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

Prishtina, on 10 August 2020
Ref.No.:RK 1600/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI79/19

Applicant

N.T.P. Arta-Impex

Constitutional review of Judgment E. Rev. No. 7/2019 of the Supreme Court of Kosovo of 2 April 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 the company N.T.P. Arta-Impex with owner Besim Çallaku from Kaçanik (hereinafter: the Applicant), represented by Valon Hasani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [E. Rev. No. 7/2009] of the Supreme Court of 2 April 2019 in conjunction with the Judgment [Ac. No. 222/2018] of the Court of Appeals of 4 December 2018, and the Judgment [I.EK. No. 434/2016] of the Basic Court in Prishtina - Department for Commercial Matters of 4 June 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] 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 Articles 113 (7) [Jurisdiction and Authorized Parties] 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 20 May 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 23 May 2019, the President of the Court appointed Judge Remzije Istefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

7. On 2 September 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 1 July 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 submitted documents, it results that on 18 March 1998, the Applicant entered into a contract with the cement factory "SOE Sharr Çimentorja" from Hani i Elezit for the supply of raw materials and repromaterials. The contract in question provided that the Applicant would supply the factory "SOE Sharr Çimentorja" with a quantity of material known as "Opalit/Tuf" and in return would receive an equivalent value of cement from the factory "SOE Sharr Çimentorja".

10. On 13 June 2000, the Kosovo Trust Agency (hereinafter, KTA) as the legal administrator of the cement factory "SOE Sharr Çimentorja" entered into an agreement with another company called "Sharr Beteilinginungs" for the lease, management and operation of the factory of cement "SOE Sharr Çimentorja" in which case the KTA was the lessor and "Sharr Beteilinginungs" was the lessee. In the lease agreement for the, management and operation of the cement factory "SOE Sharr Çimentorja", among other things, it was stated that the lessee ("Sharr Beteilinginungs") will have no obligation towards credit claims and in case of addressing any creditor the only thing all it will do is to direct the creditor to the lessor (KTA).

11. On 29 November 2005, the Applicant filed a lawsuit with the Special Chamber of the Supreme Court of Kosovo (hereinafter: the SCSC) against the respondents: the KTA, the cement factory "SOE Sharr Çimentorja" from Hani i Elezit and "Sharr Beteilingungs" from Hani i Elezit requesting the payment of the main debt in the amount of 711.000.00 euro; the amount of 106,650.00 euro in the name of legal interest of 3%, the amount of 497,700.00 euro of penalty interest of 14% and the amount of 593,394.40 euro in the name of lost profit.

12. On 20 January 2006, after having considered the Applicant's lawsuit, the SCSC by Decision [SCC-05-0532] dismissed as inadmissible the lawsuit filed against the KTA, whereas the lawsuit against two other respondents ("SOE Sharr Çimentorja" from Hani i Elezit and "Sharr Beteilingungs" from Hani i Elezit) forwarded to the District Commercial Court in Prishtina. The SCSC reasoned that pursuant to Section 18 of UNMIK Regulation 2002/12, the KTA could not be liable for the debts of any enterprise and that the lawsuit against it was dismissed as inadmissible. Regarding the lawsuits against "SOE Sharr Çimentorja" from Hani i Elezit and "Sharr Beteilingungs" from Hani i Elezit, the SCSC found that pursuant to Section 17 (b) of UNMIK Administrative Direction 2003/13, the SCSC on its own initiative may refer the case to the competent court.

13. On 2 June 2006, the KTA filed a response to the lawsuit with the District Commercial Court in Prishtina, where it announced that pursuant to Section 29.2 of UNMIK Regulation 2002/12 and in defense of the rights of the respondent "SOE Sharr Çimentorja" agrees to accept the request for the main debt in the amount of 711.000.00 euro, but not the requests for legal interest, penalty interest and lost profit.

14. On 16 June 2006, the District Commercial Court in Prishtina, acting in accordance with the Decision of the SCSC with a partial Judgment II. C. No. 51/006 obliged the respondent cement factory "SOE Sharr Çimentorja" from Hani i Elezit to pay the Applicant the amount of the main debt in the amount of 710.730.10 euro within eight (8) days, under threat of forced execution. As for issues of regular interest, penalty interest and compensation of damage from the basis of the lost profit, the District Commercial Court accepted the withdrawal of the lawsuit by the claimant against the first respondent "SOE Sharr Çimentorja" from Hani i Elezit, so that, on that issue the court will decide with a subsequent judgment between the Applicant and the second respondent "Sharr Beteilinginungs" from Hani i Elezit.

