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

Prishtina, 5 May 2021
Ref. No.:RK1765/21

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RESOLUTION ON INADMISSIBILITY

in

Case no. KI48/20

Applicant

N.N.P. "Kristal"

Constitutional Review of the Resolution CML.no.14/2019 of the Supreme Court of Kosovo, of 18 November 2019

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 N.N.P. "Kristal" represented by Franklin Rama, represented by the Law Firm "Sejdiu & Qerkini" sh.p.k. (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of the Resolution CML.no.14/2019 of the Supreme Court, of 18 November 2019 in conjunction with the Resolution [Ac. no. 4082/18] of the Court of Appeals, of 16 October 2018 and the Resolution [PPP.no.1408/18] of the Basic Court in Prishtina, of 29 May 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, through 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) and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

4. The Applicant requests that a hearing be held in accordance with Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure.

Legal basis

5. The Referral is based on paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and paragraph 4 of Article 21 [General Principles], 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

6. On 9 March 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 19 May 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 9 June 2020, the Applicant was notified of the registration of the Referral and a copy of the Referral was submitted to the Supreme Court.

9. On 11 November 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Applicant and the debtor "Dukagjini Invest" (hereinafter: the debtor) on 27 September 2011 entered into a Contract for the Execution of Works under

the turnkey system for the Construction of Residential Business Building "WTC Prishtina" in Prishtina with total value of 45,000,000.00 (forty-five million) euros. Also, from 2011 to 2015, the Applicant and the debtor agreed to add two (2) annexes to the basic contract related to the works performed, additional works and outstanding financial obligations.

11. On 16 November 2016, the creditor (Applicant) and the debtor through notarized Annex Contract no. 2 had signed the confirmation for the full and final payment of the debtor's obligations and for all other issues that are related to the Annex Contract no. 2.

12. From the submitted documents, it results that the Applicant and the debtor had had a dispute regarding the additional works that are allegedly unpaid by the debtor as defined in invoice number 1/2018 of 20 April 2018 in the amount of 266,801.76 euros and invoice number 2/2018 of 20 April 2018 in the amount of 598,028.33 euros, respectively for the total amount of 864,830.00 euros.

13. Since the Applicant and the debtor had a dispute regarding financial obligations and additional works, the Applicant addressed the Office of the Private Enforcement Agent GJ.R., in the territory of the Basic Court in Gjakova (hereinafter: the Private Enforcement Agent) in order to allow for the enforcement procedure based on the authentic document.

14. On 7 May 2018, the Private Enforcement Agent acting on the proposal of the creditor (Applicant) for execution had issued an enforcement order P. no.497/18 with which he had allowed the execution based on the authentic document-invoice number 1/2018, of 20 April 2018 in the amount of 266,801.76 euros and invoice number 2/2018, of 20 April 2018 in the amount of 598,028.33 euros, and in a total amount of 864,830.09 euros against the debtor.

15. The debtor had filed a rebuttal against the enforcement order, stating that the execution document was issued on the basis of a document that has no executive title or that has no features of enforcement in accordance with the relevant provisions of the Law on Enforcement Procedure (hereinafter: LEP).

16. On 24 July 2018, the Basic Court in Prishtina with Resolution [PPP.no.637/18] had determined:

> *"I. The rebuttal of the debtor "Dukagjini Invest" sh.p.k., based in Prishtina, exercised against the enforcement order P.no.497/18 of 7 May 2018, authorized by the Enforcement Office of the Private Enforcement Agent GJ.R., in the territory of the Basic Court in Gjakova is REJECTED;*
>
> *II. In case the debtor files an appeal against this resolution, it is* ***Ordered*** *that within seven (7) days he pay the guarantee in court in the amount of 864,830.09 euros;*

III. If the debtor fails to pay the amount of the guarantee within the set deadline, the appeal filed against this resolution will be considered as not being paid at all by the appellant."

17. The Basic Court had assessed that the enforcement order was issued based on the appropriate document for enforcement and that there are no legal reasons for the abrogation of this order.

18. Against the aforementioned resolution, the debtor had filed an appeal with the Court of Appeals alleging substantial violation of procedural provisions, erroneous application of substantive law as well as erroneous and incomplete determination of the factual situation. The debtor had requested: (i) that his appeal be upheld in its entirety as grounded; (ii) the resolution of the Basic Court be annulled in its entirety as unfounded; (iii) the case be returned for reconsideration and retrial or the challenged resolution be amended; and, (iv), the enforcement order P.no.497/18 of 7 May 2018 be annulled.

