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

Prishtina, 6 March 2020
Ref. no.:RK 1523/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI142/19

Applicant

Ge Group l.l.c.

Constitutional review of Judgment E. Rev. No. 9/2019 of the Supreme Court of Kosovo of 23 May 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by company "Ge Group l.l.c." with seat in Prizren, represented by Ruzhdi Berisha, a lawyer from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [E. Rev. No. 9/2019] of the Supreme Court of 23 May 2019, in conjunction with Judgment [Ac. No. 238/2016] of the Court of Appeals of 9 November 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions, which allegedly violate the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 [Jurisdiction and Authorized Parties] and 21.4 [General Principles] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 9 September 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 10 September 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

7. On 8 October 2019, the Applicant was notified about the registration of the Referral and a copy of the Referral was sent to the Supreme Court.

8. On 5 February 2020, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. Based on the documents included in the Referral, it follows that on 10 November 2008, the Applicant and the Ministry of Transport and Post-Telecommunications (hereinafter: the MTPT) entered into an employment contract for the construction of the road Polisht- Hoqë of City -Jeshkovë in the amount of 599,808.24 euro. In order to construct the road in question, the Applicant verbally contracted the company "NEPB Etem Trade" from Prizren for the purpose of supplying material and excavation according to the work dynamics foreseen in the contract concluded with the MTPT.

10. Due to a dispute regarding the work to be done, the Applicant filed a statement of claim with the Basic Court in Prizren (hereinafter: the Basic Court) against the company "NEPB Etem Trade" claiming that due to unjust acquisition the company in question, should pay the Applicant the amount of 43, 536, 55 euro with an annual interest rate of 4%. "NEPB Etem Trade" company responded that the Applicant's monetary claim was statute-barred.

11. On 17 March 2016, the Basic Court by Judgment [III. C. No. 650/2013] upheld in entirety the Applicant's statement of claim and ordered "NEPB Etem Trade" to pay the amount of 43, 536, 55 euro with legal interest within seven (7) days of the date the judgment becomes final, under the threat of forced execution. The Basic Court found, *inter alia*: (i) that the responding party "NEPB Etem Trade" had for a long time failed to supply the Applicant with materials and work performed; (ii) that the Applicant was forced to find another contractor for the execution of the contract with the MTPT; and (iii) that the Applicant had paid the responding party "NEPB Etem Trade" an amount of € 43,536.55 without basis which means that it has been enriched unlawfully. The Basic Court also added that the allegation of the responding party for statutory limitation of the monetary claim is unfounded because it is not about a payment of debt but about acquisition without any legal basis referring to the provision of Article 371 of the LOR of 1978.

12. On an unspecified date, the respondent "NEPB Etem Trade" filed an appeal with the Court of Appeals alleging a violation of the procedural provisions, erroneous and incomplete determination of factual situation, erroneous application of substantive law, with a proposal that the appeal be approved in entirety, the Applicant's statement of claim be rejected in entirety and the judgment of the Basic Court be quashed or modified. The Applicant requested that the appeal of the responding party be rejected as ungrounded and that the challenged Judgment of the Basic Court be upheld.

13. On 9 November 2018, the Court of Appeals by Judgment [Ac. No. 238/2016] approved as grounded the appeal of the responding party, modified the judgment of the Basic Court and rejected as ungrounded the Applicant's statement of claim to oblige the responding party to pay the amount of 43, 536, 55 euro with an annual interest rate of 4%. The Court of Appeals held that the judgment of the Basic Court cannot be approved as fair and lawful because it was based on irrelevant facts and erroneous interpretation of the legal provisions. The Court of Appeals, *inter alia*, explained: (i) that the Basic Court erroneously applied the provisions of substantive law because in the present case Article 371 is not applied but Article 374 of the LOR, because the claims for expenses are prescribed within three (3) years ; (ii) that in the present case the Applicant has filed the statement of claim after four (4) years and eight (8) months; (iii) that in the present case it is not about unjust acquisition because there is a legal basis and that transactions between the parties have been executed through their respective invoices and bank transactions; (iv) under Article 67 of the LOR, in the sale of goods and services it is not necessary to enter into any formal contract; (v) a contractual relationship has been established on the basis of Articles 27 and 67 of the LOR and the legal basis of the transactions exists, thereby the provisions for unjust acquisition cannot be applied and, (vi) under Article 210.2 of the LOR the essential requirement for

unjust acquisition is that the enrichment is without legal basis, and in the present case, the legal basis is substantiated by the relevant invoices and bank transactions between litigating parties.

14. On 21 December 2018, the Applicant filed a request for revision with the Supreme Court alleging violation of procedural provisions, erroneous and incomplete determination of factual situation, erroneous application of substantive law with the proposal that the revision be approved in entirety. whereas the judgment of the Court of Appeals be modified and the judgment of the Basic Court be upheld.

15. On 23 May 2019, the Supreme Court by Judgment [E. Rev. No. 9/2019] rejected as ungrounded the Applicant's revision filed against the Judgment of the Court of Appeals [Ac. No. 238/2016] of 9 November 2018. The Supreme Court upheld the findings of the Court of Appeals regarding the interpretation and application of the relevant provisions of the LOR to determine the issue of the statutory limitation of the statement of claim and the legality of the contract between the litigants.