15. On 29 February 2008, the Applicant filed a lawsuit with the District Commercial Court in Prishtina against the respondent "Sharr Beteilinginungs" from Hani i Elezit on behalf of the regular interest, the penalty interest and the lost profit.

16. On 27 June 2008, the District Commercial Court by Judgment [II. C. No. 51/2006]: (i) partially approved the statement of claim of the Applicant and obliged the respondent "Sharr Beteilinginungs" from Hani i Elezit to pay the Applicant on behalf of the regular interest of 5% the amount of 76.500.00 euro, within eight (8) days under threat of forced execution; (ii) rejected as ungrounded the Applicant's statement of claim to oblige the respondent "Sharr Beteilinginungs" from Hani i Elezit pay the amount of 150.00.00 euro on behalf of the penalty interest; and, (iii) rejected as ungrounded the part of the statement of claim for payment of the amount of 214.00.00 euro in the name of the lost profit. The District Commercial Court also determined that an appeal against its judgment within 60 days was allowed to the SCSC.

17. On 20 November 2011, the responding party "Sharr Beteilinginungs" from Hani i Elezit filed an appeal with the SCSC against the aforementioned judgment alleging essential violation of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

18. On 5 September 2014, the Appellate Panel of the SCSC (Decision AC-II-12-0180) declared itself incompetent to decide on the appeal of "Sharr Beteilinginungs" by Hani i Elezit filed against the Judgment of District Commercial Court [II. C. No. 51/2006] of 27 June 2008. The Appellate Panel of the SCSC found that the subject of the lawsuit based on the law on courts falls under the jurisdiction of the regular courts, namely this lawsuit should be reviewed by the Court of Appeals of Kosovo.

19. On an unspecified date, the respondent "Sharr Beteilinginungs" from Hani i Elezit but also the Applicant filed their appeals with the Court of Appeals against the Judgment [II. C. no. 51/2006] of the District Commercial Court of 27 June 2008, alleging essential violation of the contested procedure, erroneous and incomplete determination of factual situation as well as erroneous application of the substantive law.

20. On 5 September 2016, the Court of Appeals by Decision [Ac. No. 151/2014], quashed the Judgment of the District Commercial Court [II. C. No. 51/2006] of 27 June 2008 and remanded the case for retrial and reconsideration. The Court of Appeals found: (i) that the challenged judgment was characterized by essential violation of the provisions of the contested procedure under Articles 182 (1) and 182 (2) n); (ii) the judgment has flaws due to which it cannot be examined; (iii) the judgment is incomprehensible and contradictory; and that, (iv) the reasons for the decisive facts have not been indicated, namely the reasons given are unclear.

21. Based on the available material, the Court notes that the Applicant in the retrial of the case in the Basic Court in Prishtina, filed a lawsuit against the respondent "Sharr Beteilingungs GMBH", for compensation of the amount of

711.000.00 euro, on behalf of the main debt and the amount of 593,994.40 euro in the name of lost profit. Also, the Applicant in the retrial proposed the administration of evidence of forensic financial expertise.

22. On 4 June 2018, the Basic Court in Prishtina-Department for Commercial Matters by Judgment [I. EK. No. 434/2016] rejected as ungrounded the statement of claim of the Applicant to oblige the respondent "Sharr Beteilinginungs" from Hani i Elezit for compensation of the amount of 711,000.00 euro, on behalf of the basic debt and the amount of 593,994.40 euro, on behalf of the lost profit After assessing the evidence, the Basic Court, *inter alia*, found: (i) that it was not disputable that the Applicant and the cement factory SOE "Sharr Çimentorja" from Kaçanik in 1998-99 were in a contractual relationship, and the Applicant supplied the Sharr Cement Factory with raw material for the production of cement called "Tuf", while the latter had undertaken obligations to compensate the Applicant with cement; (ii) that on 13.06.2000, the KTA as the legal administrator of the cement factory SOE "Sharr Çimentorja" entered into an agreement with "Sharr Beteilinginungs" for the lease, management and operation of the cement factory "SOE Sharr Çimentorja", in which case KTA was a lessor and "Sharr Beteilinginungs" was a lessee; (iii) that the lease agreement, management and operation of the cement factory "SOE Sharr Çimentorja", "Sharr Beteilinginungs" did not accept the obligations for the payment of previous debts. Regarding the previous debts, the Court of Appeals added that in chapter four point 4.2 of the agreement for the lease, management and operation of the cement factory "SOE Sharr Çimentorja" it was stated that UNMIK will reasonably try to protect the work of the factory from the claims of any creditor, which belong to the period before the entry into force of the lease agreement. It was also stated that the lessee ("Sharr Beteilinginungs") will have no obligation to the creditor claims and in case it is addressed by any creditor the only thing it will do is to direct the creditor to the lessor (KTA). The Basic Court found that the responding party "Sharr Beteilinginungs" lacks passive legitimacy, namely it lacks responsibility for the repayment of eventual debts or interest on penalty interest or lost profits. The Basic Court found that Chapter 4 of the lease agreement, point 4.2 is clearly defined that "Sharr Beteilinginungs", as a lessee, has no obligation regarding the preliminary debts of the cement factory "SOE Sharr Çimentorja".