19. On 16 October 2018, the Court of Appeals by Resolution [Ac.no. 4082/18] approved as founded the debtor's appeal and annulled the Resolution [PPP.no.637/18] of the Basic Court of 24 July 2018, and remanded the case to the same court for retrial. The Court of Appeals had assessed: (i) that the challenged decision was issued with erroneous or incomplete determination of the factual situation based on the relevant provisions of the Law on Contested Procedure (hereinafter: LCP) and the LEP; (ii) the Basic Court had not assessed the attached evidence of the debtor such as the contract for the performance of works based on the turnkey system, annex contracts no. 1 and no. 2, confirmation for full and final payment of obligations under the annex contract of 27 May 2014 and response by e-mail and rejection of invoices; and, that (iii) in annex contract no. 2 of 27 May 2014, signed by the parties and certified by a notary with the number I.RP.no.9645/16 of 16 November 2016, in Article 1 of this confirmation was concluded that *"the overall and total amount of the employer towards the executor of works has been paid in full."*

20. On 29 May 2019, the Basic Court in Prishtina with Resolution [PPP.no.1408/18] approved the debtor's rebuttal and annulled the enforcement permit order no. P.497/18 of 7 May 2018, permitted by the Private Enforcement Agent. The Basic Court had assessed: (i) that the creditor (Applicant) in the report of 4 February 2015 had confirmed the debtor's debt in the total amount of 2,234,825.26 euros; (ii) the debtor had initially paid the amount of 219,000.00 euros, the amount stated by the creditor and the debtor, on behalf of the additional works defined as debt outside the contract; (iii) while with annex contract no. 2 of 27 May 2015, specifically in Article 1 the parties agreed that the amount of 2,015,990 euros is the total amount of the debtor's liability to the creditor (Applicant); and, (iv) in this case the report is invalidated on the occasion of reaching annex contract no. 2 where is clearly defined in Article 1 point 1.5 of that contract.

21. On an unspecified date, the Applicant filed an appeal against the aforementioned resolution alleging violations of substantive provisions, erroneous determination of factual situation and essential violations, with a proposal that the Court of Appeals, prove his appeal as well-founded, annul the

challenged resolution and the enforcement order P.no.497/18 of 7 May 2018 remain in force.

22. On 29 July 2019, the Court of Appeals with Resolution [Ac.no.3353/19] rejected the Applicant's appeal as unfounded and upheld the Resolution of the Basic Court [PPP.no.1408/18] of 29 May 2019. The Court of Appeals approved in its entirety the conclusion of the court of first instance as fair and lawful because the enforcement documents on which the creditor (Applicant) bases the enforcement proposal respectively the invoices 1/2018 and 2/2018 of 20 April 2018, do not have "coverage" in terms of their legitimacy, and therefore cannot be treated as authentic documents.

23. On 12 September 2019, the Applicant proposed to the State Prosecutor to file a request for protection of legality against the Resolution PPP.no.1408/2019 of the Basic Court in Prishtina, of 29 May 2019 and the Resolution Ac. no.3353/2019 of the Court of Appeals, of 29 July 2019, with a proposal that the case be remanded to the court of first instance for retrial.

24. On 20 September 2019, the State Prosecutor filed a request for protection of legality with the Supreme Court against the Resolution PPP.no.1408/2019 of the Basic Court in Prishtina, of 29 May 2019 and the Resolution Ac.no.3353/2019 of the Court of Appeals, of 29 July 2019. The State Prosecutor alleged: (i) erroneous application of substantive law under Article 247 (1) (b) of the LCP; (ii) approval as grounded of the request for protection of legality; (iii) to abrogate the Resolution PPP.no.1408/2019 of the Basic Court in Prishtina, of 29 May 2019 and the Resolution Ac.no.3353/2019 of the Court of Appeals of 29 July 2019; and, (iv) the case be remanded to the court of first instance for retrial. The State Prosecutor had claimed that the substantive law was erroneously applied, respectively Article 71 paragraph 1 point 1.3 of the LEP because in the concrete case from invoice no. 1/2018 of 20 April 2019 and invoice no. 2/2018 of 21 April 2018 which the Applicant as a creditor had submitted to the debtor to pay the debt, without doubt confirm the existence of the debtor's debt to the creditor (Applicant), which has come from the additional works performed.

