 17 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and signed by the Kosovo Judges after translation by the above referred interpreters/translators.