23. With regard to the expertise of experts, the Basic Court added: *"[...] the claimant's proposal was approved and it was decided to present evidence of forensic financial expertise. The forensic expert appointed V.I., has prepared the expertise report, on which the respondent has submitted remarks and at the same time has submitted a proposal for a new financial expertise. The respondent's proposal was approved by the court and R.B. was appointed as a financial forensic expert, who also prepared the expertise report and submitted it to the court [...] then the procedure continued with the reading and administration of evidence [...] expertise from financial expert V.I., [...] financial expertise from expert R.B., business data NTP Arta Impex".*

24. On 4 July 2018, the Applicant filed an appeal with the Court of Appeals alleging essential violation of the contested procedure, erroneous and incomplete determination of factual situation as well as erroneous application of the substantive law. The essence of the Applicant's complaint was to oblige

"Sharr Beteilinginungs" "*to pay the damage in full in the amount of 1,141,550.02 euro based on two expertise issued by the Court*".

25. On 4 December 2018, the Court of Appeals by Judgment [Ae. No. 222/2018] rejected the Applicant's appeal as ungrounded and upheld the Judgment [I. EK. No. 434/2016], of the Basic Court of 4 June 2018. The Court of Appeals assessed that the challenged judgment is legally correct and that it was not characterized by essential violation of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law. Regarding the allegation for payment of eventual debts, obligation of penalty interest, and lost profit, the Court of Appeals upheld the position of the Basic Court that the responding party "Sharr Beteilinginungs" lacks passive legitimacy, namely lacks the liability for repayment of eventual debts or liabilities for late interest or lost profit. The Court of Appeals - like the Basic Court - found that in Chapter 4 of the lease agreement, point 4.2 clearly defines that "Sharr Beteilinginungs", as a lessee, has no obligation regarding the preliminary debts of the cement factory "SOE Sharr Çimentorja".

26. On 8 January 2019, the Applicant filed a request for revision with the Supreme Court alleging erroneous application of substantive law and essential violation of procedural provisions, proposing that the judgments of the lower instance courts be modified so that the statement of claim is approved based on the amount determined by the expert R.B, in the name of lost profit and to pay the costs of the contested procedure. The Applicant proposed as an alternative that the revision be approved as grounded and that the judgments of the Basic Court and the Court of Appeals be annulled and that the case be remanded for retrial to the first instance court.

27. On 15 January 2019, the Applicant completed his revision regarding the claims for lost profit, the amount of damage suffered, violation of Article 8 of the LCP, administration of evidence (email dated 31.05.2016) for what the Court of Appeals had not stated whether it had given the trust or not and not considering the expertise of experts V.I., and R.B.

28. On 24 January 2019, the responding party "Sharr Beteilinginungs" filed a response to the Applicant's revision with a proposal that the revision be dismissed as inadmissible as it relates exclusively to allegations of erroneous and incomplete determination of factual situation and that the challenged judgment be upheld.

29. On 29 January 2019, the Applicant filed a counter-response to the respondent's response, alleging that the lower instance courts had erroneously applied the substantive law because, *inter alia*, they did not explain: (i) whether the responding party "Sharr Beteilinginungs" acquired the right of ownership over the raw material found in the factory stocks supplied by the Applicant upon the conclusion of the commercialization contract; (ii) in accordance with the provisions of the commercialization contract, whether "Sharr Beteilinginungs" purchased the raw material in stock from UNMIK; and (iii) whether "Sharr Beteilinginungs" was obliged to return or pay the raw material owned by the Applicant to the Applicant; (iv) as the respondent has not paid nor returned the raw material, has it caused damage to the claimant in

the form of lost profit?; and (v) when the detrimental action of Sharr Beteilinginungs against Arta Impex was taken?.