25. On 18 November 2019, the Supreme Court by Resolution [CML.no.14/2019] rejected as ungrounded the request for protection of legality of the State Prosecutor filed against the Resolution PPP.no.1408/2019 of the Basic Court in Prishtina, of 29 May 2019 and the Resolution Ac.no.3353/2019 of the Court of Appeals, of 29 July 2019. The Supreme Court had held: (i) the allegation of erroneous application of substantive law does not call into question the legality of the challenged decisions because they primarily relate to the factual situation and the character of the provision 71 paragraph 1 point 3 of the LEP; (ii) invoice no. 1/2018 and invoice no. 2/2018 have as object the obligations of the debtor to the creditor (Applicant) which were treated and concluded with Notarized Annex Contract no. 2 on 16 November 2016, in which case the Applicant had confirmed the full and final payment of the debtor's obligations and all other matters directly or indirectly related to the object of these legal affairs; (iii) that the purpose of Article 21 paragraph 1.3 of the LEP is clear in that it prohibits the enforcement of obligations and those that have been waived; and, (iv) Article 21 paragraph 1.3 of the LEP prevents situations when

unscrupulous creditors wish to collect twice their claims or intend to collect from the claims they have waived.

Applicant's allegations

26. 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 of the ECHR and Article 10 of the UDHR have been violated.

27. The Applicant alleges: "*The regular courts, including the Supreme Court of Kosovo, have resolved the disputed facts between the parties in the enforcement procedure, although these facts had to be resolved in another court procedure, in the contentious one. In litigation, a set of procedural principles are applied which enable the parties in a contradictory and direct procedure to present the facts and evidence with which they intend to support their positions.*"

28. The Applicant alleges that the Basic Court has arbitrarily applied Article 71 paragraph point 1.3 of the LEP because: "*There is no evidence that the parties ever agreed not to request enforcement for a limited period of time or permanently. There is no dilemma that in this case the Court of First Instance arbitrarily applied Article 71 par. 1 point 1.3. This arbitrary interpretation of the legal provision by the Court of First Instance has never been repaired by the courts of higher instance.*"

29. The Applicant alleges that the Court of Appeals issued arbitrary findings because: "*The arbitrariness in the finding as above lies in the fact that the object of dispute between the parties were "additional works", and not the works which were contracted. For additional works there has never been any agreement, through which the creditor would declare that the debtor has fulfilled the obligations arising from the performance of additional works. On the contrary, in the case file there is evidence that on 03.02.2015 the parties had signed and sealed the debt settlement which includes their agreement on additional works.*"

30. The Applicant alleges that the Supreme Court has arbitrarily interpreted Article 29 paragraph 1.3 of the LEP: "*Also, the Supreme Court of Kosovo, arbitrarily states that based on Article 29 par. 1.3 of the LEP, it is required that the invoice contains the basis on which it was issued. With a simple look at this legal provision, we will notice that such a thing is not required. It would be contrary to the principle of legal certainty if the courts were allowed to supplement the law while interpreting it. In this case, the court would interfere in the competencies of the Parliament, which is the only legitimate body to approve, as well as to supplement and amend the laws in force. The Supreme Court arbitrarily refers to the Law on VAT, because the LEP does not determine in any of its provisions that the invoice is unsuitable for enforcement and if it is not issued in accordance with the provisions of the Law on VAT.*"

31. The Applicant alleges: (i) the Basic Court rejected the proposal for enforcement of the Applicant referring to Article 71 paragraph 1 point 3 of the LEP; (ii) The Court of Appeals in the present case did not reason why the Basic Court erroneously applied Article 71 paragraph 1 point 3 of the LEP because, according to the Court of Appeals, the reason for rejecting the Applicant's appeal claims argues that the debtor has paid all obligations arising from the legally binding report from 29.07.2011 until 16.11.2016; (iii) the Supreme Court has relied entirely arbitrarily on Article 29 paragraph 1.3 of the LEP and the Law on VAT, even relying on the Law on VAT to which the LEP does not refer at all, when it comes to the invoice as an authentic document for enforcement.

