REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 29 January 2018
Ref. No.: RK 1187/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI82/17

Applicant

Kosovo Energy Corporation KEK j.s.c

Constitutional review of Judgment E. Rev. No. 47/2017 of the Supreme Court of Kosovo, of 31 May 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by the Kosovo Energy Corporation KEK j.s.c (hereinafter: the Applicant), which is represented by Riza Dembogaj, a lawyer at the Legal Office of the Applicant.

Challenged decision

2. The Applicant challenges Judgment E. Rev. No. 47/2017, of the Supreme Court of Kosovo of 31 May 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned Judgment of the Supreme Court.

4. The Applicant alleges that Article 31 [Right to Fair and Impartial Trial] of the Constitution has been violated.

Legal basis

5. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Articles 47 and 48 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 12 July 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 13 July 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

8. On 12 October 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 6 December 2017, the Review Panel considered the report of the Judge Rapporteur, and made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

10. It follows from the case file that on 8 February 2010, as a result of unstable supply with electrical energy, the enterprise "Banja e Kllokotit - Mineral Water Factory & CO2, l.l.c" (hereinafter: Banja e Kllokotit), with its seat at Kllokot of Viti, had suffered considerable material damage. Banja e Kollokotit considered that the damage was caused by the Applicant for which reason, on an unspecified date, filed a claim for compensation for damage with the previous District Commercial Court in Prishtina.

11. On 29 June 2012, the District Commercial Court by Judgment II. C. No. 412/2010 partially approved the statement of claim of the claimant (Banja e Kllokotit) and ordered the Applicant to compensate the damage to the claimant in the amount of 989,666.15 € with legal interest. Following the hearing of the

experts of the respective field, the District Commercial Court found that the responsibility for the current oscillation of the electrical energy was partly of the Applicant and, consequently, only partially approved the statement of claim of the claimant.

12. Against this judgment, the Applicant filed appeal with the Court of Appeals, alleging the existence of essential violations of the challenged procedure provisions, erroneous and incomplete determination of factual situation, and erroneous application of the substantive law.

13. On 9 October 2013, the Court of Appeals of Kosovo by Decision Ae. no. 418/2012 approved the Applicant's appeal, quashed the aforementioned Judgment of the District Commercial Court and remanded the case to first instance for retrial. The Court of Appeals found that the lower instance court judgment contained essential violations of legal provisions and incomplete determination of factual situation.

14. Meanwhile, the Applicant proposed to the Basic Court in Prishtina (as the competent court after the reorganization of the judicial system in Kosovo) to approve his request for the appointment of the Institute of Economy and Energy d. d Zagreb, Croatia, to give professional opinion in his case.

15. On 3 July 2014, the Basic Court in Prishtina by Decision C. No. 625/2013 (rendered out of the session of the main hearing), approved the Applicant's proposal for appointment of the Institute of Economy and Energy d. d Zagreb, Croatia, to give professional opinion in his case.

16. The claimant (Banja e Kllokotit) also proposed to the Basic Court in Prishtina the assignment of experts of the electro-technical field, in order to determine the factual situation caused by the fire in the premise of the claimant.

17. On 21 July 2015, the Basic Court by Decision C. No. 625/2013 (rendered out of the main trial), approved the proposal of the claimant (Banja e Kllokotit) for assigning experts proposed by them. The Basic Court also explained that, regarding the experts proposed by the Applicant was notified by the Ministry of Justice that the Minister is competent to act upon the request of the Basic Court. The Basic Court informed the Applicant about the proposal to propose local experts, as their proposal for appointment of international experts had failed, otherwise their proposal would be considered withdrawn.

18. On 8 March 2016, the Basic Court in the retrial proceeding rendered Judgment C. No. 625/2013, where it partially approved the statement of claim of the claimant and obliged the Applicant to pay the amount of € 989, 466.15 within seven (seven) days. The Basic Court, among other things, explained that the Applicant's request for international expertise was not realized because the Ministry of Justice is not competent to act upon the request of the Basic Court, therefore, this court assigned local experts in the respective fields.

19. Against this decision, the Applicant filed an appeal with the Court of Appeals, alleging an essential violation of the provisions of the contested procedure,

erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

20. On 3 October 2016, the Court of Appeals by Judgment Ae. No. 90/2016, rejected as ungrounded the Applicant's appeal, while it upheld the aforementioned Judgment, finding that the Basic Court had correctly applied the procedural law, correctly applied the substantive law and correctly and completely determined the factual situation.

21. Against this decision, the Applicant submitted a revision to the Supreme Court, alleging essential violation of the challenged procedure provisions and erroneous application of the substantive law, with the proposal that the revision should be approved, both judgments be modified and the claimant's statement of claim be rejected, or the latter be quashed and the case be remanded to the first instance court for retrial.

