KR.no.135/2013

THE APPELLATE COURT OF KOSOVO – Serious Crimes Department, in the panel composed of the judges, Annemarie Meister as a EULEX presiding judge, Abdullah Ahmeti and Driton Muharremi as local panel members, and assisted professionally by a EULEX legal officer, Andres Parmas, as a court clerk, in respect to the criminal case against the defendants, H.S. from Pristina, B.H. from Pristina and M.K. from Mitrovica, because of the criminal offences of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), and the offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK); against the defendants Z.S. from Ferizaj, M.N. from Pristina, O.I. from Vushtri, B.H1. from Pristina and H.G. from Pristina, because of the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), in regard to the defendants Z.S., M.N. and B.H1., because of the criminal offence of Misuse of Economic Authorisation as provided for by article 236 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK); in relation to the defendants O.I., Z.S., M.N., H.G. and B.H1., because of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK), by ruling on the appeal filed by the defendants' defence counsels, the appeals filed by the defendant B.H1. and the injured party, against the judgement rendered by Pristina Basic Court with reference P.no.86/2007 dated on 23.05.2011, in the panel's hearing held on 06.02.2014 issued the following:

R U L I N G

1. **By partially approving the appeals of the defendants' defence counsels concerning the defendants H.S., M.K., Z.S., O.I., B.H1. and H.G., as well as the appeal of the defendant B.H1., and also *ex officio* in regard of defendants B.H. and M.N., the judgment P.no.86/2007 dated on 23.05.2011 rendered by Pristina Basic Court is annulled, and the case is sent back to the first instance court for retrial before a different panel.**

2. **The charges against the defendant:**
   - **H.S. are rejected concerning the 300 000 Euro loan to xxx company in February 2004;**
   - **B.H. are rejected concerning the 231 950 and 218 050 Euro loans to xxx1. company in March 2004;**
   - **M.K. are rejected concerning the 300 000 Euro loan to the Company xxx2 in February 2004 due to absolute expiry of the period of statutory expiration for these criminal offences.**

3. **The appeal, filed by the injured party xxx3, is dismissed as inadmissible.**

R e a s o n i n g

The judgment P.no.86/2007 dated on 23.05.2011 rendered by Pristina Basic Court found the defendant **H.S.** guilty of the criminal offence: Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), where he

was imposed a custodial sentence of 4 (four) years and 6 (six) months. Whereas, based on Article 390 par. 3 of CPCK, he was acquitted in relation to the criminal offence of Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, and the offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of CCK; the defendant **B.H.** was found guilty of the criminal offence: Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), where he was imposed a custodial suspended sentence of 2 (two) years, which it will not be served provided that the defendant does not commit another offence within 2 (two) years. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2, in conjunction with article 23 of CCK and, the offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK); the defendant **M.K.** was found guilty of the following criminal offence: Fraud as provided for by article 261 par. 1 and 2, in conjunction with article 23 of the Criminal Code of Kosovo (CCK), where he was imposed a custodial sentence of 3 (three) years and 6 (six) months. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2, in conjunction with article 23 of CCK and the offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK); the defendant **Z.S.** was found guilty of the following criminal offence: Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, where he was imposed a custodial sentence of 4 (four) years. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK), and the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK); the defendant **M.N.** was found guilty of the following criminal offence: Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, where he was imposed a suspended custodial sentence of 2 (two) years, which it would not be served provided that the defendant does not commit another offence within 2 (two) years. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK), and the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK); the defendant **O.I.** was found guilty of the following criminal offence: Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, where he was imposed a custodial sentence of 4 (four) years, as well as of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK), where he was imposed a custodial sentence of 2 (two) years, therefore an aggregate sentence of 5 (five) years was imposed based on article 71 of CCK. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK); the defendant **B.H1.** was found guilty of the following criminal offence: Misuse of Economic Authorisations as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, where he was imposed a custodial sentence of 4 (four) years. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK) and the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK); the defendant **H.G.** was found guilty of the following criminal offence: Misuse of Economic Authorisations

as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, where he was imposed a custodial sentence of 1 (one) year and 6 (six) months, which it would not be served provided that the defendant does not commit another offence within 2 (two) years. Whereas, based on article 390 par. 3 of CPCK, he was acquitted of the criminal offence of Entering into Harmful Contracts as provided for by article 237 par. 1 and 2 of the Criminal Code of Kosovo (CCK), and the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK). The defendants are reimbursed the costs of the criminal proceedings conform to article 102 par. 1 of CPCK, apart from the interpreting cost in the amount of 1000€.