32. The Applicant alleges that in addition to arbitrariness, the regular courts have not reasoned their decisions because they lack the "logical relationship" between the established facts and the applicable legal provisions. In support of this allegation, the Applicant refers to the jurisprudence of the Court in cases KI72/12, KI135/14 and KI97/16.

33. Finally, the Applicant requests the Court: (i) to find that the Referral is admissible; (ii) to hold a hearing in accordance with Rule 42 of the Rules of Procedure; (iii) to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 10 of the UDHR; (iv) to determine any other measure deemed to be legally justified and reasonable.

Relevant legal provisions

LAW ON CONTESTED PROCEDURE No. 03/L-006

Procedure according to the complaint

Article 185

The complaint will be presented to the court that issued the decision of the first degree in a satisfactory number for the court and opposing party.

Article 186

186.1 The complaint presented after the deadline foreseeable by the court, the incomplete one, or the illegal one the court can reject with a decision of the first degree without setting a court session.

186.2 The complaint has no value if presented after the deadline determined by the law for presenting it.

186.3 The complaint is illegal if it is presented by the person who is not authorized for presenting, or the people who withdraw from the right to complain or who withdrew the complaint, or of the person who presented the complaint has no judicial interest to present a complaint.

Article 187

187.1 A sample of the complaint presented timely, legally and complete, is sent within seven days to the opposing party by the court of the first degree complain, that can be replied with presentation of a complaint within seven days.

187.2 A sample of the reply with complaint the first degree court sends to the complainer immediately or at the latest within the period of seven days from its arrival to the court.

187.3 A reply to the complaint presented after the deadline will be dealt by the second degree court.

187.4 Statements arriving at the court after the arrival of the reply to the complaint or after the deadline for replying to the complaint will not be considered, except when the party demand additional declarations from the court.

Article 188

188.1 After receiving the reply to the complaint, or after the deadline for replying to the complaint, the court of the first degree will forward the subject with following documentation to the court of the second degree the complaint and the reply presented within a period of seven days at most.

188.2 If the complainer asses that during the first degree procedure the provisions of contestation procedures are violated, the court of the first degree can issue explanation regarding the subject of the complaint relating to the violations of the kind, and according to the need it can conduct investigations aiming at verification of the correctness of the subject in the complaint.

Article 189

189.1 After the file of the subjects reaches the second degree court, the relevant judge prepares the report for the exploration of the case at the complaint court, which will judge with the court body consisting of three judges.

189.2 If necessary, the relevant judge from the court of the first instance will require a report on the violation of the procedural provisions and other missing facts mentioned at the complaint, also the judge may require necessary investigations to determine the violations mentioned or missing facts.

Article 190

190.1 The court of second instance will decide about the complaint in a session of the court body or based on the examination of the subject in a court session.

190.2 The court of the second instance determines the examination of the case, when it considers the factual state, exactly and completely by verifying new facts and receiving new proofs under the conditions set by article 180, paragraph 1 and 2 of this law.

190.3 3 For discussion, the court of second instance will determine a direct examination for the case even if the verdict of the first instance court was twice annulled, and in the case when the college session evaluates that the verdict against which a complaint is raised was based on essential violation of provisions of contestation procedure, or when the factual state was evaluated wrongly or incompletely.

190.4 The court of second instance can determine evaluation of the case when it estimates that for a rightful factual state is to be determined and all or partial proofs administered in the court of first instance should be considered.

Article 191

191.1 For the hearing session of the case, parties should be invited directly, respectively their legal representative or by proxy, as well as other witnesses and experts, whose hearing was determined necessary by the complaint court.

191.2 If the complainer is missing from the court, the hearing doesn't take place, while the decision will be brought based on the sayings of the complaint and the ones that respond to the complaint.

191.3 If the non-complaining side of the case doesn't attend the hearing, the court acts upon it by issuing the necessary decision.

191.4 The writ for the session informs about the procedural consequences for not attending the case evaluation.

Article 192

192.1 The case examination in front of the Court of second instance starts with detailed explanation of the relater about the case but without his/her opinion regarding the basis of the complaint.

192.2 2 After this, the verdict is read or just the part involving the complaint and when needed the procès-verbal on the final hearing in front of the court of first instance is read. Then, complainer justifies its complaint, while the opposing party responds to the complaint.