22. On 31 May 2017, the Supreme Court by Judgment E. Rev. 47/2017 rejected as ungrounded the revision filed by the Applicant against the decisions of the lower instance courts. The Supreme Court approved the decisions of the lower instance courts, stating that there is no essential violation of the procedural law and that the substantive law is properly applied. The Supreme Court, among other things, stated that from the expert report results that the cause of the damage suffered by the claimant (Banja e Kllokotit) was the frequent ocillation in the voltage of the electrical energy.

23. Regarding the Applicant's allegation of appointment of international experts, the Supreme Court reasoned:

> *"The respondent proposed that the expertise is conducted by the Institute for Economy and Energetic in Zagreb which was also granted by the first instance court. However, due to inability to conduct the expertise at this institute, the respondent, by a submission presented to the first instance court on 15 December 2014, proposed that the expertise is carried out by a group of experts composed of As. Dr. A.A., G.K. – doctor of electronic sciences and K.K. – professor of the electrical engineering faculty. This proposal was granted by the court and the supra-expertise was conducted by aforementioned licensed experts. Therefore, allegations in the revision that the first instance court did not comply with its decision on the expertise to be carried out at the Institute for Economy and Energy in Zagreb – Republic of Croatia, do not stand. Based on Article 7 of LCP, parties have obligation to present all facts which they support their claims on and can propose evidence by which may be confirmed other facts. In respect to the respondent's fact that the loss was not caused due to fluctuations in the tension but it is result of claimant's liability, the respondent should have presented evidence and ask for expertise on its own by an institution and presents them to the court. This is in harmony with a fair trial principle."*

Applicant's allegations

24. The Applicant alleges that Article 31 [Right to Fair and Impartial Trial] of the Constitution has been violated, and requests the Court to annul the challenged judgments.

25. The Applicant further alleges that, based on Article 102 (3) [General Principles of the Judicial System] of the Constitution:*"the courts shall adjudicate based on the applicable law in the present case is not reviewed, processed and decided in accordance with the law by unilaterally addressing the allegations and evidence of the claimant."*

26. Regarding the allegation of the appointment of the international experts, the Applicant alleges that: *"the Court rendered the decision by granting the respondent's – KEK request for assigning the scientific licensed institute and appointed the Institute from Zagreb which was supposed to provide its final recommendations about the case. [...] This ruling was never implemented and as such it remained in force_as the court has erroneously submitted to the Ministry of Justice the request for international legal assistance, that the sector in question is not competent for legal assistance [...]".*

27. The Applicant also alleges that the Presiding Judge at the Supreme Court should not be part of the decision-making because of the conflict of interest because he was *"a claiming party in a delayed civil dispute with the respondent (the Applicant) No. (CNR 105/2005 case delegated to the Court of Deçan)".*

28. The Applicant requests the Court to: *"(i) declare the Referral admissible; (ii) annul the decisions of the regular courts; and (iii) to oblige for a new judicial process in accordance with the law by which a decision on expertise by the licensed scientific institute will be implemented and where the applicable law will be taken to divide the area of responsibility, and to be obliged by the court to treat and justify crucial evidence related to voltage measurements and opinions of licensed international experts [...]".*

Admissibility of Referral

29. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further specified in the Law and the Rules of Procedure.

30. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".

31. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

"[...]
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".

32. The Court further refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 48

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision".

33. The Court also takes into account Rule 36 (2) (d) of the Rules of Procedure, which specifies:

"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
d) the Applicant does not sufficiently substantiate his claim."

34. In the present case, the Court notes that the Applicant has exhausted all legal remedies in accordance with paragraph 7, Article 113 of the Constitution; and that the Referral was submitted within 4 (four) month legal deadline, as provided for in Article 49 of the Law.

35. The Court must further establish whether the Applicant has specified and substantiated his constitutional allegations as established in Article 48 of the Law and further specified in Rule 36 (2) (d) of the Rules of Procedure.

36. Finally, the Court refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

37. In this regard, the Court as a preliminary matter notes that the Applicant alleges that one of the judges of the Supreme Court should not be a part of the decision-making because of the conflict of interest, because the judge in question was *"a claimant in a civil dispute prolonged with the respondent (the Applicant) [...]"*.

38. The Court considers that this allegation of the Applicant raises doubts as to the impartiality of the court, namely a judge, in the adjudication of the case.

39. The Court points out that the impartiality of a judge implies a lack of prejudice or partiality and can be tested in different ways (see *Wettstein v. Switzerland*, case 33958/96, paragraph 44, ECtHR 2000-XII and also see *Micallef v. Malta*, ECtHR No. 17056/06, paragraph 93/2009).

40. In this connection, the Court notes that the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long established in the case-law of the Court of the European Court of Human Rights (ECtHR) (see Case *Driza v. Albania*, ECtHR, Appeal no. 33771/02, Judgment of 13 November 2007, paragraph 75).