30. On 2 April 2019, the Supreme Court by Judgment [E. Rev. No. 7/2019] rejected as ungrounded the Applicant's revision filed against Judgment [Ae. No. 222/2018] of the Court of Appeals, of 4 December 2018. The Supreme Court found that the challenged judgments of the lower instance courts have correctly and completely determined the factual situation, have correctly applied the substantive law and that they contain sufficient reasons for the relevant facts for a fair trial of this legal matter. Regarding the claim for the main debt, penalty interest, lost profit, the Supreme Court approved the position of the lower instance courts than the responding party "Sharr Beteilinginungs" lacks passive legitimacy, namely it lacks the liability for repayment of eventual debts or penalty interest or lost profit. The Supreme Court - like the lower instance courts - found that in Chapter 4 of the lease agreement, point 4.2 clearly defines that "Sharr Beteilinginungs", as a lessee, has no obligation regarding the preliminary debts of the cement factory "SOE Sharr Çimentorja".

31. Regarding the completion of the revision submitted by the Applicant, the Supreme Court added that the administration of the evidence "email of 31 May 2016", the statement of the daily cost of the machinery, the TAK form are claims related to the determination of factual situation, for which according to Article 214 of the LCP the revision cannot be filed.

Applicant's allegations

32. The Applicant alleges that his fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) of the ECHR have been violated.

33. The Applicant, first citing Articles 154 and 155 of the old Law on Obligations, published in the Official Gazette of the SFRY (1978), which was in force at the time the disputed obligations were established between the parties which according to the Applicant "is part of Chapter 2 of Chapter II of the new Law on Obligations (Law No. 04/L-077) alleges that "*it can be concluded that the obligation may arise from a contractual relationship between the parties (Contract), but may also arise from a non-contractual relationship between the parties (Damage, Profit without grounds, Expansion of foreign affairs without order and unilateral expression of will)*".

34. The Applicant specifically states: "*Throughout the contested procedure conducted before the three court instances (Basic Court, Court of Appeals and Supreme Court) the claimant has repeatedly requested that his statement of claim for damages be approved, in the form of lost profit, which is a non-contractual source of obligation, and the period after the signing of the Commercialization Contract, while the regular courts in all three instances have decided to reject the claimant's request on the grounds that there was no contractual relationship between the socially-owned enterprise and the respondent to take over the debts before signing of the Commercialization Contract*".

35. The Applicant further states that while "*compensation for the contractual obligation (compensation of debt) was established by the District Commercial Court in Prishtina with Partial Judgment II. C. No. 51/2006 thus obliging SOE Sharr to pay the amount of 710,320.72 euro, "the procedures for compensation of the non-contractual damage continued "against Sharr Beteilignungs GMBH but that they were rejected by the District Commercial Court in Prishtina (by Judgment II. C. No. 51/2006) without giving any reason for this rejection*".

36. According to the Applicant "*even in the retrial procedure before the Basic Court in Prishtina - Department for Commercial Matters (Judgment I.EK. No. 434/2016, of 04.06.2018)*" and "*the Court of Appeals also gives the same reasoning that there is no contractual relationship by which the obligations are transferred by SOE Sharr to Sharr Beteiligungs GMBH, completely distorting the statement of claim of the claimant*".

37. The Applicant alleges that the Supreme Court by Judgment [E. Rev. No. 7/2009] committed the same violations as the lower court because it only repeated their reasoning. The Applicant further alleges that the Supreme Court only casually dealt with the arguments presented in the revision because the legal provisions mentioned by the Applicant were based on the old law on the obligational relationship published in the Official Gazette of the SFRY, while the Supreme Court interpreted and implemented the provisions of the new law on obligational relationships (Law No. 04/L-077).

38. In this regard the Applicant states "*in the revision Arta Impex did not even claim that we are dealing with Article 17 of the new LOR, or the obligatory conclusion of the contract, but we are dealing with Article 16 of the old LOR) due to a technical error Article 17is mentioned, but from the context it can be seen that we are dealing with Article 16 of the Old Law on Obligational Relationships). Thus, the Supreme Court of Kosovo rejects a non-existent argument of Arta Impex*". The Applicant also states that "*the Supreme Court rejected another argument of Arta Impex referring to Article 154 of the New Law on Obligational Relationships, but Arta Impex in revision referred to Article 154 of the old Law on Obligational Relationships*".

39. The Applicant alleges that in his case the Supreme Court acted in violation of Article 6 (1) of the ECHR and Article 31 of the Constitution. According to the Applicant "*the notion of a fair trial requires that an appellate court that has given scarce reasoning for its decision, whether incorporating the reasoning of the lower courts, should at least address the essential issues that have been brought before that court for decision and not just supports the previous findings without any consideration [...] The Supreme Court of Kosovo does not respond to the essential and substantive issues raised by the claimant (that it was about the claim for compensation of damages caused by Sharr Beteilinginungs, after the signing of the Commercialization Contract), and in addition rejects some "arguments" which do not belong to the claimant*".

40. In support of his allegations of violation of the right to a reasoned decision, the Applicant refers to the case of the ECHR *Helle v. Finland* and the Judgment of the Court in case no. KI72/12.