192.3 If any means of proof cannot be used directly, the court of appeal decides to read the minutes in the part that contains such evidence.

Article 193 If there is a proof that can't be used directly, the complaining court decides to read the procès-verbal covering the part of that specific proof.

LAW ON ENFORCEMENT PROCEDURE NO. 04/L-139

Article 21
Legal basis for awarding enforcement

The enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law.

Article 29
Authentic documents

1. Enforcement for the purpose of settlement of monetary claims shall be also assigned based in the authentic document. According to this law, authentic document is:

1.3. bills;

Article 71

Reasons for objection

1. Objection under article 69 of this Law may be based only on findings that:

1.3. parties, through the public document or certified document according to the law drafted after the creation of enforcement document, have agreed not to require, for a limited time or permanently, the enforcement based on enforcement document;

Article 72

Response regarding the objection

1. On presented objection the court shall decide within fifteen (15) days from the day when the objection was filed.

2. The court shall deliver the statement of the objection and the supporting evidence to the opposing party and to all other parties to the enforcement proceeding within three (3) days after the court receives the objection. When the objection is against the action of a private enforcement agent, the court also delivers the statement of the objection and the supporting evidence to the private enforcement agent.

3. Responses regarding the objection must be submitted in writing within three (3) days from the day of receipt of the objection by the parties.

LAW ON VALUE ADDED TAX NO. 05/L -037

Article 45

Content of invoices issued by taxable persons to taxable persons

1.6. the quantity and nature of goods supplied, or the extent and nature of the services performed;

Assessment of the admissibility of the Referral

34. The Court initially examines whether the Referral has met the admissibility criteria, defined by the Constitution, provided by Law and further specified by the Rules of Procedure.

35. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

"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."

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

37. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in the Law. In this regard, the Court initially 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 ...".

38. In assessing the fulfilment of the admissibility criteria as mentioned above, the Court notes that the Applicant has the right to file a constitutional complaint, citing alleged violations of his fundamental rights and freedoms, which apply to individuals and legal entities. (See, Court cases no. KI118/18 Applicant *Eco Construction sh.p.k.*, Resolution on Inadmissibility of 10 September 2019, paragraph 29; and, 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 who challenges an act of public authority, respectively Resolution [CML. no.14/2019] of the Supreme Court, of 18 November 2019, after exhaustion of all legal remedies provided by law.

39. In terms of meeting these requirements, the Court finds that the Applicant has also clarified the rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

40. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria on the basis of which the Court may examine the Referral, including the criterion 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."

41. The Court recalls that the Applicant and the debtor had entered into a Contract for the Performance of Works under the turnkey system for the Construction of Residential Business Building "WTC Prishtina" in Prishtina with a total value of 45,000,000.00 (forty-five million) euros. Also, from 2011 to 2015, the Applicant and the debtor agreed to add two (2) annexes to the basic contract related to the works performed, additional works and outstanding financial obligations. As the Applicant and the debtor had a dispute regarding financial obligations and additional works, the Applicant addressed the Private Enforcement Agent in order to allow the enforcement procedure based on the authentic invoice document no. 1/2018 of 20 April 2018, with a claimed amount of debt of 266,801.76 euros and invoice no. 2/2018 of 20 April 2018, with a claimed amount of debt of 598,028.33 euros, respectively the total amount of 864,830.09 euros.

42. The Court notes that the essence of the Applicant's complaint is that the regular courts have been so arbitrary in the application of the relevant provisions of the LEP, LCP and the Law on VAT, that their approach has violated the right to a reasoned decision as guaranteed by Article 31 of the

Constitution in conjunction with Article 6 of the ECHR and Article 10 of the UDHR.

43. The Court recalls that the Applicant - in the context of erroneous application of the law - claims: (i) the regular courts in the circumstances of the present case should have applied the law of contentious procedure and not the law of enforcement procedure; (ii) the Basic Court has rejected the proposal for enforcement of the Applicant referring to Article 71 paragraph 1 point 3 of the LEP; (iii) the Court of Appeals in the present case did not reason why the Basic Court erroneously applied Article 71 paragraph 1 point 3 of the LEP because, according to the Court of Appeals, the reason for rejecting the Applicant's appeal claims by reasoning that the debtor has paid all obligations arising from the legally binding report from 29.07.2011 until 16.11.2016; (iv) the Supreme Court has relied entirely arbitrarily on Article 29 paragraph 1.3 of the LEP and the Law on VAT, even relying on the Law on VAT to which the LEP does not refer at all, when it comes to the invoice as an authentic document for enforcement.