Appeal against this judgement was timely filed by the following:

-the defence counsels Osman Havolli and Ahmet Hasolli acting on the behalf of the defendant Z.S., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on criminal sanctions, whereby it was proposed that the defendant, Z.S.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence, or to send the case to the first instance court for retrial.

The defence counsels consider that the appealed judgement consists of essential violations of criminal procedure provisions, as provided for by article 403 par. 1, subpar. 1.2 of CPCK, and this is because the enacting clause of the judgement is incomprehensible and inconsistent with its contents, or with the judgment reasoning, the reasoning is not included in the judgement, the reasons concerning the decisive facts were not provided in it. According to the defence, in the enacting clause II of the actual judgement, the court by describing Z.S.'s duty and the work responsibilities in the course of employment, it finds that he was employed in the bank on the regular basis and that he had a key position, and that being the XXX3 management council chair, and that due to his fault, this bank's licence was revoked by CBK. According to the defence, Z.S. was found guilty not as per the indictment in its continuity, but due to its assessment of the court which autonomously formulated an enacting clause II of the judgement against Z.S., that is contrary to the law. The XXX3 Management Council as well as its chairman, Z.S., is a fraud victim for which he is held accountable and punished, knowingly that he did not have any personal benefit or any benefit for his organisations, hence it is noticed that the judgement enacting clause is incomprehensible and inconsistent with itself. A question is raised, according to the defence, as how is it possible that Z.S. is accountable for somebody's actions, i.e. M.N.'s, B.H.'s, M.K.'s, B.H1.'s and H.G.'s, where it is stated that they have each individually deceived XXX3 in order to obtain personal benefits and benefits for their business organisations, by concealing facts concerning their financial situation, i.e. Z.S. was also deceived by them, where he was found guilty of the criminal offences not committed by him. From this, it can be concluded that there are substantial breaches of CPCK provisions, as provided for by article 403 in conjunction with subpar. 10 of CPCK.

The factual situation was erroneously determined as it is not based on any concrete evidence, and it remains only a piece of investigators' writing which is nothing more but speculations and assumptions. It has not been proven in any form from all these pieces of evidence that Z.S., being in a position of XXX3 Management Council, has committed the criminal offence of Misuse of the economic authorisations as the intention to commit the criminal offence has not been proven by any piece of evidence, respectively the material benefit for himself or his organisation. The Criminal Law also has been breached in this

criminal matter conform to article 404 par. 1, subpar. 1 of CPCK, since the offence which Z.S. was accused does not constitute a criminal offence.

-The defence counsels Qerim Metal and Avdi Ahmeti acting on behalf of the defendant H.S., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on criminal sanctions, whereby it was proposed that the defendant, H.S.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence, or to send the case to the first instance court for retrial.