41. The Applicant states that *"All three courts, in particular the decision of the Supreme Court on revision, have not complied with the standard of reasoning of the court decisions, and as such conflict with the guarantees of Article 31 of the Constitution and Article 6 of the European Convention on Human Rights"*. The Applicant also adds that *"he is aware that it is not the duty of the Constitutional Court to deal with the interpretation of legal provisions as this is the primary duty of the regular courts (*Brualla Gomezde la Torre v. Spain, Judgment of 19 December 1997, paragraph 31*)*. However, this does not apply even in cases when we have cases of manifest arbitrariness. In this connection the Applicant invokes the cases of the ECtHR *"Farbers and Harlanova v. Latvia No. 57313/00, Judgment of 6 September 2001 and Beyler v. Italy (GC) No. 33202/96, paragraph 108, in the context of Article 1 of the Protocol 1)"*.

42. The Applicant adds that *"moreover, the three courts decide on a case that was decided against SOE Sharr by a final judgment (debt), instead of deciding on the unresolved statement of claim, which was a claim for compensation of damages in the form of the lost profit. In addition to the arbitrariness shown in the review of the claimant's statement of claim we also have decision-making contrary to a decision res judicata"*.

43. The Applicant also alleges that his case was not resolved within a reasonable time as set out in ECtHR standards: *"[...] all this court procedure that started in 2005 and continued until 2019 does not meet the standards for a trial within a reasonable time [...] it took 14 years from the beginning of the contested procedure until final resolution by the Supreme Court of Kosovo"*.

44. The Applicant requests the Court: *"(i) Declare the referral admissible; (ii) To hold that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo, read together with Article 6 (1) of the European Convention on Human Rights, by the Supreme Court of Kosovo by Judgment Rev. No. 7/2009, of 02.04.2019, by the Court of Appeals of Kosovo, Judgment Ae. No. 222/2018, of 04.12.2018 and by Judgment I. Ek. No. 434/2016 of the Basic Court in Prishtina of 04.06.2018 as well as the entire procedure conducted before the regular courts; (iii) Declare invalid Judgment Rev. No. 7/2019 of the Supreme Court of Kosovo of 02.04.2019, Judgment Ae. No. 222/2018 of the Court of Appeals of Kosovo of 04.12.2018 and Judgment I.Ek. nr. 434 2016 of the Basic Court in Prishtina of 04.06.2018"*.

Admissibility of the Referral

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

46. 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".

47. The Court refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states:

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

48. The Court also 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...".

49. As to the fulfillment of the admissibility requirements as stated 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). Consequently, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment [E. Rev. No. 7/2019]

of the Supreme Court of 2 April 2019, after the exhaustion of all legal remedies provided by law.

50. The Applicant has also clarified the fundamental rights and freedoms that allegedly have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadline provided in Article 49 of the Law.

51. The Court also refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which specifies:

> *"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".*

52. The Applicant, as mentioned above, alleges that Judgment [E. Rev. No. 7/2009] of the Supreme Court was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because the Supreme Court (i) has erroneously interpreted the law, and (ii) has not reasoned its judgment. The Applicant also alleges that in its case (iii) the proceedings as a whole did not comply with the right to an effective resolution of the case within a reasonable time, and (iv) that in its case there was also a decision-making contrary to a decision *"res judicata"*.

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

(i) Allegations of erroneous application of law

54. With regard to (i) erroneous interpretation and application of the law, the allegations raised by the Applicant at the level of legality with a view to build the alleged violations are allegations which he relates to the fact that the Supreme Court in its Judgment [E. Rev. No. 7/2009] only sparsely dealt with the arguments presented in the revision because the legal provisions mentioned by the Applicant were based on the old law on the obligational relationship published in the Official Gazette of the SFRY, while the Supreme Court interpreted and applied provisions of the new law on obligational relationship (Law No. 04/L-077). According to the Applicant, if Articles 154 and 155 of the old Law on Obligations had been applied, published in the Official Gazette of the SFRY (1978), which was in force at the time when the disputed obligatory relationship was established between the parties, which according to the Applicant "is part of Part 2 of Chapter II of the new Law on Obligational Relationships (Law No. 04/L-077) *"it can be concluded that the obligation may arise from a contractual relationship between the parties (Contract), but may also arise from a non-contractual relationship between the parties (Damage, Profit without grounds, Expansion of someone's else works without order and unilateral expression of will)".*

55. In support of the abovementioned violations, the Applicant adds that *"Since the obligational relationship created by causing the damage to the responding party was created during the 2000-2005, certainly that the responding party referred to the provisions of the old LOR that was in force at that time."*

56. Regarding these allegations, 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. 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 *Garcia 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*, Resolution on Inadmissibility of 20 December 2017, paragraph 37; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility of 19 June 2018, paragraph 57).