44. The Court notes that the Applicant alleges that the regular courts erroneously applied the LEP whereas in the present case they should have applied the LCP: "*The regular courts, including the Supreme Court of Kosovo, have resolved the disputed facts between the parties in the enforcement procedure, although these facts had to be resolved in another court procedure, in the contentious one. In litigation, a set of procedural principles are applied which enable the parties in a contradictory and direct procedure to present the facts and evidence with which they intend to support their positions.*"

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

46. In this regard, the Court notes that the Basic Court had ascertained and later the Court of Appeals had upheld the findings of the lower instance court by determining: (i) that the creditor (Applicant) in the report of 4 February 2015 had confirmed the debt of the debtor in the total amount of 2,234,825.26 euros; (ii) the debtor had initially paid the amount of 219,000.00 euros, the amount stated by the creditor and the debtor, on behalf of the additional works defined as debt outside the contract; (iii) while with annex contract no. 2 of 27 May 2015, specifically in Article 1 the parties agreed that the amount of 2,015,990 euros is the total amount of the debtor's liability to the creditor (Applicant); and, (iv) in this case the report is invalidated on the occasion of reaching annex contract no. 2 which is clearly defined in Article 1 point 1.5 of that contract.

47. Regarding the allegation that in the circumstances of the present case the contentious procedure should have been applied instead of the enforcement procedure, the Court notes that the Applicant with his free will and conviction had initiated the enforcement procedure by addressing the private

Enforcement Agent GJ.R., with the purpose of allowing the enforcement procedure.

48. The Court also notes that the Supreme Court found: (i) the allegation of erroneous application of substantive law does not call into question the legality of the challenged decisions because they primarily relate to the factual situation and the character of the provision 71 paragraph 1 point 3 of the LEP; (ii) invoice no. 1/2018 and invoice no. 2/2018 have as object the obligations of the debtor to the creditor (Applicant) which were treated and concluded with notarized Annex Contract no. 2 on 16 November 2016, in which case the Applicant had confirmed the full and final payment of the debtor's obligations and all other matters directly or indirectly related to the object of these legal affairs; (iii) that the purpose of Article 21 paragraph 1.3 of the LEP is clear that it prohibits the enforcement of obligations and those that have been waived; and, (iv) Article 21 paragraph 1.3 of the LEP prevents situations when unscrupulous creditors wish to collect twice their claims or intend to collect from the claims they have waived.

49. In this regard, the Court highlights the relevant parts of the Resolution of the Supreme Court:

> *"The Supreme Court of Kosovo, based on this situation of the case, found that the court of second instance correctly applied the provisions of the enforcement procedure and the substantive law when they found that the proposal of proposer to the creditor to allow the enforcement based on the invoice; No. 1/2018 and No. 2/2018, are not suitable documents for enforcement based on article 29 par 1 point 1.3 of the LEP.*
>
> *The purpose of the enforcement procedure is to use force to realize the creditor's claim or to secure the future enforcement of that claim. Reasons of legal certainty and creditor protection require that force against the debtor be reduced in the enforcement proceedings only on the basis of a legally valid document, enforcement, and according to LEP. The enforcement document is a necessary procedural presumption for allowing enforcement. In order for an enforcement document to be suitable for forcible enforcement, it must contain the complete data on the debtor, as well as the full definition of the obligation according to the subject, type and time of enforcement.*
>
> *Article 29 par. 1 point 1.3 of the LEP, clearly defines the title of the invoice as an authentic document which provides that an authentic document is suitable for enforcement if in it has been shown the creditor and the debtor, as well as the object of the type, the amount and time of fulfilment of the monetary obligation. An authentic document to be considered suitable for enforcement aims to prove the fact that the existence of the obligation required to be paid by invoice is not disputed for the creditor and the debtor, therefore, Article 29 1.3 of the LEP, requires that the invoice shall also contain the basis on which it was issued", respectively the object and type of the obligation as well as the acceptance of the obligation by the debtor. One of the main elements for an invoice to be considered an authentic document is the acceptance of the obligation*