The defence considers that the appealed judgment under count 1 of the indictment, whereby the accused H.S. was found guilty of the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of the Criminal Code of Kosovo (CCK), where he was imposed a custodial sentence of 4 (four) years and 6 (six) months, as such it is unlawful because there are also substantial breaches of the criminal procedure provisions, as provided for by article 403 par. 1, item 10 of CPCK, as the court has exceeded the indictment, and the defendant was found guilty of the criminal offence of Fraud pursuant to article 261 par. 1 and 2 of CCK. According to the defence, the court had no right to do this as the defendant was not accused of this in the indictment, nor during the main trial, but he was charged for providing assistance to commit the offence of fraud, as provided for by article 261 par. 1 and 2, in conjunction with article 25 of CCK. Therefore, only this substantial breach, according to the defence, makes the judgement unsustainable. Also, the defence underlines that the judgement was announced on 23.05.2011, whereas it was send to the parties on 12.12.2012, i.e. 19 months after its announcement, hence it is acted in contradiction with the Criminal Procedure Code provisions. According to the defence, the appealed judgment enacting clause, where the defendant H.S. was also included, is unclear and incomprehensible. In the other hand, the enacting clause is inconsistent in itself and with its reasoning, as well as with evidence and minutes contents which are in the case file. The judgment enacting clause description does not have the criminal offence elements of the fraud, as the defendant H.S. has not mislead the XXX3 with any actions, i.e. this defendant had not presented or provided any false facts whatsoever when his loans (two loans) were realised. This actual matter in question is a civil case. The defendant H.S. has realised two loans which were fully granted in accordance with the conditions and criteria as determined by XXX3, and not the defendant H.S.. This is also corroborated by the witnesses D.P. and N.S. who explicitly stated that the entire documentations was proper when the accused H.S. applied for the loan, in conform to the criteria and conditions as set out by the XXX3 itself. Also, the financial expert X.K., having examined the documentations concerning the borrowers, treated by the indictment as "H" group, it was proved that all the applicants had applied and contracted on their names and for the interest of their businesses. Commercial subjects led by the accused H.S. had about 6.000.000,00 Euro in annual turnover, so they had a sufficient cover to obtain any loan, and this was proved also by the financial expert's expertise. He also adds that one of the accused H.S.'s loan was to be repaid within 36 months with grace period of 6 months, whereas the other one was a revolving loan allowing him to repay within 12 months, which was withdrawn bit by bit, by putting as a collateral three times more, however he was unable to know that the bank would be liquidated on 13.03.2006 where the period to repay the respective loans as per the contract was not due.

-the defence counsel Nikë Shala acting on the behalf of the defendant M.K., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on

criminal sanctions, whereby it was proposed that the defendant, M.K.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence.

The defence counsel alleges that the judgement consist of essential violations of criminal procedure provisions, as provided for by article 403 par. 1, item 12 of CPCK, because the enacting clause of the judgement is incomprehensible and inconsistent with its contents, or with the judgment reasoning, as the judgement does not match the reasoning concerning the decisive facts. All these breaches influenced in rendering a correct and lawful judgment in this criminal matter. According to the defence, also the factual situation was determined incompletely and erroneously. The defendant's intention to commit the offence was not proved by any evidence. He had applied for loan on three occasions complying with the procedure in place, having valid documentations whereby the loans were allocated to him and he repaid the first and second loan in full. Then he took the third loan which was approved, where he failed to repay a part of it. This was a personal loan, where the witness B.P., from the "T.F.", stated in both, during the investigation stage and the main trial, that it was his loan and that he is liable for the loan and not the defendant M.K.. The defence considers that in the actual case, it was not proven by any evidence that this relates to the "K" group, because in order for the group to exist, firstly it shall exist an agreement entered between the parties, members, which shall be signed and confirmed between each-other, where the rights and obligations are known to them. In the actual case, there are also criminal law breaches to the defendant's detriment, because in the defendant's actions, there are no elements which constitute the criminal offence of fraud which he has been charged with.

-the defence counsel Abdylaziz Sadiku acting on the behalf of the defendant O.I., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on criminal sanctions, whereby it was proposed that the defendant, O.I.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence, or to send the case to the first instance court for retrial. According to the defence, the appealed judgment consists of substantial breaches of the criminal procedure provisions, because it is not based on the provisions as provided for by article 387 of CPCK. Item *a)* under the count II of the appealed judgement enacting clause, it results that the defendants Z.S., M.N., O.I., B.H1. and H.G. were found guilty of having committed the criminal offence of misuse of economic authorisations as provided for by article 236 par.1, item 5 and par. 2 in conjunction with article 23 of CCK. When this is read, it would come across that the defendants have committed the criminal offence of misuse of economic authorisations, as provided for by article 261 (10 item 5 and 2) of CCK. This part of the judgment enacting clause is made entirely unclear. For this reasons, the second instance court shall quash the first instance court judgment and send the case for retrial due to essential violations of a procedural provisions relative nature. The item *a)* of the enacting clause under II is unclear due to the fact that, the defendant, O.I.'s incriminating actions are not described at all. It is deemed, from this enacting clause that the defendant O.I. is not the perpetrator of this criminal offence at all. As the incriminating actions characteristic of this offence is that, this could only be intentionally committed by the business organisation responsible person, who shall make unlawful material benefit to the business organisation where he works or to other organisation because of his/her actions. The factual situation, in relation to the defendant O.I. having obtained a material benefit to the other organisation business, respectively the borrowers, was erroneously determined by the first instance court. The first instance court has not correctly determined the factual situation, where it found that the defendant O.I., as an executive XXX3 director, has committed two criminal offences as stated earlier. Even if it