57. 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 situation 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,* Resolution on Inadmissibility of 20 December 2017, paragraph 38; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility, of 19 June 2018, paragraph 58).

58. Returning to the present case and the first category of appealing allegations, the Court notes that the Applicant challenges the application of the respective articles of the new Law on Obligational Relationships instead of the old Law Obligational Relationships.

59. From the case file the Court notes that in relation to the Applicant's specific allegation of erroneous application of substantive law, that the lower courts acted contrary to Article 17 and Article 154 of the old LOR, the Court notes that the Supreme Court in Judgment [E. Rev. No. 7/2019], of 2 April 2019 stated *"The allegation mentioned in the revision that the courts of lower instance acted contrary to Article 17 and Article 154 of the LOR, this court assessed as ungrounded, because in this case the legal requirements for entering into a mandatory contract are not met, which are foreseen in Article 17, while Article 154 of the mentioned law provides the responsibility for the damage which derives from the dangerous item or from the dangerous activity which circumstance does not correspond to the circumstances of the present case".*

60. With regard to the specific allegation of application of the provisions of the old LOR instead of the new LOR (paragraph 31 of this report) the Court notes that the allegation in question was not raised before the Court of Appeals or the

Supreme Court and that for the first time it was raised before this Court. The Court emphasizes its principled position that, in accordance with the principle of subsidiarity, the Constitutional Court cannot assess an allegation or an issue which has not been raised and assessed previously by the regular courts (see Case No. KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, of 22 March 2016, paragraph 35). The principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Thus, the Applicant is liable to have his case declared inadmissible by the Constitutional Court, when failing to avail himself of the regular proceedings. (see, Case No. KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, of 16 November 2016, paragraph 39 and the references cited therein).

61. With regard to procedural justice, the Court notes that the Applicant has been afforded a conduct of procedure based on adversarial principle; it was able to adduce the arguments and evidence it considered relevant to its case at the various stages of those proceedings; that it has been given the opportunity to effectively challenge the arguments and evidence presented by the opposing 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 presented and 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*, case *Garcia Ruiz v. Spain*, ECtHR No. 30544/96, of 21 January 1999, paragraph 29).

62. From the above, the Court considers that by the challenged Judgment of the Supreme Court [E. Rev. No. 7/2019, of 2 April 2019] as well as in the other two court instances nothing was found that would lead to the conclusion that the regular courts have erroneously or arbitrarily applied the relevant legal provisions, leading to the conclusion that there has been no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in relation to the first part of the Applicant's allegations.

(ii) Allegations regarding the lack of a reasoned decision

63. With regard to the allegation (ii) that the Supreme Court did not reason its judgment, the Court notes that Article 31 of the Constitution in conjunction with Article 6 of the ECHR obliges the courts to give reasons for their decisions., but this obligation cannot be understood as a requirement to provide a detailed response to any argument (see *Van de Hurk v. the Netherlands*, paragraph 61; *Garcia Ruiz*, cited above, paragraph 26; *Jahnke and Lenoble v. France* (Decision); and *Perez v. France* [GC], paragraph 81). The case law of the ECtHR and that of the Court emphasize that the right to a fair trial includes the right to a reasoned decision and that the courts should "*indicate with sufficient clarity the grounds on which they based their decision*". The extent to which the obligation to give reasons applies may vary depending on the nature of the decision and should be determined in the light

of the circumstances of the case. It is the essential arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law.

64. The Court recalls the Applicant's specific allegations regarding the lack of a reasoned court decision and reflected in paragraph 34 of this report.

65. In this context the Court notes the relevant part of the reasoning of the Supreme Court, which states: *"The Supreme Court has assessed [...] the second instance court in its judgment has given ample reasons for a fair and judgment based on law. This is because the claimant with the respondent Sharr Beteilingungs GmbH, based in Hani i Elezit, were not in the contractual relations and the obligations of the Socially Owned Enterprise of Sharr Çimentore and the claims of the claimant which relate to the period before the entry into force of the lease contract cannot be transferred to the respondent, as long as there has been no agreement or similar legal act by which the respondent would have accepted the obligations of Socially Owned Enterprise Sharr Çimentore. Therefore, the lower instance courts have rightly assessed that the respondent lacks passive legitimacy to be a party to the proceedings [...] the agreement on the lease, management and operation of the Sharr Cement Factory, Hani i Elezit, in which agreement in the fourth chapter point 4.2 stipulates that UNMIK will make reasonable efforts to protect the operation of the plant from the claims of any creditor, which belong to the period before the entry into force of the lease agreement, from which agreement is the conclusion that the respondent is not obliged towards the claimant for the debts previously created by the other entity and has no obligation to fulfill any eventual obligations that remain unfulfilled".*