included in the invoice by the debtor. Content of invoice no. 1/2018 and invoice no. 2/2018 is in complete contradiction with Article 45, par. 1.6 of the Law on VAT. This is due to the fact that it does not contain at all the basis on which they are issued, much less specify the level and nature of services rendered. Also, invoice no. 1/2018 and invoice no. 2/2018, are also in contradiction with Article 45 par. 1.7 of the Law on VAT, as they do not contain the exact date when the invoice services were performed. Therefore, the invoices issued by the creditor do not meet the legal requirements and as such do not present an authentic document for enforcement on their basis and consequently there are no submissions in the request for protection of legality that the resolutions of the two courts were rendered on the basis of erroneous application of substantive law within the meaning of Article 247 par. 1 b) of the LCP.

The allegations raised in the Request for Protection of Legality of the State Prosecutor of Kosovo do not question the legality of the challenged resolutions, regarding the erroneous application of the substantive law, as they relate mainly to the factual situation and with the character of the provision of Article 71 par. 1 point 3 of the Law on Enforcement Procedure (LEP), where it is alleged that the resolutions of both courts were rendered in violation of Article 71 par. 1 point 3 of the LEP. In the Request for Protection of Legality, the content of the invoices no. 1/2018 and invoice no. 2/2018 as well as other evidence in the case has not been assessed. This is due to the fact that invoice no. 1/2018 and invoice no. 2/2018 had as object the debtor's obligations to the creditor, which were treated and concluded with notarized Annex Contract no. 2 of 16 November 2016, where it is verified that the parties have fulfilled all mutual rights and obligations they had under the notarized Annex Contract no. 2. The purpose of Article 21 par. 1.3 of the Law on Enforcement Procedure is clear in that it prohibits the enforcement of obligations that have been paid or which have been waived by public documents and this Article prevents situations when unscrupulous creditors want to collect their claims twice or intend to collect claims which they have waived due to other benefits and therefore when reviewing this provision, primary importance should be given to the content of the document, date of the service allegedly invoiced and not just the date of the invoice itself."

50. In this regard, the Court notes that the practice of ECtHR sets that the justice of a procedure is assessed based on the procedure as a whole. (See, in this context the ECtHR case *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court shall also adhere to this principle. (See, Court cases 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).

51. The Court notes the Applicant with his claims for application of the LCP instead of the LEP, erroneous assessment of the factual situation because the financial obligation of the basic contract and additional works has not been properly assessed or that the courts have erroneously interpreted the Law on VAT in relation to the LEP, in fact, requests from the Court to replace the

assessment of the regular courts with its own assessment; which, clearly, is not within the scope of this Court.

52. The Court does not notice any apparent arbitrary application of the law, it does not notice a clearly unreasonable conclusion of the proceedings or even a lack of logical relationship between the established facts and the application of the relevant legal provisions to those facts. Indeed, from the challenged decisions of the regular courts, the Court considers: (i) the Applicant, with his free will and conviction, had initiated the enforcement procedure by addressing the Private Enforcement Agent GJ.R. aiming to allow the enforcement procedure, (ii) the regular courts have explained why invoices no. 1/2018 and no. 2/2018 are not an authentic document for enforcement explaining the conditions that must be met by law in order for a document to be considered enforceable; (iii) they have explained and interpreted the purpose of the enforcement proceedings which is a matter of legality and consequently within their scope; and, (iv) they have interpreted and explained the purpose of Article 29.1.3 of the LEP and Article 71.1.3 of the LEP regarding the prohibition of the enforcement of obligations that have been paid but which have been waived; which is also a matter of legality and consequently within their scope.

53. The Court also considers that in the present case, the Applicant has been given procedural opportunities to protect his interests even though the procedure was conducted according to the LEP and not the LCP as claimed by the Applicant. The Court considers that in substance the Applicant has received a response to all his central allegations and this is very important for the Court. The Court also considers that the conduct of the challenged procedure according to the LEP has not revealed flagrant arbitrariness to the detriment of the Applicant, especially when taking into account the fact that the Applicant with his free will and conviction had initiated the enforcement procedure by addressing the Private Enforcement Agent GJ.R., with the aim of allowing the enforcement procedure.