eventually found a sort of an accountability concerning the accused, the court within its scope couldn't, in any way, make up two various criminal offences for the same actions. When the offences are functionally interlinked and subject to each-other, then the offence with a greater liability normally prevails in relation to the minor ones. In no way, the defendant could've committed the offence of entering into harmful contracts, if he previously has also committed the offence of misuse of economic authorisations. In case that the person's intention concerning the particular authorisations is to commit the offence of misuse of the economic authorisations by granting a harmful loan, then in this case entering into the contracts is a product of the first criminal offence, respectively the criminal offence completion of misuse of economic authorisations.

-the defence counsel Ramë Gashi acting on the behalf of the defendant B.H1., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on criminal sanctions, whereby it was proposed that the defendant, B.H1.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence, or to send the case to the first instance court for retrial.

The allegations relied on, in relation to the substantial violations as provided for by article 403 par. 1, item 12 of CPCK are that the appealed judgement enacting clause is incomprehensible, inconsistent with its contents as well as the reasoning of the judgment. The defendant B.H1., under item *a)* of the enacting clause II, was found guilty of the offence of misuse of economic authorisations in co-perpetration, as provided for by article 261 (10, item 5 and 2) of CCK. Article 261 of CCK defines the offence of fraud, and not the criminal offence of misuse of economic authorisations as stated in the enacting clause of the judgement. This fact explicitly makes the enacting clause of the impugned judgement incomprehensible, inconsistent with its contents and in contradiction with the factual situation, which is reasoned by the first instance court itself. This would be sufficient for the substantial breaches of criminal procedure provisions to be considered, as provided for by article 403 par. 1, item 12 of CPCK. The defence, as other fact relating to the substantial breaches, alleges that the first instance court does not provide any reasoning in the impugned judgment in relation to article 23 of CCK, respectively that the offence was committed in co-perpetration with other defendants. The first instance court has allegedly failed to argue and reason the criminal offence's co-perpetration of B.H1. with others. There is no evidence whatsoever which would constitute a co-perpetration between B.H1. and the others, as well as with the bank's management, or the bank's administrative staff, during the time that B.H1. was a member of the bank's management council. Also, this has not derived from the case file documents at all, which were administered as evidence, and let alone from the financial expertise which has clearly defined that the loan liability is personal and the borrower is accountable. As such, it was also stated by the financial expert during his examination in the main trial. All the bank's employees have stated that B.H1. had never any influence, nor that he had contacted anyone concerning the loan of whomever person, in the capacity of the bank's management council. B.H1., being a Board shareholder member of XXX3, he has never obtained any personal loan from this bank. He would be in the bank only when he participated at the board meeting. He didn't have even any slightest implication concerning the loan which was obtained by his brothers. The witness E.D. who worked also in the bank, states that B.H1., as a board member, had no interest whatsoever about certain subjects, in relation to the loans allocation. Thus, individuals who have obtained and used the loan shall be liable (a joint appeal of the defence counsel and the defendant himself).

-the defence counsel Destan Rukiqi acting on behalf of the defendant H.G., due to the essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation, criminal law violations and on account of a decision on criminal sanctions, whereby it was proposed that the defendant, H.G.'s appeal is approved by the Appellate Court of Kosovo, and to acquit him of the charges due to the lack of evidence, or to send the case to the first instance court for retrial.

According to the defence, article 403 par. 1, subpar. 8 and 12 and par. 12 of CPCK has been breached substantially, which makes the judgment unlawful and unsustainable, by alleging that the judgment was based on inadmissible evidence, since the witnesses D.P., E.D. and V.M. were initially questioned in the capacity of a suspect in the absence of the defence counsels. Therefore, it is alleged that these pieces of evidence is inadmissible as provided for by article 153 of CPCK, and these evidence had to be severed from the case file by the first instance court pursuant to article 154 par. 4 of CPCK. The first instance court, acting as such, has also substantially breached the criminal procedure provisions as defined by article 403 par. 1, subpar. 8 of CPCK. Also, it is asserted that the criminal proceedings were unreasonably prolonged, and that article 6 of the European convention on human rights has been breached in the actual case, where the indictment was submitted to the court on 26.02.2007, the main trial commenced on 02.03.2010, it was concluded on 11.05.2011 and the judgment was delivered to the parties on 12.11.2012, i.e. five years from the time when the indictment was filed with the court to the delivery of the judgement to the parties. Also, the factual situation has not been established because none of the direct or indirect evidence proves the fact that the accused H.G. has influenced the banking entities, in order that one of the borrowers to obtain a loan. This is proved by the witness D.P., N.S. who were employed in the XXX3, as well as the financial expert, X.K's testimony, however, this was assessed by the court biasedly.