41. Further, referring to the substantive case law of the ECtHR, the Court notes that there are generally two situations when the question of the impartiality of the court is raised. The first situation is of a functional nature where the behavior of a judge does not cause suspicion when performing various functions within a judicial proceeding by the same judge (see the case *Piersack v. Georgia*, ECtHR, Appeal No. 8692/79, Judgment of 1 October 1982, paragraphs 28-32), or the hierarchical or similar relation of the judge to another party involved (see Case *Grieves v. United Kingdom*, ECtHR, Appeal No. 57067/00, Judgment of 16 December 2003, para. 74- 91), raises doubts about the impartiality of the Court. The second situation is personal (subjective) and relates to the behavior of the judge in the present case.

42. In the light of this explanation, the consecutive exercise of judicial and advisory functions within an authority may, under certain circumstances, raise issues within the scope of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR), as regards the impartiality of the authority from an objective point of view (see: case *Procola v Luxembourg*, ECtHR, Appeal No 14570/89, Judgment of 28 September 1995, paragraph 45).

43. The question is whether there was an exercise of judicial and advisory functions with respect to the "same case", "same decision" or "similar matters" (see case *Kleyn and Others v. The Netherlands* [GC], Appeal No. 39343/98 39651/98 43147/98 46664/99, Judgment of 6 May 2003, paragraph 200, see also case *Sacilor Lormines v. France*, ECtHR, Appeal No. 65411/01, Judgment of 9 November 2006, paragraph 74 – no violation).

44. In the present case, the Court notes that the judge of the Supreme Court mentioned by the Applicant is a private claimant to the Applicant in another and completely different case. Therefore, it cannot be alleged that he exercised

any function, whatever, in the same judicial process, namely in relation to the same case, the same decision or similar matter.

45. In addition, according to the ECtHR case law, the fact that Judge did not withdraw from dealing with the civil action on appeal following his earlier participation in another related set of civil proceedings, does not constitute the required proof to rebut the presumption of impartiality (see *Golubović v. Croatia,* ECtHR, Appeal No. 43947/10, Judgment of 27 November 2012, paragraph 52).

46. In this respect, the ECtHR case law proposes that in such cases it must be determined whether there are ascertainable facts which may raise doubts as to the impartiality of the judge. When this decision is applied to a trial panel, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. This means that it is not decisive whether in a given case there is a legitimate reason to fear that a particular judge or body lacks impartiality. What is decisive is whether this fear can be held to be objectively justified (see cases *Wettstein v. Switzerland,* ECtHR, Appeal No. 33958/96, Judgment of 21 December 2000, paragraph 44, *Pabla Ky v. Finland,* ECtHR, appeal no. 47221/99, Judgment of 22 June 2004 paragraph 30, *Micallef v. Malta* [GC], appeal no. 17056/06, Judgment of 15 October 2009, paragraph 96).

47. Consequently, the Court considers that the Applicant's allegation of impartiality of the judge is only declarative, it is not clear and it is not supported by evidence and arguments, as required by Article 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure. Therefore, this allegation is manifestly ill-founded.

48. Regarding the Applicant's allegation that the international experts were not heard, the Court notes that: (i) non-hearing of international experts cannot be attributed to the courts, because the case file indicate that this has been the case for objective reasons outside control of the respective courts; (ii) the courts have approved the alternative proposal of the Applicant for hearing the licensed local experts; and (iii) the courts have emphasized that the Applicant has the right, based on the law, to bring evidence of the expertise that he considers relevant to his case.

49. In addition, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and to submit the arguments he considered relevant to his case at the various stages of those proceedings; he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; the factual and legal reasons against the challenged judgments were examined in detail by the regular courts; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair (See, for example, *Garcia Ruiz v. Spain,* [GC], application no 30544/96, Judgment of 21 January 1999, paragraph 29).

50. The Court states that Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECtHR, does not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provides for the Court to challenge the application of substantive law by the regular courts of a civil dispute (Constitutional Court of the Republic of Kosovo: Case no. KI142/15 Applicant: *Habib Makiqi*, Constitutional review of Judgment Rev. No. 231/2015, of the Supreme Court of Kosovo, of 1 September 2015, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

51. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and material law (See, *mutatis mutandis*, *Garcia Ruiz v. Spain [GC]*, No. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I).

52. In addition, the Constitutional Court recalls that it is not a fact-finding court and that the correct and complete determination of factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore, it cannot act as "*fourth instance court*" (see case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, in case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility, of 5 April 2012).

53. In conclusion, the Court considers that the Applicant has not substantiated allegations of violation of fundamental human rights and freedoms guaranteed by the Constitution.

54. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, as established in Article 113.7 of the Constitution, foreseen by Article 48 of the Law and as further specified in Rule 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, on 6 December 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional**

Bekim Sejdiu Arta Rama-Hajrizi