Applicant's allegations

16. The Applicant alleges that the Judgment of the Supreme Court [E. Rev. No. 9/2019] of 23 May 2019 was rendered in violation of its fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 of the ECHR.

17. As to the violation of Article 24 of the Constitution, the Applicant alleges: "*By the very fact of rendering the judgment, the constitutional review of which is required by this complaint, contrary to the legal provisions of Article 210 paragraph 2 and 4 and of Article 371 of the LOR, the Applicant is placed in an unequal position before the law with the responding party*".

18. As to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges: "*The Judgment of the Supreme Court was rendered in violation of the legal provisions of Article 210 paragraphs 2 and 4 and Article 371 of the LOR [...] so that it was rendered in violation of Article 6 of the ECHR*".

19. Finally, the Applicant requests the Court to: (i) declare his Referral admissible; (ii) find that there has been a violation of Articles 24, 31 and 54 of the Constitution in conjunction with Article 6 of the ECHR and, (iii) annul the judgment of the Supreme Court and remand the case to the Court of Appeals for retrial.

Admissibility of the Referral

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

21. 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."*

22. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which establishes: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

23. In addition, the Court also refers to the admissibility requirements as defined by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

> *"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
[Deadlines]

> *"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...".*

24. In assessing the admissibility requirements as mentioned above, the Court initially notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (see case of the Constitutional Court No. KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

Therefore, the Court finds that the Applicant is an authorized party challenging the act of public authority, namely the Judgment of the Supreme Court [E. Rev. No. 9/2019] of 23 May 2019, after exhausting all legal remedies provided by law.

25. The Applicant also clarified the rights and freedoms it claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

26. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph 2 of Rule 39 of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

> *"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."*

27. The Applicant alleges that the decisions of the Court of Appeals and of the Supreme Court were rendered in breach of Articles 24, 31 and 54 of the Constitution in conjunction with Article 6 of the ECHR, because the courts have erroneously interpreted and applied legal provisions 210 (2) and 4 and 371 of the LOR.

28. The Court will further deal with the Applicant's allegations, applying the ECtHR case law, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

29. The Court notes that the case law of the ECtHR states that the fairness of a proceeding is assessed looking at the proceeding as a whole (see, in this regard the ECtHR, case *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, paragraph 68). Therefore, when assessing the Applicant's allegations, the Court will also adhere to this principle (See cases of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

30. As to the Applicant's allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court notes that the Applicant built its case on the basis of legality, namely, the determination of facts and erroneous interpretation of laws, and more specifically the LOR. The Court recalls that these allegations relate to the domain of legality and as such they do not fall within the jurisdiction of the Court and, therefore, in principle, cannot be considered by the Court (see, among other, case of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35).

31. The Court has consistently reiterated that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (*legality*), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (*constitutionality*). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (See ECtHR case, *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and see, also cases of the Court KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 29; KI06/17, Applicant *L.G. and five others*, cited above, paragraph 37; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility of 19 June 2018, paragraph 57).

32. The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual state and the application of substantive law (see ECtHR case *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the Court cases KI06/17, Applicant: *L.G. and five others*, cited above, paragraph 38; and KI122/16, cited above, paragraph 58).

33. However, the Court emphasizes that the case law of the ECtHR and of the Court also determines the circumstances under which exceptions to this paragraph are to be made. The ECtHR emphasized that while it primarily pertains to the domestic authorities, that is, the courts, to resolve problems of interpretation of the legislation, the role of the Court is to make sure or verify that the effects of this interpretation are compatible with the ECHR (see the ECtHR case *Miragall Escolano and Others v. Spain,* Judgment of 25 May 2000, paragraphs 33-39).

34. Therefore, although the role of the Court is limited in terms of the assessment of the interpretation of the law, it must make sure and take action when it notices that a particular court has *"applied the law in an obviously arbitrary manner"* which in the a particular case could have resulted in *"arbitrary"* or *"manifestly unreasonable"* conclusions for the Applicant (see, in this regard, ECtHR cases *Anheuser-Busch Inc. v. Portugal*, Judgment of 11 January 2007, paragraph 83; and see also the cases of Court KI06/17, Applicant *LG and five others*, cited above, paragraph 40; KI122/16, cited above, paragraph 59).

35. In the circumstances of the present case, according to the Applicant, the Supreme Court and the Court of Appeals have erroneously interpreted the provisions of the LOR regarding the statutory limitation of the statement of claim.

36. The Court recalls that the Court of Appeals found: (i) that the Basic Court erroneously applied the provisions of substantive law because in the present case Article 371 is not applied but Article 374 of the LOR, because the claims for expenses are prescribed within three (3) years ; (ii) that in the present case the Applicant has filed the statement of claim after four (4) years and eight (8) months; (iii) that in the present case it is not about unjust acquisition because

there is a legal basis and that transactions between the parties have been executed through their respective invoices and bank transactions; (iv) under Article 67 of the LOR, in the sale of goods and services it is not necessary to enter into any formal contract; (v) a contractual relationship has been established on the basis of Articles 27 and 67 of the LOR and the legal basis of the transactions exists, thereby the provisions for unjust acquisition cannot be applied and, (vi) under Article 210.2 of the LOR the essential requirement for unjust acquisition is that the enrichment is without legal basis, and in the present case, the legal basis is substantiated by the relevant invoices and bank transactions between litigating parties.