-B.H1. also filed an appeal, who even though he did not state the basis of the appeal, from the voluminous content of the appeal, it is noticed that he bases his appeal on all the appeals grounds, and proposes that the Appellate Court of Kosovo approves his appeal and acquits him from the charge due to the lack of evidence, or the case is sent to the first instance court for retrial. Amongst other issues, he added that it can be seen from the Board's original minutes and not from those which were falsified, that the Board did not grant any loan, and that he motioned the First Instance Court to obtain the original minutes and the notebook from the Bank, which were in the archives, but the court refused this motion.

-Also Xxx3 in liquidation filed an appeal, which even though it did not mention the grounds of appeal, it can be seen from its content that it describes the current situation of the obligation for each defendant and that it ascertains that the punishments were not properly balanced compared to the damage caused to the creditors. He proposed that the court imposes conditional punishments provided that the repayments are made to the bank.

The Appellate Court of Kosovo scheduled and held a session before Appeal Panel in conform with the provisions of article 410 par. 1 of KCCP, for which the parties were notified. The prosecution was represented by the Appeals Prosecutor, Haxhi Dërguti and the defendants H.S., M.K., Z.S., O.I., B.H1. and H.G. together with their respective defence counsels Osman Havolli, Ahmet Hasolli, Qerim Metaj, Avdi Ahmeti, Nikë Shala, Abdylaziz Sadiku, Ramë Gashi and Destan Rukiqi, and the representative of the injured party, Ragip Krasniqi were present. The Appeals Prosecutor relied on the written proposal PPA/I.no.79/13 dated on 05.06.2013, where he proposed that the defence counsels' appeals are dismissed as

ungrounded. The defendants' defence counsels relied on their allegations as stated in the appeals and also the defendants supported their defence counsels. The injured party stated that he stands by his two submissions which were filed with the second instance court, which concerned the loans repayment dynamic by the defendants, as well as to strengthen the collateral.

The Appellate Court reviewed the case file documents, studied the impugned judgment pursuant to the provisions of article 415 of KCCP, and having assessed the grounds of the appeal, it found that:

-the judgment shall be annulled and the case is send back for retrial.

The Court of Appeals has carefully assessed the impugned judgment as well as the counsels' allegations and ascertains that:

1. The judgement contains substantial violations of the criminal procedure provisions, as it does not have the elements and the form as required by article 396 of KCCP. As defined by par. 2 of this article *"The introduction shall include: an indication that the judgment is rendered in the name of the people; the name of the court; the first name and surname of the single trial judge or presiding trial judge, members of the trial panel and the recording clerk; the first name and surname of the accused; the criminal offence of which the accused was convicted and an indication as to whether he or she was present at the main trial; the day of the main trial; whether the main trial was public; the first name and surname of the state prosecutor, counsel, legal representative and authorized representative present at the main trial; the day of the announcement of the judgment that has been rendered; and the date when the judgment was drawn".*

1.1. Several elements are missing in the appealed judgment such as: *the first name and surname of the recording clerk; the first name and surname of the accused; the criminal offence of which the accused was convicted and an indication as to whether he or she was present at the main trial; the day of the main trial; whether the main trial was public; the first name and surname of the state prosecutor, counsel, legal representative and authorized representative present at the main trial; the day of the announcement of the judgment that has been rendered; and the date when the judgment was drawn up.* The Court of Appeals notes that when the violations of the criminal procedure would have stopped with only these misgivings, there would be no reason to send the case back, because all relevant information is present in the case file. Hence these violations could be best solved by modifying the judgment of the Trial Panel. These violations alone would not put under question the legality of the Trial Panel's judgment. However when taking into account numerous other violations that are indicated below, the Court of Appeals concludes that these violations contribute to a general outcome that is in fact illegal.