66. The Supreme Court of Kosovo adds that *"the claimant has failed to substantiate that the respondent was a participant in the obligational relationship with the claimant, to fulfill its obligation deriving from the relationship of obligations, as provided in Article 8 of the LOR, which provides that only the participants in an obligational relationship shall be obliged to perform their obligations, while in this case the claimant was in contractual relations with the Socially Owned Enterprise according to the above mentioned contracts of 1998 and 1999, while with the respondent it was not in any obligational relationship, therefore the lower instance courts assessed that the respondent lacks passive legitimacy in this relationship, for which reason the allegations of the claimant mentioned in the revision regarding erroneous application of substantive law by this Court were considered as ungrounded.*

The Supreme Court of Kosovo reviewed the statements mentioned in the revision regarding the administration of evidence Email dated 31.5.2016 the statement of the daily cost of machinery; request for receipt related to the listed machinery; TAK form and Part II of the revision, but they did not affect this Court to decide differently from what the lower instance courts have decided, because these allegations are related to the determination of the factual situation, for which in accordance with Article 214 of the LCP, the revision cannot be submitted".

67. The Court also highlights the relevant parts of the reasoning of the Court of Appeals:

> *"From the evidence found in the case file it follows that the court of first instance rightly concluded that it was not disputable that the Applicant and the SOE "Sharr Çimentorja" from Kaçanik in 1998-99 were in a contractual relationship, and the Applicant supplied the Sharr Cement Factory with raw material for the production of cement called "Tuf", while the latter had undertaken obligations to compensate the claimant with cement. On 13.06.2000, the KTA as the legal administrator of the SOE entered into an agreement with "Sharr Beteilinginungs" for the lease, management and operation of the cement factory "Sharri" with "Sharr Beteilingungs" GMBH, in which case KTA was a lessor and "Sharr Beteilinginungs" was a lessee. Under the commercialization contract, "Sharr Beteilingungs" GMBH had not accepted the obligations for the payment of previous obligations. Specifically with the fourth chapter of the contract point 4.2 it was stated that UNMIK will make reasonable efforts to protect the operation of the plant from the claims of any creditor, which belong to the period before the entry into force of the lease agreement.*
>
> *Therefore, the Court of Appeals, as well as the court of first instance, has concluded that in this court procedure, the respondent lacks passive legitimacy to be a party, namely it lacks responsibility for compensation of eventual debts or penalty interest and profit lost. Regardless of the fact whether to the claimant have been fulfilled or not all the obligations by the Socially Owned Enterprise "Sharr Çimentorja" as a contracting party, its obligations are not transferred to "Sharr Beteilingungs: GMBH, as long there is no agreement or legal act similar to the one by which the claimant would have accepted the obligations of the SOE "Sharr Çimentorja". In Chapter 4 of the lease agreement, point 4.2 clearly defines that "Sharr Beteilingungs GMBH", as a lessee, has no obligation on the eventual preliminary debts of the SOE "Sharr Çimentorja". The fact claimed by the claimant that the respondent as a lessee inherited assets and stocks from SOE "Sharr Cimentorja" does not constitute any legal basis on which would be created the obligation of the respondent to fulfill any remaining obligations, not realized by SOE "Sharr Cimentorja".*

68. From the above, the Court notes that the regular courts have dealt with the central aspects of the Applicant's statement of claim and have explained and interpreted the relevant provisions of the agreement on lease, management and operation of the cement plant "SOE Sharr Çimentorja" in which case have ascertained the lack of passive legitimacy of the respondent "Sharr Beteilingungs" regarding the preliminary debts. The Court in this context states that the courts are obliged to reason the substantive allegations of the Applicants, but that this obligation does not mean that the courts must respond to each argument submitted by the Applicants in the circumstances of the present case. The Court considers that the essential allegations of the Applicant in relation to Judgment [E. Rev. No. 7/2009] of the Supreme Court of 2 April 2019 but also throughout the decisions of other regular courts, in

their entirety were sufficiently reasoned and were not characterized by "apparent arbitrariness" as claimed by the Applicant.

69. The Applicant refers to the case of the ECtHR *Helle v. Finland* and the Judgment of the Court in case No. KI72/12. However, in case no. KI72/12, the Court found a violation of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR because the regular courts had not provided answers to the specific and central issues raised by the Applicant, and in the present case the regular courts have addressed all the central allegations raised by the Applicant during the course of the regular proceedings.