54. In addition, the Court notes that the Supreme Court explained that on 16 November 2016, the Applicant and the debtor through notarized Annex Contract no. 2 had signed the confirmation for the full and final payment of the debtor's obligations and for all other issues that are directly or indirectly related to the object of these legal works (see paragraph no. 11 of the Resolution CML. no.14/2019 of the Supreme Court, of 18 November 2019).

55. The Court has repeatedly reiterated that it is not its duty to deal with errors of fact or law allegedly made by the regular courts (*legality*), except to the extent that they may have violated the rights and freedoms protected by the Constitution (*constitutionality*). The Court itself cannot review the law that has made a regular court 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 imposed on its jurisdiction. Indeed, it is the role of the regular courts to interpret and apply the relevant rules of procedural and substantive law. (See the ECtHR case, *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also, inter alia, the Court cases: 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).

56. The Court has continuously maintained this position based on the case law of the ECtHR which clearly states that it is not the role of this Court to review conclusions of regular courts regarding the factual situation and the application of substantive law. (See the ECtHR case, *Pronina v. Russia,* Judgment of 30 June 2005, paragraph 24; and Court cases KI06/17, Applicant *L.G. and five others,* cited above, paragraph 38; and KI122/16, cited above, paragraph 58).

57. The Court notes, however, that the case law of the ECtHR and the Court also sets out the circumstances under which exceptions to this position should be made. The ECtHR has emphasized that while local authorities, namely the courts, have the primary task of resolving problems with the interpretation of legislation, the Court's role is to ensure 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).

58. Consequently, although the role of the Court is limited in terms of assessing the interpretation of the law, it must ensure and take action when it finds that a court has *"applied the law clearly erroneously"* in a specific case and which may have resulted in *"arbitrary conclusions"* or *"clearly unreasonable conclusions"* for the Applicant. (See, in this context, the ECtHR case, *Anheuser-Busch Inc. v. Portugal,* Judgment of 11 January 2007, paragraph 83; and also, the Court cases KI06/17, Applicant *L.G. and five others*, cited above, paragraph 40; and KI122/16, cited above, paragraph 59).

59. In this context, the Court notes that the Applicant has not argued how this interpretation of the law and the establishment of the facts is clearly erroneous or arbitrary and has resulted in *"arbitrary conclusions"* or *"clearly unreasonable conclusions"* for the Applicant.

60. The Court further reiterates that, in principle, the interpretation of the law is the competence of the regular courts. Furthermore, *"fairness"* required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR is not *"substantive"* fairness, but *"procedural"* fairness. In practical terms, this is expressed through adversarial proceedings, where the parties are heard and placed on an equal footing before the court. (See, in this context, the Court case no. KI42/16 Applicant *Valdet Sutaj*, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references mentioned therein).

61. The Court also notes that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, does not guarantee anyone a favourable outcome in a litigation nor does it stipulate for the Court to challenge the application of substantive law by regular courts in a civil dispute, where mainly one of the parties to the proceedings wins and the other loses. (See, in this context, the Court cases, KI118/17, *Şani Kervan and others,* Resolution on Inadmissibility, paragraph 36; and KI142/15, Applicant *Habib Makiqi,* Resolution on Inadmissibility, of 1 November 2016, paragraph 43).

62. The Court concludes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts cannot by itself raise a substantive claim for a violation of the right to a fair and impartial trial. (see the Court case no. KI118/18 Applicant *Eco Construction sh.p.k.*, cited above, paragraph 53; and see also the ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21; and, inter alia, KI56/17, cited above, paragraph 42).

63. From the abovementioned, the Court, based on the standards set in its case law in similar cases and the ECtHR case law, finds that the Applicant has not proved and has not sufficiently substantiated his allegation of violation of fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 10 of the UDHR.

64. Consequently, the Referral is manifestly ill-founded on constitutional grounds, and must be declared inadmissible, as stipulated by Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

Request for an oral hearing

65. With regard to the Applicant's request for an oral hearing, the Court refers to Article 20 [Decisions] of the Law which provides:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files."*

66. The Court considers that the documents included in the Referral are sufficient to decide in this case based on the provision of Article 20 paragraph 2 of the Law. (See the Constitutional Court case no. KI34/17, *Applicant Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

67. Therefore, the Applicant's request for oral hearing is rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113. 7 and Article 21. 4 of the Constitution, Article 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 29 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the Applicant's request for an oral hearing;

III. TO NOTIFY this decision to the parties;

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

V. This decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.