1.2. The enacting clause of the judgment is incomprehensible and ambiguous; it is not consistent with the reasoning and the decisive facts as provided by the first instance court. It is not clear which facts were found proven by the first instance court and the factual description does not exist that it would clarify as which are the defendants' actual incriminating actions and which pieces of evidence were relied upon to prove such actions. The first instance court, amongst others, describes the following in the enacting clause I/a "*….has deceived the injured party XXX3 by concealing facts concerning the financial situation to repay the debt…"* by not specifying which concealed facts were used to commit

this defendant's fraud, and which of their commercial organizations they have committed the fraud. It is also the same in regard to item II/a, in which the enacting clause is utterly unclear, by not describing personal actions for each defendant as well as the evidence which support such an allegation. Also in this case, their profitable organizations concerning the misuse of economic authorizations are not mentioned.

1.3 Analyzing the indictment and the impugned judgment, it is seen that the vast majority of the proposed witnesses by the prosecution were not heard at all, such as: M.S., E.N., E.H., B.T., A.L., B.C., F.N., L.B., F.K., M.R., H.H., R.S., R.G., D.C., T.C., and also the borrower's statements which were only provided to the police, where the court administered as evidence on page 12 (of the Albanian version), and the defendants as well as the counsels were not given the opportunity to challenge such statements. The court cannot find from the main trial minutes or from the judgement that the prosecution waived his right to hear such witnesses or that they were not heard for some other reasons and this is not noted in the judgement. In this case, provided that the prosecutor hasn't waved his right to hear these witnesses, the first instance court shall summon these individuals if they can be found and once statements have been taken from them, then these have to be assessed concerning the eventual proven or unproven facts.

1.4 The Court of Appeals shares the same opinion with the defendant, H.S.'s counsel allegations in regard to the defendants H.S., M.K. and B.H. that the court has substantially violated the criminal procedure provisions as defined by article 384 par. 1 item 1.10 of CPC, as the scope of the indictment was exceeded to the detriment of the defendants H.S., M.K. and B.H., who according to the amended indictment, they were accused of providing assistance to Fraud pursuant to article 261 par. 1 and 2 in conjunction with article 23 and 25 of CCK, whereas they were found guilty in the judgement because of the criminal offence of Fraud as provided for by article 261 par. 1 and 2 in conjunction with article 23 of CCK.

1.5. The first instance court, as it can be seen also from the judgement, has administered 150 pieces of material evidence, which were only noted as per the order, however these pieces of evidence were not elaborated, reviewed or confirmed by providing reasons concerning their relevance and the causal link with the whole criminal case in general, as well as with the defendants in particular. For instance, concerning the exhibit no. 1 which is noted "The guarantee statement no.26/05", no reasons are provided for this, nor it is assessed as what it contains, whether it incriminates any of them or all the defendants, and also which evidence is this one consistent with, in order to make this exhibit a relevant evidence, whereby it corroborates or not the defendants' culpability.

1.5 Also, the court by administering the individual evidence such as the statements of more than 30 witnesses, it has only described their statements, and it was sufficient to conclude for each of them that, e.g. in the statement of the witness D.P. *"that her statement shall be considered as reliable. She has taken part in the management board meetings and that she has informed the members about the actual situation concerning the loans. She admitted that the responsibility in relation to the large loans was approved by the shareholders who were part of the board, and this is confirmed by the object documents-the minutes taken during the management council meeting".* It cannot be concluded by such first instance court's finding as what in fact was proven by the court by this evidence, whose defendants' incriminating actions, or perhaps this statement proved the incriminating actions of all defendants, and also which other pieces of administered evidence is this statement consistent with, that would prove the defendants' culpability, and also what is purported

about the management council. Thus, the first instance court is not required to summon the witnesses once more, who have been heard during the main trial (only if it is to prove any other fact), but it is required that these statements are analysed separately, and then to conclude about the reliability of such statements, its causal link of these testimonies with the defendants' actions, the facts which are proved by such testimonies, and then these pieces of evidence to be harmonised with other evidence, and subject to this, to render a correct and lawful decision.