70. In case *Helle v. Finland*, the ECtHR stated that the criterion of the fair court proceedings, in the appeals to the courts of appeals is not only the approval of the findings of the lower courts but also the addressing of all the central allegations within the jurisdiction of the appeal. In the present case, the ECtHR found that in the circumstances of the present case the proceedings have been unfair towards the allegations raised by the complainant. (See the case of the ECHR, *Helle v. Finland*, Judgment of 19 December 1997, paragraphs 60-61). Similarly, in the present case, the Supreme Court upheld the findings of the lower instance courts and provided answers to all central issues by explaining: (i) the fact that the Applicant did not have a contractual relationship with the respondent, namely the latter lacked passive legitimacy; (ii) the Applicant failed to argue that the respondent was a participant in the obligational relationship to fulfill them in accordance with Article 8 of the LOR; and that, (iii) in Chapter 4 of the lease agreement, point 4.2 clearly stated that the respondent, as the lessee, has no obligation for the eventual prior debts of the SOE "Sharr Çimentorja".

71. From the foregoing, the Court considers that the Supreme Court, by the challenged Judgment, has responded in a specific manner to the Applicant's central allegations also regarding the fair administration of the case by the lower instance courts. The Court also considers that it does not follow that the proceedings conducted before the courts of general jurisdiction have been conducted with "apparent arbitrariness" which would make their decision-making incompatible with the standards of a reasoned and reasonable court decision (see, *mutatis mutandis*, Constitutional Court in Case No. KI55/19, Applicant *Ramadan Osmani*, Resolution on Inadmissibility, od 23 January 2020, paragraph 46).

(iii) Allegations regarding effective remedy within a reasonable time

72. With regard to the allegation (iii) for an effective remedy within a reasonable time, the Court refers to the criteria derived from the consolidated case law of the ECHR which set out: (a) the complexity of the case, (b) the conduct of the parties to the proceedings, (c) the conduct of the competent courts or other public authorities to the proceedings, and (d) the importance of what is at stake for the Applicant in the litigation (see ECtHR, case *Mikulic v. Croatia*, 6, No. complaint no. 53176/99, Judgment of 7 February 2002, paragraph 38).

73. As a preliminary issue regarding the allegation of effective remedy within a reasonable time, the Court notes that the first contract between the Applicant

and the cement factory "SOE Sharr Çimentorja" was concluded in 1998-99 and the cement factory "SOE Sharr Çimentorja" was transferred into the administration of the KTA in 2000, which later resulted in court proceedings that had begun in 2005.

74. In the present case, the Court notes that in accordance with its temporal jurisdiction, the duration of the proceedings is calculated from 15 June 2008 until 2019. The Court also notes: (i) that the courts have not remained passive because the proceedings have taken place in three court instances; (ii) in two other cases the procedure was also conducted in the SCSC, even though the latter declared itself incompetent and referred the case to the regular courts; and that (iii) the procedure was complicated because it was necessary to clarify aspects of the transfer of assets, property, previous debts and work from one entity to another where several parties were involved (Applicant, cement factory "SOE Sharr Çimentorja", "Sharr Beteilingungs" and KTA), each of which sought to protect personal interests.

75. Based on the above, the Court considers that the overall duration of the proceedings, considering its temporal jurisdiction, the proceedings conducted before the SCSC and the regular courts, the complexity of the case, the conduct of the parties and what was at stake for the Applicant, cannot be considered as unreasonable (see, *mutatis mutandis*, the Constitutional Court, Case no. KI23/16 Applicant *Qazim Bytyqi and others*, Resolution on Inadmissibility, of 12 May 2017, paragraph 75 and the references mentioned therein).

(iv) Allegation of violation of principle "res judicata"

76. With regard to the Applicant's allegation (iv) that in its case there was also a decision-making contrary to a "*res judicata*" decision, the Court notes that the Applicant only mentioned the allegation of a violation of the principle of the adjudicated case *res judicata*, however, it did not explain exactly and did not support with evidence how the alleged principle was violated to his detriment (see, *mutatis mutandis*, the Constitutional Court case no. KI142/15 *Applicant Habib Makiqi*, Resolution on Inadmissibility, of 1 November 2016, paragraphs 48-49).

77. The Court at the end emphasizes that the Applicant's dissatisfaction with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for violation of the right to fair and impartial trial or for violation of their rights to judicial protection (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21; and, see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 20 December 2017, paragraph 42).

78. Therefore, the Referral is manifestly ill-founded on constitutional basis, and is to be declared inadmissible, in accordance with Articles 113.7 and 21.4 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 21.4 of the Constitution, Article 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 1 July 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**

Remzije Istrefi-Peci | Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.