37. The Court also refers to the relevant part of the judgment of the Supreme Court, which provides:

> *"The Supreme Court approves as fair and grounded the legal position of the second instance court regarding the rejection as ungrounded of the claim of the claimant, due to the fact that a contractual relationship was established between the parties, the claimant has verbally contracted with the respondent and agreed that the respondent should supply it with material necessary for the development of the construction work on the said road, under this contract, the respondent sent part of the material, on the basis of invoice and bank transactions. According to Article 67 of the LOR, it is not necessary to enter into any formal contract in the circulation of goods and services. In the present case within the meaning of Articles 26 and 67 of the LOR, the contractual relationship has been established and the legal basis for the transactions exists [...] there can be no unjust acquisition as long as there has once been a legal basis in the relationship between the parties, for this reason the legal position of the court of second instance that it cannot be decided according to the institute of unjust acquisition, as regulated by Article 210 par. 1, 2 and 4 of the LOR (1978). This provision may apply only if all the elements of Article 210 par. 2 of the LOR are met in a cumulative manner. The basic condition for ungrounded acquisition under this provision is that the acquisition be without legal basis, in this case this condition has not been fulfilled and consequently was erroneously applied by the court of first instance [...] in the present case from the case file it follows that the last contractual relationship between the litigating parties was concluded on 27.12.2008, while the claimant on 23.09.2013 filed a proposal considered the claim for the payment of debt in the amount of € 43,536,55, which results in the prescription of the claim of the claimant from the aforementioned agreement on circulation of goods, because over 4 years and 8 months have elapsed since the last report between the parties and up to the date of filing the claim. Therefore, the first instance court has erroneously held that the contested debt resulted from the unjust acquisition for which claims under this legal basis is to be applied 10 year general statutory limitation period under Article 371 of the old LOR [...] in the revision is stated in an ungrounded manner that the second instance court has incorrectly applied the substantive law under Article 374 of the LOR (1978) since the mutual claims of the subjects on the movement of goods and services do not relate to socially-legal persons; but to the claims of natural persons. This allegation is ungrounded due to the fact that in the*

present case the dispute regarding the mutual claims of the entities on the movement of goods and services does not arise between natural persons as stated in the revision since the claimant and the respondent are registered as business organizations based on the Law on Business Organizations of the Assembly of Kosovo, which are responsible for all obligations imposed by laws or contracts".

38. The Court further reiterates that, in principle, the interpretation of the law is the responsibility of the regular courts. Furthermore, the "*fairness*" required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is not "*substantive*" fairness, but "*procedural*" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court. (see, in this regard, the case of the Court KI42/16 Applicant: *Valdet Sutaj*, Resolution on Inadmissibility of 7 November, paragraph 41 and other references therein).

39. The Court also reiterates that the Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses. (see, in this regard, cases of the Court KI118/17 Applicant *Şani Kervan and others*, Resolution on Inadmissibility, paragraph 36; and KI142/15, Applicant *Habib Makiqi*, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

40. Regarding the procedural fairness, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that it was able to adduce the arguments and evidence it considered relevant to its case at the various stages of those proceedings; that it 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 its case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. (See, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, *Garcia Ruiz v. Spain*, ECtHR no. 30544/96 of 21 January 1999, paragraph 29).

41. As to the allegation of violation of equality before the law as guaranteed by Article 24 of the Constitution, the Court notes that based on the case law of the ECtHR, generally, in order for an issue to arise under Article 14 [Prohibition of discrimination] of the ECHR there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see ECtHR case, *X and Others v. Austria*, Judgment of 19 February 2013, paragraph 98). However, not every difference in treatment will amount to a violation of Article 14. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see ECtHR case, *Guberina v. Croatia*, Judgment of 22 March 2016, paragraph 69 and other references therein).

42. In the present case, the regular courts have explained what legal provisions should be interpreted and applied to resolve the Applicant's case, what is legal relationship between the litigants, what is a contract in a legal relationship between the litigants, and how the Applicant's statement of claim became statute-barred.

43. Therefore, the Court considers that the Applicant has failed to prove that he was treated differently in relation to other persons in similar or comparable situations, as required by Article 24 of the Constitution in conjunction with Article 14 of the ECHR.

44. The Court also notes that the allegation of violation of Article 54 of the Constitution has been merely mentioned by the Applicant without providing any evidence to substantiate the allegation in question.

45. The Court finally reiterates that the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for violation of the constitutional right to fair and impartial trial, the right to equality before the law or the violation of judicial protection of rights (see ECtHR case, *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

46. Therefore, the Referral is manifestly ill-founded on constitutional basis, and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 5 February 2020, 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 Court**

Radomir Laban Arta Rama-Hajrizi

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