1.6 The judgement lacks in its entirety the counsels' and defendants' allegations, as well as the final speeches, which were provided during the main trial, and also the court failed to respond in relation to any allegations put by the counsels or the accused, as why it does or does not trust the evidence presented by the defence. Also the counsel, Osman Havolli's allegations are sustainable that the court ignored some of his written submissions which were filed and this was reflected in the main trial minutes. It is noticed from the case file that the counsels addressed the court in writing for several times, in order that the new facts to be assessed as well as the counsel's objections concerning the evidence content (the letter dated on 31.12.2010, on 06.05.2010, on 26.05.2010), however, such concerns were not considered at all. Also the court ignored and failed to rule on the motion filed by the defendant B.H1., so the board meeting minutes as well as the note book which was in the bank's archives to be obtained.

2. As far as the financial expert, X.K's expertise is concerned, this court ascertains that this was assessed by the first instance court selectively, by partially approving it, even though he was engaged by the court itself, and also it had requested to complete the expertise. The first instance court, in relation to this, finds that the expert's second opinion was utterly inconceivable and in contradiction with the detailed and trusted opinion provided earlier, however it fails to provide reasons why it does not find it reliable, and only the parts which disfavour the defendants are considered, thus acting contrary to article 184 of KCCP, where it is stated *"If data in the findings of expert witnesses differ on essential points or if their findings are ambiguous, incomplete, contradictory in themselves or with respect to the circumstances examined and if such deficiencies cannot be removed by a new hearing of expert witnesses, the expert analysis shall be repeated with the participation of the same or different expert witnesses",* so in this case, the court was supposed to engage another expert witness and if eventually there are contradictions between the first expertise and the second one provided by the other expert witness, then the court must request a super-expertise, where at least three financial experts would participate, as in such situations the super-expertise panel is composed of two or more experts, respectively from a relevant faculty or any other scientific or professional institution, taking into account that we would then obtain a more authoritative opinion than a person's one.

The issue that was ambiguous by the financial expertise, which the court did not trust, whereas it failed to state and provide its opinion as well as to individualise the liability is:

a) Was Xxx3 in such financial situation to go insolvent, where the expert was clear and concrete according to this court.
b) Was it the termination of the contract concerning the PTK deposits, one of the causes of the bank's financial situation deterioration.
c) The issue of the period time concerning the loans repayment.
d) A BPK's non-approval of decisions on reprogramming of some loans allowed by the management board on 29.12.2005.

e) The expert's opinion concerning the memorandum of understanding proposed by BPK, which is on 28.09.2005 where there are two financial expert's findings.
f) Were the borrowing companies solvent, and whether the collaterals were in place as per the regulations defined by the bank and CBK.
g) Finally it failed to assess the expert's opinion that concerning the liability in respect to the loans, each borrower had entered into contract individually and for their businesses' interest, and that each borrowing company is liable for the loan amounts in regard to their respective contractual obligations….

Therefore, there is a need for a new expertise in order to clarify these issues, and in particular the issue concerning the liability of each borrower in respect to these loans, and then subject to the new finding provided by the expert or experts, a correct and lawful decision to be rendered. This is very crucial because by such conclusion, the group existence or inexistence would also be depended on, which the prosecution and the court designates them in accordance to the defendants' surnames, (H, S, H1, H2 and N group).

The first instance court, on page 49 par. 2 states *"that the intention to benefit materially in an unlawful way must exist at the time when the fraud act is being carried out. Hence there is no fraud, if a borrower decides not to repay the loan at a later stage and to benefit materially in an unlawful way".* However, the justification provided further, is not based on particular evidence by not specifying as which actions or evidence it is ascertained that the defendants, who are in the capacity of the witnesses, at the time when they applied or simply when they made the loans' application intended to defraud, and that they had no intention to repay the loan from the beginning. The court, in respect to this, has also failed to provide a response on the allegations of the defence which are mentioned also in their appeals against this judgement, whether this is a civil or a criminal matter in respect to fraud, which in any circumstance the court was supposed to provide its assessment.

3. The Appellate Court of Kosovo, ascertains that as far as the defendant O.I. is concerned, the criminal law has been breached to the defendant's detriment, as the defendant O.I., for the same incriminating actions which were considered as proven by the first instance court, was found guilty of two criminal offences in relation to the Misuse of economic authorisations, as provided for by article 236 par. 1 and 2 in conjunction with article 23 of CCK, and also in respect to the criminal offence of Entering into harmful contracts as defined by article 237 par. 1 and 2 of CCK. This court ascertains that the theory conception prevails in this actual case, since the defendant entered into harmful contract through misuse of economic authorisations, so the criminal offence of Entering into harmful contract as defined by article 237 par. 1 and 2 of CCK, it is more serious offence, hence it overrides the criminal offence of Misuse of economic authorisations pursuant to article 236 par. 1 and 2 of CCK, as this is a less serious offence. Thus, the first instance court, during the retrial against the defendant O.I., shall proceed only with the criminal offence of Entering into harmful contracts as defined by article 237 par. 2 of CCK.

The first instance court has got discretion in respect to the assessment of the evidence, whereas the evidence is only re-assessed by the Court of Appeal, whether it finds any error in relation to the assessment of the court, and only on extraordinary occasions, it administers pieces of evidence by holding a session in the second instance. This court

has found that the factual description in the judgment was not carried out properly and that its reasoning is incomplete. Since the judgement is in contradiction with the KCCP provisions, as it is ambiguous to identify as what were the findings of Pristina District Court, and the manner how this court drew such conclusions, the Court of Appeal has decided as in the enacting clause of this ruling.

In the case at hand the Defendants H.S., B.H. and M.K. have been indicted for having committed a criminal offence of fraud under Art 261 (1) and (2) CCK, punishable by an imprisonment up to five years. The Court of Appeals notes that under Art 90 (1) 4) CCK criminal prosecution may not be commenced after five years from the commission of a criminal offence punishable by imprisonment of more than 3 years but not more than 5 years. According to Art 91 (1) the period of statutory limitation on criminal prosecution commences on the day when the criminal offence was committed. Although pursuant to par (3) of the same article the period of statutory limitation is interrupted by every act undertaken for the purpose of criminal prosecution of the criminal offence committed, however, pursuant to par (6) of the same article criminal prosecution shall be prohibited in every case when twice the period of statutory limitation has elapsed. These defendants are, inter alia, indicted for the criminal offence of Fraud pursuant to Art 261 (1) and (2) in conjunction with article 23 CCK in regard of:

- 300 000 Euro loan to XXX company in February 2004 (H.S.);
- 231 950 and 218 050 Euro loans to XXX1 company in March 2004 (B.H.); and
- 300 000 Euro loan to XXX2 company in February 2004 (M.K.).

Since the above acts that H.S., B.H. and M.K. are indicted with, were committed more than 10 years ago, there is an absolute bar on criminal prosecution because of the lapse of time set in Art 91 (6) CCK. Therefore, according to Art 389 1) CPCK and Art 426 (1) CPCK the charges against the Defendants H.S., B.H. and M.K. have to be rejected in regard of these episodes.

From the aforementioned reasons, the impugned judgment is legally unsustainable and it had to be annulled as such, so the case is send back to the first instance court for a retrial, except for the part in which the charges have to be rejected because of the lapse of time. The first instance court during the retrial shall act pursuant to the above mentioned remarks, in order to eliminate all the aforementioned breaches, to administer all the evidence and to assess them as provided for by the provision of article 396 par. 6 and 7 of CPC, and subject to the evidence assessment outcome to render a correct and lawful findings based on the administered evidence and then to issue a respective decision.

The Appellate Court of Kosovo, dismissed the injured party's appeal as inadmissible, and this is due to the fact that pursuant to the provision under article 399 par. 3 of KCCP, the injured party may challenge a judgment only with respect to the court's decision on the punitive sanctions for criminal offences committed against life or body, against sexual integrity or against the security of public traffic and on the costs of criminal proceedings, so the criminal offence in this case for which the defendants were found guilty differs from the offences which gives right to the injured party to file an appeal.

As per the aforementioned, and pursuant to the provision as provided for by article 424 of KCCP, it has been decided as in the enacting clause of this ruling.

THE APPELLATE COURT OF KOSOVO
PAKR.no.135/2013, on 06.02.2014

Recording clerk,
Andres Parmas

Presiding Judge
1. Annemarie Meister

Panel members:

2. Abdullah Ahmeti_____

3. Driton Muharremi_____